ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2009-002

March 11, 2009

ALBERTA CHILDREN AND YOUTH SERVICES

Case File Number F4166

Office URL: www.oipc.ab.ca

Summary: The Applicant made a request to Alberta Children and Youth Services (the Public Body) for access to a record relating to an application for benefits made under victims of crime legislation by an individual.

The Public Body applied section 12(2)(b) of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) which states that a public body may refuse to confirm or deny the existence of a record of the Act if disclosing the existence of the record would be an unreasonable invasion of a third party's personal privacy.

The Adjudicator confirmed the decision of the Public Body to refuse to confirm or deny the existence of a responsive record, because disclosing whether such an application existed would reveal personal information about a third party that would be an unreasonable invasion of the third party's personal privacy.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 2, 12, 17, 72; *Child, Youth and Family Enhancement Act*, R.S.A. 2000, c. 12, ss. 126, 126.1; *Victims of Crime Act*, R.S.A. 2000, c. V-3 **ON:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 s. 21

Authorities Cited: AB: Order 98-009, F2006-012; **ON:** Order PO-2472

Cases Cited: *University of Alberta v. Pylypiuk*, 2002 ABQB 22; *Ontario (Minister of Health and Long-Term Care) v. Ontario (Information and Privacy Commissioner),* (2004), 73 O.R. (3d) 321

I. BACKGROUND

[para 1] On July 19, 2007, the Applicant made the following request for records to Alberta Children and Youth Services (the Public Body):

> I am researching the policy of Child Welfare to apply for crimes compensation benefits for children who are under Permanent Guardianship Orders. To assist me in my review of this policy, could you please provide me with any records that disclose if a Crimes Compensation application was made for the Child [initials of an individual] who is referred to in the attached newspaper article. The only record that I would need would be the application for benefits and the decision. I understand that all personal information identifying [initials of an individual] will be deleted…
>
> … I am not certain what the policy of child welfare is/was regarding applying for crimes compensation benefits for children under PGO … By getting records on particular cases, I hope to be able to draw a conclusion on what the policy or practice of Child Welfare is/was.

The Applicant included an article from the Edmonton Journal about the individual to whom he referred in his access request. The article did not identify the individual, but referred to the individual by initials and indicated that the individual had been in foster care and detailed the individual's experiences in foster care. The article indicated that this individual had been named in an Edmonton Journal article published in 2005.

[para 2] The Public Body responded to the Applicant's access request on July 23, 2007. The Public Body applied section 12(2) of the FOIP Act, which establishes the circumstances in which a public body need not confirm or deny the existence of a record.

[para 3] On July 25, 2007, the Applicant requested that the Commissioner review the Public Body's decision regarding his access request. The Commissioner authorized mediation.

[para 4] As mediation was unsuccessful, the matter was scheduled for a written inquiry. The Public Body provided submissions; however, the Applicant did not.

III. ISSUES

Issue A: Did the Public Body properly refuse to confirm or deny the existence of a record, as authorized by section 12(2) of the Act?

IV. DISCUSSION OF ISSUES

Issue A: Did the Public Body properly refuse to confirm or deny the existence of a record, as authorized by section 12(2) of the Act?

[para 5] Section 12 of the FOIP Act establishes the formal requirements of a response under the Act. It states, in part:

12(1) In a response under section 11, the applicant must be told…

(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…

(2) Despite subsection (1)(c)(i), the head of a public body may, in a response, refuse to confirm or deny the existence of

…

(b) a record containing personal information about a third party if disclosing the existence of the information would be an unreasonable invasion of the third party's personal privacy.

[para 6] Section 1(1)(n) defines personal information under the 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;

Personal information under the FOIP Act is information about an identifiable individual that is recorded in some form.

[para 7] 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
(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 8] Section 17 does not say that a public body is *never* allowed to disclose third party personal information. It is only when the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy that a public body must refuse to disclose the information to an applicant under section 17(1). Section 17(2) (not reproduced) establishes that disclosing certain kinds of personal information is not an unreasonable invasion of personal privacy.

[para 9] When the specific types of personal information set out in section 17(4) are involved, disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. To determine whether disclosure would be an unreasonable invasion of the personal privacy of a third party, a public body must consider and weigh all relevant circumstances under section 17(5). It is important to note that section 17(5) is not an exhaustive list and that other relevant circumstances must be considered.

[para 10] 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) 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).

[para 11] The Public Body argues that if a responsive record exists, it would disclose that the third party is a person that has come to the attention of a person employed or assisting in the administration of the *Child, Youth and Family Enhancement Act* (CYFEA), which would be contrary to section 126 of the CYFEA.

[para 12] Section 126 of the CYFEA states, in part:

> *126(1) The Minister and any person employed or assisting in the administration of this Act shall preserve confidentiality with respect to personal information that comes to the Minister's or person's attention under this Act and shall not disclose or communicate that information except in accordance with the Freedom of Information and Protection of Privacy Act, in proceedings under this Act, in accordance with Part 2, Division 2 or this Division or as follows:*
>
> *(a) to any person or organization if the disclosure is necessary to plan or provide services to a child or the child's family or to plan or provide for the day to day care or education of the child;*
>
> *(b) to the guardian of the child to whom the information relates or the guardian's lawyer;*
>
> *(c) to the child to whom the information relates or the child's lawyer;*
>
> *(d) to any person employed in the administration of child protection legislation in another province or territory of Canada;*
>
> *(e) to any person with the written consent of the Minister.*

I note that section 126 does not prohibit disclosing personal information under the FOIP Act. I also note that the FOIP Act is paramount unless the personal information referred to in section 126(1) is the name of a person who makes a report to the director under section 126.1 of the CYFEA.

[para 13] The Public Body supplied the affidavit of an employee to explain the process it followed when it responded to the Applicant:

> In his request, the Applicant specified that he was seeking records relating to an application for a victim of crime financial benefit made on [third party initials] behalf. For a child in permanent care, such a record would be located in a confidential child protection file…Based on the information, including the nature of the record requested and the privacy legislation, I believed it would be an unreasonable invasion of [third party initials] privacy to provide confirmation of the existence of any record. Accordingly, a response invoking section 12(2)(b) was sent to the Applicant… I did not identify, locate, or review a record relating to the third party [third party initials] prior to responding to the Applicant's request for access to information.

[para 14] I agree with the Public Body that one must consider the nature of the record requested and the relevant provisions of the FOIP Act when determining whether disclosing information would be an unreasonable invasion of personal privacy. I disagree that the fact that a potentially responsive record would be located in a confidential child protection file necessarily attracts section 12(2)(b), as there is no reason that the Public Body would be required to disclose the nature of the file in which the record was located to the Applicant in a response to his access request. If the Applicant had made a request for "records contained in the third party's confidential child protection file", and responding to the request would confirm the existence of such a file, from which it could be inferred that the third party was the subject of a guardianship order under the CYFEA, then the nature of the file would be relevant. However, that is not the case in this inquiry.

[para 15] In Order F2006-012, the Commissioner adopted a purposive interpretation of section 12(2) and said at paragraph 21:

> The sensible purpose for both provisions [sections 12(2)(a) and (b)] … is to prevent requestors from obtaining information from a request indirectly that they cannot obtain directly. Requestors are denied access to information if access would cause harm to law enforcement, or unreasonable invasion of privacy. They should be denied information as to whether a record exists for the same reason, but not otherwise… This interpretation is also in accordance with the general principle in the Act of permitting access subject only to limited and specific exceptions.

I agree with the Commissioner that the purpose of section 12(2)(b) is to prevent an applicant from obtaining personal information indirectly that the FOIP Act prohibits a Public Body from disclosing directly.

[para 16] I do not accept the argument of the Public Body that confirming the existence of the requested record would, of necessity, disclose information contrary to section 126 of the CYFEA. Section 126 of CYFEA contemplates that personal information gathered collected under its authority may be disclosed in accordance with the FOIP Act. Therefore, the fact that information was collected under the CYFEA does not necessarily invoke the application of section 12(2)(b) of the FOIP Act, as long as the release is in accordance with the FOIP Act

[para 17] In addition, the Public Body administers legislation other than the CYFEA. Consequently, unless an applicant is seeking information that could only have been collected under the authority of the CYFEA, the confirmation of the Public Body that it has responsive records does not necessarily disclose that information was collected under the CYFEA. In the present case, the Applicant requested a copy of an application for financial benefits under the *Victims of Crime Act*. Consequently, a confirmation that

the Public Body has responsive records would not necessarily lead to a conclusion that the information in a responsive record was collected under the CYFEA or that the third party was a child in care.

[para 18] Although I disagree with some of the Public Body's reasons for applying section 12(2)(b), I find that it was correct to apply this provision in this case, for the reasons that follow.

[para 19] As noted above, the Applicant requested a record containing information about a specific individual, identified in a newspaper article by initials. While the Applicant has suggested that personal information in the record could be severed, the information in the record and the nature of the record itself, if such a record exists, would remain associated with this individual even if personally identifying information were removed. The newspaper article provided by the Applicant as part of his access request indicates that the name of the individual was published in the Edmonton Journal in 2005. Consequently, the name of the individual whom the information is about could be obtained by searching archives.

[para 20] While the Applicant stated in the request for review that he does not know the identity of the third party whose information he requested, he, or another member of the public could, with minimal effort, learn the identity of the third party from publicly available archives of the Edmonton Journal. When a public body discloses a record under the FOIP Act, the public body is effectively making the information in the record publicly available. Consequently, it does not matter whether an applicant intends to discover the identity of a third party. Instead, a public body must consider whether the applicant or a member of the public could readily determine the identity of a third party from the record using resources available to the public when determining whether disclosing a record would disclose personal information.

[para 21] In *Ontario (Minister of Health and Long-Term Care) v. Ontario (Information and Privacy Commissioner)* (2004), 73 O.R. (3d) 321, the Ontario Court of Appeal found that the following approach adopted by the Ontario Information and Privacy Commissioner in relation to section 21(5) of the Ontario *Freedom of Information and Protection of Privacy Act*, a provision equivalent to section 12(2)(b) of the FOIP Act, was reasonable:

> …in order to substantiate a section 21(5) claim, the Ministry must provide sufficient evidence to establish that
>
> 1. Disclosure of the records (if they exist) would constitute an unjustified invasion of personal privacy; and
>
> 2. Disclosure of the fact that records exist (or do not exist) would in itself convey information to the requester, and the nature of the information conveyed is such that disclosure would constitute an unjustified invasion of personal privacy.

I find that this approach is also reasonable in relation to applying section 12(2)(b) of the FOIP Act, as it strikes a balance between the right of access contemplated by section

2(a) and the protection of personal privacy contemplated by section 2(b) of the FOIP Act, and establishes an appropriate limit to the discretion of the head of a public body to refuse to confirm or deny the existence of records.

[para 22] In this case, the access request itself is sufficient evidence that disclosing the existence of a responsive record would be an unreasonable invasion of personal privacy. The specific nature of the record requested by the Applicant dictates the personal information that a responsive record would contain. Confirmation of the existence of the requested record would, if such a record existed, have the effect of disclosing recorded information about a third party as an identifiable individual to the Applicant, as the fact that an application for financial benefits under the *Victims of Crime Act* had been made on the third party's behalf could be inferred. It could also be inferred that the third party was, or was considered, a victim of crime. This is personal information of the third party

[para 23] Any personal information disclosed by revealing the existence of such a record is information falling under section 17(4)(g), cited above, as the information would consist of the third party's name in the context of other information about the third party. Disclosure of information falling under section 17(4)(g) is presumed to be an unreasonable invasion of a third party's personal privacy.

[para 24] I agree with the Public Body that none of the factors in section 17(5) would weigh in favor of disclosing the third party's personal information to the Applicant. While the Applicant stated that he requested the information to determine the Public Body's policies in relation to making applications under the *Victims of Crime Act* for children under the protection of the CYFEA, which would suggest that he has requested the information to subject the activities of the Public Body to public scrutiny within the meaning of section 17(5)(a), it is open to the Applicant to make a request for records relating to the Public Body's policies and statistics in relation to applications for benefits under the *Victims of Crime Act*. Further, it is unlikely that information about one individual would enable the Applicant to determine or evaluate the Public Body's policies in relation to applications made under victims of crime legislation.

[para 25] I find that disclosing the existence of the record to the Applicant would enable the Applicant to obtain, indirectly, information that the FOIP Act prohibits the Public Body from providing to the Applicant directly. I therefore find that the Public Body was correct to refuse to confirm or deny the existence of the record requested by the Applicant.

[para 26] I note that in Order PO-2472, a 2006 decision of the Ontario Office of the Information and Privacy Commissioner, the Adjudicator came to a similar conclusion in relation to a request for the applications of named individuals made to Ontario's Criminal Injuries Compensation board. In that case, the Adjudicator said:

> In the circumstances of this appeal, particularly in light of the nature and wording of the request and the subject matter and content of any responsive records, if they exist, I have concluded that part two of the test for section 21(5) has been met. In my view, disclosure of the very existence or non-existence of records responsive to this request would in and of itself convey information to

> the appellant and the nature of that information is such that disclosure would constitute an unjustified invasion of privacy under sections 21(1) and 49(b).
>
> In the circumstances of this appeal, disclosure of the existence or non-existence of the records, if they exist, would reveal personal information about the named individuals, specifically whether or not those individuals have applied for compensation from the CICB which in turn reveals whether or not the applicant might be (or consider herself to be) a victim of a violent crime. Given the nature of the information in the records that would be responsive to the request, if they exist, in my view, the very knowledge that responsive records exist would reveal personal information about the named individuals that is highly sensitive (section 21(2)(f)) and personal information that I accept has been supplied to the CICB in confidence (section 21(2)(h))...
>
> …In my view, I have been provided with sufficient evidence to satisfy me that this is a situation in which the very nature of the request permits the Ministry to rely on the application of section 21(5), as disclosure of the very existence or non-existence of responsive records would result in an unjustified invasion of the personal privacy of the individuals named in the appellant's request.

I agree with the reasoning and analysis of the Adjudicator in that case, and agree that the very nature of an access request can permit a Ministry to rely on section 12(2)(b).

[para 27] In its submissions, the Public Body conceded that it did not search for the records prior to invoking section 12(2)(b), and that the process it followed is contrary to that set out by the former Commissioner in Order 98-009. In that Order, the former Commissioner said:

> Clearly, a public body is required to conduct a search for records which are responsive to a request and satisfy itself as to what records it has and what exceptions to disclosure apply. It cannot decide how to respond to an access request in a vacuum. A public body must search for and review the record, if one is found to exist, in order to determine if the circumstances in section 11(2) [now 12(2)] exist.
>
> To determine whether a public body correctly applied section 11(2) [now 12(2)] and exercised its discretion properly in refusing to confirm or deny the existence of the record, I must be told whether a record exists or not, and have an opportunity to review the record if, in fact, one exists.

[para 28] The Public Body made the following argument to support its decision not to search for records:

> Arguably, … the nature of the information sought… provided sufficient context and direction in the circumstances, to permit the Public Body to determine that disclosing the existence or non-existence of a responsive record would reveal personal information about [an individual] and result in an unreasonable invasion of privacy.

[para 29] I find that in this case, there is no need for the Public Body to search for a responsive record, as the evidence of the access request and the newspaper article is sufficient to establish that section 12(2)(b) applies. If a responsive record exists, it must necessarily contain information that would be an unreasonable invasion of an individual's personal privacy to disclose. Further, disclosing the existence of any responsive record would also have the effect of disclosing information that would invade an individual's personal privacy. While other circumstances might arise in which it would be necessary for a Public Body to first search for records and review the information they contain

before deciding whether to apply section 12(2)(b), and to provide such records to the Commissioner on a review, this is not such a case.

V. ORDER

[para 30] I make this Order under section 72 of the Act.

[para 31] I confirm the decision of the head of the Public Body to refuse to confirm or deny the existence of the record requested by the Applicant.

_____

Teresa Cunningham
Adjudicator