

ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 2000-014

July 17, 2001

ALBERTA HUMAN RESOURCES AND EMPLOYMENT

Review Number 1822

Office URL: <http://www.oipc.ab.ca>

Summary: The Applicant applied under the *Freedom of Information and Protection of Privacy Act* (the “Act”) for access to certain information about the operation of the third party, Chem-Security (Alberta) Ltd. In Order 99-018, the Commissioner ordered access to records that the third party argued should be withheld under section 15 (business interests) of the Act. In this Order, the Commissioner ordered access to other records that Alberta Human Resources and Employment (the “Public Body”) argued should be withheld under section 15 of the Act. The Commissioner also found that the Public Body breached section 30 of the Act by failing to inform the Applicant of its right to request a review.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, S.A. 1994, c. F-18.5, ss. 9, 9(1), 10(1), 10(1)(a), 10(2), 11, 11(1), 12, 13(1)(d), 15, 15(1), 15(1)(a), (b) and (c), 15(1)(c)(i), (ii) and (iii), 16, 29, 29(1) and (2), 30, 30(1), (2), (3) and (4), 64, 67(1), 68; *Occupational Health and Safety Act*, R.S.A. 1980, c. O-2, s. 6.

Authorities Cited: AB: Orders 99-018, 2000-017.

I. BACKGROUND

[para 1.] On July 21, 1997, there was an explosion at the Swan Hills waste treatment centre. On August 15, 1997, Alberta Federation of Labour (the “Applicant”) applied under the *Freedom of Information and Protection of Privacy Act* (the “Act”) to Alberta Labour, now Alberta Human Resources and Employment (the “Public Body”), for access to general information about the operation of Chem-Security (Alberta) Ltd. under the *Occupational Health and Safety Act*, R.S.A. 1980, c. O-2. Chem-Security (Alberta) Ltd. operated the Swan Hills waste treatment centre under the name “Bovar Waste Management” (the “third party” or “Bovar”).

[para 2.] On January 20, 1998, the Applicant revised the access request. The Applicant asked for access to the following records:

- Copies of records covering medical assessments, air sampling, environmental monitoring and pollution control from 1994 onward;
- Records pertaining to the site visit (following the July 21, 1997 explosion), that took place July 25, 1997 and the follow-up with the company on the recommendations;
- Inspections of the operation commencing with the one dated July 27, 1996 to the present.

[para 3.] I have put together the following chronology of events from the Public Body’s initial submission, particularly the sequence of events provided at Tab 20. I have included dates where available and/or relevant.

[para 4.] The Public Body received the fee for access to the records (May 19, 1998).

[para 5.] There were 223 pages of records for which the Public Body decided to do a third party consultation, as provided by section 29 of the Act. The Public Body contacted the third party, Bovar.

[para 6.] The Public Body wrote to the Applicant to say that it was providing “partial access” to the records requested. The Public Body further said that some of the records contained information that may affect the interest of a third party, who was being afforded the opportunity to make representations as required by section 29. The Public Body said it would notify the Applicant of its decision regarding those records by July 16, 1998 (June 16, 1998).

[para 7.] The Public Body disclosed 73 pages of records to the Applicant and withheld 86 pages of records under section 4(1)(g). None of these records is at issue.

[para 8.] After receiving and reviewing Bovar's representations on the 223 pages of records, the Public Body decided:

(i) to withhold 72 pages of records in their entirety under section 15 (business interests) and section 16 (personal information) of the Act, and

(ii) to disclose 151 pages of records to the Applicant.

[para 9.] The Public Body notified Bovar of its decision (July 17, 1998).

[para 10.] The Public Body wrote to the Applicant to say that it was providing "partial access" to the records that were subject to the third party notice. The Public Body said that it would give access to the records on August 6, 1998 if the third party did not ask the Commissioner for a review (July 17, 1998).

[para 11.] Bovar requested a review of the Public Body's decision to disclose records (August 6, 1998). The Public Body notified the Applicant that Bovar requested a review (August 6, 1998).

[para 12.] On the review, I authorized mediation. My Office notified the Applicant that it was a party affected by the review, as provided by section 64 of the Act (September 21, 1998).

[para 13.] When the matter came to inquiry, only 19 pages (4 records) were at issue between the Public Body and Bovar. I conducted an inquiry on those 19 pages. I agreed with the Public Body's decision to disclose the 19 pages to the Applicant, and ordered disclosure: see Order 99-018 (issued to the parties on October 19, 1999).

[para 14.] The Public Body informed the Applicant that it was providing "partial access" to the final package of records relating to Bovar. The Public Body disclosed the 151 pages of records, including the 19 pages I ordered disclosed and the remaining 132 pages that the Public Body initially decided to disclose to the Applicant. The Public Body also notified the Applicant that other records were being severed under section 15 and section 16 (December 14, 1999). The Public Body withheld 72 pages of records in their entirety under section 15 and section 16.

[para 15.] The Applicant requested a review of the Public Body's decision to withhold the 72 pages of records under section 15 (January 19, 2000). Section 16 was not at issue.

[para 16.] I authorized mediation, which the parties subsequently decided would serve no useful purpose. The Applicant complained that the Public Body unnecessarily and unjustifiably delayed the completion of the access request by (i) not telling the Applicant at the beginning of the access request that it was withholding 72 pages of records, and (ii) by waiting until after Order 99-018 was issued to release 132 pages of records that could have been released earlier.

[para 17.] The matters were set down for a written inquiry. The Applicant and the Public Body provided written submissions. Bovar did not.

[para 18.] This Order proceeds on the basis of the Act before the amendments to the Act came into force on May 19, 1999.

II. RECORDS AT ISSUE

[para 19.] The records directly at issue consist of the 72 pages the Public Body withheld under section 15 and section 16 of the Act.

[para 20.] The Public Body numbered those pages of records consecutively. In this Order, I will refer to the records individually by page number and collectively as the "72 pages of records" or the "Records".

III. ISSUES

[para 21.] The Notice of Inquiry set out the following issues for the inquiry:

A. Did the Public Body correctly apply section 15 of the Act to the Records?

B. Is there a requirement under section 30 of the Act for the Public Body to notify the Applicant if, at any time after receiving an applicant's access request, it decides not to give access to some records? If there is such a requirement, did the Public Body comply with the requirement set out in section 30 of the Act?

C. Did the Public Body breach section 9, section 11 or section 12 of the Act?

IV. DISCUSSION OF THE ISSUES

ISSUE A: Did the Public Body correctly apply section 15 of the Act to the Records?

1. General

[para 22.] Section 15(1) of the Act is relevant. The relevant portions of section 15(1) read:

15(1) The head of a public body must refuse to disclose to an applicant information

(a) that would reveal

(i) trade secrets of a third party, or

(ii) commercial, financial labour relations, scientific or technical information of a third party,

(b) that is supplied, explicitly or implicitly, in confidence, and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,

(iii) result in undue financial loss or gain to any person or organization...

[para 23.] Since the Public Body refused access to the 72 pages of records, the Public Body has the burden of proof, as provided by section 67(1) of the Act.

[para 24.] For section 15(1) to apply, the Public Body must establish that:

(i) Disclosure of the information would reveal trade secrets of a third party, or commercial, financial, labour relations, scientific or technical information of a third party (section 15(1)(a));

(ii) The information was supplied, explicitly or implicitly, in confidence (section 15(1)(b)); and

(iii) Disclosure of the information could reasonably be expected to bring about one of the outcomes set out in section 15(1)(c).

2. Would disclosure of the information reveal trade secrets of a third party, or commercial, financial, labour relations, scientific or technical information of a third party (section 15(1)(a))?

[para 25.] The Public Body says that the Records withheld under this section include the following: PCB test results, chemical analysis reports and technical information around sampling procedures. The Public Body says that the information contained in the Records is scientific or technical information of Bovar.

[para 26.] In Order 2000-017, which was released before this Order, I said that “scientific information” is information exhibiting the principles or methods of science, and “technical information” is information relating to a particular subject, craft or technique.

[para 27.] I have reviewed the Records. Except for those pages set out below and page 72, I find that the Records would reveal scientific information of Bovar, since those Records set out test data and discuss that data. I find that page 72 would reveal technical information of Bovar.

[para 28.] The following pages of the Records would not reveal scientific or technical information of Bovar, or any of the other kinds of information set out in section 15(1)(a):

pages 10, 20, 22, 24, 27, 26, 37, 38, 40, 42, 44, 49, 62 (everything severed except the 3rd paragraph), 63, 64 (everything severed except the table), 65 (everything severed except the 3rd last and last

paragraphs), 66, 67, 68, 69, 70 (everything severed except the last paragraph).

[para 29.] The foregoing pages consist of such things as cover pages for reports, a fax coversheet, end parts of faxed pages that spilled over onto another page, general information about contamination control, and general lists of types of analyses made and methodologies used.

[para 30.] As the information in the foregoing pages does not meet the requirements of section 15(1)(a), the Public Body did not correctly apply section 15(1). I therefore intend to order the Public Body to disclose that information to the Applicant.

3. Was the information supplied, explicitly or implicitly, in confidence (section 15(1)(b))?

[para 31.] The Public Body says it told Bovar in 1997 that the Public Body could not guarantee the confidentiality of information. Bovar allegedly then stopped supplying the information to the Public Body except the monthly reports, which are not the subject of this inquiry. The Public Body argues that that is evidence that the information supplied before 1997 was supplied implicitly in confidence.

[para 32.] The Applicant argues that there is no evidence that the information was supplied either explicitly or implicitly in confidence from 1994 to 1997. The Applicant disagrees that Bovar's no longer supplying the information is evidence that the information was supplied in confidence.

[para 33.] There is no evidence before me that the information was supplied explicitly in confidence, such as a statement or agreement. Except for an internal memorandum of Bovar that has been marked "Confidential" (discussed below), there is also nothing on the face of the Records that would lead me to conclude Bovar supplied the information explicitly in confidence. Therefore I must decide whether the information was supplied implicitly in confidence, that is, whether there was an expectation or understanding of confidentiality.

[para 34.] In Order 99-018, I said that, in deciding whether there was an expectation of confidentiality based on reasonable and objective grounds, it was necessary to consider all the circumstances of the case, including whether the information was:

- (i) Communicated to the public body on the basis that it was confidential and that it was to be kept confidential;

- (ii) Treated consistently in a manner that indicates a concern for its protection from disclosure by the third party prior to being communicated to the public body;
- (iii) Not otherwise disclosed or available from sources to which the public has access;
- (iv) Prepared for a purpose that would not entail disclosure.

[para 35.] Page 27 of the Records consists of an internal memorandum of Bovar that has been marked “Confidential”. Attached to that memorandum are pages 28-36.

[para 36.] I have already said that page 27 does not meet the requirements of section 15(1)(a) and must be disclosed. However, because of the “confidential” marking on page 27, I am able to find that pages 28-36 meet the criteria of (ii)-(iv) set out above, and that there was an expectation of confidentiality. I am also able to draw an inference that the information contained in those pages was communicated to the Public Body on the basis that the information was confidential and was to be kept confidential. Therefore, I find that the information contained in pages 28-36 meets the requirements of section 15(1)(b), and that that information was supplied implicitly in confidence.

[para 37.] Other than for the information contained in pages 28-36 of the Records, there is no evidence of any circumstances or facts that would give rise to a reasonable expectation that the remainder of the information contained in the records was communicated on the understanding that it was supplied in confidence. Therefore, the requirements of section 15(1)(b) have not been met for the remainder of the information. I find that Bovar did not supply the remainder of the information in confidence to the Public Body.

[para 38.] I have found that the requirements of section 15(1)(b) have been met for the information contained in pages 28-36 of the Records. I will therefore consider those pages under section 15(1)(c).

[para 39.] Since I have found that the remainder of the information contained in the Records does not meet the requirements of either section 15(1)(a) or (b), it is not necessary that I consider whether the requirements of section 15(1)(c) have been met for that information. However, as the Public Body has provided representations on section 15(1)(c) for all the Records, I will consider all the information contained in the Records under section 15(1)(c).

4. Could disclosure of the information reasonably be expected to bring about one of the outcomes set out in section 15(1)(c)?

[para 40.] The Public Body argues only section 15(1)(c)(ii), that disclosure could reasonably be expected to result in similar information no longer being supplied to the Public Body when it is in the public interest that similar information continue to be supplied.

[para 41.] The Applicant submits that section 15(1)(c)(ii) does not apply because the *Occupational Health and Safety Act* requires a third party to supply such information to the Public Body on demand. In Order 99-018, the Public Body made the same argument that the Applicant is now making to argue that section 15(1)(c)(ii) did not apply to the three monthly reports and one letter from Bovar to the Public Body. However, this Order deals primarily with other kinds of records, such as internal memoranda of Bovar and laboratory tests conducted for Bovar.

[para 42.] According to the Public Body, Bovar asserted that the information supplied to the Public Body went beyond the narrow reporting requirements of the *Occupational Health and Safety Act*. Bovar also asserted that the information would no longer be provided voluntarily, although it would be available on site.

[para 43.] The Public Body says that Bovar could not legally refuse permission for copies to be taken of documents, if requested under the *Occupational Health and Safety Act*. However, the Public Body maintains it is possible that the release of the scientific information, of which Bovar had an expectation of confidentiality, could affect some of the advances made in occupational health and safety partnerships between government and industry in recent years. Those advances are very much in the public interest.

[para 44.] I have reviewed section 6 of the *Occupational Health and Safety Act*, which requires the production of any records, books, plans or other documents which relate to the health or safety of workers, for examination and copying. I agree with the Public Body that Bovar could not legally refuse the Public Body's requiring production and taking copies of the Records. If the information is not voluntarily supplied, the Public Body can compel Bovar to supply it.

[para 45.] In my view, as Bovar is legally required to supply the information under the *Occupational Health and Safety Act*, it cannot be said that disclosure of the information could reasonably be expected to result in similar information no longer being supplied to the Public Body,

whether or not it is in the public interest that similar information continue to be supplied.

[para 46.] I have also considered whether section 15(1)(c)(i) and (iii) apply to the information contained in the Records. On the face of the Records, there is no evidence of the applicability of those provisions. The Public Body has the burden of proof, but the Public Body did not provide evidence about or argue those provisions.

[para 47.] In this inquiry, Bovar does not have the burden of proof. However, as I have no evidence from the Public Body on section 15(1)(c)(i) or (iii), I would have looked to Bovar for what it had to say about the applicability of those provisions. Bovar was given an opportunity to make representations to me, but Bovar did not.

[para 48.] In the inquiry resulting in Order 99-018, Bovar had the burden of proof and argued that disclosure of the information could reasonably be expected to harm significantly its competitive position, in that disclosure would interfere with Bovar's ability to obtain and maintain qualified employees (section 15(1)(c)(i)). Bovar also argued that disclosure could reasonably be expected to result in undue financial loss to Bovar (section 15(1)(c)(iii)). In Order 99-018, I said that Bovar's arguments were unconvincing.

[para 49.] As there is no evidence before me on the face of the Records or from either the Public Body or Bovar on the applicability of section 15(1)(c)(i) or (iii) in this case, I find that section 15(1)(c)(i) and (iii) do not apply.

[para 50.] I find that disclosure of the information contained in the Records could not reasonably be expected to bring about one of the outcomes set out in section 15(1)(c).

5. Conclusion under section 15(1)

[para 51.] I find that the Public Body did not correctly apply section 15(1) to the Records. I intend to order the Public Body to disclose the Records to the Applicant, except for the personal information the Public Body has severed, which is not at issue.

ISSUE B: Is there a requirement under section 30 of the Act for the Public Body to notify the Applicant if, at any time after receiving an applicant's access request, it decides not to give access to some records? If there is such a requirement, did the Public Body comply with the requirement set out in section 30 of the Act?

1. General

[para 52.] Section 30 of the Act reads:

30(1) Within 30 days after notice is given pursuant to section 29(1) or (2), the head of the public body must decide whether or not to give access to the record or to part of the record, but no decision may be made before the earlier of

(a) 21 days after the day notice is given, and

(b) the day a response is received from the third party.

(2) On reaching a decision under subsection (1), the head of the public body must give written notice of the decision, including reasons for the decision, to the applicant and the third party.

(3) If the head of the public body decides to give access to the record or part of the record, notice under subsection (2) must state that the applicant will be given access unless the third party asks for a review under Part 4 within 20 days after that notice is given.

(4) If the head of the public body decides not to give access to the record or part of the record, the notice under subsection (2) must state that the applicant may ask for a review under Part 4.

[para 53.] Section 29(1) and (2), referred to in section 30(1), sets out the provisions for a public body's giving written notice to a third party when a head is considering whether or not to give access to a record containing information to which section 15 or section 16 may apply.

[para 54.] Within 30 days after giving notice under section 29(1) or (2), a public body must then do two things: (i) decide whether or not to give access to a record or part of a record for which it gave notice under

section 29(1) or (2); and (ii) give written notice to the applicant and the third party regarding its decision about access.

[para 55.] The issue of notice to the Applicant under section 30 arises with respect to the 72 pages of records the Public Body decided to withhold under section 15 and section 16, and the 151 pages of records the Public Body decided to disclose to the Applicant.

2. The 72 pages of records withheld under section 15 and section 16

[para 56.] The Applicant believes that the Public Body should have notified the Applicant at the beginning of the access request about the Public Body's intention to withhold the 72 pages of records under section 15 and section 16. The Public Body should not have waited until after Order 99-018 was issued to notify the Applicant.

[para 57.] The Public Body says that, by letter dated July 17, 1998, it notified both the Applicant and Bovar about the Public Body's decision to give "partial access". In this case, "partial access" meant that the Public Body decided to provide access to some records but not to others. However, the Public Body did not explain this. The Public Body agrees that the letter did not say that 72 pages of records had been severed in their entirety, although it did state that the records were severed under section 15 and section 16.

[para 58.] As the Public Body decided to give "partial access", the Public Body submits that it complied with section 30(1), (2) and (3), and was not required to consider notice to the Applicant under section 30(4). The Public Body submits that notice under section 30(4) would not apply since the third party records were subject to a review. It was the Public Body's understanding that the Applicant would exercise the right to ask for a review when the Public Body had fully responded to the request and all decisions had been made on the records.

[para 59.] I believe the Public Body is arguing that notice is to be given consecutively to a third party and an applicant under section 30, rather than at the same time. I do not agree with that interpretation.

[para 60.] Section 30(2) contemplates giving notice to both an applicant and a third party. There is nothing in section 30(2), (3) or (4) that says that notice must be given consecutively to an applicant and a third party. Consequently, if a public body's decision is to give access to some records but not to others, as here, the public body must give notice under section 30 to both an applicant and a third party at the same time.

[para 61.] I believe this is the proper interpretation of section 30, for the following reasons. There is more to section 30 than the requirement that a public body give notice about its decision to give access or not to give access to a record or part of a record to which section 15 or section 16 may apply. More importantly, a decision under section 30 triggers an applicant's or a third party's right to ask me for a review of the public body's decision. However, an applicant or a third party does not know that the right has been triggered until a public body gives written notice under section 30. Notice is fundamental to an applicant's or a third party's exercising the right to ask me for a review.

[para 62.] A public body's decision to give access to some records but not to others triggers the rights of both an applicant and a third party to ask for a review of the public body's decision at the same time. In my view, a requirement to exercise the rights consecutively would unnecessarily and unjustifiably delay an applicant's or a third party's right to ask for a review.

[para 63.] If the Public Body had given notice to the Applicant and Bovar at the same time, the Applicant could have exercised the right to ask for a review of the Public Body's decision to withhold the 72 pages of records, simultaneously with Bovar exercising the right to ask for a review of the Public Body's decision to disclose the 151 pages of records.

[para 64.] I find that the Public Body breached section 30 because the Public Body's July 17, 1998 letter to the Applicant does not state that the Applicant can ask for a review of the Public Body's decision to withhold the 72 pages of records. I intend to bring to the head's attention the Public Body's breach of section 30.

[para 65.] The Public Body's December 14, 1999 letter to the Applicant is belated compliance with section 30, some 17 months after the Applicant's access request.

3. The 151 pages of records the Public Body decided to disclose to the Applicant

[para 66.] In the review requested by Bovar, 151 pages of records were at issue. Apparently, the Applicant did not know the number of pages at issue until the Applicant received Order 99-018 and subsequently the entire 151 pages of records from the Public Body. I also did not know because I am not privy to what goes on in mediation during a review.

[para 67.] When the matter came to inquiry, only 19 of those 151 pages (four records) were at issue. There is the matter of what happened to the

remaining 132 pages (151 pages minus 19 pages) between the time of the request for review and the disclosure of those pages to the Applicant.

[para 68.] I have considered the following: (i) during the review, the Public Body unilaterally changed its decision about disclosing all 151 pages of records to the Applicant, and decided instead to disclose 19 pages and to withhold 132 pages; (ii) alternatively, during the review, the Public Body and Bovar both decided that 132 pages were no longer at issue in Bovar's review and could be disclosed to the Applicant.

(i) The Public Body unilaterally decided to withhold the 132 pages of records

[para 69.] If the Public Body had unilaterally changed its decision from one of access to 151 pages of records, to one of access to 19 pages of records and withholding of 132 pages of records from the Applicant, the Applicant would have had a right to ask for a review of the Public Body's decision to withhold the 132 pages of records. But the Applicant would not have known of that right until notified. Therefore, the Public Body would have been required under section 30(4) to notify the Applicant.

(ii) The Public Body and Bovar both decided that 132 pages were no longer at issue in Bovar's review and could be disclosed to the Applicant

[para 70.] It is more likely that the Public Body and Bovar both decided that the 132 pages of records were no longer at issue in Bovar's review and could be disclosed to the Applicant. I conclude this from the Public Body's statement on page nine of its submission: "On [sic] retrospect, the Public Body could have disclosed the records that were part of the review but not part of the inquiry once a decision had been made that they no longer were at issue." The Public Body then goes on to explain that a number of factors contributed to the non-disclosure of those records to the Applicant at that time, including the government reorganization that affected the Public Body.

[para 71.] The Applicant argues that, if a decision regarding a record is altered and will be disclosed, the disclosure should occur at the earliest opportunity, with an explanation of why the decision was changed.

[para 72.] The Public Body says that the decision was made not to release all the third party records until the inquiry was concluded. The Public Body also says that it will be reviewing the process as to whether to release portions of third party records as decisions are made in a review process.

[para 73.] In my view, the Public Body's and Bovar's decision that 132 pages of records were no longer at issue in Bovar's review and could be disclosed to the Applicant is not a decision as contemplated by section 30(4). That decision did not require the Public Body to give notice to the Applicant under section 30(4).

(iii) Response to the Applicant

[para 74.] However, there is still the matter of the Public Body's waiting until after Order 99-018 was issued before releasing those 132 pages of records to the Applicant. I view this as a matter of the Public Body's response to the Applicant under section 10 of the Act.

[para 75.] Section 10(1)(a) says that a public body must respond to a request within 30 days unless the time limit for responding is extended under section 13. Section 13(1)(d) provides for extending the time limit when a third party asks for a review.

[para 76.] The Public Body's August 6, 1998 letter to the Applicant appears to have extended the time limit under section 13(1)(d) to November 4, 1998, but this is not entirely clear. In practice, the time limit for responding to the Applicant would have been extended either until I completed the review by issuing an Order, or records were no longer at issue in Bovar's review.

[para 77.] When the Public Body and Bovar decided that 132 pages of records were no longer at issue in Bovar's review and could be disclosed to the Applicant, the time extension under section 13(1)(d) came to an end. The Public Body was then required to respond to the Applicant under section 10(1). Immediately providing the 132 pages of records to the Applicant would have been a response under section 10(1).

[para 78.] Section 10(2) says that a failure to respond within the extended period is to be treated as a deemed refusal. Consequently, an extended period that comes to an end without a response under section 10(1), as in this case, is a deemed refusal. On the Public Body's deemed refusal, I could have ordered the Public Body to respond if the Applicant had asked, but the Applicant did not know about the 132 pages of records.

[para 79.] The Public Body belatedly remedied the deemed refusal by responding under section 10(1) after Order 99-018 was issued.

4. Conclusions under section 30

[para 80.] As to the Public Body, I have summarized my conclusions under section 30 under the heading “V. Order”.

[para 81.] The following are my instructions under section 30 to this and other public bodies in the future:

a. When giving notice of your decision under section 30:

- avoid using the phrase “partial access”
- be as specific as possible about records to which you have decided to give access and not give access

b. If you decide to give an applicant access to some, but not all, of the records to which section 15 or section 16 may apply:

- give notice to the third party under section 30(3)
- at the same time, give notice to the applicant under section 30(4)

c. If you have decided to give an applicant access to the records, you have notified the third party under section 30(3), and later you unilaterally decide not to give access to some or all of those records:

- immediately notify the applicant under section 30(4)

d. If you have decided to give an applicant access to the records, you have notified the third party under section 30(3), and later both you and the third party decide that some or all of the records are no longer at issue between you and the third party:

- immediately respond to the applicant under section 10(1) (providing the records to the applicant is a response under section 10(1); not responding is a deemed refusal under section 10(2))

ISSUE C: Did the Public Body breach section 9, section 11 or section 12 of the Act?

[para 82.] I cite again the Applicant’s complaints that the Public Body unnecessarily and unjustifiably delayed the completion of the request by

not telling the Applicant at the beginning of the access request that it was withholding 72 pages of records, and by waiting until after Order 99-018 was issued to release 132 pages of records that could have been released earlier. Those complaints remain to be considered under sections 9, 11 and 12.

1. Application of section 9

[para 83.] Section 9(1) of the Act is relevant, and reads:

9(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.

[para 84.] Section 9(1) sets out the general duty of public bodies to assist applicants. I have said that section 9(1) does not encompass other, more specific, duties set out under the Act.

[para 85.] In my view, the Applicant's complaints fall within the specific duties under section 10 (time limit for responding) and section 11 (contents of a response). Consequently, I will not deal with those complaints under section 9(1).

[para 86.] I have reviewed the Public Body's evidence about how it assisted the Applicant. I find that the Public Body met its general duty to assist the Applicant under section 9(1), and did not breach section 9(1).

2. Application of section 11

[para 87.] Section 11(1) is relevant, and reads:

11(1) In a response under section 10, the applicant must be told

(a) whether access to the record or part of it is granted or refused,

(b) if access to the record or part of it is granted, where, when and how access will be given, and

(c) if access to the record or to part of it is refused,

(i) the reasons for the refusal and the provision of this Act on which the refusal is based,

(ii) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and

(iii) that the applicant may ask for a review of that decision by the Commissioner or an adjudicator, as the case may be.

[para 88.] The Public Body's July 17, 1998 letter to the Applicant did not clearly set out that the Public Body was refusing access to 72 pages of records and did not tell the Applicant that the Applicant could ask for a review. Therefore, I find that the Public Body breached section 11(1) of the Act in relation to the 72 pages of records.

[para 89.] Section 11(1) is dependent upon there being a response under section 10. I have found that there was no response under section 10(1) in relation to the 132 pages of records. Instead, there was a failure to respond (a deemed refusal under section 10(2)). Therefore, section 11(1) does not apply, and the Public Body did not breach section 11(1) in relation to the 132 pages of records.

3. Application of section 12

[para 90.] The relevant portions of section 12 read:

12(1) If an applicant is told under section 11(1) that access will be granted, the head of the public body must comply with this section.

(2) If the applicant has asked for a copy of a record and the record can reasonably be reproduced,

(a) a copy of the record or part of it must be provided with the response, or

(b) the applicant must be given reasons for any delay in providing the copy.

(2.1) If there will be a delay in providing the copy under subsection (2), the applicant must be told where, when and how the copy will be provided.

[para 91.] Since section 12 concerns granting access to records, section 12 does not apply to the 72 pages of records.

[para 92.] Section 12 is dependent on section 11(1). I have found that section 11(1) does not apply to the 132 pages of records. Therefore, I find that section 12 also does not apply to the 132 pages of records.

[para 93.] As section 12 of the Act does not apply, I find that the Public Body did not breach section 12.

V. ORDER

[para 94.] I make the following Order under section 68 of the Act.

A. Application of section 15

[para 95.] The Public Body did not correctly apply section 15 of the Act to the Records. I do not uphold the Public Body's refusal to disclose the Records. I order the Public Body to disclose the Records to the Applicant, except for the personal information the Public Body severed under section 16, which is not at issue.

[para 96.] I order the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that the Public Body has complied with this Order.

B. Application of section 30

[para 97.] The Public Body breached section 30 of the Act because the Public Body's July 17, 1998 letter to the Applicant does not state that the Applicant can ask for a review of the Public Body's decision to withhold the 72 pages of records. By this Order, I am bringing to the head's attention the Public Body's breach of section 30.

[para 98.] The Public Body's and Bovar's decision that 132 pages of records were no longer at issue in Bovar's review and could be disclosed to the Applicant is not a decision as contemplated by section 30(4). That decision did not require the Public Body to give notice to the Applicant under section 30(4).

[para 99.] However, when the Public Body and Bovar decided that 132 pages of records were no longer at issue in Bovar's review and could be disclosed to the Applicant, the Public Body was required to immediately respond to the Applicant under section 10(1) and to provide the 132 pages of records to the Applicant. The Public Body's failure to respond was a deemed refusal under section 10(2).

C. Application of sections 9, 11, and 12

[para 100.] The Public Body met its general duty to assist the Applicant under section 9(1), and did not breach section 9(1).

[para 101.] The Public Body breached section 11(1) of the Act in relation to the 72 pages of records that the Public Body withheld under section 15 and section 16. By this Order, I am bringing to the head's attention the Public Body's breach of section 11(1).

[para 102.] Section 11(1) does not apply to the 132 pages of records that the Public Body could have released earlier. Therefore, the Public Body did not breach section 11(1) in relation to the 132 pages of records.

[para 103.] Section 12 of the Act does not apply to either the 72 pages of records or to the 132 pages of records. Therefore, the Public Body did not breach section 12.

Robert C. Clark
Information and Privacy Commissioner