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OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2009-029

March 18, 2010

EDMONTON POLICE SERVICE

Case File Number F4426

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Summary: Under the *Freedom of Information and Protection of Privacy Act* (the "Act"), the Applicant asked the Edmonton Police Service (the "Public Body") for a copy of a third party's access request. The Public Body refused to confirm or deny the existence of responsive records, on the basis that disclosing the existence or non-existence of the information would be an unreasonable invasion of the third party's personal privacy under section 12(2)(b) of the Act. The Applicant requested a review of that response.

To decide whether the Public Body could rely on section 12(2)(b), the Adjudicator had to determine whether confirmation or denial of the fact that an access request had been made by the third party would be an unreasonable invasion of her personal privacy. To make this determination, the Adjudicator considered the following: whether the Applicant's claim that he knew that an access request had, in fact, been made was relevant; whether an access request, had it been made, would have been made in confidence; whether the third party would suffer unfair damage to her reputation or other harm if the Applicant knew that she made an access request, if she indeed made one; and whether knowing whether or not the third party made an access request was relevant to a fair determination of the Applicant's rights.

The Adjudicator found that the Applicant's claimed knowledge that the third party made an access request was not relevant, and that no unfair damage to the third party's reputation or unfair harm would result on disclosure of the existence of her access

request, if she made one. He further found that, in the unique circumstances of the case, the Applicant had a sufficient interest in knowing whether the third party made an access request in order for his rights to be fairly determined, as the Applicant had made a privacy complaint to the Commissioner that his own personal information had been improperly disclosed by the Public Body in response to the third party's alleged access request. This outweighed the possibility that, if the third party were to have made an access request, she would have done so in confidence.

The Adjudicator concluded that disclosure of the existence or non-existence of records responsive to the Applicant's access request would not be an unreasonable invasion of the third party's personal privacy under section 12(2)(b) of the Act. He ordered the Public Body to respond to the Applicant's access request without relying on section 12(2).

Statutes and Regulations Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(n), 2(a), 2(b), 4(1), 12, 12(2), 12(2)(b), 17, 17(2), 17(4)(g), 17(5), 17(5)(c), 17(5)(e), 17(5)(f), 17(5)(h), 20, 30, 30(1)(b), 40(1)(a), 40(4), 71, 71(1), 71(2) and 72; *Police Act*, R.S.A. 2000, c. P-17; *Police Service Regulation*, Alta. Reg. 356/90. **BC:** *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, s. 8(2)(b).

Authorities Cited: AB: Orders 98-009, 99-014, 99-028, 2000-015, 2000-016, 2000-021, F2004-026, F2006-030, F2007-003, F2007-021, F2008-005, F2008-012 and F2009-002. **CAN:** *Minister of Indian Affairs and Northern Development v. Sawridge Band*, 2009 FCA 245. **BC:** Order 316-1999. **Other:** Office of the Privacy Commissioner of Canada, *Access to Information and Privacy Process and Compliance Manual*, Ottawa, April 2008 (online).

I. BACKGROUND

[para 1] In a letter dated March 21, 2007, the Applicant, a sworn police member of the Edmonton Police Service (the "Public Body"), asked the Public Body for information under the *Freedom of Information and Protection of Privacy Act* (the "Act"). His request was as follows:

> *Prior to 06 December 20, I received an e-mail from Insp. [name]. He advised me at the time that the EPS FOIP coordinator had advised him that e-mails that I had sent to himself had been FOIPed by [a third party].*
>
> *As a result of that request by [the third party] the personal and confidential e-mail I had sent to Insp. [name] was released to her unsevered.*
>
> *I have attached a copy of my original request from the FOIP Unit to assist in clarification.*

In view of the above information I am requesting disclosure of the request to access information submitted by [the third party] concerning this matter.

[para 2] The third party in question is another sworn police member of the Public Body. The "original request" to which the Applicant refers above was an earlier request for copies of written and electronic communication between various individuals, including that third party. That access request, dated February 1, 2007, is not the subject of this inquiry.

[para 3] By letter dated April 17, 2007, the Public Body responded to the Applicant's March 21, 2007 access request. It neither confirmed nor denied the existence of records in relation to the matter, relying on section 12(2)(b) of the Act.

[para 4] In correspondence received by this Office on September 7, 2007, the Applicant requested, among other things, a review of the Public Body's response to his access request. Mediation was authorized but was not successful. The matter was therefore set down for a written inquiry.

II. RECORDS AT ISSUE

[para 5] As the issue in this inquiry is whether the Public Body properly refused to confirm or deny the existence of a record, there are no records at issue, whether or not there were records responsive to the Applicant's access request.

III. ISSUE

[para 6] The Notice of Inquiry, dated June 29, 2009, set out the issue of whether the Public Body properly refused to confirm or deny the existence of a record, as authorized by section 12(2) of the Act.

IV. DISCUSSION

[para 7] Section 12 of the Act reads, in part, as follows:

12(1) In a response [to an access request] under section 11, the applicant must be told

(a) whether access to the record or part of it is granted or refused,

(b) if access to the record or part of it is granted, where, when and how access will be given, and

(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*
>
> *(a) a record containing information described in section 18 or 20, or*
>
> *(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 8] The Public Body specifically relies on section 12(2)(b) in order to refuse to confirm or deny the existence of a record. The Applicant was under the impression that the Public Body was refusing to confirm or deny the existence of a record containing information described in section 20 (disclosure harmful to law enforcement), but this impression was corrected on receipt of the Public Body's initial submissions in this inquiry.

1. Clarification regarding burden of proof

[para 9] The Applicant submits that the Public Body has the burden of proof in this inquiry because of section 71(1) of the Act. Section 71 reads, in part, as follows:

> *71(1) If the inquiry relates to a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part of the record.*
>
> *(2) Despite subsection (1), if the record or part of the record that the applicant is refused access to contains personal information about a third party, 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.*
> …

[para 10] Section 71(1) does not apply in this inquiry – and neither does section 71(2), as further explained below. A public body's decision to refuse to confirm or deny the existence of a record is not a decision to refuse an applicant access to a record. Section 71 of the Act therefore does not set out the burden of proof under section 12(2).

[para 11] Still, a public body has the burden of proving that it properly relied on section 12(2). Previous orders of this Office have said that where the Act is silent on the burden of proof, the burden should be allocated to the party that is in the best position to provide evidence on the particular issue (Order 2000-021 at para. 13). As public bodies are in the best position to explain why they have refused to confirm or deny the existence of a record requested by an applicant – and moreover, public bodies

relying on section 12(2) often submit argument and evidence *in camera* to which an applicant is not able to respond – they have the burden of proof under section 12(2). Having said this, it is in an applicant's best interest to also provide argument and evidence, even where the other party has the burden of proof (Order 99-014 at para. 11).

[para 12] For clarity, a public body has the burden of proof even where the decision to refuse to confirm or deny the existence of a record is based on the position that disclosure of the existence or non-existence of the record would be an unreasonable invasion of a third party's personal privacy under section 12(2)(b). Again, section 71(2) does not apply. I note that this is consistent with B.C. Order 316-1999 (at paras. 5 and 6), involving section 8(2)(b) of B.C.'s *Freedom of Information and Protection of Privacy Act*, which is virtually identical to section 12(2)(b) of Alberta's Act:

> In its initial submission, the Ministry asserts that the applicant should have the burden of proof where the issue is the application of section 8(2)(b) of the Act (i.e., the public body's refusal to confirm or deny the existence of a record containing personal information of a third party, if disclosure that the information exists, or does not exist, would be an unreasonable invasion of a third party's personal privacy).
>
> In this inquiry, however, the issue is simply the Ministry's decision to refuse to confirm or deny the existence of a record, not a public body's decision to deny access to records containing third party personal information. Therefore, I believe the Ministry is still in the best position to discharge the burden of proof under this section.

[para 13] Finally, the fact that a public body has the burden of proof under section 12(2) of the Act is implicit in previous Orders of this Office, which have set out three requirements that a public body must fulfill in order to show that it properly applied the section.

[para 14] Specifically, in order for a public body to properly apply section 12(2)(b) of the Act, it must do each of the following: (a) search for the requested records, determine whether responsive records exist and provide any such records to the Commissioner for review; (b) determine that the records, if they exist, would contain the personal information of a third party and that disclosure of the existence of the information would be an unreasonable invasion of the third party's personal privacy; and (c) show that it properly exercised its discretion to refuse to confirm or deny the existence of a record by considering the objects and purpose of the Act and providing evidence of what was considered (Order 98-009 at paras. 8 to 10; Order 2000-016 at paras. 35 and 38).

2. Process carried out by the Public Body

[para 15] The Public Body made *in camera* submissions addressing whether it conducted an adequate search for records and whether responsive records were identified. On review of those submissions, I am satisfied that the Public Body fulfilled the requirement under section 12(2) of the Act regarding appropriate process. I cannot discuss my finding in any greater detail, as it would reveal to the Applicant whether or not there were records responsive to his access request.

3. The personal information in question

[para 16] The second requirement that a public body must fulfill in order to rely on section 12(2)(b) of the Act is to show that, if responsive records exist, they would contain the personal information of a third party and that disclosure of the existence or non-existence of the information would be an unreasonable invasion of the third party's personal privacy.

[para 17] The Public Body submits that, if an access request by the third party exists, it would contain personal information as set out in section 1(n) of the Act, such as her name, registration number, date of birth, address, telephone number, signature, observations and personal views. The Public Body makes this assertion based on what access requests from its sworn police members normally include.

[para 18] I am satisfied that, if an access request by the third party exists, it would contain her personal information, so that section 12(2)(b) could be relied on by the Public Body. In particular, the personal information would be her identity as an applicant or "access requestor". In other words, if a responsive record exists, it would reveal the fact that the third party made an access request, which I find would be her personal information. Conversely, if a responsive record does not exist, the fact of its non-existence would reveal that the third party did not make an access request.

[para 19] I considered the application of principles from previous Orders of this Office whereby the fact that an individual did something in a work-related capacity is not properly considered personal information. It has been stated that records of the performance of work responsibilities by an individual is not, generally speaking, personal information about that individual, as there is no personal dimension (Order F2004-026 at para 108; Order F2006-030 at paras. 10; Order F2007-021 at para. 97). Absent a personal aspect, there is no reason to treat the records of the acts of individuals conducting the business of a public body as "about them" (Order F2006-030 at para. 12).

[para 20] If an access request by the third party were to exist, it is first possible that it would have been made in her strictly personal capacity, rather than as part of any work-related responsibilities, in which case the fact that she made an access request would be her personal information. Second, even if an access request were made for work-related reasons, I would find that the existence of it would be the third party's personal information in this case. Given the background set out by the Applicant, there would be a

personal aspect or dimension to the act of the third party in making an access request. As explained later in this Order, her conduct was called into question by the Applicant and there is now a dispute between those parties, which would render an access request by the third party, if she made one, more than merely a work-related act.

[para 21] The possibility that the third party's registration number, date of birth, address, telephone number, observations or personal views might also be contained in her access request, if it exists, is not relevant for the purpose of applying section 12(2). This is because the Public Body would be in a position to sever this personal information – as well as the personal information of any other third party – if disclosure of it would be an unreasonable invasion of personal privacy under section 17. Even the date of an access request could be severed in those cases where a public body determines that it would reveal personal information about a third party. As submitted by the Applicant, the issue in this inquiry is not whether the Applicant is entitled to have access to the requested records, if any; it is whether he is entitled to know whether any such records exist (Order F2007-003 at para. 8).

[para 22] In this inquiry, it is only the fact that the third party did or did not make an access request that the Public Body could not withhold from the Applicant other than by relying on section 12(2)(b). This is therefore the personal information in question when deciding whether disclosure of the access request by the third party, if one exists, would be an unreasonable invasion of her personal privacy. Having said this, the Public Body also raises the possibility that disclosure of whether an access request was made by the third party may also indirectly reveal her motive for making the access request, if she indeed made one. I therefore also consider this later in the Order.

4. An unreasonable invasion of personal privacy

[para 23] In deciding whether section 12(2)(b) can be relied on so as to avoid an unreasonable invasion of a third party's personal privacy, the provisions regarding unreasonable invasions of personal privacy under section 17 of the Act may be used as guidance (Order 2000-016 at para. 35). Section 17 reads, in part, as follows:

> *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.*
>
> *(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if*
>
> *[various situations]*
>
> …
>
> *(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

…

(c) the personal information is relevant to a fair determination of the applicant's rights,

…

(e) the third party will be exposed unfairly to financial or other harm,

(f) the personal information has been supplied in confidence,

…

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

…

[para 24] The Public Body submits that disclosure of whether an individual has made an access request would be an unreasonable invasion of his or her personal privacy for the following reasons: nothing in section 17(2) states that such disclosure would not be an unreasonable invasion of personal privacy; there would be a presumption against disclosure under section 17(4)(g) in that the individual's name would appear with or reveal the fact that an access request was made; there are no relevant circumstances in favour of disclosure under section 17(5); and there are relevant circumstances against disclosure under section 17(5).

[para 25] I agree that the presumption against disclosure under section 17(4)(g) would be applicable if, in fact, the third party made an access request. I also agree that section 17(2) would not apply. I will return below to the relevant circumstances in favour of and against disclosure of the fact that a third party did or did not make an access request.

[para 26] The Applicant submits that section 12(2) should be used sparingly and that discretion cannot properly be exercised under it without taking into consideration the individual circumstances surrounding an access request, which may or may not lead to

the conclusion that it is appropriate to rely on section 12(2) in the particular case (Order F2008-005 at paras. 85 and 87). Here, the Applicant indicates that he is on the Board of Directors of the Edmonton Police Association, which advocates on behalf of members who have concerns about the Public Body, or the terms and conditions of their employment. He states that he was approached by two constables who had concerns about the conduct of a Duty Officer in charge of the Public Body's operations one evening. The Duty Officer is the third party identified in the Applicant's access request. The Applicant informally raised the concerns with an Inspector in the course of an e-mail exchange. This e-mail exchange – with the name of the Applicant removed – was apparently then forwarded by the Inspector to three other individuals, one of whom was the third party. The Applicant claims that he subsequently found out that the third party made an access request for the complete e-mail exchange, and that the Public Body's FOIPP office disclosed his name to her.

[para 27] I will now review the circumstances of this particular case that are, or may be, relevant to determining whether disclosure of the existence or non-existence of records responsive to the Applicant's access request would be an unreasonable invasion of the third party's personal privacy under section 12(2)(b) of the Act.

(i) Applicant's claim that he knows that the third party made an access request

[para 28] The Applicant's submissions raise the possibility that the Public Body cannot rely on section 12(2)(b) of the Act, in order to refuse to confirm or deny the existence of an access request by the third party, because the Applicant is already aware of the fact of its existence. He states that he knows that the third party made an access request because he learned as much through conversations with an Inspector, the Public Body's legal counsel and the third party herself. The Applicant submits that revealing whether or not there exists an access request by the third party would not be an unreasonable invasion of her personal privacy, as it is already known by him and others that she made one. He cites comments made in Order F2007-003 (at para. 15):

> […] I cannot see how, as a matter of common sense, revealing whether or not the police made or kept records relative to a matter in which they are publicly known to have been involved can be said to unreasonably invade the personal privacy of a persons [sic] who were also involved in the matter and were known to be so.

[para 29] In my view, Order F2007-003 may be distinguished because, although disclosure of the existence of responsive records in that case would reveal that third parties had been involved in certain events, it would not reveal anything personal about them that was not already clearly and broadly known to the public; the facts that would be revealed by disclosure of the mere existence of records were "not open to question" because they were clearly documented in other, publicly available records (Order F2007-003 at paras. 15 and 16). By contrast, in this inquiry, disclosure of the existence of records responsive to the Applicant's access request would reveal that the third party

made an access request, which alleged fact is not in the public domain and remains in question.

[para 30] The Public Body submits that the Applicant has not provided any evidence in support of his assertion that the third party, in fact, made an access request. This submission was made before the Public Body received the Applicant's rebuttal submissions, in which he gives by affidavit the reasons why he knows that the third party made an access request. Nonetheless, on review of the *in camera* evidence submitted by the Public Body and the evidence submitted by the Applicant, I find that the Applicant has not established that the third party made an access request.

[para 31] In his affidavit, the Applicant states: "I am further advised by Inspector [name] that sometime shortly after forwarding the e-mail and prior to December 20, 2006, he was contacted by the Edmonton Police Service's FOIPP office and advised that a request for disclosure had been made by [the third party] seeking copies of the entire e-mail exchange he had with me." This amounts to double hearsay, which I find not to be reliable in a case where an applicant is asserting that responsive records do, in fact, exist and that a public body therefore cannot rely on section 12(2) of the Act for that reason.

[para 32] The Applicant goes on to swear: "Upon being advised of this request for disclosure, I contacted [the Public Body's legal counsel] and requested a meeting with her. I met with [her] to discuss my concerns with EPS possibly releasing the e-mails and disclosing my identity to [the third party]. [She] indicated that she had given the matter serious consideration, but that she was going to release the e-mails." Here, the Applicant does not say anything about whether the Public Body's legal counsel told him the name of the individual who allegedly made an access request for his information. Even if the Applicant were to establish that an access request was made, this would not amount to establishing that the third party was the access requestor.

[para 33] Finally, the Applicant says in his affidavit: "Shortly after this meeting with [the Public Body's legal counsel] I was confronted by [the third party] at EPS Headquarters. [The third party] was very agitated and she indicated that she was going to sue me for defamation over what I had written in the e-mail to Inspector [name]." I dismiss this as evidence that the third party made an access request, as she could have learned the Applicant's identity through various other means, such as during conversations with anybody who happened to be aware that the Applicant was the author of the e-mails about her.

[para 34] Given the foregoing, I give no weight to the Applicant's claim that he knows that the third party made an access request.

(ii) Confidentiality of access requests

[para 35] The Public Body submits that the identity of an access requestor under privacy and access to information legislation is normally confidential (*Minister of Indian*

Affairs and Northern Development v. Sawridge Band, 2009 FCA 245 at para. 35). This raises the possibility that the relevant circumstance against disclosure under section 17(5)(f) of the Act would exist, if the third party indeed made an access request, on the basis that individuals often supply their personal information in confidence when making access requests.

[para 36] The Public Body points to general evidence that the identities of access requestors are normally treated in a confidential matter and therefore that disclosure of their identities would be an unreasonable invasion of their personal privacy. It notes the following: the Office of the Privacy Commissioner of Canada's *Access to Information and Privacy Process and Compliance Manual* (at part 1.7) states that the identity of a requestor should be disclosed only to those who need to know it for the purpose of processing the access request and locating the requested information; the Public Body's own process for handling access requests restricts who knows the identities of requestors (e.g., there is controlled entry to the FOIPP unit and files not being worked on are kept in locked cabinets); and the Offices of the Information and Privacy Commissioners in Alberta and British Columbia have processes reflecting the inherent privacy of individuals who have made an access request (e.g., applicants are not named in orders or else non-identifying initials are used). In further support of the privacy interests of access requestors, the Public Body notes that public bodies should normally not ask requestors for the reason for their access request (Order 2000-015 at paras. 39 to 42).

[para 37] In response to the Public Body's argument that the identities of access requestors are normally confidential, the Applicant submits that section 12(2) should not be applied as a blanket policy when dealing with access requests for particular types of information, as this would represent an improper exercise of discretion and fail to take into consideration factors personal to the applicant and facts relating to his or her individual access request (Order F2008-005 at paras. 86 and 87). The Applicant identifies the proper approach. The question to be answered in this inquiry is whether disclosure of the fact that the third party did or did not make an access request would be an unreasonable invasion of her personal privacy in the circumstances of this particular case. While the Public Body's evidence that the identities of access requestors are normally treated as confidential and therefore not disclosed is relevant to this question, it is not determinative.

[para 38] Still, in the circumstances of this case, I find that, if the third party were to have made an access request, she would have done so with an expectation of confidentiality and therefore would have supplied her personal information – including the fact that she was making an access request – in confidence. I say so because of the alleged facts in this matter, and the nature of the relationship between the Applicant and the third party. As explained elsewhere in this Order, the Applicant indicates that there were concerns about the conduct of the third party one evening and that he raised those concerns with the Public Body. He alleges that the third party then made an access request to inappropriately find out his identity as the individual who expressed those concerns. If the allegations about the third party's conduct are true, I would find it very

likely that she would not want others – and the Applicant in particular – to be aware of her access request.

[para 39] The likely confidentiality of an access request on the part of the third party, if one were to exist, suggests that there would be an unreasonable invasion of her personal privacy, under section 12(2)(b), if the Public Body indicated the existence or non-existence of such an access request. This weighs in favour of a conclusion that the Public Body had the discretion to rely on section 12(2)(b) of the Act in this case.

(iii) Unfair damage to reputation and unfair harm

[para 40] The Public Body raises the relevant circumstance against disclosure under section 17(5)(h) of the Act, arguing that disclosure of whether an individual has made an access request, which in turn might reveal a motive, may unfairly damage the individual's reputation. The Public Body further submits that, inherent in the right of access set out under section 2(a), is the right of access without repercussion. It accordingly alludes to the possibility of unfair harm under section 17(5)(e).

[para 41] As explained earlier in this Order, the only direct fact that would be conveyed by the Public Body, if it confirmed the existence of records responsive to the Applicant's access request, would be that the third party made an access request. I do not find that the third party would be exposed to harm, or that her reputation would be damaged, by disclosure of that fact alone. A responsive record, if it exists, may contain personal information the disclosure of which would damage the third party's reputation, or otherwise harm her, but that information could then be severed under section 17.

[para 42] As for the Public Body's argument that indirect facts about the motive or reasons for an access request may be revealed by the fact of its existence, I do not find that the third party's motive or reasons would be revealed, in this case, by the mere fact that she made an access request, if she indeed made one. The Applicant alleges that the third party made an access request to confront him or retaliate against him. However, if she did make an access request, this does not automatically mean that her motive was as suggested by the Applicant. She could also have made the access request in order to have a fuller and fairer opportunity to respond to the concerns raised about her. As I have no basis on which to find that the third party's motive or reasons for making an access request, if she made one, would be revealed on disclosure of its mere existence, I find that her reputation would not be damaged, and that she would not be exposed to harm. Having said this, I make an alternative finding as follows.

[para 43] The Public Body argues that, in order for individuals to freely exercise their rights of access under the Act, there is an inherent right to make an access request without repercussion or scrutiny by any other person. The Applicant counters that, if records relating to access requests or the fact of their existence were not to be disclosed in any case, the Legislature would have indicated that the Act did not apply to such records under section 4(1).

[para 44] In my view, an individual does not have an automatic right to make an access request under the Act without any possibility of consequences. While the reason for making an access request is generally irrelevant in that an individual can make an access request for whatever reason he or she wishes, it does not necessarily follow that it is unfair for others to find out the reason or motive for the access request. Here, the Applicant alleges that the third party exercised her right of access in order to circumvent the appropriate process for addressing her concerns in relation to the Applicant. He argues that if the third party, who is one of his superior officers, wanted to investigate his conduct in relation to the e-mails that he sent about her, she should have made a complaint and sought an employment investigation under the *Police Act* and *Police Service Regulation*. He alleges that she used an access request to learn his identity as the author of e-mails about her, after disclosure of his identity had already been informally refused, and that she sought the information in order to retaliate against him.

[para 45] Given the particular circumstances in this inquiry, I alternatively find that if the third party did make an access request, if her motive was as suggested by the Applicant, and if that motive would be revealed by the mere existence of an access request by the third party, then any damage to her reputation, or other harm, would not be unfair. If the third party did make an access request for the Applicant's personal information for a questionable motive, it would not be unfair for the Applicant to know that she made the access request for that questionable motive. The appropriateness of the Applicant's e-mails about the third party has itself been criticized, and there appears now to be an employment-related dispute between the Applicant and the third party. If the third party used the Act in order to gain an advantage over the Applicant or to retaliate against him, it would not be unfair for her to face the consequences of the Applicant knowing that she made an access request for those reasons.

[para 46] Given the foregoing, the Public Body's submissions regarding unfair damage to reputation and unfair harm have very limited relevance to my determination of whether it properly relied on section 12(2)(b) of the Act.

(iv) Applicant's interest in knowing whether or not responsive records exist

[para 47] The Applicant requested access to the third party's access request because her request was allegedly for the Applicant's own personal information, being his identity as the author of e-mails expressing concerns about her, and the Applicant believes that the Public Body improperly released his name to her when it responded to her access request. He accordingly has a personal interest in knowing whether an access request was made. In other words, this inquiry does not simply involve the general question of whether disclosure of the identity of an applicant or access requestor to another individual would be an unreasonable invasion of personal privacy. It requires a more specific balancing of the right of the Applicant to know whether the third party requested information about him with the third party's interest in keeping private the fact that she did or did not request information about the Applicant.

[para 48] The next question that needs to be answered is whether the Applicant's interest in knowing whether the third party made an access request is sufficient to suggest that the Public Body should disclose whether there are records responsive to the Applicant's access request. Guidance may be taken from section 17(5)(c) of the Act, under which disclosure of a third party's personal information may not to be an unreasonable invasion of personal privacy if the information is relevant to a fair determination of an applicant's rights. In order for section 17(5)(c) to be a relevant consideration, all four of the following criteria must be fulfilled: (a) the right in question is a legal right drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; (b) the right is related to a proceeding that is either existing or contemplated, not one that has already been completed; (c) the personal information to which the applicant is seeking access has some bearing on or is significant to the determination of the right in question; and (d) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing (Order 99-028 at para. 32; Order F2008-012 at para. 55).

[para 49] I find, in this inquiry, that knowledge of whether the third party requested the Applicant's personal information – and therefore knowledge of whether there are records responsive to the Applicant's own access request – is required in order for the Applicant to have his rights fairly determined in the context of a privacy complaint that he has made. Before specifically reviewing the four criteria above, I will first set out the nature of the Applicant's complaint, as well as make some general comments regarding privacy complaints about a public body's response to another individual's access request.

[para 50] In his March 21, 2007 access request, the Applicant expressed concerns that a personal and confidential e-mail exchange, in which he made comments about the third party, was released to the third party unsevered. In his request for review received by this Office on September 7, 2007, he not only requested a review of the Public Body's response to his access request, but also complained about an alleged unauthorized disclosure of his personal information to the third party. He identified the following issues that he wanted reviewed by this Office:

> *1. Was the release of the unsevered personal and confidential e-mail authored by me, by the Edmonton Police Service, a Breach of my Personal Privacy?*
> *2. Under what section of current FOIP legislation authorizes the release of private and confidential communication by a public body between two individuals, to a third party[?] Was it appropriate in this specific case?*
> *3. If communication in any form is to be released, does the individual being identified by the release of the information, need to be so advised of the release[?]*
> *4. Why was the request to access information form submitted by [the third party] (EPS FOIPP Unit file #...) not disclosed to me?*
> *5. Was [the Public Body's legal counsel] in breach of the FOIPP Act in the release o[f] my personal and confidential e-mail[?]*

In his request for review, the Applicant added that he had received hate mail from a civilian employee of the Public Body, and that he had been placed in personal and professional "jeopardy" as a result of his identity, as the author of the e-mail exchange, being disclosed in response to the third party's alleged access request.

[para 51] First, by way of general comment, it is my view that not every individual who believes that his or her personal information was improperly disclosed in response to an access request has a sufficient interest in having his or her privacy complaint determined. Under section 40(1)(a) of the Act, a public body has the authority to disclose personal information if it is "in accordance with Part 1", being the Part of the Act governing access requests. In turn, section 40(4) permits a disclosure of personal information to the extent necessary to carry out the purpose of responding to an access request in a "reasonable" manner. Therefore, a privacy complaint cannot be used to test the correctness of a public body's response to an access request, and a privacy complaint about disclosure in response to another person's access request will not necessarily require, or lead to, a review or inquiry by this Office. There must be something about the complaint that makes it arguable that, in responding to an access request, a public body did not properly follow the process set out in Part 1 or its response to the access request was unreasonable.

[para 52] The facts in this inquiry meet the threshold for concluding that the Applicant has a sufficient interest in having his privacy complaint determined. He alleges that, if the third party did make an access request, the Public Body gave her preferential treatment when processing and responding to it, due to her rank. In point 3 of the Applicant's request for review above, he also raises a complaint that, if the third party did make an access request, he was not properly notified by the Public Body, under section 30(1)(b) of the Act, that it was considering giving access to his personal information. The Applicant's allegations about impropriety, or a defect, in the way that the Public Body handled the third party's access request, if she made one, have an arguable foundation, which gives the Applicant a right to obtain the relevant information in order to more fully establish the basis for his privacy complaint, if there is indeed a basis, and then have it resolved. Assuming that the third party did make an access request for the Applicant's personal information, and that his personal information was released by the Public Body, the Applicant's privacy complaint is not about the correctness of the Public Body's response to the access request; it is about the reasonableness of the Public Body's processing of the access request and the reasonableness of its decision to release his personal information.

[para 53] Further, the Applicant claims that the inspector with whom he had the e-mail exchange about the third party refused to – in my words – "routinely" or "informally" disclose the Applicant's identity to the third party, which the Applicant believes was the proper approach given his own expectation of confidentiality, yet the third party was able to obtain his identity through a "formal" access request. In other words, there is an allegation here that the Public Body did not have the authority to routinely or informally disclose the Applicant's personal information under Part 2 of the Act and is now using the formality of the access request to shield itself from

accountability. While I do not purport to give every individual the right to know whether, and by whom, information has been requested about him or her so that the individual can complain about a resulting disclosure, I also do not want to relieve every public body from responding to an alleged improper disclosure on the basis that the disclosure was by way of an access request. If I did, a public body could – in a very extreme case – avoid any responsibility whatsoever for disclosures under the Act simply by arranging for all of its disclosures to occur in the context of formal access requests.

[para 54] Given the particular circumstances of this case, the four aforementioned criteria are met for finding that the Applicant must know whether records responsive to his own access request exist in order to have a fair determination of his rights. First, if the third party did make an access request, the Applicant's complaint of alleged unauthorized disclosure of his personal information has an arguable foundation, insofar as the reasonableness of the Public Body's alleged release of his name is concerned, making his own privacy rights under the Act at issue. His request for review raised the questions of whether the Public Body had the authority to disclose and was reasonable in disclosing his personal information under Part 2 of the Act, and whether it failed in a duty to notify him that it was considering giving access to his personal information under section 30. These questions engage the Applicant's legal rights.

[para 55] Second, the Applicant's rights are related to a proceeding that is existing or contemplated, not one that has been completed. He made his privacy complaint to the Commissioner in his September 7, 2007 request for review, and that complaint has not been resolved. In another letter of March 10, 2008 to the Commissioner, he made the following clear: "In your review, should you not uphold the EPS's use of section 12(2) in its response to my access request, [I ask] that you also review whether the EPS disclosed my personal information in contravention of the FOIP Act."

[para 56] Third, knowledge of whether an access request was made for the Applicant's personal information is significant to a determination of his privacy complaint. In this particular case, knowledge of the identity of the individual who made such an access request – and therefore knowledge of whether the third party is that individual – is also relevant and significant. In order to determine whether the Public Body had the authority to disclose and was reasonable in disclosing the Applicant's personal information, if it did disclose it, it must be known to whom the Applicant's personal information was disclosed. For instance, whereas some members or employees of the Public Body may be entitled to know particular personal information of the Applicant, other members or employees may not be. Having said this, in the context of a different privacy complaint, it may only be necessary for an individual to know that his or her personal information was disclosed, not to whom the information was disclosed.

[para 57] Finally, knowledge of whether the third party requested the Applicant's personal information, and therefore whether there are records responsive to the Applicant's own access request, is required in order for him to prepare for the proceeding in relation to his privacy complaint (i.e., an investigation, mediation or inquiry by this Office), and is required in order to ensure an impartial hearing. In order for the Applicant

to have a fair determination of whether the Public Body had the authority to disclose his personal information, procedural fairness requires him to know whether his personal information was, in fact, disclosed and, if so, to whom.

[para 58] All of the foregoing weighs heavily in favour of a conclusion that it would not be an unreasonable invasion of the third party's personal privacy if the Public Body were to indicate whether there are records responsive to the Applicant's access request, thereby disclosing whether or not the third party made an access request. The Public Body's reliance on section 12(2)(b) of the Act precludes the Applicant from having his legal rights fairly determined.

5. Summary of considerations and conclusion

[para 59] If records responsive to the Applicant's access request were to exist, a confirmation of their existence by the Public Body would reveal that the third party made an access request, which would be her personal information. While individuals do not always or necessarily make their access requests in confidence – and the general practice of keeping the identities of access requestors confidential is not determinative – I believe here that the third party would have supplied her identity as an access requestor in confidence, if she indeed made an access request. This weighs in favour of a conclusion that the Public Body had the discretion to rely on section 12(2)(b) of the Act in this case.

[para 60] If the third party did make an access request, I believe that her motive for doing so would not be revealed by the mere existence of the access request. Therefore, she would not suffer damage to reputation, or other harm, on disclosure. Alternatively, any damage to reputation or harm would not be unfair. Although individuals often make their access request in confidence, and their reasons for making requests are generally irrelevant, they do not have an automatic right to make an access request without consequence. Here, the Applicant alleges that the third party made her access request in order to retaliate against him. If that is indeed the case, and it would be revealed by the mere existence of an access request by the third party, the consequences to the third party would not be unfair, given the nature of the dispute between her and the Applicant.

[para 61] The Applicant claims that he knows that the third party, in fact, made an access request, but that alleged fact remains open to question. Even if he were to establish that an access request was made, this does not establish that it was made by the third party. The Applicant's claimed knowledge is therefore not relevant to my determination of whether the Public Body properly relied on section 12(2)(b).

[para 62] Finally, in the circumstances of this inquiry, the Applicant has a sufficient interest in knowing whether the third party made an access request, in order to fairly determine his legal rights. The Applicant alleges that the Public Body gave the third party preferential treatment when responding to her access request, and that it also failed to properly notify him under section 30 that it was considering giving access to his personal information. He made his own access request in order to determine whether his

identity had been improperly disclosed to the third party, and subsequently made a privacy complaint to the Commissioner.

[para 63] In weighing the relevant considerations, I note the following principle: In order to decide whether a public body had the discretion to apply section 12(2)(b) of the Act, one must strike a balance between the right of access contemplated by section 2(a) and the protection of personal privacy contemplated by section 2(b) (Order F2009-002 at para. 21). In this inquiry, I must weigh the Applicant's right of access, and his interest in a fair determination of his privacy complaint, against the third party's privacy and confidentiality in relation to her own access request, if she made one, along with the possibility that her motive for making the access request may be revealed by the mere fact of its existence.

[para 64] I find that the Applicant's interest in having a fair determination of his rights outweighs the remaining circumstances. A resolution of the Applicant's privacy complaint is warranted, in that there is an arguable foundation that the Public Body acted unreasonably in processing and responding to the third party's access request, if she indeed made one. The third party's privacy interest and the likely confidentiality of her access request, if she made one, is not sufficient to outweigh the Applicant's right of access, given the apparent dispute between the Applicant and the third party, and the nature of the Applicant's privacy complaint. Among other things, there is an allegation that the third party made an access request to gain an advantage over the Applicant or to retaliate against him, and an allegation that the third party obtained preferential treatment if, in fact, the Public Body gave her access to the Applicant's personal information. The Public Body's refusal to indicate whether the third party made an access request for the Applicant's personal information unfairly precludes the Applicant from obtaining the facts to substantiate his privacy complaint, if those facts do exist.

[para 65] In weighing the relevant considerations as I have in this inquiry, I do not purport to say that the correctness of every response to an access request may be re-evaluated as a result of a privacy complaint, or that the identity of the access requestor must be known to the complainant in order for his or her complaint to be fairly determined. The circumstances in this inquiry are unique in that the Applicant has complained about the reasonableness of the Public Body's response to an access request for his own personal information, the complaint has an arguable basis if the alleged facts are true, and the Applicant must know whether the third party, if anyone, is the individual who made the access request, and therefore obtained access to his personal information, in order to have the privacy complaint resolved by this Office.

[para 66] I conclude that disclosure of the existence or non-existence of records responsive to the Applicant's access request would not be an unreasonable invasion of the third party's personal privacy under section 12(2)(b) of the Act. Therefore, the Public Body did not correctly determine that the requirements under section 12(2)(b) were met, and did not have the discretion to rely on the section in response to the Applicant's access request.

V. ORDER

[para 67] I make this Order under section 72 of the Act.

[para 68] I find that the Public Body did not properly refuse to confirm or deny the existence of a record under section 12(2) of the Act. I order the Public Body to respond to the Applicant's access request without relying on section 12(2).

[para 69] 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.

Wade Riordan Raaflaub
Adjudicator