ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 98-020

January 12, 1999

ALBERTA FAMILY & SOCIAL SERVICES

Review Number 1377

I. BACKGROUND

[para 1.] On October 8, 1997, the Applicant applied to Alberta Family & Social Services (the "Public Body") for access under the *Freedom of Information and Protection of Privacy Act* (the "Act") to the Applicant's personnel file, and to all audit reports issued by the Public Body's northwest regional office since May 1995.

[para 2.] The Applicant subsequently narrowed the request, and the Public Body provided the Applicant with access to a number of the requested records. However, the Public Body refused to disclose the audit reports of five First Nations who are administering their own Supports for Independence/Assured Income for the Severely Handicapped programs for First Nation members living off-reserve. The Public Body said that disclosure would be harmful to intergovernmental relations (section 20(1)(a)(i) of the Act) and would harm the economic interest of the Government of Alberta (section 24(1) of the Act).

[para 3.] Mediation was authorized but was not successful. The matter was set down for a written inquiry. I received the Applicant's submission on September 3, 1998 and the Public Body's submission on September 15, 1998. I received the Applicant's reply submission on September 30, 1998 and the Public Body's reply submission on October 2, 1998.

II. RECORDS AT ISSUE

[para 4.] The records at issue are the audit reports of five First Nations who are administering their own Supports for Independence/Assured Income for the Severely Handicapped ("SFI/AISH") programs for First Nation members living off-reserve. Attached to three of the audit reports are memoranda authored by the Applicant.

[para 5.] In this Order, I will refer to the audit reports and the three attached memoranda as the "Records".

III. ISSUES

[para 6.] There are four issues in this inquiry:

A. Did the Public Body correctly apply section 20(1)(a)(i) of the Act (harm to intergovernmental relations)?

B. Did the Public Body correctly apply section 24(1) of the Act (harm to the economic interest of a public body or the Government of Alberta)?

C. If I find that the Public Body did not correctly apply section 20(1)(a)(i) and section 24(1), does the Public Body get to apply other exceptions to the Records?

D. Would disclosure of the third parties' personal information be an unreasonable invasion of the third parties' personal privacy, as provided by section 16 of the Act?

IV. DISCUSSION OF THE ISSUES

ISSUE A: Did the Public Body correctly apply section 20(1)(a)(i) of the Act (harm to intergovernmental relations)?

[para 7.] The Public Body says that disclosing the Records will harm relations between the Government of Alberta and First Nations, as provided by section 20(1)(a)(i) of the Act.

[para 8.] Section 20(1)(a)(i) reads:

> *20(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.*

[para 9.] For section 20(1)(a)(i) to apply, there must be a government listed in section 20(1)(a)(i), or an agency of that government.

[para 10.] On the plain words of section 20(1)(a)(i), First Nations, including the five First Nations in question, are not any of the governments listed in section 20(1)(a)(i).

[para 11.] Are the five First Nations "agencies" of any of the governments listed in section 20(1)(a)(i)? In general terms, an "agency" relationship may exist when an individual or organization acts on behalf of another, with the authority to do so. Legislation may also define an "agency" for some particular purpose: see, for example, the definition of "Provincial agency" in *the Financial Administration Act*, R.S.A. 1980, c. F-9.

[para 12.] I do not find that the five First Nations are "agencies" of the Government of Canada; they are parties to treaties with the Government of Canada, which has a fiduciary (trust) relationship with First Nations.

[para 13.] I also do not find that the five First Nations are "agencies" of a province or territory of Canada. Specifically, they are not agencies of the Government of Alberta. I have reviewed a copy of one First Nation's SFI/AISH agreement provided by the Public Body. That agreement provides that "[Name of First Nation] is an independent party, and this Agreement does not create the relationship of fiduciary and beneficiary, employer and employee, or of <u>principal and agent</u> [my emphasis] between [name of First Nation] and Alberta."

[para 14.] The Public Body argues that section 20(1)(a)(i) should nevertheless encompass First Nations because the Government of Alberta deals with First Nations on a government-to-government basis.

[para 15.] However desirable it might be to include First Nations under section 20(1)(a)(i), the plain words of the section do not, at present, include First Nations, and I do not have the jurisdiction to interpret the

section to include them. If First Nations are to be included in section 20(1)(a)(i) or section 20(1)(a) generally, the Legislature must make that decision.

[para 16.] Therefore, I find that the Public Body did not correctly apply section 20(1)(a)(i).

[para 17.] Having come to that conclusion, I do not find it necessary to consider whether the Public Body exercised its discretion properly under section 20(1)(a)(i), which is a discretionary ("may") exception.

ISSUE B: Did the Public Body correctly apply section 24(1) of the Act (harm to the economic interest of a public body or the Government of Alberta)?

1. General

[para 18.] The Public Body says that section 24(1)(c)(iii) applies to the Records.

[para 19.] Section 24(1)(c)(iii) reads:

> *24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to harm the economic interest of a public body or the Government of Alberta or the ability of the Government to manage the economy, including the following information:*
>
> *…*
>
> *(c) information the disclosure of which could reasonably be expected to*
>
> *…*
>
> *(iii) interfere with contractual or other negotiations of,*
>
> *the Government of Alberta or a public body.*

[para 20.] In Orders 96-012, 96-013 and 96-016, I said that a public body may meet the criteria under section 24(1)(a) to (d), but it must nevertheless meet the criteria under section 24(1). Therefore, the Public Body may meet the criteria under section 24(1)(c)(iii) (interference with contractual or other negotiations), but the Public Body must meet the criteria under section 24(1) (harm to economic interest).

2. The Public Body's arguments

(i) Disclosure could reasonably be expected to interfere with contractual or other negotiations of the Government of Alberta or a public body (section 24(1)(c)(iii))

[para 21.] In its submission, the Public Body says:

> *The number of Aboriginal children in care is proportionally greater than it should be, given the Aboriginal population of Alberta. This has been a long-standing problem. It is being recognized that in order to affect any positive changes, and thereby deal with some of the concerns and issues facing the Aboriginal people, they need to be involved in service delivery. The anticipated outcome is a decrease in the amount of intervention that is required for this group.*

[para 22.] The Public Body says it is currently involved in ongoing negotiations with First Nations to have them assume responsibility for their own child welfare programs. These are sensitive negotiations, and the First Nations need to feel confident that the Public Body is working with them in a co-operative environment to assist them towards independence in delivery of their own child welfare services. The Public Body feels that if the Records are released at this particular time, First Nations will feel that they are being publicly criticized, and this might well result in a breakdown in communications and the negotiation process.

[para 23.] The Public Body concludes that the release of the Records will have a direct and destructive effect on the negotiations which are currently underway, that would see First Nations become responsible for their own child welfare services.

[para 24.] The Public Body is also concerned that the loss of goodwill in this case will impede future negotiations that the Government of Alberta might attempt to enter into with First Nations.

(ii) Disclosure could reasonably be expected to harm the economic interest of a public body or the Government of Alberta (section 24(1))

[para 25.] The Public Body says it has invested a great deal of time and expense into the process of assisting First Nations towards independence in the area of managing their own child welfare services. According to the Public Body, the release of the Records would not only result in a breakdown of communications and negotiations, but it would also result in (i) the loss of the financial expenditures that have gone into this

initiative, and (ii) the loss of expected future financial savings from the reduced number of children taken into care.

[para 26.] As to the loss of financial expenditures to date, the Public Body says that the loss of manpower costs that have gone into this initiative is a direct monetary loss.

[para 27.] As to the expected future financial savings, the Public Body argues that it is only through an increased involvement of First Nations in the delivery of child welfare services that the Public Body can hope to see an eventual decrease in the number of Aboriginal children taken into care. According to the Public Body, reduced numbers of children in care will obviously have a financial impact.

3. Analysis of the Public Body's arguments

(i) General

[para 28.] In Order 96-016, I said that, for section 24(1) to apply, there must be a direct link between the disclosure of the information and the expected harm. In other words, harm has to result directly from the release of the particular information. "Ripple-effect" harm is not sufficient. Also, there must be a reasonable expectation that the harm will occur.

(ii) Interference with contractual or other negotiations (section 24(1)(c)(iii))

[para 29.] The Public Body fears that disclosing the information contained in the Records will result in First Nations' feeling that they are being publicly criticized, resulting in a breakdown of the negotiating process for agreements. The Public Body did not say with whom it is currently negotiating. As evidenced by the Records, there are at least five agreements or arrangements presently in place. One of the Records comments that, in spite of no agreement being in place, active negotiations to arrive at an agreement are not taking place.

[para 30.] In recent years, there has been a highly publicized movement of First Nations towards self-governing status. Therefore, I find it speculative to think that, because of perceived criticism, First Nations will not negotiate agreements such as SFI/AISH agreements or child welfare agreements, which allow for some measure of self-government.

[para 31.] I have reviewed a copy of one First Nation's SFI/AISH agreement provided by the Public Body. The agreement provides that

"All documents submitted by [name of First Nation] become the property of the Province of Alberta, and as such become subject to the provisions of FOIP." Given that documents submitted are not the property of the First Nation, the potential disclosure of those documents (or information contained in those documents) under the Act cannot come as a surprise to that First Nation, or any First Nation currently under an SFI/AISH agreement or negotiating such an agreement.

[para 32.] I find that disclosure of the information contained in the Records cannot reasonably be expected to interfere with contractual or other negotiations of the Government of Alberta or a public body. Therefore, the Public Body did not correctly apply section 24(1)(c)(iii).

(iii) Harm to economic interest (section 24(1))

[para 33.] The Public Body says the expected harm to economic interest is twofold:

> (i) the loss of manpower costs that have gone into the initiative to date, if First Nations decide not to enter into agreements currently being negotiated (the Public Body may also be concerned about First Nations pulling out of agreements already negotiated); and
>
> (ii) the loss of expected future financial savings from the reduced number of children taken into care, if First Nations do not enter into agreements with the Government of Alberta.

[para 34.] As to the loss of manpower costs, there is no evidence before me as to what the manpower costs might be for agreements currently under negotiation, if negotiations are indeed in progress. I have reviewed one First Nation's SFI/AISH agreement provided by the Public Body, to get a general sense of those manpower costs. That agreement contained a $50,000 implementation cost and a $115,000 yearly administration fee (paid since 1996).

[para 35.] As to the loss of expected future financial savings, the Public Body did not quantify or further elaborate on these. I believe the Public Body's argument to be not only that the expected savings will not be achieved, but also that the Public Body will have to continue to spend money on child welfare for First Nations.

[para 36.] I do not believe that speculative losses, such as the loss of manpower costs, loss of expected savings, or having to continue to spend money, is harm to economic interest in this case, as contemplated by section 24(1). I have said that, to establish "harm", there must be "damage" or "detriment". Such speculative losses are not "damage" or

"detriment" to economic interest. Furthermore, if harm to economic interest were to include every speculative loss, then section 24(1) could be used in ways not intended, to withhold a vast array of a public body's records.

[para 37.] The information contained in the Records is audit information concerning how five First Nations are managing SFI/AISH programs under agreements or arrangements with the Government of Alberta. The Records contain a review of individual cases, conclusions based on those cases, and a general assessment about management of the programs. The Records also contain observations that established protocols for paying benefits are not always followed, and that the average cost per case administered under some agreements is higher than the average cost per case administered outside of those agreements.

[para 38.] The issue is whether disclosure of the information contained in the Records could reasonably be expected to harm the economic interest of a public body or the Government of Alberta.

[para 39.] The following is my simplified version of the Public Body's arguments relating to that issue:

> (i) Disclosure of the information contained in the Records will result in First Nations not entering into agreements, which will result in the loss of manpower costs, namely, what the Government of Alberta or the Public Body has already invested in negotiating agreements.
>
> (ii) Disclosure of the information contained in the Records will result in First Nations not entering into agreements, which will result in more children in care, which will result in the loss of expected savings, or will result in money continuing to be spent on child welfare for First Nations.

[para 40.] In my view, it is speculative to think that the disclosure will result in no agreements, which will result in more children in care, which will result in the loss of manpower costs and the loss of expected savings. Even if I had found that the speculative losses were harm to economic interest, there is no direct link between the disclosure of the information and the expected harm to economic interest. The Public Body is arguing "ripple-effect" harm. Disclosure of the information contained in the Records could not reasonably be expected to result in the loss of manpower costs or the loss of expected savings.

[para 41.] Therefore, disclosure of the information contained in the Records could not reasonably be expected to harm the economic interest of a public body or the Government of Alberta.

4. My conclusion under section 24(1)

[para 42.] I find that the Public Body did not correctly apply section 24(1).

[para 43.] Having come to that conclusion, I do not find it necessary to consider whether the Public Body exercised its discretion properly under section 24(1), which is a discretionary ("may") exception.

ISSUE C: If I find that the Public Body did not correctly apply section 20(1)(a)(i) and section 24(1), does the Public Body get to apply other exceptions to the Records?

[para 44.] The Public Body's submission states:

> *Should the Commissioner's ruling order the release of the reports, the Department requests the opportunity to sever third party personal information under section 16 of the FOIP Act. The Department also contends that the recommendations contained in the reports would qualify for an exception under section 23(1)(a).*
>
> *It should be noted, however, that the Department is committed to the decision it has made to not release the records. It only points out that should the Commissioner not agree with the position of the Department, we have not applied other exceptions to the documents that should be, prior to disclosure.*

[para 45.] I do not agree with the Public Body's submission. This is not a case in which the Public Body is raising a further exception late in the review process. This is a case in which the Public Body is asking me to make a decision on the exceptions it has applied and, having made that decision, is asking me to return the Records so that other exceptions may be applied.

[para 46.] A request under section 62(1) of the Act that I review a public body's decision to refuse access to a record must, of necessity, deal with <u>all</u> the public body's reasons for refusing access. Under section 68(2) of the Act, I have the power, among others, to require the head to give access if I find the head is not authorized or required to refuse access. That power anticipates that I make a decision as to access. Furthermore, my decision on the matter of access is final. The Act says

so in section 69. If a public body can demand that I decide one exception, then return a record for the public body's consideration under another exception, the intent of the legislation that my decision be final would be frustrated.

[para 47.] I conclude that the Public Body does not get to apply any further exceptions once I have made my decision regarding the exceptions that the Public Body applied to the Records.

[para 48.] The Public Body said that section 23(1)(a) (advice) would apply to the Records. However, the Public Body did not provide any evidence to support its claim or to show that it exercised its discretion properly under section 23(1)(a) (advice), which is a discretionary ("may") exception. Therefore, I find that section 23(1)(a) (advice) does not apply.

[para 49.] However, I will consider the mandatory ("must") exceptions under the Act, even if a public body does not raise them. The Public Body said that section 16 (personal information) applied, and asked that I return the Records for severing under section 16.

[para 50.] I do not intend to return the Records to the Public Body for severing of personal information under section 16. In this case, the Applicant wants all the information in the Records, including the personal information. If I were to return the Records to the Public Body for severing, this inquiry would not be concluded. Therefore, I will consider the application of section 16 myself, and my decision under section 16 will be final.

ISSUE D: Would disclosure of the third parties' personal information be an unreasonable invasion of the third parties' personal privacy, as provided by section 16 of the Act?

[para 51.] Personal information is defined in section 1(1)(n) of the Act. The Records contain personal information of the following third parties: (i) First Nation members, (ii) certain other third parties, and (iii) some government employees. The Applicant is not a third party for the purposes of section 16 of the Act: see Order 98-004.

[para 52.] The personal information of government employees consists of names and job titles. In Order 98-001, I said that a job title would be considered "employment responsibilities" for the purposes of section 16(4)(e) of the Act. Section 16(4)(e) says that disclosure of employment responsibilities of an employee of a public body, among others, would not be an unreasonable invasion of personal privacy. Therefore, the job titles of the government employees may be disclosed.

[para 53.] The personal information of the First Nation members includes names and other personal information, such as addresses, birth dates, family status, and file numbers, and information relating to eligibility for income assistance or social service benefits, or the determination of benefit levels.

[para 54.] For the most part, the name of an individual appears with other personal information. However, in a few cases, the personal information consists of the name alone, or personal information without a name. This is especially the case for the personal information of third parties other than First Nation members.

[para 55.] Section 16(1), section 16(2)(c) and section 16(2)(g)(i) of the Act are relevant. Those sections 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*
>
> *…*
>
> *(c) the personal information relates to eligibility for income assistance or social service benefits or to the determination of benefit levels,*
>
> *…*
>
> *(g) the personal information consists of the third party's name when*
>
> *(i) it appears with other personal information about the third party.*

[para 56.] I find that most of the personal information consists of the kinds described in section 16(2)(c) or section 16(2)(g)(i).

[para 57.] In determining whether disclosure would be an unreasonable invasion of the third parties' personal privacy under section 16(1), section 16(2)(c) or section 16(2)(g)(i), I have reviewed the relevant circumstances under section 16(3). The Applicant raised section 16(3)(a). 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 the relevant circumstances, including whether*
>
> > *(a) disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny.*

[para 58.] To decide whether section 16(3)(a) is a relevant circumstance weighing in favour of disclosing personal information, the following must be considered:

> (a) It is not sufficient for one person to have decided that public scrutiny is necessary;
>
> (b) The applicant's concerns have to be about the actions of more than one person within the Public Body; and
>
> (c) Where the public body has previously disclosed a substantial amount of information, the release of the personal information is not likely to be desirable for the purpose of subjecting the activities of the public body to public scrutiny. This is particularly so if the public body has also investigated the matter in issue.

[para 59.] The fact that audits were completed is not conclusive about whether one or more persons decided that public scrutiny was necessary. It may be that the audits were required as a matter of course. Furthermore, the Applicant's concerns are not about anyone within the Public Body. Moreover, by conducting the audits, the Public Body has investigated the matter. Therefore, in this case, I find that section 16(3)(a) does not weigh in favour of disclosing the third parties' personal information. I believe that disclosing the conclusions reached by the audits will be sufficient to meet any public scrutiny concern, without having to disclose the personal information that formed the basis for the conclusions.

[para 60.] I find that there are no relevant circumstances weighing in favour of disclosing the personal information. Therefore, except for the job titles of certain government employees, I find that disclosure of the third parties' personal information would be an unreasonable invasion of the third parties' personal privacy, as provided by section 16(1), section 16(2)(c) or section 16(2)(g)(i). The Public Body must not disclose that personal information. I will provide the Public Body with a copy of the highlighted personal information that is not to be disclosed.

V. ORDER

[para 61.] I make the following Order under section 68 of the Act.

[para 62.] The Public Body did not correctly apply section 20(1)(a)(i) of the Act.

[para 63.] The Public Body did not correctly apply section 24(1) of the Act.

[para 64.] The Public Body does not get to apply further exceptions to the Records.

[para 65.] Except for the job titles of certain government employees, disclosure of the third parties' personal information would be an unreasonable invasion of the third parties' personal privacy, as provided by section 16(1), section 16(2)(c) or section 16(2)(g)(i) of the Act.

[para 66.] I do not uphold the Public Body's decision to refuse to disclose the Records, except for the highlighted personal information. I order that the Public Body disclose the Records to the Applicant, except for the highlighted personal information. Along with this Order, I will provide the Public Body with a copy of the highlighted personal information that is not to be disclosed.

[para 67.] I further order that the Public Body notify me in writing, within 30 days of being given a copy of this Order, that the Public Body has complied with this Order.

Robert C. Clark
Information and Privacy Commissioner