ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDERS F2009-019 & F2009-020

January 28, 2010

CITY OF EDMONTON

Case File Numbers F4660 & F4665

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Summary: The Applicant made an access request to the City of Edmonton (the Public Body) in order to determine the source of information about her plans to build a new house and details about her building permit that appeared in a newsletter. The Public Body responded to her request. The Applicant then requested that the Commissioner review the Public Body's response to her access request, in particular, whether it had conducted an adequate search for responsive records. She also made a complaint that the Public Body had disclosed her personal information contrary to Part 2 of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) when it showed drawings for her future home to her neighbour at a meeting and disclosed information about her house plans to the neighbour in response to an access request by the neighbour made under the FOIP Act.

The Adjudicator found that the Public Body had not conducted an adequate search for responsive records. The Adjudicator found that the Public Body disclosed the Applicant's personal information in two ways: by showing drawings of her house to a neighbour at a meeting, and when it responded to an access request. The Adjudicator found that the disclosure of the drawings at the meetings contravened Part 2 of the FOIP Act; however, she found that the disclosure in response to an access request was done in accordance with Part 2. The Adjudicator ordered the Public Body to conduct an adequate search for responsive records and to respond to the Applicant openly, accurately and completely, as required by section 10 of the FOIP Act (duty to assist). She also ordered the Public Body

to stop disclosing the Applicant's personal information contrary to Part 2 of the FOIP Act.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act* R.S.A. 2000, c. F-25, ss. 1, 6, 10, 16, 17, 30, 31, 40, 72; *Personal Information Protection Act* S.A. 2003, c. P-6.5 s. 1; Freedom of Information and Protection of Privacy Regulation A.R. 200/1995 s. 1(3); *Interpretation Act* R.S.A. 2000, c. 1-8, s. 1

Authorities Cited: AB: Orders 2001-016, F2007-029, P2007-004,

Barber, Katherine, ed. *Canadian Oxford Dictionary.* 2nd ed. Don Mills: Oxford University Press, 2004.

Cases Cited: *Edmonton Police Service v. Alberta (Information and Privacy Commissioner),* 2009 ABQB 593

I. BACKGROUND

[para 1] The Applicant received a copy of a newsletter that was distributed in Edmonton. This newsletter contained her name, her address, her builder's name, her building plans and the history of the variance approval process relating to her building plans.

[para 2] On September 23, 2008, the Applicant made an access request to the City of Edmonton (the Public Body) for copies of the following records:

- Any documentation, including all correspondence such as emails and letters, related to (1) the application for the development permit, (2) the development permit (3) the as-built application, and (4) the more recent stop work order for the property / house to be built at [the Applicant's address].
- Any documentation that references my name or my husband's name, or [the builder's name] or makes reference to "the owner/owners" of [the Applicant's address] or the municipal address…
- Specific records pertaining to how decisions were arrived at with respect to the as-built application and the stop work order for our development.
- Any letters of support and complaints referencing my name, my husband's name, our house or our property. We understand that the names and other personal information would have to be severed from these records.

The access request form indicates the request was made to the Planning and Development department, which is a department of the Public Body. The Applicant made this request in order to determine whether the Public Body had disclosed the information about her building plans that appeared in the newsletter.

[para 3] The Public Body responded to the Applicant's access request on October 7, 2008. On October 8, 2008, the Applicant requested that the Commissioner review the Public Body's response on the basis that the Public Body had not provided all the records in its custody or under its control that were responsive to her access request.

[para 4] The Applicant discovered on review of the records that a neighbour had requested and been granted access to some of these records under the FOIP Act. The Applicant made a complaint to the Commissioner that the Public Body had disclosed her personal information without her consent when it granted the neighbour access to these records.

[para 5] The Commissioner authorized mediation. As mediation was unsuccessful, the matter was scheduled for a written inquiry. Both parties provided initial and rebuttal submissions.

[para 6] As the Applicant has made an access request and a complaint, she is both an Applicant and a Complainant. For consistency, I will refer to her as the Applicant throughout the order.

II. RECORDS AT ISSUE

[para 7] As the issues for inquiry are whether the Public Body made every reasonable effort to respond to the Applicant openly, accurately and completely under section 10 of the FOIP Act, and whether it disclosed her personal information in contravention of Part 2 of the FOIP Act, there are no records at issue.

III. ISSUES

Issue A: Did the Public Body meet its duty to the Applicant, as provided by section 10(1) of the Act?

Issue B: Did the Public Body disclose the Complainant's personal information in contravention of Part 2 of the Act?

IV. DISCUSSION OF ISSUES

Issue A: Did the Public Body meet its duty to the Applicant, as provided by section 10(1) of the Act?

[para 8] Section 6 of the FOIP Act establishes an applicant's right to access information. It states, in part:

> *6(1) An applicant has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.*
>
> *(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record.*

> *(3) The right of access to a record is subject to the payment of any fee required by the regulations.*

[para 9] An applicant has a right to access to information in the custody of or under the control of a public body unless an exception under Division 2 applies to the information.

[para 10] Section 10 of the FOIP Act explains a public body's obligations to respond to an applicant when an applicant makes an access request for records. It states, in part:

> *10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.*

[para 11] The Public Body has the onus of establishing that it has made every reasonable effort to assist the Applicant, as it is in the best position to explain the steps it has taken to assist the Applicant within the meaning of section 10(1).

[para 12] Previous orders of this Office have established that the duty to assist includes conducting an adequate search for records. In Order 2001-016, the Commissioner said:

> In Order 97-003, the Commissioner said that a public body must provide sufficient evidence that it has made a reasonable effort to identify and locate records responsive to the request to discharge its obligation under section 9(1) [now 10(1))]of the Act. In Order 97-006, the Commissioner said that the public body has the burden of proving that it has fulfilled its duty under section 9(1) [now 10(1)].
>
> Previous orders ... say that the public body must show that it conducted an adequate search to fulfill its obligation under section 9(1) [now 10(1)] of the Act. An adequate search has two components: (1) every reasonable effort must be made to search for the actual record requested and (2) the applicant must be informed in a timely fashion about what has been done.

[para 13] The Public Body made the following arguments:

> The Complainant, after receiving the information on October 7, 2008, contacted the FOIP Coordinator, indicating that pieces of information were missing from the package. The FOIP Coordinator asked the individuals for these records and they responded that they did not have them. The FOIP Coordinator promptly advised the Complainant of his findings.
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> One of the records that the Complainant indicated was missing from Planning and Development file was actually submitted to the Subdivision Development Appeal Board. This record was not part of the Planning and Development file and so was not responsive to the Complainant's FOIP request, however, it was available to anyone reviewing the SDAB Case file.
>
> In Order 2001-016, Frank Work QC, Assistant Information and Privacy Commissioner commented on the meaning of "reasonable effort to assist the Applicant" and held:

> [28] The issue before me is whether or not the Public Body has made every reasonable effort to assist the Applicant. Meeting the requirement under the Act does not require a standard of perfection, but does require every reasonable effort in the circumstances.

The City submits that the affidavit of the FOIP Coordinator deposing to making all reasonable efforts to assist the Applicant is sufficient to fulfill the duty imposed on the City.

Further, it is submitted that the expectations of the Complainant that the City must possess a record(s) that has not been disclosed to her, that SHOULD (in her opinion) be available, when in fact those employees no longer or never possessed the record, is not sufficient to find the City in breach of a duty to assist. [emphasis in original]

…

The Complainant's FOIP request is a parallel procedure to disclosure of records by the SDAB. The latter releases records under the authority of section 686 of the municipal Government Act. Furthermore, **the SDAB is not part of the Planning and Development Department**. [emphasis in original]

[para 14] The Public Body provided an affidavit of an employee dated October 23, 2009 to explain the process it followed to locate responsive records. This affidavit states:

I personally conducted a search in the POSSE (Planning One-Stop Service) database using the names of the [Applicant]t, her husband, her house builder and her neighbour (a lady who had brought the appeal before the Subdivision and Development Appeal Board against the Complainant); I also requested records from three employees of the City: the Manager of Development Compliance, the Director of the Permitting Section, and the Development Officer who made the decision on the variance and permit.

Since 1995, the P.D. Department has been moving to an electronic records system. The electronic record stored in POSSE is considered the master copy and is the only record managed by the P/D Department;

By letter dated October 7, 2008, I responded to the Applicant and provided records to the Applicant. The names of any complainants or other individuals and their personal information was removed.

The Complainant contacted me after she received the information and stated that pieces of information were missing from the package. She indicated to me the nature of these records. At that time, I conducted a further search, and individually contacted the employees mentioned in paragraph 3.3. I was advised by all three employees that they did not have the record that the Complainant requested.

I do verily believe that all information that was responsive to the Complainant's request from the P/D Department were provided to the Complainant. The Subdivision and Development Appeal Board is NOT part of the P/D Department. [emphasis in original]

I have had several dealings with the Complainant and I do verily believe that my conduct has always been above reproach.

I have been the FOIP Coordinator for the P/D Department since 2001 and I understand the duty to assist an Applicant. However, the City can only provided the records in its possession and as they exist, and therefore I do verily believe that the City has complied with all elements of its duties under section 10 of the FOIP Act.

[para 15] In her initial submissions, the Applicant described some of the records she believes were not provided by the Public Body and her reasons for believing the Public Body has custody or control of these records.

> [A former acting general manager of PDD] in an August 7, 2009 email explains to other City officials… the situation regarding my house and refers to an attached letter he drafted for the Mayor's signature. If the letter falls within the terms of my FOIP request (e.g. it references me, my husband, [my builder] or the construction of my house as [the former acting general manager of PDD] suggests it does), I believe a copy of this letter should have [been] included in the FOIP package.
>
> An internal City email (May 20, 2008) notes that [a former acting general manager of PDD] met with a third party and that a FOIP request was made… The email attachment is labeled with my home address… but a copy of that record is not contained in the FOIP package.
>
> In a May 7, 2008 letter to [a former acting general manager of PDD], [a named individual] outlines her issues with my property. On May 15, 2008, [the former acting general manager of PDD] called my husband to discuss these issues, acknowledging that we had no legal obligation to address them and suggested the neighbour failed to understand the notion of property rights, particularly as they applied to us, her neighbours. [The former acting general manager of PDD] advised that following this conversation with my husband he would write a response letter to [the named individual] noting the conversation he had with my husband so that the Public Body could bring the matter to a close. If the letter was prepared, we were never copied on it, and it is not contained in the FOIP package.
>
> Other missing records are emails I received from sources other than the City but expect the PDD to have them in their files since PDD staff … are the recipients of these emails…

[para 16] The Public Body made the following rebuttal submission:

> The City acknowledges that 2 attachments to emails were overlooked… by the Planning and Development Department when responding to the [Applicant's access request]. In this request, the Complainant asked for an expedited search, which the FOIP Coordinator accommodated. Unfortunately, in an effort to process the records as quickly as possible, the FOIP Coordinator mistakenly omitted the attachments from the release package. Had the Complainant brought this oversight to the FOIP Coordinator's attention as soon as she realized it was missing, it would have been corrected and the relevant records promptly provided to the Complainant.
>
> The City of Edmonton sincerely apologizes to the Complainant for this oversight in processing her FOIP request.
>
> The City has evaluated the oversight from this request, and is now reviewing and will be amending electronic search and retrieval protocols for the POSSE system (the database used by Planning and Development for records storage and retention). It is submitted that the rush for documents does not excuse this oversight, however, the standard under section 10(1) of the FOIP act is for reasonableness not perfection.

[para 17] The Applicant made the following arguments in her rebuttal submissions:

> First, I would like to be clear that I have never suggested that [the affiant's] conduct with me has been problematic. Paragraph 3.8 in [his] affidavit suggests this may be a concern. This is indeed is not at issue. My concerns are related to how PDD staff, which may include [the affiant], have applied legislative requirements of the FOIP Act…

> [The affiant's] affidavit confirms that he is the main FOIP practitioner in the PDD and was responsible for handling the two access requests made by [the neighbour] and the one made by me. However, other PDD staff are necessarily involved in access requests (and subject to FOIP) as they must locate and retrieve all records in their custody or control and submit them to [the affiant], as the FOIP Coordinator, for processing. ([The affiant] acknowledges contacting three PDD although I would submit, based on a review of my FOIP package, that more were involved). According to the City of Edmonton's Administrative Directive A1433A – Privacy (Tab 2), "All employees are responsible for maintaining privacy and confidentiality of information in accordance with FOIP." As such, I believe the City's submission should have also addressed the conduct of other key PDD staff (at minimum the three who were contacted by [the affiant] who were involved with processing my access request or who had direct dealings (outside of a formal access request) with parties such as [the neighbour] and [another named individual].
>
> Fourth, I would like to clarify, contrary to what the City suggests, that I do appreciate the different roles undertaken by the City and the SDAB. I have difficulty accepting, without evidence from the City, that there may be different access and privacy requirements for the two bodies…

[para 18] In Order F2007-029, the Commissioner described the kind of evidence that assists a decision-maker to determine whether a public body has made reasonable efforts to search for records. He said:

> In general, evidence as to the adequacy of a search should cover the following points:
>
> - The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
> - The scope of the search conducted - for example: physical sites, program areas, specific databases, off-site storage areas, etc.
> - The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
> - Who did the search
> - Why the Public Body believes no more responsive records exist than what has been found or produced

[para 19] The Public Body has provided evidence in relation to the first and fourth criteria, but not the second, third, and fifth criteria. On review of its evidence, I find that the Public Body has not established that it conducted an adequate search for responsive records, and, as a result, has not established that it responded to the Applicant openly accurately and completely.

[para 20] The affiant states that he conducted a search in the POSSE database using the name of the Complainant, her husband, her house builder and a neighbour as search terms. He also requested records from the Manager of Development Compliance, the Director of the Permitting Section and the Development Officer who made decisions regarding the variance and permit.

[para 21] The affiant did not explain what the response of the three employees was in relation to his request for records. In *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 593, Nielsen J. explained that a public body

must be able to explain what steps were taken in order to establish that it has conducted a reasonable search. He said at paragraphs 53 and 54:

> As recognized by the Commissioner, it would be impractical to require the head of a public body to either conduct or supervise the searches mandated by *FOIPP*. This obligation can be delegated. However, the public body must be in a position to establish that reasonable efforts were taken to search records in order to be able to respond openly, accurately and completely to the request. It follows that the person to whom the obligation is delegated must be in a position to provide evidence sufficient to establish what was done.
>
> In this case, [an employee] was tasked with organizing the search. Her letter of January 18, 2006 does not detail the steps taken to search for records. It simply asserts that she conducted searches with various individuals and categories of individuals and located the records itemized in the letter. There is no evidence from [the employee] as to the steps which she took to supervise the search.
>
> The EPS relies in particular on the Affidavit [of another employee]. [The employee], at the time of affirming the Affidavit, was another Disclosure Analyst for the EPS. He deposed to the contents of his Affidavit based on information and belief as a result of a review of the EPS file in this matter. In my view, the information disclosed in the… Affidavit as to the searches conducted identifies a number of gaps in either disclosure regarding the search process or the process itself.
>
> First, [the employee] states in his affidavit that the 32 members and units of the EPS contacted with respect to the Request "encompassed all of the possible holders of responsive records". There is no explanation as to how it was determined that these 32 members or units were the only ones who might have information responsive to the Request…

Similarly, the affiant in the case before me does not explain what the results were of his request to the three employees and does not say whether they responded to the request. In addition, he does not explain why he contacted only these three employees and not others. Because there are gaps in the Public Body's evidence on these points, I am unable to conclude that this aspect of its search was reasonable.

[para 22] The affiant also did not explain why he limited the search terms in the database search as he did and did not search for records containing the street address or municipal address of the property in question, even though the Applicant had specifically requested records referencing her property. By searching through the database using only the name of the Applicant, her husband, her builder and a neighbour, the affiant potentially eliminated responsive records containing the street or municipal address of the property but not the names of the Applicant, her husband, her builder, or neighbour.

[para 23] The affiant made the following statement about the POSSE database: "Since 1995, the P/D Department *has been moving to* an electronic records system. The electronic record stored in POSSE is considered the master copy and *is the only record managed by the P/D Department*." [emphasis mine] This statement implies that a department of the Public Body is developing an electronic records system, but has not yet fully adopted an electronic records system. Relying solely on an electronic records search, given that the Public Body has not yet completed its move to an electronic records system, eliminates hard copies of records from the scope of the search, even though it is possible that they may exist outside the POSSE system, given that it is only "moving

toward" an electronic records system. Further, the affiant's statement also implies that the affiant limited his search of POSSE to only those records managed by the Planning and Development Department, as opposed to records in the custody or under the control of the Public Body.

[para 24] As set out above, the affiant deposed that all responsive records in the custody of the Planning and Development department were provided to the Applicant. The affiant also deposed that the Subdivision and Development Appeal Board is not part of the Planning and Development Department. In its submissions, the Public Body attributed to the Applicant a mistaken belief that the Subdivision and Development Appeal Board and the Planning and Development Department are the same department. In its submissions, the Public Body sometimes referred to itself as the City of Edmonton, and at other times, as the Planning and Development Department of the City of Edmonton. The Applicant responded in rebuttal that she does not believe that the Subdivision Development Appeal Board and the Planning and Development Department are the same department, but is of the view that the FOIP Act applies in the same manner to both departments. As I understand the Public Body's argument, it takes the position that the scope of the Applicant's access request is limited to only those records located in the Planning and Development Department and does not include records in the custody of the Public Body that may be located in other areas or departments of the City of Edmonton, such as the Subdivision Development Appeal Board.

[para 25] The Public Body's "Request to Access Information form" poses the following question to applicants: "To which Department are you making your request?" In response to this question, the Applicant indicated that she was making a request to the Planning and Development Department. In my view, the question posed on this form is misleading. Under the FOIP Act, the City of Edmonton is a public body and the access request in this case was made to the City of Edmonton. Moreover, the head of the City of Edmonton, the City Manager, is responsible for responding to the Applicant. An access request cannot be made to the Planning and Development Department or the Subdivision and Development Appeal Board, as these are not public bodies as defined by section 1(p) of the FOIP Act. Instead, requests for information located in these program areas must be made to the City of Edmonton, and the City of Edmonton is responsible for locating all responsive records regardless of location. In my view, the Applicant's response to the question is best interpreted as indicating where she believes the records are most likely to be located, and not as an indication that she is limiting her request to records physically located in the Planning and Development department. This interpretation is supported by the Public Body's form entitled "How to complete the form", which indicates that an applicant should enter the name of the department that the applicant believes has the records in answer to this question.

[para 26] I find that it was unreasonable for the Public Body to characterize the Applicant's access request as applying only to records located within the Planning and Development Department and not to search in other program areas, such as the Subdivision and Development Appeal Board, particularly as it acknowledges that responsive records are located in other program areas. The Applicant made her access

request to the City of Edmonton and this request cannot be construed as requesting only records in the custody of the Planning and Development Department. For the purposes of the FOIP Act, the City of Edmonton is the Public Body and not the Planning and Development Department.

[para 27] The Public Body gave evidence that it did not contact retired staff members who may have had information regarding the existence of other responsive records. In its rebuttal submissions, the Public Body stated:

> With respect to the letter the Complainant alleged that … the former Branch Manager of Development Compliance agreed to write after a meeting with the Complainant's husband… we can confirm that no such letter exists in the City of Edmonton's files. If the letter was written, [he] should have forwarded a copy of the letter to POSSE for retention. Both [the former acting general manager of PDD] and his assistant have since retired, *and their memory of events related to this matter and any emails that were not retained in POSSE are no longer available to City staff.* [emphasis mine]

While the Public Body states that it can confirm no such letter exists in the City of Edmonton's files, it has not explained the basis for its conclusion that the letter does not exist. The Public Body does not dispute that the individual referred to as the "former acting general manager of PDD" by the Applicant, and as "the former Branch Manager of Development Compliance" by the Public Body, told the Complainant he intended to write a letter. In my view, there is no reason to dispute that this conversation took place. There is, therefore, some evidence to support that a letter may have been written, and, as a result, to support taking reasonable steps to determine whether the Public Body has it in its custody or control.

[para 28] The Public Body is more specific in its submissions as to the steps it did not take to locate this letter: that is, it did not search outside the POSSE system, it did not consider whether it could retrieve deleted emails, and has not taken steps to determine whether the former Branch Manager of Development Compliance wrote a letter, and if so, where it is located. In its rebuttal submissions, the Public Body stated:

> In conclusion, the Complainant's brief identifies
>
> > - A letter that [the former Branch Manager of Development Compliance] was alleged to have promised to write;
> >
> > > -- Both [the former Branch Manager of Development Compliance] and his assistant have retired;
> > >
> > > -- There is nothing in the file indicating that this letter was ever written, and the City maintains that the duty to assist CANNOT include retrieving information that the Complainant believes SHOULD exist when there is no evidence of that record's existence.

[para 29] As noted above, I have found that the conversation between the Applicant and the former Branch Manager is some evidence to support the existence of the letter. The next step for the Public Body to take would be to conduct a reasonable search for it in order to confirm that it does or does not exist. As the former Branch Manager of

Development Compliance clearly had dealings with the Applicant and the Applicant's property during the time period covered by the access request, there was every reason to determine whether he created responsive records and their locations. This could be done by contacting employees who worked with the former Branch Manager or potentially, even the former Branch Manager himself, if appropriate or possible. It may be that it is not possible to obtain information regarding the letter or any additional responsive records created by former employees; however, that cannot be established until the Public Body explains why it is unable to do so.

[para 30] In addition, the Public Body relies on an assumption that once an electronic record, such as an email, has been deleted, it cannot be retrieved. This may prove to be the case, but the Public Body has not told me the steps it has taken to arrive at its conclusion that deleted correspondence of the former Branch Manager of Development Compliance or the former administrative assistant cannot be retrieved.

[para 31] The Public Body's rebuttal submissions, cited above, acknowledge that the search of the POSSE system failed to locate records responsive to the access request and that the response to the access request was done as "a rush for documents". It further notes that it will amend its search and retrieval protocols. However, it argues that the standard in relation to determining whether an adequate search has been performed is reasonableness, rather than perfection.

[para 32] The Public Body confined its search to one program area rather than searching for all responsive records in its custody or under its control, even though it acknowledges in its submissions that responsive records are located in other program areas or departments. For example, in its arguments, cited above, it confirmed that responsive records were located in the files of the Subdivision and Development Appeal Board and that it did not provide it to the Applicant. Further, the Public Body largely confined its search to an electronic database even though it is possible that some responsive records exist only in paper form, and limited its electronic search further by restricting its search terms so as to exclude aspects of the Applicant's access request. The Public Body requested records from only three employees and has not explained what their response was or why it did not ask any other employees. In addition, it did not determine whether the former Branch Manager of Development Compliance created other responsive records, even though he was employed by the City during the time frame contemplated by the access request and had dealings with records responsive to the access request. In addition, it has not explained whether it took steps to locate or retrieve deleted electronic records created or received by this former employee. Finally, by its own admission, the Public Body conducted its search "in a rush" using protocols that failed to locate responsive records and are now the subject of amendment. While I commend the Public Body for acknowledging this shortfall, it does not follow that the approach it took to locate responsive records was adequate. For all these reasons, I find that the Public Body conducted an inadequate search for responsive records, and has therefore failed to respond to the Applicant openly, accurately, and completely under section 10 of the FOIP Act.

Issue B: Did the Public Body disclose the Applicant's personal information in contravention of Part 2 of the Act?

[para 33] The Applicant made a complaint that the Public Body disclosed her personal information to a neighbour. Following this disclosure, personal information relating to her house plans appeared in a newsletter. The Applicant points to notes taken by an employee of the Public Body that indicate that on February 28, 2008 the former Branch Manager of Development Compliance, another employee of the City and the neighbour, met to review the drawings for the Applicant's house. Following that meeting, the neighbour made two access requests to the Public Body for information relating to the Applicant's house plans and permit application. The Applicant also complains that her personal information was disclosed to the neighbour when the Public Body responded to those access requests, contrary to sections 16 and 17 of the FOIP Act. The Applicant also takes the position that the Public Body failed to provide notice to her under section 30 of the FOIP Act.

[para 34] The Public Body made the following argument in rebuttal.

> The complainant continues to express dismay at her house plans being viewed by the Neighbour. With respect to this point, the City would submit as follows:
>
> Pursuant to pages 9 – 13 of the City's brief, the City continues to maintain that the information contained in house plans was either not personal information, or not used/disclosed in contravention of Part II of FOIP…
>
> The City does not dispute that a meeting occurred between the Neighbour and [a named individual] (who attended the meeting with the Neighbour). Such meetings are inside the scope of Planning and Development's normal mandate as development compliance, including breach of the Zoning Bylaw, is enforced only on a COMPLAINT basis. [emphasis in original] Any potential complainant can request the assistance of Planning and Development in order to ensure that they have sufficient information to file a complaint. Planning and Development has found that engaging in a dialogue with potential complainants helps to alleviate frivolous or unsubstantiated complaints.
>
> Copies of house plans were NOT provided to the Neighbour. Neither Planning and Development nor the SDAB allow copies of plans to be made. [emphasis in original]
>
> It is submitted that a complaint before the Information and Privacy Commissioner is not the correct forum for the Complainant to vent her dispute with the Neighbour and the City. The Complainant suggests some collusion between the Neighbour and the City, and a breach of natural justice prior to her SDAB hearing. It is submitted that the principles of FOIP are not breached and therefore the allegations are outside of the jurisdiction of the Office of the Information and Privacy Commissioner.
>
> With respect to the release of the neighbourhood consultation as part of the SDAB process and in the release package for City of Edmonton FOIP Request [number of FOIP request] it is submitted that this release is an inherent and necessary part of any development process under section 814(23) of the City's Zoning Bylaw and manifests the essence of access to information. The City maintains that these comments relate to the house, not the person who occupies the house or the permit applicant. However, even if the comments are "personal information", which the City continue to dispute, the comments attributed to the Neighbour were used to decide the development permit of the Complainant, it is submitted that these comments (in addition to other

> comments of neighbours) are collected under statute (Zoning Bylaw). Consultation under the zoning bylaw is for the purpose of communication and for approval, and the City used the information for a purpose related to issuance of the permit, namely a dispute of the development permit before the Subdivision and Development Appeal Board.

[para 35] In essence, the Public Body argues that it did not disclose the Applicant's personal information, but that if it did, it did so in compliance with municipal bylaws and the FOIP Act.

[para 36] Contrary to the Public Body's assertion, the Applicant does not suggest in her submissions that the Public Body and the neighbour "colluded" with one another, nor has she chosen to "vent" a dispute with the neighbour in this inquiry. Rather, she argues that the Public Body disclosed her personal information to the neighbour contrary to Part 2 of the FOIP Act when it showed the neighbour the drawings of her house on February 28, 2008 and when it responded to the neighbour's access requests. The Public Body's mischaracterization of the Applicant's arguments does not address the Applicant's actual arguments in any meaningful way.

Did the Public Body disclose the Applicant's personal information?

[para 37] Section 1(n) of the FOIP Act defines "personal information" in the following way:

> *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;*

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

[para 38] Section 17 of the FOIP Act establishes the circumstances when it is, and when it is not, an invasion of a third party's personal privacy to disclose personal information to an applicant who has made an access request. Section 40 of the FOIP Act, sets out the circumstances in which a Public Body may disclose personal information in accordance with Part 2 of the FOIP Act.

The February 28, 2008 meeting

[para 39] As noted above, the Applicant argues that the Public Body disclosed information about her house plans to the neighbour at a meeting of February 28, 2008. She submitted two notes written by an employee of the Public Body to support this aspect of her complaint. These notes state:

> February 2008. Spoke with [name redacted]. She is the adjacent neighbour and was [out of the country] when the Notice was distributed. She advised she spoke with the SDAB who said it was too late to file an appeal. They advised her to call me. Told her I couldn't show her the drawings because the appeal period has passed, and the drawings belong to the owner. Advised her to ask the owners for the drawings.
>
> February 28-08. Met with [the former Branch Manager of Development Compliance] and [name redacted]. Went over the drawings. Concerns were the removal of the common shrub, trees, proximity to the property line, and second storey hot tub. [The former Branch Manager] would call the applicant to discuss additional screening from the hot tub.

[para 40] In its initial submissions, the Public Body argues that information about property is not personal information, and that the specific details relating to building a house remain the same regardless of the identity of the property owners. However, I note that section 17(2)(g) establishes that information about permits, including development and building permits, is personal information. It states:

> *17(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if*
>
> *(g) information is about a licence, permit or other similar discretionary benefit relating to*
>
> *(i) a commercial or professional activity, that has been granted to the third party by a public body, or*
>
> *(ii) real property, including a development permit or building permit, that has been granted to the third party by a public body,*
>
> *and the disclosure is limited to the name of the third party and the nature of the licence, permit or other similar discretionary benefit,*

Although section 17(2)(g) states that it is not an unreasonable invasion of personal privacy to disclose information about the nature of a permit, it establishes that information relating to permits obtained for the purposes of building a house is personal information.

[para 41] In Order P2007-004, the Adjudicator considered whether information about a place occupied by an individual is personal information about the individual under section 1(k) of the *Personal Information and Protection Act*, which, like the FOIP Act, defines "personal information" as "information about an identifiable individual". She concluded that it can be, provided the information about the residence conveys something about the individual:

> The conclusion I draw from the cases is that information as to the nature or state of property owned or occupied by someone is their personal information if it reflects something of a personal nature about them such as their taste, personal style, personal intentions, or compliance with legal requirements.

I agree with the reasoning of the Adjudicator in Order P2007-004. In my view, the drawings shown to the Applicant's neighbour on February 28, 2008, contain information about the Applicant's personal intentions. For example, the notes of the meeting indicate that two employees of the City went over drawings with the neighbour and that the neighbour's concerns were the removal of the common shrub, trees, proximity to the property line, and second storey hot tub. The notes indicate that the neighbour was shown the plans for the structure the Applicant intended to build, including plans to put a hot tub on the second storey. Consequently, the drawings referred to in the notes contain the personal information of the Applicant. While the Public Body notes that the neighbour was not provided with copies of the interior plans of the house, this does not change the fact that personal information about the Applicant was shown to and discussed with the neighbour, and therefore was disclosed to the neighbour.

[para 42] Section 17(4)(g) establishes a presumption that it is an unreasonable invasion of personal privacy to disclose personal information when the name of a third party appears in the context of other information about the third party. It 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 43] Under section 17(2)(g), information about the nature of the permit received, i.e., what kind of permit it is, in association with the permit holder's name, is personal information. According to the *Canadian Oxford Dictionary*, "nature", when it appears in the phrase, "the nature of" usually means "characteristically resembling or belonging to the class of". The nature of a licence or permit in section 17(2)(g) would therefore refer to a class or type of permit. As the Applicant notes, a purpose of the FOIP Act is to protect personal privacy. Section 17(2)(g) is an exception to this general principle. The purpose of section 17(2)(g) is to ensure that public bodies are accountable and transparent when they issue discretionary licences and permits. This provision also

enables members of the public to satisfy themselves that appropriate permits and licences have been obtained. In my view, the dictionary definition of "nature" is appropriate as it conveys this dual purpose. Therefore, information about the type of permit issued to the Applicant would be personal information falling under section 17(2)(g); however, information about the Applicant's personal choices and decisions, such as the Applicant's drawings and plans, would be personal information falling under section 17(4)(g) when it appears in the context of the Applicant's name. In the circumstances of the February 28, 2008 meeting, the information was associated with the Applicant's name, as the email indicates the parties were aware that drawings belonged to her and reflected her intentions and choices.

[para 44] For these reasons, I find that the Public Body disclosed personal information of the Applicant falling under section 17(4)(g) when it disclosed the drawings to the neighbour in the meeting of February 28, 2008.

The access requests

[para 45] As noted above, the Applicant argues that the Public Body disclosed her personal information when it responded to her neighbour's access requests.

[para 46] The affiant confirmed that he processed two FOIP requests made by the Applicant's neighbour and released information to her pursuant to the FOIP Act. Volume 3 of the Public Body's exhibits contains the information disclosed to the Applicant's neighbour in response to her access requests.

[para 47] The Public Body argues that none of the information disclosed in response to the access requests was the Applicant's personal information. However, the Public Body also made the following argument:

> The information submitted by the Complainant through their contractor to the City included an email that confirmed a discussion with the Neighbour about the variance, and a statement that "The neighbour's only comment in our discussion prior to me sending the e-mail is that she is not going to cause us trouble with the variances."
>
> The neighbour denied making this statement, and the Complainant has objected to the City providing this email to the Neighbour. The Complainant has also objected to the release of the property information to the Neighbour as an invasion of her privacy.

Having reviewed the email to which the Public Body refers, I am satisfied that it contains the personal information of the Applicant. From reading this email, one can learn the Applicant's interpretation of the conversation she had with her neighbour and learn that she communicated this conversation to the Public Body as part of the permit application process. Even though the Applicant's name was redacted from the email when it was provided to the neighbour, the neighbour's knowledge of the conversation would enable the neighbour to "re-identify" the Applicant as the author of the email. As a result, redacting the Applicant's name did not have the effect of removing her personally identifying information from the email. Given that the name of the Applicant would remain associated with other personal information about her in the email, the personal

information in the email is subject to section 17(4)(g). I therefore find that the Public Body disclosed the Applicant's personal information when it gave access to this email to the neighbour.

[para 48] The Public Body also disclosed information about the Applicant's building plans in response to the neighbour's access request. I find that this information is personal information about her as it contains her plans for building a house.

[para 49] As I find that the Public Body disclosed the Applicant's personal information in the meeting of February 28, 2009 when it showed the drawings to the neighbour, and when it responded to the neighbour's access requests. I must therefore consider whether these disclosures were in contravention of Part 2 of the FOIP Act.

Did the Public Body disclose the Applicant's personal information in contravention of Part 2 of the FOIP Act?

[para 50] Section 40 limits the purposes for which a Public Body may disclose personal information. It states, in part:

> *40(1) A public body may disclose personal information only…*
>
> *(a) in accordance with Part 1,*
> *(b) if the disclosure would not be an unreasonable invasion of a third party's personal privacy under section 17,*
> *(c) for the purpose for which the information was collected or compiled or for a use consistent with that purpose…*
> …
> *(e) for the purpose of complying with an enactment of Alberta or Canada or with a treaty, arrangement or agreement made under an enactment of Alberta or Canada…*

[para 51] The Public Body argues that if it disclosed personal information, that it did so for the purposes for which the information was collected. I understand the Public Body to argue that any disclosure of personal information was in accordance with section 40(1)(c), as the Public Body points to section 814.23 of City of Edmonton Bylaw 12800 as establishing the purpose for which the information was collected. This provision states:

> *814.23 Where an application for a Development Permit does not comply with the regulations contained in this Overlay:*
>
> *a. the applicant shall contact the affected parties, being each assessed owner of land wholly or partly located within a distance of 60.0 m of the Site of the proposed development and the President of each affected Community League, at least 21 days prior to submission of a Development Application;*

> *b. the applicant shall outline, to the affected parties, any requested variances to the Overlay and solicit their comments on the application;*
> *c. the applicant shall document any opinions or concerns, expressed by the affected parties, and what modifications were made to address their concerns; and*
> *d. the applicant shall submit this documentation as part of the Development Application.*

Bylaw 814.23 creates a duty for development permit applicants to disclose requested variances to affected parties, but not for the Public Body to do so. This Bylaw requires an applicant to provide the Public Body with documentation that it has contacted affected parties and provided them with notice. The purpose of this provision is not to enable the Public Body to provide documents to neighbours or to respond to access requests under the FOIP Act. Rather, the purpose of the Public Body's collection of this information is to satisfy itself that an applicant gave appropriate notice to other parties. I find that the Applicant's personal information was not disclosed for the purpose for which it was collected under section 814.23 of Bylaw 12800, as the information the Public Body collects under this provision is not collected so that the Public Body may disclose it to neighbours at meetings after the appeal period has ended or respond to access requests under the FOIP Act.

The meeting of February 28, 2008

[para 52] As the Public Body also argues that its disclosure at the meeting of February 28, 2008 was done in accordance with bylaws, I will also consider whether section 40(1)(e) applies to this disclosure. Section 40(1)(e) establishes that a public body may disclose personal information for the purpose of complying with an enactment of Alberta. Under section 1(3) of the Freedom of Information and Protection of Privacy Regulation, an enactment of Alberta includes a "regulation". Under section 1(c) of the *Interpretation Act*, a "regulation" includes a "bylaw". Therefore, if a public body discloses personal information in order to comply with a bylaw, section 40(1)(e) arguably allows the disclosure. However, Bylaw 12800 does not require the Public Body to disclose information to neighbours. As noted above, that responsibility lies on an applicant. In addition, this duty arises as part of the Development Application process, but ends once that process has concluded. The notes of February 2008 and the Public Body's submissions indicate that the appeal process had already expired. Consequently, the disclosure of the drawings was not made for the purpose of complying with the Public Body's bylaws.

[para 53] The Public Body argues that factors in section 17(5) apply and weigh in favor of disclosure. From this argument, I understand it to argue that section 40(1)(b) applies. I will therefore consider whether this provision authorized the disclosure at the meeting of February 28, 2008.

[para 54] As noted above, I have already found that the drawings shown to the neighbour on February 28, 2008 were the personal information of the Applicant falling

under section 17(4)(g). Section 17(4)(g) creates a presumption that disclosing personal information is an unreasonable invasion of personal privacy. The Public Body argues that section 17(5)(c) applies and weighs in favor of disclosing the drawings to the neighbour. Section 17(5)(c) 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*
>
> > *(c) the personal information is relevant to a fair determination of the applicant's rights,*

The Public Body argues that the disclosure was made pursuant to the neighbour's right of appeal. However, the notes of February 2008 and paragraph 13 of the Public Body's chronology in its submissions indicate that the appeal period had expired when the disclosure was made. Consequently, section 17(5)(c) does not apply, as the neighbour did not have rights to exercise.

[para 55] The Public Body also argues that the Applicant did not supply the drawings in confidence and that it was within its rights under Bylaw 814.23 to show the drawings to the neighbour. However, Bylaw 814.23 requires an applicant to outline the requested variance to affected parties. It does not necessarily require an applicant to provide drawings. The fact that it was necessary for the Public Body to show the drawings to the neighbour suggests that the Bylaw did not require the Applicant to provide the drawings to the neighbour as part of the permit application process. The Public Body indicates that it is its usual practice to provide neighbours sufficient information about applicants so that the neighbours may make complaints; however, it has not provided its authority under statute or bylaw for following such a process.

[para 56] The notes of the affiant from February 2008 state the following:

> Told her I couldn't show her the drawings because the appeal period has passed, and the drawings belong to the owner. Advised her to ask the owners for the drawings.

In my view, these statements indicate that the Public Body was aware of the Applicant's proprietary interest in the drawings and understood that they were not to be distributed without authorization, whether statutory, or by the owner. In addition, I find that none of the other factors under section 17(5) that weigh in favor of disclosure apply.

[para 57] The Public Body also argues that the disclosure during the meeting "would have been pursuant to the principles of ensuring the rights of all parties in a quasi-judicial dispute". However, there is nothing in the Public Body's evidence to suggest that the meeting was part of a "quasi-judicial" dispute. In addition, the appeal period had already ended and so the neighbour had no rights to exercise.

[para 58] I find that section 40(1)(b) did not authorize the Public Body to disclose the drawings to the neighbour. I find that none of the other provisions of section 40 apply to authorize the Public Body to show the drawings to the neighbour at the meeting of February 28, 2008. I therefore find that the Public Body contravened Part 2 of the FOIP Act when it showed the drawings to the neighbour at the meeting.

The access request

[para 59] The remaining personal information disclosed by the Public Body was disclosed to the neighbour in response to her access requests under the FOIP Act.

[para 60] As provided by section 40(1)(a) of the Act, a complaint under Part 2 of the Act fails if the Public Body disclosed the information, "in accordance with Part 1." In my view, section 40(1)(a) is met as long as a public body has followed the procedures set out in Part 1 of the Act, and has reached a reasonable conclusion. In other words, it is unnecessary that the Public Body in this case persuade me that it was correct in concluding that it ought to disclose the requested information because none of the exceptions in Part 1 apply. I do not believe that a complaint that Part 2 was not complied with can be used to test the correctness of a decision made under Part 1.

[para 61] I recognize that the Public Body did not provide notice to the Applicant under section 30 when it processed the neighbour's access request, with the consequence that the Applicant did not have an opportunity to provide her point of view about the proposed disclosure of what I regard to be her personal information. I also take into account section 40(4), which provides:

> *40(4) A public body may disclose personal information only to the extent necessary to enable the public body to carry out the purposes described in subsections (1), (2) and (3) in a reasonable manner.*

Section 40(4) authorizes a public body to disclose information under subsections (1), (2), and (3), only to the extent necessary to meet its purposes under those subsections in a reasonable way. By implication, it would be a contravention of this provision if a public body disclosed more information than is necessary for meeting the purpose contemplated by section 40(1)(a).

[para 62] The Public Body provided records containing the Applicant's personal information to the neighbour because the information in the records was responsive to the neighbour's access request and it did not regard any of the exceptions to disclosure to be applicable. The Public Body did not provide more information than was responsive and it responded to the neighbour's access request in a reasonable way. Presumably, the Public Body turned its mind to the question of whether it would be an unreasonable invasion of the Applicant's personal privacy to disclose the information it disclosed to the neighbour, and did not provide the Applicant with notice under section 30 as it was of the view that disclosing her personal information would not be an unreasonable invasion of her personal privacy. While one might argue that it was an unreasonable invasion of the

Applicant's personal privacy to disclose the information the Public Body disclosed in response to the neighbour's access request, it was within the Public Body's authority under sections 17 and 30 to decide that it was not. I find that this decision was not unreasonable or made in bad faith.

[para 63] I find that the Public Body did not disclose more information than was necessary for carrying out its purpose under section 40(1)(a) in a reasonable manner and the requirements of section 40(4) are therefore met.

[para 64] For these reasons, I find that the Public Body's disclosure of the Applicant's personal information in response to the neighbour's access request was authorized by Part 2 of the FOIP Act.

Sections 16 and 17

[para 65] The Notice of Inquiry contained the following issues, apparently to reflect the Applicant's argument that information subject to sections 16 and 17 was disclosed by the Public Body:

1. Does section 16 of the Act (disclosure harmful to business interests of a third party) apply to the records/information?

2. Does section 17 of the Act (disclosure harmful to personal privacy) apply to the records/information?

As the Applicant does not take issue with the Public Body's decision to sever information from the records she received in response to her access request, I have not addressed these issues, other than to discuss them when considering whether the Public Body disclosed personal information contrary to Part 2 of the Act.

V. ORDER

[para 66] I make this Order under section 72 of the Act.

[para 67] I order the Public Body to conduct a new search for responsive records. The new search is to include a search of all records in its custody or under its control responsive to the access request. The Public Body's search must include paper copies of records, in addition to electronic copies of records. The Public Body must also search for electronic records using the street address and municipal address of the Applicant as search terms. The Public Body must also determine whether it has custody or control of records created or received by former employees.

[para 68] I order the head of the Public Body to respond to the Applicant openly, accurately and completely by detailing the search the Public Body conducts. The response should cover the following points:

- The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
- The scope of the search conducted - for example: physical sites, program areas, specific databases, off-site storage areas, etc.
- The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
- Who did the search
- Why the Public Body believes no more responsive records exist than what has been found or produced

[para 69] I order the Public Body to stop disclosing the personal information of the Applicant in contravention of Part 2 of the FOIP Act. Compliance with this portion of the order can be achieved by communicating the requirements of Part 2 to employees of the Public Body in any way the Public Body considers appropriate.

[para 70] I further order the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that it has complied with the Order.

_____

Teresa Cunningham
Adjudicator