

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2005-010

March 7, 2007

CITY OF CALGARY

Case File Number 3032

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

Summary: The City of Calgary received a request for access to records which contained the personal information of a third party or parties. The Third Party objected to the disclosure and requested a review of the Public Body's decision to release the records after severing out third party information. The Third Party also argued that the records were excluded from the Act by section 4(1)(m) (personal or constituency records of an elected member of a local public body).

The Adjudicator found that the records at issue, a communication with an Alderman about an issue in the constituency, were not excluded from the Act by section 4(1)(m). The Adjudicator found that section 17 applied to portions of the records and ordered the Public Body to disclose the records after severing third party personal information.

Statutes Cited: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000 c. F-25, s. 1(n), 4(1), 4(1)(m), 17, 17(1), 17(2), 17(4), 17(4)(g), 17(5), 17(5)(f), 30, 31, 71(3)(a), 72.

Orders Cited: Order 99-032

I. BACKGROUND

[para 1] The City of Calgary (the “Public Body”) received an access request under the *Freedom of Information and Protection of Privacy Act* (the “Act”) for two letters sent by email to an Alderman on City Council. The Alderman later forwarded the letters to a department of the Public Body who, in turn, forwarded them to another department.

[para 2] The Public Body identified personal information of a third party or parties (the “Third Party”) in the records. The Public Body gave notice to the Third Party, pursuant to sections 30 and 31 of the Act, that it intended to release the records with certain information severed.

[para 3] The Third Party objected and requested that this Office review the decision of the Public Body to the release any part of the records. Mediation was authorized, but was not successful. The matter was set down for a written inquiry.

[para 4] On commencement of this inquiry, I identified two Affected Parties (the Alderman and the requester). After the submissions process began, I identified another Affected Party. This was an individual whose name appeared in the records. The original requester was an association, represented by two individuals. During the submission process, the association withdrew its participation, and one of the individuals who had been representing the association expressed a desire to continue the process in a personal capacity. Because of the change in parties and requests for time extensions, the process was delayed.

[para 5] The Public Body made a submission but not a rebuttal. It also submitted, in camera, copies of the records at issue in severed and unsevered versions. The Third Party filed a submission and a rebuttal, which I accepted in camera. Two of the three Affected Parties filed submissions, and the two of them filed a joint rebuttal. The third Affected Party did not make any submissions.

[para 6] The joint rebuttal of the two Affected Parties included new evidence and raised new arguments. Through the process of this inquiry the Public Body and the Third Party had no chance to respond to that information. Generally, parties should not raise new evidence and arguments in rebuttals. They should only respond to the positions of the other parties, set out in the original submissions. In this case, given the content of that rebuttal, I have accepted it because the new material was minimal and the new arguments do not affect the outcome for the Public Body or the Third Party.

II. RECORDS AT ISSUE

[para 7] The records at issue consist of two letters (totalling five pages) sent by email from the Third Party to an Alderman sitting on City Council.

III. ISSUES

[para 8] The Notice of Inquiry set out the following issues for this inquiry:

Issue A: Are the records excluded from the application of the Act by section 4(1)(m)?

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

IV. DISCUSSION OF THE ISSUES

Issue A: Are the records excluded from the application of the Act by section 4(1)(m)?

[para 9] The Third Party says that the record is a “constituency record” as contemplated by the Act in section 4(1)(m), which states:

4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

(m) a personal record or constituency record of an elected member of a local public body;

[para 10] In Order 99-032, at paragraphs 56 and 57, the former Commissioner interpreted section 4(1)(m) [formerly section 4(1)(i)] as follows:

[para 56.] I have further said that section 4(1)(i), which is an exception to the Act, should be interpreted narrowly. Therefore, section 4(1)(i) should be confined to records relating to that aspect of the official’s role related to being “elected”. Another way of looking at this is to say that the records intended to be encompassed by section 4(1)(i) should not relate to the role of the official in carrying out the local public body’s mandate and functions.

[para 57.] Therefore, I find that section 4(1)(i) should be interpreted to exclude from the application of the Act only those kinds of records that can clearly be distinguished as the records of an “elected official”, and not records that pertain to the mandate and functions of the local public body.

[para 11] The Third Party argued that the letters were written to an elected official about constituency business and that the Public Body had no right to release the records to anyone else. The Third Party also argued that preserving free and open communication between members of the public and elected members is a value that should be protected.

[para 12] In my view, preserving free and open communication between members of the public and elected members is the reason that the legislators saw fit to exclude constituency records from the Act. However, the Third Party appears to have overlooked

the full effect of excluding a record from the Act. While exclusion would mean that no one has a right to access the record through the Act, it also means that the record is not subject to any privacy protections.

[para 13] The Third Party complained that the Public Body should not have removed the records from the office of the Alderman, and compared that with the treatment of such records in other jurisdictions. The Third Party argued that the interpretation of the Act put forward by the Public Body is without merit or source and referred to the breadth of the definition of “record” in the Act and said that breadth ought to be applied to the term “constituency.”

[para 14] The Public Body said that the record does not fit within the meaning of the term “constituency record” used in the Act. It offered a definition of the term and examples that would essentially limit the term to records that relate to the elected members’ election campaign and political organizing activities. The definition would exclude records relating to, as here, a discussion of a perceived problem in the constituency and a request for related action.

[para 15] The Affected Parties argued that the record is not excluded from the Act and should be released because:

- Any confidentiality or intention of confidentiality has in fact been breached already – the letter was circulated to the Public Body and allegedly circulated to certain members of the public.
- The Third Party allegedly contributed to that breach and should not now to be able to use the Act to preserve whatever confidentiality is left.
- The letter allegedly contains personal information about the two Affected Parties and they should be able to see it.
- The principles of the Act clearly weigh in favour of disclosure.
- The record is not excluded because the Public Body does not have “sole and exclusive” custody and control over it.

[para 16] The Public Body is bound by the provisions of the Act for records within its custody or control, regardless of how many others may have a copy of the records or how other parties came into possession of the records. Section 4(1) refers to records in the custody or under the control of the Public Body and then lists a number of exclusions of those records in the following subsections.

[para 17] Location of the record can be one indicator of the type of record and whether or not it has come into the possession of the Public Body for reasons of its business mandate and functions.

[para 18] Members of the Legislative Assembly of Alberta have constituency offices which are separate from their offices at the Legislature. This separation is helpful when trying to determine which records are constituency records. However, elected members of local public bodies do not have the luxury of two offices with a separation of staff and function. Therefore, the fact that a record was written directly to an Alderman and that a copy was retained in his or her office is not particularly helpful in determining whether a record should be classified as a constituency record.

[para 19] Not all actions of an elected member can be equated with actions of the Public Body. Elected members act in a governance role and as representatives of their constituency. Political governance and representation of constituents differs from the administration of the Public Body.

[para 20] The Act is fully aimed at accountability by the administration, both for protecting privacy and allowing required access. It requires elected members of local public bodies to treat certain records within that framework. It also recognizes that elected members of local public bodies have constituencies, and records will arise from their interactions with the portion of the community that they represent. The Act excludes those records from its obligations and accountabilities.

[para 21] The Public Body relied on a definition of “constituency record” that is found in policy statements of local public bodies and the Alberta provincial government (FOIP Bulletin Number 6, June 2004, page 3). Public bodies have had to develop policy in many areas, for consistency and operational efficiency in application of the Act. I will consider that policy but I am not bound by it.

[para 22] The distinction between records in the hands of an elected representative as part of the mandate and function of the public body, as opposed to the representative political role of the elected official may well be a challenge to draw on a case by case basis. Nonetheless, in my view, the Act intends to exclude records that are, regardless that they may be located in the premises of a public body, in the control of the elected member as a record of constituency business. I do not read the Act as confining that business to the actions of political organizing and electioneering. That business may include a letter from a person about activity in the constituency and a request for the elected member to get action from the public body.

[para 23] In this case, the elected member received a letter via email regarding a matter in the Alderman’s constituency. The letter specifically requested action from the Alderman, who chose to follow up with action and directed the letter to a department of the Public Body. Given the content of the letter, that was a clearly foreseeable result. The email was not just a conversational exchange of views. It was a demand for specific action from the Public Body with a request for a reply. The letter was purposely directed into the hands of the Public Body, by the Alderman, for action by the Public Body that was squarely within its mandate and functions.

[para 24] Once the letter was received by the Public Body, it was fully and properly in the Public Body's custody and control. It was not identified as a constituency record by the Alderman. It is evident from the face of the records that forwarding the records to the department or departments who are in the best position to bring about the action requested by the Third Party was the most expedient way for the Alderman to serve her constituents. Therefore, I find that the records are not constituency records as set out in section 4(1)(m) of the Act.

ISSUE B: Does section 17 of the Act apply to the records/information?

[para 25] Section 17 of the Act is mandatory. The Public Body must refuse to disclose third party personal information where disclosure would be an unreasonable invasion of a third party's personal privacy. Section 17(1) states:

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.

[para 26] In order for section 17 to apply to the records, they must contain the personal information of a third party. Personal information is defined in section 1(n) of the Act. I have reviewed the records and find that they contain personal information of the Third Party, including name, address, telephone number, and personal opinions. The records also contain the personal information of other third parties.

[para 27] The Public Body severed what it considered to be personal information of third parties. It then decided that the remainder of the record could be released because the information was not third parties' personal information. The Third Party said the whole of the record is his opinion and objected to the release of the remaining information.

[para 28] I disagree with the Third Party. The information in the records is not all personal information and in some cases, it is the personal information of other third parties. I agree with the Public Body's position that personal information can be severed and the remainder of the information disclosed. However, I must still decide whether any of the personal information can be disclosed.

[para 29] The Affected Parties argued that the records had been released to others by the Third Party and therefore they no longer had a right to privacy protection through the Act. The Affected Parties offered no evidence to back up their assertion. Even if they had, their argument is not relevant to the matter in front of me. Section 17 places a duty on the Public Body to refuse to disclose third party personal information if disclosure would be an unreasonable invasion of privacy. The Third Party is free to disclose their personal information to anyone they choose. The only time that it would be relevant to the matter before me is if there was evidence that the Third Party had given consent to the Public Body to release their personal information. That is clearly not the case in this inquiry.

[para 30] Section 17(2) of the Act sets out numerous circumstances in which disclosure of third party personal information is not an unreasonable invasion of third party personal privacy.

[para 31] The Affected Parties did not specifically identify any part of section 17(2) which might apply so that disclosure would not be an unreasonable invasion of personal privacy. Likewise, there is nothing on the face of the records that would cause me to conclude that section 17(2) applies to the records.

[para 32] Section 17(4) sets out circumstances where disclosure of third party personal information is presumed to be an unreasonable invasion of privacy. The relevant provision of Section 17(4) states:

17(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,

[para 33] The Public Body's evidence was that some information in the record fell within section 17(4)(g), being third party names and other personal information about the third party. I have reviewed the records and I agree with the Public Body's decision about the information in the record. Therefore, there is a presumption that release of the Third Party's personal information would be an unreasonable invasion of the Third Party's personal privacy.

[para 34] In coming to its decision, the Public Body must consider all relevant circumstances, including those listed in section 17(5) of the Act, which states:

17(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,
- (b) the disclosure is likely to promote public health and safety or the protection of the environment,
- (c) the personal information is relevant to a fair determination of the applicant's rights,
- (d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,
- (e) the third party will be exposed unfairly to financial or other harm,
- (f) the personal information has been supplied in confidence,
- (g) the personal information is likely to be inaccurate or unreliable,

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and

(i) the personal information was originally provided by the applicant.

[para 35] The Third Party claimed that the Public Body breached section 17(5)(f) of the Act. Section 17(5)(f) requires the Public Body to consider whether the information was supplied in confidence when deciding whether to release third party personal information. There is an indication on one letter that it was supplied in confidence.

[para 36] The Public Body says it considered section 17(5)(f) when it decided to sever all personal information of the Third Party. The Public Body argued that section 17(5)(f) is not a factor for the remainder of the records which is not personal information. I agree with the Public Body's decision that disclosure of the personal information of the Third Party, as well as other third parties, would be an unreasonable invasion of their personal privacy. I also agree that information which is not personal information can be disclosed.

[para 37] Once a public body has determined that disclosure of third party personal information would be an unreasonable invasion of a third party's personal privacy, the burden shifts to the applicant to prove that disclosure would not be an unreasonable invasion. Section 71(3)(a) states:

71(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

[para 38] By definition, an applicant is a person who makes a request for access to a record. This inquiry was commenced as a result of a third party request for review. Therefore, I have not referred to any of the parties as an "applicant." However, two of the Affected Parties were given that status because they requested access to the records at issue. They are the two Affected Parties who have made submissions in this inquiry. Consequently, the Affected Parties have the burden of proof regarding the personal information of the Third Party. The Affected Parties failed to meet this burden.

[para 39] The Third Party says the remaining information in the record, in the context of the circumstances, would be enough for other parties to identify him, and that would be an unreasonable invasion of his privacy. I have reviewed the severing done by the Public Body. I am satisfied that the remaining information can be disclosed. Therefore, I intend to order the Public Body to disclose the severed records to the Affected Parties.

V. ORDER

[para 40] I make this Order under section 72 of the Act.

[para 41] I find that the records are not constituency records as set out in section 4(1)(m) of the Act. Therefore, I find that the Act applies to these records and I have jurisdiction over them.

[para 42] I find that section 17 applies to the personal information in the records. I confirm the Public Body's decision to sever the personal information of the Third Party and other third parties from the records, pursuant to section 17 of the Act. I order the Public Body to disclose the remainder of the severed records to the Affected Parties.

[para 43] I further 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.

Dave Bell
Adjudicator