

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2008-019

July 31, 2008

ALBERTA INFRASTRUCTURE

Case File Number 3902

Office URL: www.oipc.ab.ca

Summary: The Applicant requested copies of records relating to the sale of the McLeod and Permanent Trust Buildings by the Province of Alberta in 1997 from Alberta Infrastructure (the Public Body). The Public Body determined that a purchase agreement between Juniper Development and Supply Co. (Juniper) and Alberta Public Works, Supply and Services was responsive to the Applicant's request and decided to disclose the record. Juniper Development objected to disclosure of the record and requested review by the Office of the Information and Privacy Commissioner.

The Adjudicator confirmed the decision of the Public Body to disclose the record and ordered the Public Body to disclose the record to the Applicant.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1,16, 17, 65, 71, 72; *Government Organization Act* R.S.A. 2000 c. G-10 Schedule 11 section10

Authorities Cited: AB: Orders 99-018, F2003-004, F2004-013, F2004-026, F2005-011, F2005-016, F2005-030, F2007-029 **BC:** 01-36

Cases Cited: *Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner)*, 2006 ABQB 515; *University of Alberta v. Pylypiuk*, 2002 ABQB 22

I. BACKGROUND

[para 1] The Applicant requested copies of records relating to the sale of the McLeod and Permanent Trust Buildings by the Province of Alberta in 1997 from Alberta Infrastructure (the Public Body). The Public Body determined that a purchase agreement between Juniper Development and Alberta Public Works, Supply and Services was responsive to the Applicant's request and decided to disclose the record.

[para 2] On November 23, 2006, the Public Body advised Juniper that it intended to disclose the purchase agreement. On November 27, 2006, Juniper requested that this office review the decision pursuant to section 65(2) of the *Freedom of Information and Protection of Privacy Act* (the Act).

[para 3] The Commissioner authorized mediation to resolve the dispute. As mediation was unsuccessful, the matter was scheduled for a written inquiry. The Applicant, the Public Body, and Juniper provided initial submissions. The Public Body and Juniper also provided rebuttal submissions.

II. RECORDS AT ISSUE

[para 4] A purchase agreement between Juniper and Alberta Public Works, Supply and Services is at issue.

III. ISSUES

Issue A: Does section 16 of the Act (business information) apply to the records / information?

Issue B: Does section 17 of the Act (personal information) apply to the records / information?

IV. DISCUSSION OF ISSUES

Issue A: Does section 16 of the Act (business information) apply to the records / information?

[para 5] Section 16 is a mandatory exception to disclosure. It states:

16(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 6] In Order F2005-011, the Commissioner adopted the following approach to section 16 analysis:

According to section 71(3)(b) of the Act, the Third Party has the burden to show that the information should not be disclosed under section 16. This burden is to be discharged on a balance of probabilities. (See Order 2001-019.)

Order F2004-013 held that to qualify for the exception in section 16(1), a record must satisfy the following three-part test:

Part 1: 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?

Part 2: Was the information supplied, explicitly or implicitly, in confidence?

Part 3: Could disclosure of the information reasonably be expected to bring about one of the outcomes set out in section 16(1)(c)?

I will therefore consider whether the information at issue meets each requirement of the test set out in Order F2004-013.

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?

[para 7] Juniper argues that disclosure of the purchase agreement would reveal Juniper's commercial and financial interests.

[para 8] The Applicant made no submissions in relation to this issue.

[para 9] The Public Body argues that some of the information in the purchase agreement can be classified as commercial or financial information, but that the entire contents of the records would not be classified in this way. The Public Body relies on Order F2003-004, in which the Adjudicator said:

In Order 96-013, the Commissioner said:

The purpose of [what is now section 16(1)] is to give a third party some degree of protection regarding information it provides to a public body. This section protects, to a limited extent, the integrity of third party contractual relationships with a public body.

A third party will often argue that the entirety of a contract between the third party and a public body is the third party's commercial information and should not be disclosed on an access request. As the Commissioner said, section 16(1) is not about protecting the entirety of the contract between a third party and a public body. Section 16(1) is about protecting only a third party's proprietary information supplied in confidence to a public body and contained in the contract, or proprietary information supplied in confidence to a public body that would otherwise be revealed by the contract. In either case, disclosure must result in one of the enumerated outcomes set out in section 16(1)(c).

In my view, it will be a rare circumstance in which the entirety of a contract between a third party and a public body meets all the requirements of section 16(1). If it were otherwise, section 16(1) would serve no purpose because every contract between a third party and a public body would have to be withheld under section 16(1), which is a mandatory ("must") provision. The Legislature could not have intended that result in enacting section 16(1).

[para 10] I agree with the Public Body that section 16 applies to information contained in a record and not necessarily to the entire record. If a record contains some financial or commercial information of a third party, it does not follow that the entire record may be withheld for that reason. It is therefore important to consider whether all the information in a record is commercial or financial information, or whether only some of it falls under section 16(1)(a). Review of the purchase agreement indicates that the following information is the financial or commercial information of Juniper:

1. The purchase price
2. The deposit amount
3. Juniper's GST number

The remainder of the purchase agreement contains the terms, conditions and obligations of the agreement between purchaser and vendor and does not reveal commercial or financial information belonging to Juniper.

Was the information supplied, explicitly or implicitly, in confidence?

[para 11] To meet this aspect of the test, a third party must establish that it supplied the information at issue to a public body and that it did so in confidence.

[para 12] The Public Body argues that the purchase agreement does not indicate that it was supplied in confidence.

[para 13] Juniper argues that it intended for the purchase agreement to be kept confidential.

[para 14] The purchase agreement indicates that Juniper and the Public Body negotiated the terms of the agreement and the purchase price. The Public Body did not

accept Juniper's initial offer, but did accept its second offer. Accordingly, the information contained in the contract was negotiated by Juniper and the Public Body.

[para 15] In Order F2005-030, the Commissioner commented that information that is negotiated between a public body and a third party is not information that has been *supplied* to the public body by a third party.

Order 2000-005 held that, generally, information in an agreement that has been negotiated between a third party and a public body is not information that has been *supplied to* a public body. There are exceptions, where information supplied to the public body prior to or during negotiations is contained in the agreement in a relatively unchanged state, or is immutable, or where disclosure of information in an agreement would permit an applicant to make an accurate inference about information supplied to the public body during the negotiations (See Order 2000-005 at para 85; see also an extensive discussion of this topic in British Columbia Order 03-15.)

In this case, the information the Public Body seeks to withhold is part of a contract negotiated between itself and the Affected Party. With respect to most of the Agreement, there is no evidence before me that any of the information that the Affected Party has described as its commercial or financial information was supplied to the Public Body by the Affected Party for the purpose of or prior to the negotiations of the contracts, or that any inferences can be drawn from the requested information about information that was so supplied. Accordingly I cannot conclude that most of this part of the requested information was information *supplied to* a Public Body as contemplated by section 16(1)(b).

[para 16] As noted above, the information Juniper seeks to withhold was negotiated between itself and the Public Body. The purchase agreement indicates that the parties negotiated the terms of the agreement and the purchase price. The Public Body did not accept Juniper's initial offer, but did accept its second offer. As a result, Juniper did not supply the information contained in the purchase agreement, as the information is the result of negotiations.

[para 17] In Order No. 01-36, the Privacy Commissioner of British Columbia considered the following factors in determining whether a third party had supplied information to a public body in confidence:

To establish confidentiality of supply, a party must show that information was supplied under an objectively reasonable expectation of confidentiality, by the supplier of the information, at the time the information was provided... The cases in which confidentiality of supply is alleged to be implicit are more difficult. This is because there is, in such instances, no express promise of, or agreement to, confidentiality or any explicit rejection of confidentiality. All of the circumstances must be considered in such cases in determining if there was a reasonable expectation of confidentiality. The circumstances to be considered include 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 affected person 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 which would not entail disclosure.

This test is the same as that adopted by the former Commissioner of this office in Order 99-018.

[para 18] In determining that the information in Order No. 01-36 had not been supplied in confidence, the Commissioner of British Columbia said:

It has not elaborated on the bare assertion that it has always treated the list as confidential. It has not provided me with any evidence as to how it has handled the list internally or in any dealings with others. There is no evidence before me of security measures to ensure confidentiality or other circumstances suggesting that Western Rubber was concerned to keep the list confidential before it was supplied to PWC. Certainly, the copy of the list provided to me for the purposes of this inquiry is not marked as being confidential.

I agree that a party asserting that information was supplied in confidence should provide evidence of the steps it has taken to ensure confidentiality.

[para 19] I note that the purchase agreement does not contain a confidentiality warning. In addition, an assertion made after the fact that information was supplied in confidence is insufficient to establish that the information was in fact supplied in confidence. Rather, a party seeking to establish that information was supplied in confidence must do so through evidence. Evidence of the party's practices in relation to its commercial and financial information and the steps it has taken to maintain confidentiality of information are vital, particularly in cases where the record itself does not indicate that it was intended to be confidential. However, Juniper has not provided any evidence as to the steps it took, if any, to ensure the confidentiality of the information contained in the purchase agreement.

[para 20] For these reasons, I find that Juniper has not established that it supplied the deposit amount, the purchase price or the terms of the agreement to the Public Body, and I find that it has not established that it supplied its G.S.T. number in confidence.

Could disclosure of the information reasonably be expected to bring about one of the outcomes set out in section 16(1)(c)?

[para 21] In *Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner)*, 2006 ABQB 515 the Court agreed with the Commissioner that a party alleging that it will suffer harm if information is disclosed must establish, through evidence, a reasonable expectation of harm:

The Commissioner's decision did not prospectively require evidence of actual harm; the Commissioner required some evidence to support the contention that there was a risk of harm. At no point in his reasons does he suggest that evidence of actual harm is necessary.

The evidentiary standard that the Commissioner applied was appropriate. The legislation requires that there be a "reasonable expectation of harm." Bare arguments or submissions cannot establish a "reasonable expectation of harm." When interpreting similar legislation, courts in Ontario and Nova Scotia have held that there is an evidentiary burden on the party opposing disclosure based on expectation of harm: *Chesal v. Nova Scotia (Attorney General)*, at para. 56 Ontario (Workers' Compensation Board) v. Ontario (Assistant Information & Privacy Commissioner) at para. 26.

Similarly, section 16 requires that disclosure of the information of a third party be reasonably expected to result in the harms set out in section 16(c)(i)-(v) before it applies. In addition, section 71 of the Act places the burden of proof on a third party to establish that an applicant has no right to the information at issue.

[para 22] Juniper argues that disclosure of the purchase agreement will harm its competitive and commercial position.

[para 23] The Public Body argues that Juniper has not established that it will suffer the harms contemplated by section 16(1)(c) if the purchase agreement is disclosed. Further, it argues that some of the information contained in the purchase agreement is already in the public domain. It drew my attention to the April 30, 1996 edition of the Alberta Gazette Part 1 in which information regarding the purchase agreement is published. This information includes the name of the purchaser, the consideration, and the land description. Further, the Public Body also entered into evidence the Land Title Certificate for the Perma Building, which contains the name of the owners, the value of the property, the consideration paid for the property, and the caveats on the property.

[para 24] The Public Body has established that the name of the buyers, the purchase price and caveats on the property are already publicly available. As a result, I do not accept that disclosing this information as it appears in the purchase agreement would result in harm to Juniper's competitive or commercial position, as this information has been publicly available since 1996.

[para 25] In regard to the deposit amount, the GST number, or the terms of the offer, the third party has not entered any evidence or made any arguments to establish that any of the outcomes in section 16 would reasonably be expected to result from disclosure of this information.

Conclusion

[para 26] I find that section 16 does not apply to the record at issue.

Issue B: Does section 17 of the Act (personal information) apply to the records / information?

[para 27] Juniper argues that disclosing the purchase agreement would be an unreasonable invasion of the its personal privacy of Five Oaks Inc., with whom it has entered easement and encroachment agreements, and its principal. It also contends that disclosing the purchase agreement would be an unreasonable invasion of its own privacy.

[para 28] The Public Body argues that corporations are not "individuals" under the Act and therefore, information about them is not personal information within the meaning of the Act.

[para 29] There are several difficulties with Juniper’s argument. First, the purchase agreement makes no reference to Five Oaks Inc. and its principal. Second, personal information is defined in section 1 of the Act in the following way:

1 In this Act,

- (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,*
 - (ii) *the individual’s race, national or ethnic origin, colour or religious or political beliefs or associations,*
 - (iii) *the individual’s age, sex, marital status or family status,*
 - (iv) *an identifying number, symbol or other particular assigned to the individual,*
 - (v) *the individual’s fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,*
 - (vi) *information about the individual’s health and health care history, including information about a physical or mental disability,*
 - (vii) *information about the individual’s educational, financial, employment or criminal history, including criminal records where a pardon has been given,*
 - (viii) *anyone else’s opinions about the individual, and*
 - (ix) *the individual’s personal views or opinions, except if they are about someone else...*

[para 30] Section 17 addresses disclosure of personal information. Under the Act, personal information can only be about individuals. As a result, even if the purchase agreement had contained information about Five Oaks Inc., it would not be personal information. In addition, the purchase agreement does not contain any personal information about the principal of Five Oaks Inc. Consequently, disclosure of the purchase agreement cannot be an unreasonable invasion of the personal privacy of the principal of Five Oaks Inc.

[para 31] As Juniper is not an individual, disclosing the purchase agreement cannot be an invasion of its personal privacy. However, in the purchase agreement, there are the signatures of two individuals: a representative of Juniper and a representative of the Public Body. I will therefore consider whether disclosing their personal information would be an unreasonable invasion of personal privacy.

[para 32] Both individuals signed the contract not to bind themselves personally, but to bind the legal entities – a corporation and a government department -- that they represented at the time. Consequently, the signatures may not be personal information within the meaning of section 17 as it is not information about these individuals, but rather, about the entities they represent.

[para 33] In Order F2004-026 and in Order F2007-029, the Commissioner said:

Information *about* a person's "employment responsibilities" – a description of their position or duties – is different from information that records their performance of their responsibilities. The fact that a description of a person's employment responsibilities is personal information does not conflict with the conclusion (found in the Ontario cases) that recorded information created by people "in their professional capacity or the execution of employment responsibilities" is not personal information about them. The Ontario cases also acknowledge that even information consisting of records of employment activities can, depending on its nature, have a personal aspect. I agree with the Ontario cases referred to above insofar as they stand for the proposition that a record of what a public body employee has done in their professional or official capacities is not *personal* or *about the person*, unless that information is evaluative or is otherwise of a 'human resources' nature, or there is some other factor which gives it a personal dimension...

Information about individuals acting in professional or official capacities, then, is not necessarily personal information under the Act.

[para 34] If the name and signature of the individual signing on behalf of Juniper are personal information within the meaning of section 17, then I find that it would not be an unreasonable invasion of personal privacy to disclose this information for the reasons that follow.

[para 35] Section 17 (1) requires the head of a public body to refuse to disclose a third party's personal information if the disclosure would be an unreasonable invasion of the third party's personal privacy. However, this provision cannot be read in isolation. Section 17 (2) establishes situations in which disclosure is not an unreasonable invasion of privacy, while section 17(3) and (4) describe the situations in which disclosure of personal information is presumed to be an unreasonable invasion of privacy. Section 17(5) is a non-exhaustive list of criteria for the head of a public to weigh when determining whether disclosure of personal information is an unreasonable invasion of privacy. Section 17 states in part:

17(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.

(4) 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...

(5) In determining under subsections (1) and (4) 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) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny...

[para 36] When certain types of personal information are involved, disclosure is presumed to be an unreasonable invasion of a third party's personal privacy under section 17(4). A public body must consider and weigh the factors set out in section 17(5), and other relevant circumstances, when determining whether a disclosure would be an unreasonable invasion of the personal privacy of a third party. In *University of Alberta v. Pylypiuk*, 2002 ABQB 22, the Court commented on the interpretation of what is now section 17. The Court said:

In interpreting how these sections work together, the Commissioner noted that s. 16(4) lists a set of circumstances where disclosure of a third party's personal information is presumed to be an unreasonable invasion of a third party's personal privacy. Then, according to the Commissioner, the relevant circumstances listed in s. 16(5), and any other relevant factors, are factors that must be weighed either in favour of or against disclosure of personal information once it has been determined that the information comes within s. 16(1) and (4). In my opinion, that is a reasonable and correct interpretation of those provisions in s. 16. Once it is determined that the criteria in s. 16(4) (now s. 17(4)) is (sic) met, the presumption is that disclosure will be an unreasonable invasion of personal privacy, subject to the other factors to be considered in s. 16(5). The factors in s. 16(5) must then be weighed against the presumption in s. 16(4).

Presumptions

[para 37] When information falls under one of the provisions in section 17(4) of the Act, disclosure of the personal information is presumed to be an unreasonable invasion of a third party's personal privacy. Section 17(4) creates a presumption only. A Public Body must then consider the factors under section 17(5), as these factors may outweigh the presumption. It is also important to note that section 17(5) is not intended to be an exhaustive list, and that other factors weighing for or against disclosure may be considered.

[para 38] The signatures of the buyer and the government representative are on the purchase agreement. As signatures are a personalized way in which a name is signed, both the names and signatures of these individuals are present on the purchase agreement. Consequently, the presumption in section 17(4)(g) is raised.

[para 39] As noted above, the presumption can be rebutted. For example, if disclosure is desirable for the purposes of subjecting the activities of the Government of Alberta or a public body to public scrutiny under section 17(5)(a), then this factor outweighs the presumption in 17(4).

[para 40] I find that disclosure of the purchase agreement is desirable for the purposes of subjecting the activities of the Public Body to public scrutiny. The purchase

agreement is a record of the sale of land between the Public Body as vendor and the third party as purchaser. As the Public Body notes, section 10 of Schedule 11 of the *Government Organization Act* requires that notice of a sale or disposition of land be published in the Alberta Gazette and that the notice must contain the name of the person whom the land is sold or otherwise disposed of, a description of the land, and the amount paid for the land. This provision ensures that the public is given knowledge of land dispositions by the Government of Alberta to ensure that they are at arm's length and for appropriate market value. Similarly, disclosing the purchase agreement fulfills a similar function, as it contains the same information required to be published in the Alberta Gazette. Disclosing the personal information contained in this record also serves to subject the activities of the Public Body to public scrutiny, as without the evidence of the signature, it would be unclear as to whether the Public Body and Juniper entered a written contract.

[para 41] In Order F2005-016, the Commissioner said:

Finally, I come to the signatures of the other third parties. In the former Commissioner's Order 2000-005 and subsequent Orders F2003-004 and F2004-022, a relevant circumstance under section 17(5) that weighed in favour of disclosing personal information consisting of names and/or signatures was whether individuals were acting in representative capacities. In those cases, disclosure of the names and/or signatures was found to not be an unreasonable invasion of those third parties' personal privacy under section 17(1).

Following Order 2000-005 and subsequent Orders, I find that the other third parties in this case were acting in representative capacities. That relevant circumstance weighs in favour of disclosing their personal information, consisting of their signatures.

[para 42] I therefore find that the fact that the individuals signed the purchase agreement in their representative capacities is also a factor that weighs in favor of disclosure.

[para 43] For these reasons, I find that the requirement of public scrutiny of land transactions involving government and the fact that the individuals signed in representative capacities outweighs the presumption in section 17(4). As a result, I find that it would not be an unreasonable invasion of personal privacy to disclose the signatures of the signatories to the contract.

Conclusion

[para 44] For these reasons, I find that section 17 does not require the Public Body to withhold the records and information.

V. ORDER

[para 45] I make this Order under section 72 of the Act.

[para 46] I confirm the Public Body's decision to give the Applicant access to the record at issue and require the head of the Public Body to give the Applicant access to the record at issue.

[para 59] I further order that the Public Body notify me in writing within 50 days of being given a copy of this Order, that the Public Body has complied with this Order.

Teresa Cunningham
Adjudicator