NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER

Review Recommendation 03-30
File: 02-191-4 and 02-190-4
March 14, 2003

BACKGROUND

This review actually deals with two separate Requests for Review received from two separate companies who are both Third Parties as that term is defined in the *Access to Information and Protection of Privacy Act.* Both Third Parties are companies who were given notice pursuant to section 26 of the Act that the Department of Justice was considering releasing certain information about them to an Applicant. .

The Department of Justice received the initial Request for Information on December 20, 2001. The request was very wide in scope, seeking

1. All permits, authorizations, approvals or other related or accompanying records which record, reflect, disclose or summarize a decision on the part of any Public Body to approve, or to deny, any request by any employer that it be issued a permit or granted permission pursuant to Section 6 and/or Section 7 of the *Labour Standards Act*, with specific respect to the carrying on of business by any such employer and/or the performance of work by employees of any such employer, at or about Ekati Mine site, Lac de Gras area, Northwest Territories,

2. All records, in any format or medium, which are or which together form any and all requests, made by any employer, for authorizations, approvals, permits or permissions to carry on business and/or have employees perform work at or about the Ekati Mine site, Lac de Gras area, Northwest Territories, in any manner which requires the issuance of a permit pursuant to Section 6 and/or Section 7 of the *Labour Standards Act*.

3. All records, in any format or medium, which have been received by any Public Body, in response or reply to a letter dated November 15th, 2001, which letter

was sent by Ms. Janelle James, Labour Standards Officer, to the BHP Biliton corporation at #1102-4920-52nd Street, Yellowknife, NT, X1A 3T1, addressed to the attention of "Payroll - Human Resources". For greater clarity, but without limiting the generality of the foregoing, I hereby further request that I be provided with copies of any supporting or explanatory documents, exhibits, appendices, schedules, attachments or other records which were provided to any Public Body, by the BHP Billiton corporation, on or subsequent to the date of any response or reply to Ms. James' November 15th, 2001 letter referred to above;

4. All records, in any format or medium, prepared and/or sent to the BHP Billiton corporation by any officer or employee of the Department of Justice, the Labour Standards Board and/or the Labour Services Branch, subsequent to November 15th, 2001.

Before releasing the information requested, the Department of Justice gave a number of Third Parties notice of their intent to release the information. Only two, the two who have asked me to review this matter, objected. Both of the Third Parties in this case were companies who had received Overtime Averaging permits pursuant to the Labour Standards Act of the Northwest Territories. They were informed by the Department of Justice that, notwithstanding the objections of the two Third Parties, the department had decided to disclose to the Applicant the Overtime Averaging permits and the letters to the third parties accompanying those permits, but that they would not disclose the application forms received from the Third Parties for the permits. Two of the affected Third Parties then asked me to review that decision.

ISSUE

Both of the Third Parties say that the release of the information contained in the permits and supporting background material would be reasonably expected to prejudice their competitive position and that section 24(1)(c)(ii) of the *Access to Information and Protection of Privacy Act* therefore protects that information from disclosure.

In addition, one of the Third Parties relies on the following provisions of the Act as support for its position that the information should not be released:

a) Section 25(1) - This section provides that the public body may refuse to disclose the information requested when that information is, or will within 6 months, be generally available to the public.

b) Section 23(1) - This section provides that the public body is to refuse disclosure of information where it would be an unreasonable invasion of a third party's personal privacy. It is suggested that the disclosure of the information in question would result in an unreasonable invasion of the personal privacy of the employees of the Third Party who work under the terms of the permit granted, and that the information should, therefore, be protected from disclosure

THE PARTIES' POSITIONS

The two Third Parties rely primarily upon section 24(1)(c)(ii) to support their position that the information in question should not be released to the Applicant. Section 24(1)(c)(ii) reads as follows:

> Subject to subsection (2), the head of a public body shall refuse to disclose to an applicant
>
> (c) information the disclosure of which could reasonably be expected to ...
>
> (ii) prejudice the competitive position of a third party,

The documents in question in this case are "Overtime Averaging Permits" issued pursuant to the Labour Standards Act. These are permits which allow employers to average, for the purpose of the payment of overtime wages, the hours worked by their employees. These permits are typically applied for and granted where the work site is a remote mining or exploration camp where the employees work on site for a period of

time, typically two weeks, and then have an extended period of time off, during which they return to their home community. These permits are issued upon application by the employer to the Department of Justice (Labour Services) and are usually granted for a one year period, requiring a re-application by the employer to extend the permit. The permit is granted in the form of a standard "fill in the blanks" form. It names the employer, the home base of the employer, the type of employee that the permit applies to (for example, "miners", "technicians" etc), the work site for which the permit is granted, the period for which the permit is granted and the hours permitted. It also outlines the length of each rotation (for example, a typical permit would provide for a schedule to consist of 14 days on followed by 14 days off).

The Third Parties take the position that they are able to provide services at competitive rates at the BHP mine site because of the relief from the payment of overtime wages that is provided by the Overtime Averaging permits. They say that disclosure of the terms of the permits to a competitor would allow that competitor to accurately assess their labour costs. They further say that this would allow the competitor to alter its negotiating position when seeking contracts with BHP and thereby prejudice the position of the Third Parties. They rely on an Order made by the Alberta Information and Privacy Commissioner on November 25th, 1998 (Order 98-015) as support for their position. In that case, the Information and Privacy Commissioner determined, having reviewed the documents in question, that the nature of the information contained in the records was sufficient to establish that the disclosure of the information could be reasonably be expected to harm significantly the competitive position of the Third Party because the disclosure would allow the Applicant, or a competitor of the Third Party, to make accurate inferences about the Third Party's pricing strategy, revenues, contracts for goods and services, and operating, capital and other expenses.

One of the Third Parties also asked me to consider section 25(1) of the *Access to Information and Protection of Privacy Act,* which states as follows:

> **25.** (1) The head of a public body may refuse to disclose to an applicant information that is otherwise available to the public or that is required to be made available within six months after the applicant's request is received, whether or not for a fee.

The Third Party submitted that general information about the rules and regulations governing Overtime Averaging Permits was available to the public by reference to the Act and the Regulations and decisions made in court actions. It was their position that the Department could have and should have chosen not to release the specific information requested because general information was available from other public sources.

Finally, one of the Third Parties takes the position that the release of the permits and letters in question would result in an unreasonable invasion of the personal information of their employees affected by the permit. They take the position that disclosure of the information the applicant seeks will enable it to determine some of the important employment terms under which the Third Party's employees work at the BHP site. They take the position that this constitutes personal information of the type referred to in section 23(2)(d) of the Act which reads a follows:

> (2) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where
>
> (d) the personal information relates to employment, occupational or educational history;

It is to be noted that one of the two Third Parties, in the end, agreed to the release of the Overtime Averaging Permits and the accompanying letters.

When asked for their position on the matter, the Public Body indicated that they had taken many factors into consideration when deciding whether or not to release the information, including the submissions of the Third Parties. In deciding not to disclose the application forms submitted by the Third Parties in support of their request for Overtime Averaging Permits, the department put particular emphasis on subsection

24(1)(b) of the Act which reads as follows:

> Subject to subsection (2), the head of a public body shall refuse to disclose to an applicant
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> b) financial, commercial, scientific, technical or labour relations information
>
> i) obtained in confidence, explicitly or implicitly, from a Third Party, or
> ii) that is of a confidential nature and was supplied by a third party in compliance with a lawful requirement.

They felt that the information contained in the applications for extended hour permits and overtime averaging authorizations was in fact labour relations information, supplied by a Third Party in compliance with a lawful requirement and, if not implicitly obtained in confidence, was confidential in nature. They relied on a decision of the Federal Court of Canada in *Air Atonabe Limited* v. *Canada (Minister of Transport)* (1989) F.T.R. 194, and adopted by the Supreme Court of the Northwest Territories in *Canadian Broadcasting Corp.* v. *Northwest Territories (Commissioner)* [1999] N.W.T.J. No. 117. These cases set out the test for determining whether or not information was given in confidence:

1. The information contained in the document is not available from any other source;
2. There was an assumption that the information would be kept in confidence; and
3. The public benefits from having a relationship of trust between the Third Party and the Public body was fostered by keeping the information confidential

The Department took the position that in this case, all three tests were met with respect to the applications for the permits.

The Department further took the position, however, that the permits themselves and the authorization letters which accompanied those permits did not fall within the protection

of Section 24. They point out that the permits and authorizations cannot be considered to be confidential, particularly in light of the fact that they were required to be posted publicly at the relevant job sites. Additionally, they point out, the permits and authorization letters provide much less detail than the application forms and that their disclosure would not, therefore, likely result in any harm to the business interests of the Third Parties.

DISCUSSION

Section 23(2)(d)

Dealing with the issues raised by the Third Parties in reverse order, I will deal first with the argument made that the disclosure of the permits and the accompanying letters would be an unreasonable invasion of the privacy of the employees of the Third Parties. However, having reviewed the permits and the accompanying letters, there is no personal information about any person contained in either of those documents. There is no list of employees covered by the permit on the permit or in the letter. The only place that that information appears is on the application form, which the Department has indicated that they will not be releasing. Neither the Third Parties or the Applicant have asked me to review that decision.

There is nothing in the permit to suggest names or remuneration paid. In the circumstances, I do not agree with the Third Parties' submission on this point. The documents in question do not contain any personal information and their disclosure could not, therefore, constitute an unreasonable invasion of an individual's privacy.

Section 25

One of the Third Parties further takes the position that the general rules and regulations with respect to the issuance of Overtime Averaging Permits is available to the general public by reference to the *Labour Standards Act* and the court cases decided pursuant

to that Act and, therefore, the public body should have exercised its discretion to refuse access to the specific permits requested by the Applicant.

Several points are to be made about this submission. Firstly, as a general rule, the case law is clear that exceptions to the right of access should be construed narrowly. As the Federal Court of Appeal stated in *Rubin v. Canada (Minister of Transport)* [1998] 2 F.C. 430 (C.A.) at para. 23.

> ... where there are two interpretations open to the Court, it must, given Parliament's stated intention, choose the one that infringes on the public's right to access the least. It is only in this way that the purpose of the Act can be achieved. It follows that an interpretation of an exemption that allows the government to withhold information from public scrutiny weakens the stated purpose of the Act.

With that in mind, it is my opinion that section 26 should be relied on to refuse disclosure only in very exceptional circumstances. If, for example, statistical information were being collected on a particular issue which had not yet been compiled, but would be compiled and publicly issued within a reasonable period of time, it might be reasonable to ask the Applicant to wait until the compilation was completed within the normal course of things and made public. However, even where information might otherwise be publicly available, the general intention of the Act is to encourage openness and it would be unusual for this section to be invoked by a public body to deny access. However, more importantly, the Applicant in this case was not seeking general information about the how the public body applies the act, nor about how courts have interpreted the Act. What the Applicant in this case was seeking was actual copies of Overtime Averaging Permits and supporting documents. Pointing the Applicant to statute and case law is not going to satisfy the request.

Section 26 cannot be relied on by the Third Parties to prevent disclosure of the records in question.

Section 24(1)(c)(iii)

As a preliminary matter, it is to be noted that section 33(3) of the *Access to Information and Protection of Privacy Act* in a case such as this one puts the onus of establishing that the information requested should not be released on the Third Party seeking to prevent the disclosure. It is, therefore, up to the Third Parties in this case to establish that one of the exemptions applies.

Both Third Parties have said that the disclosure of the records in question will prejudice their competitive positions. They rely on Order 98-015 made by the Alberta Information and Privacy Commissioner. In that Order, the Commissioner considered a request for copies of all independent valuations and/or fairness assessments prepared for the Government of Alberta in relation to a joint venture involving the Government of Alberta and several private companies. Much information was disclosed but 71 pages from a report prepared by a contractor hired by the Public Body were withheld. The report related to the loan given to the Third Party by the Government and was created to assist the Public Body in assessing the appropriateness of negotiating a settlement to certain loan obligations of the Third Party. The report contained information actually supplied by the Third Party, forecasts and estimates based on that information and information about the published price of the Third Party's products on the open market. The issue in that case was whether the Public Body correctly applied section 15 of the Alberta Act which is similar to our section 24 in that it protects from disclosure information that might harm significantly the competitive position of the Third Party or interfere significantly with the negotiating position of the Third Party. In analysing the issue, the Information and Privacy Commissioner outlines what must be demonstrated before this section will act to prevent disclosure:

1. there must be evidence of the connection between disclosure of the specific information and the harm that is alleged;
2. there must be evidence of how the harm constitutes "damage" or "detriment" to the matter, and

3. there must be evidence as to whether there is a reasonable expectation that the harm will occur.

There is nothing before me to suggest that the disclosure of the specific information contained in the permits will have the effect which is alleged by the two Third Parties. Nor is there anything in the permits themselves which would inevitably lead me to that conclusion. There is no secret in the fact that virtually every company doing business in a camp setting in the mining industry in the Northwest Territories operates with the assistance of Overtime Averaging Permits. The fact that the two Third Parties concerned have such permits will not come as a surprise to anyone else in the industry and nor will the specific terms of those permits, which, from what I understand, fall into three or four fairly standard permutations. Furthermore, as pointed out by the Public Body, these permits are required to be publicly displayed at the work site. In these circumstances, the Third Parties have not satisfied me that the disclosure of this information might provide a competitor access to information they don't already have or couldn't reasonably ascertain. This is not the same situation as that described in Alberta Order 98-015 where the information in question was clearly detailed financial information about the company including pricing strategy, revenues, contracts for goods and services, and operating, capital and other expenses which originated from the company itself and could not otherwise be ascertained.

CONCLUSION AND RECOMMENDATION

In light of the above discussion, it is my conclusion that the public body, in this case the Department of Justice, was correct in its interpretation of the *Access to Information and Protection of Privacy Act* insofar as this request for information was concerned. In deciding not to release the Third Parties' application forms for the permits in question, they have protected the proprietary information of the Third Parties and the personal information contained in those documents. On the other hand, the permits themselves, as well as the accompanying letters, contain no information which, in my estimation,

could be said to affect the competitive position of the Third Parties and should be disclosed to the Applicant.

I recommend that the Department continue its refusal to release the application forms of Third Parties who had requested Overtime Averaging Permits but that they disclose to the Applicant the permits granted and the letters which accompanied those permits.

Elaine Keenan Bengts
Northwest Territories
Information and Privacy Commissioner