

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER 2001-021

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ALBERTA COMMUNITY DEVELOPMENT

Review Number 2128

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Summary: The Applicant made a request under the *Freedom of Information and Protection of Privacy Act* for access to a letter dated January 5, 2001 from Epcor Generation Inc. to Alberta Community Development and for other records relating to the future development of the Rossdale Power Plant site. Epcor Generation Inc. objected to the disclosure of one sentence found in one of the records and requested a review by the Information and Privacy Commissioner.

The Commissioner found that the information met all of the requirements under section 15(1) of the Act. In addition, the Commissioner held that Epcor Generation Inc. did not consent to the disclosure of the information under section 15(3)(a). Therefore, the Commissioner ordered Alberta Community Development not to disclose the information to the Applicant.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, S.A. 1994, c.F-18.5, ss. 15(1), 15(3)(a), 30, 67(3), 68.

Authorities Cited: AB: Orders 96-013, 97-013, 98-006, 99-018, 2000-010; **ON:** P-489 (1993).

Cases Cited: Canada (Information Commissioner) v. Canada (Prime Minister), [1992] F.C.J. No. 1054 (Fed. T.D.).

I. BACKGROUND

[para 1.] On January 21, 2001, the Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the “Act”) to Alberta Community Development (“the Public Body”) for a letter dated January 5, 2001 from Epcor Generation Inc. (the “Third Party”) to the Public Body and for other records relating to the future development of the Rossdale Power Plant site.

[para 2.] The Public Body identified 15 pages of records responsive to the access request.

[para 3.] On February 6, 2001, the Public Body notified the Third Party about the request and asked the Third Party to either consent to the disclosure or give written representations as to why these records should not be disclosed.

[para 4.] On February 23, 2001, the Third Party wrote to the Public Body objecting to the disclosure of one sentence found in the January 5, 2001 letter.

[para 5.] In a letter dated February 27, 2001, the Public Body informed the Applicant that it had decided to disclose all of the records that were responsive to the access request.

[para 6.] On March 19, 2001, the Third Party requested a review of the Public Body’s decision to disclose the one sentence at issue. Mediation was unsuccessful and the matter was set down for an oral inquiry.

[para 7.] The Public Body, Applicant and Third Party each provided me with a written submission in advance of the inquiry. In addition, at the conclusion of the inquiry, I asked the Applicant to provide me with a supplemental submission regarding some allegations the Applicant had made at the inquiry about the information at issue already being in the public domain. On May 31, 2001, the Applicant sent a supplemental submission to this Office. My Office sent a copy of this submission to the other parties and gave each of them an opportunity to respond to this submission. In response, the Third Party sent a rebuttal to this Office. The Public Body did not submit a rebuttal.

II. RECORDS AT ISSUE

[para 8.] The information at issue is one sentence found on page 4 of a letter, dated January 5, 2001, from the Third Party to the Public Body.

III. ISSUE

[para 9.] There is one issue in this inquiry: Does section 15(1) apply to the information at issue?

IV. BURDEN OF PROOF

[para 10.] The relevant portion of section 67 reads as follows:

67(3) If the inquiry relates to a decision to give an applicant access to all or part of a record containing information about a third party,

(a) in the case of personal information, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy, and

(b) in any other case, it is up to the third party to prove that the applicant has no right of access to the record or part of the record.

[para 11.] The Public Body decided to give the Applicant access to the records at issue. The records do not contain personal information. As such, pursuant to section 67(3)(b), the Third Party bears the burden of proof.

V. DISCUSSION: Does section 15(1) apply to the information at issue?

[para 12.] Section 15(1) reads as follows:

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, or

(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

[para 13.] Section 15(1) is a mandatory exception. This means that if a head of a Public Body determines the information falls within the exception, the head must refuse access.

[para 14.] For information to fall under section 15(1), the Third Party must satisfy the following three-part test:

Part 1: The information must reveal the trade secrets of a third party, or commercial, financial, labour relations, scientific or technical information of a third party (Section 15(1)(a));

Part 2: The information must be supplied, explicitly or implicitly, in confidence (Section 15(1)(b)); and

Part 3: The disclosure of the information must reasonably be expected to bring about one of the outcomes set out in section 15(1)(c).

A. Does 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 15.] The Third Party states that the disclosure of the information would reveal its commercial information.

[para 16.] The Public Body states that the information at issue is not a trade secret, commercial, financial, labour relations, scientific or technical information of a third party under section 15(1)(a).

[para 17.] The Applicant did not dispute the Third Party's assertion that the disclosure of the information at issue would reveal commercial information.

[para 18.] In Orders 96-013 and 97-013, I adopted part of Ontario Order P-489 (1993) which defined commercial information as that "... which relates to the buying, selling, or exchange of merchandise or services...". In these Orders, I held that this type

of information included Third Party associations, past history, references, and insurance policies.

[para 19.] After a review of the information at issue and the submissions of the parties, I find that the information at issue consists of commercial information. The information at issue consists of specific information regarding the Third Party's future expansion plans for the Rossdale Power Plant. I find that this information relates to the buying, selling or exchange of merchandise or services. As such, I find that the information constitutes commercial information under section 15(1)(a).

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

[para 20.] The Public Body and the Applicant state that the information at issue was not supplied in confidence. These parties argued that if the record had been sent in confidence, the Third Party would not have asked the Public Body to destroy it. In the Applicant's supplemental submission, the Applicant also attached several documents which the Applicant argues show that the Third Party's plans to add further generation facilities have been common knowledge since at least June of 1999. One of these documents is an extract from a draft Historic Resource Impact Assessment which the Applicant states was disclosed to the Applicant, the Public Body, the City of Edmonton and Alberta Environment.

[para 21.] The Third Party states that it had a reasonable expectation of confidentiality regarding the information at issue. The Third Party argues that the January 5, 2001 letter was sent to the Public Body in error and that it had requested that the Public Body destroy the letter. The Third Party also stated that it had sent the Public Body another letter in its place. In support of its argument regarding confidentiality, the Third Party provided me with letters, transcript extracts and other documents from the Alberta Energy and Utilities Board ("EUB") hearings respecting its Rossdale Unit 11 application. The Third Party states that the documents show that it consistently refused to disclose information regarding new power projects.

[para 22.] In Orders 99-018 and 2000-010, I stated that in order to fulfill the confidentiality requirements under section 15(1)(b), a third party must, from an objective point of view, have a reasonable expectation of confidentiality in regard to the information that was supplied. Furthermore, it is necessary to consider all the circumstances of the case including whether the information was:

- a) communicated to the public body on the basis that it was confidential and that it was to be kept confidential;
- b) 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;

c) not otherwise disclosed or available from sources to which the public has access; or

d) prepared for a purpose which would not entail disclosure.

[para 23.] After a review of the information at issue and the submissions of all the parties, I find that the Third Party had a reasonable expectation of confidentiality.

[para 24.] I find that the information was communicated to the Public Body on the basis that it was confidential and that it was to be kept confidential. Although the record is not marked confidential, the nature and content of the information and the evidence of the Third Party support the finding that the information was submitted implicitly in confidence. I also find that the Third Party's request to the Public Body to destroy the letter is irrelevant in determining whether the letter was submitted in confidence. I find that the Third Party requested the letter be destroyed because the Third Party realized it had made an error and wanted to make sure that the Public Body did not, overtly or inadvertently, disclose the sensitive information found in that document. In these circumstances, I do not think that the Third Party's request to destroy the document is indicative of whether the information at issue was submitted in confidence.

[para 25.] I also find that the information at issue has consistently been treated in a manner that indicated a concern for its protection from disclosure by the Third Party prior to being communicated to the Public Body and was prepared for a purpose that would not entail disclosure. In coming to this conclusion, I took into account the testimony of the Third Party and documents presented by the Third Party which show that the Third Party consistently refused to disclose specific development plans regarding new power projects.

[para 26.] Lastly, I find that there is insufficient evidence before me that the information at issue has otherwise been disclosed or is publicly available. In the Applicant's supplemental submission, the Applicant attached several documents which the Applicant states show that the Third Party's plans to add further generation facilities have been common knowledge since at least June of 1999. I have reviewed the supplemental submission and the attached documents. I find that the documents reveal that several options for development were available to the Third Party and thereby reveal that the Third Party was contemplating further development of the Rosedale Power Plant. However, despite the persuasive arguments of the Applicant, I find that these documents do not reveal the specific information that is at issue in this inquiry.

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

[para 27.] The Third Party states that the disclosure of the information could reasonably be expected to significantly harm the competitive position or interfere significantly with its negotiating position under section 15(1)(c)(i) or result in undue financial loss or gain to any person or organization under section 15(1)(c)(iii).

[para 28.] The Public Body and the Applicant state that the disclosure of the information could not reasonably be expected to bring about one of the outcomes set out in section 15(1)(c).

[para 29.] Section 15(1)(c)(i) states that the head of a public body must refuse to disclose information if the disclosure could reasonably be expected to significantly harm the competitive position or interfere significantly with the negotiating position of a third party.

[para 30.] In Order 96-013, I emphasized that the harm or interference under section 15(1)(c)(i) must be “significant”. In that Order, I also said that in order for a public body to meet the “harm” test under section 15(1)(c)(i),

“... [The] evidence must demonstrate a probability of harm from disclosure and not just a well-intentioned but unjustifiably cautious approach to the avoidance of any risk whatsoever because of the sensitivity of the matters at issue.” (*Canada (Information Commissioner) v. Canada (Prime Minister)*, [1992] F.C.J. No. 1054 (Fed. T.D.))

[para 31.] In that Order, I also stated that the Public Body must provide evidence of the following to prove significant harm or interference:

- (i) the connection between disclosure of the specific information and the harm which is alleged;
- (ii) how the harm constitutes “damage” or “detriment” to the matter; and
- (iii) whether there is a reasonable expectation that the harm will occur.

[para 32.] Section 15(1)(c)(iii) states that the head of a public body must refuse to disclose information if it could reasonably be expected to result in undue financial loss or gain to any person or organization. In Order 96-013, I emphasized that in order to fulfill this criterion the financial loss or gain must be “undue”.

[para 33.] After a review of the information at issue and the submissions of all the parties, I find that the disclosure of the information could reasonably be expected to significantly harm the Third Party’s competitive position under section 15(1)(c)(i). I am satisfied that if this information were made public, the Third Party’s competitors would have specific information respecting a project very early in the development phase of the project. Conversely, the Third Party would not have the same type of information respecting its competitor’s future projects. I also find that the disclosure of the information would significantly interfere with the Third Party’s negotiating position with potential contractors and suppliers under section 15(1)(c)(i). I find that if this information were disclosed, the Third Party’s suppliers would have advance notice of the specific project requirements for the future development of the Rosssdale Power Plant. I am satisfied that this type of advance notice would significantly harm and

interfere with the Third Party's future negotiating position with these suppliers. I am also satisfied that providing this type of notice to the Third Party's competitors and suppliers would, in turn, result in undue financial loss to the Third Party under section 15(1)(c)(iii). As such, I find that the criteria under section 15(1)(c) are fulfilled.

D. Did the Third Party consent to the disclosure under section 15(3)(a)?

[para 34.] Section 15(3)(a) states that section 15(1) will not apply to information if the third party consents to the disclosure of the information. Section 15(3)(a) reads:

15(3) Subsections (1) and (2) do not apply if

(a) the third party consents to the disclosure...

[para 35.] The Applicant argues that the Third Party impliedly consented to the disclosure of the first letter when the Third Party sent that letter to the Public Body. The Applicant states that the Third Party knew when it sent the letter to the Public Body that the Public Body could publicly disclose these letters during the EUB hearings.

[para 36.] The Third Party states that it did not consent to the disclosure of the information under section 15(3)(a).

[para 37.] After a review of the submissions of the parties, I find that the Third Party did not consent to the disclosure under section 15(3)(a). Section 15(3)(a) states that section 15(1) and 15(2) will not apply if the Third Party consents to "the" disclosure. Section 15(3)(a) does not refer to the Third Party as consenting to "any" disclosure. In my opinion, this means that a Third Party's consent under section 15(3)(a) must refer to, and be in response to, an access request under this Act.

[para 38.] In this inquiry, there is no evidence before me that the Third Party specifically consented to disclose the information in response to the Applicant's access request. Disclosure outside of the access process, as in this case, does not constitute a consent for the purposes of section 15(3)(a). As such, I find that the criteria under section 15(3)(a) are not fulfilled.

E. Conclusion

[para 39.] In this inquiry, the only information at issue is one sentence found in a letter, dated January 5, 2001, from the Third Party to the Public Body. I find that this information meets all of the criteria under section 15(1) of the Act. I also find that the Third Party did not consent to the disclosure of this information under section 15(3)(a). Therefore, the Public Body must refuse to disclose this information to the Applicant.

VI. ORDER

[para 40.] I make the following Order under section 68 of the Act.

[para 41.] In this inquiry, the only information at issue is one sentence found in a letter, dated January 5, 2001, from the Third Party to the Public Body. I find that this information fulfills all of the criteria under section 15(1) of the Act. I also find that the Third Party did not consent to the disclosure of this information under section 15(3)(a). Therefore, I order the Public Body not to disclose this information to the Applicant.

Robert C. Clark
Information and Privacy Commissioner