ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2010-001

June 3, 2010

ALBERTA ENVIRONMENT

Case File Number F4503

Office URL: www.oipc.ab.ca

Summary: The Applicant made a request for access to Alberta Environment (the Public Body) for water and gas well data collected in a particular area.

The Public Body identified 1067 responsive records and provided them to the Applicant with the personal information of third parties severed. The Applicant requested that the Commissioner review whether the Public Body had met its duty to assist her by conducting an adequate search for responsive records, and whether it had properly withheld information from the records under section 17 (information harmful to personal privacy).

The Adjudicator determined that the Public Body had met its duty to assist the Applicant and had properly withheld personal information of third parties under section 17.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 6, 10, 17, 72

Authorities Cited: AB: Orders 97-020, 2001-016, F2007-029, F2009-010

Cases Cited: *University of Alberta v. Pylypiuk*, 2002 ABQB 22

I. BACKGROUND

[para 1] On March 29, 2007, the Applicant made a request for access to Alberta Environment (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to the following information:

> I request copes please of 1) all water well and gas well data collected under AENV's Baseline Testing Standard by EnCana or any other company or subcontractor in all sections of TWP 27-RGE 22 W4M and TWP 27-RGE 21W4M, with copies of any related correspondence and 2) all data and analysis so far collected by AENV, the Alberta Research Council, EnCana, the U of C, the U of A for AENV or any other company or subcontractor or the AEUB for AENV on any water well and any gas well or facility in all sections of TWP 27-RGE 22 W4M and all sections of TWP 27-RGE 21 W4M, with copies of any related correspondence, and 3) any data or information requested of the AEUB, EnCana, the Alberta Research Council or Wheatland County by AENV pertaining to any matters of concern or interest or contamination investigation cases in those sections listed above. Please specify all dates of AENV entry without notice onto private properties in any of the above sections, with locations & landowners listed, the type of sampling completed, name of AENV sampler and whether or not the water well was purged & all results.

[para 2] The Public Body responded to the Applicant's access request. It identified a total of 1067 records as containing information falling within the parameters of the Applicant's request. It severed personal information from the records under section 17(1).

[para 3] The Applicant requested review of the Public Body's response to her. In particular, she noted that there were no legal land descriptions on the records and that critical information was missing. She also indicated that the information she received was deficient for the following reasons:

> In addition to the missing legal land descriptions, there is still critical data missing. Perhaps the compliance investigators in charge of the investigation (one was reportedly asked to leave AENV last spring) did not release the data to [the Public Body's FOIP Advisor], or perhaps others at AENV do not want this data released. This data was also excluded in the Alberta Research Reports (ARC) on our contamination cases here, so it appears there is a reluctance to release it. This data is required to back up the conclusions made by the ARC and AENV, notably as their conclusions differ.
>
> … I think it is unprofessional and unscientific to make conclusions that appear contrary to the data and then exclude the data, and refuse to provide the data even after numerous complainants request it.

[para 4] The Commissioner authorized mediation to resolve the issues between the Applicant and the Public Body. As mediation was unsuccessful, the matter was scheduled for a written inquiry. The issues for the inquiry were identified as the following:

> Issue A: Did the Public Body meet its duty to assist the Applicant under section 10(1) of the Act?
>
> Issue B: Does section 17 of the Act (personal information harmful to the personal privacy of a third party) apply to the information in the records?

[para 5] Both parties provided initial and rebuttal submissions.

II. RECORDS AT ISSUE

[para 6] 1067 records from which the Public Body severed personal information are at issue.

III. ISSUES

Issue A: Did the Public Body meet its duty to assist the Applicant under section 10(1) of the Act?

Issue B: Does section 17 of the Act (personal information harmful to the personal privacy of a third party) apply to the information in the records?

IV. DISCUSSION OF ISSUES

Issue A: Did the Public Body meet its duty to assist the Applicant under section 10(1) of the Act?

[para 7] 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 8] An applicant has a right to access to information in the custody or under the control of a public body unless an exception under Division 2 applies to the information.

[para 9] 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 10] 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 11] 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 12] 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 13] The Public Body provided the affidavit of its FOIP Advisor, the FOIP Advisor's notes, and the affidavit of a Groundwater Data Management Technologist to establish the steps it followed to locate responsive records and communicate the results of its search to the Applicant.

[para 14] The FOIP Advisor states:

> This access request was assigned to [me] for processing. I prepared and sent to the Applicant an Acknowledgment / Clarification letter, a copy of which is attached as Exhibit "B" to this my affidavit.
>
> Alberta Environment has developed a set of search and retrieval procedures to be followed by the Advisors and department staff to locate and identify potentially responsive records to an Access Request. These procedures are titled "FOIP Line Contact (Records Search & Retrieval) Guidelines". A copy of the Guidelines documents is attached as Exhibit "C" to this my affidavit.

> For Access Request No E07-G-0309, the Guidelines were followed and a blanket search was conducted within Alberta Environment for all program areas where it was believed there may have been even a remote possibility of existing responsive records within the control of the Public Body. A search request was sent to these program areas and copies of these are set out in Exhibit "D" to this my affidavit.

Exhibit "D", the search request referred to in the affidavit, contains the precise wording from the Applicant's access request.

[para 15] The FOIP Advisor's notes document all contact with the Applicant and all action taken by the FOIP Advisor, including the steps taken to clarify the scope of the access request and to follow up with program areas where responsive records were located. A note dated May 28, 2007 states:

> The applicant called regarding the fee estimate letter pointing out contradictions between the wording of her request submitted to us March 28, 2007 and the wording used by us in the heading of our May 17, 2007 preliminary estimate letter. The advisor explained that the FOIP Office abbreviates lengthy and wordy requests submitted by applicants in our letter headings and correspondence. What matters, however, is how the search for records is conducted. The advisor assured the applicant that the exact wording she used in her request for information was used on our Search for and Retrieval of Records Form, which is sent to the Regions and to our line contacts. Based on this form, records are sent to the FOIP Office for review. With respect to narrowing her request, the applicant only indicated what kind of records she would not want to receive, namely annual water reports, the applicant's correspondence including e-mail, correspondence of other landowners including e-mail, copies of the Baseline Testing Standards, duplicates and generally records not responsive to the request.

[para 16] The Groundwater Data Management Technologist explained the search process for electronic records. He outlined initial problems with the search and how these were later addressed. He states:

> In September 2007, the Department realized that the problem with the templates, the electronic submissions and the loading program required the review, correction and reloading of all the submissions received to that date. Upon re-loading the Department was able to successfully load 3600 of the 5000 well tests submitted.
>
> Well Test submissions are received as set by the sender, and there is no way to determine what is contained in the file based on the file name alone. A query of data loaded in the database would only provide an accurate listing of the submissions that had been submitted and properly loaded into the database.
>
> At the time that I received the request (June 2008), the only possible way to find all of the well test submissions that had been received for the requested area would have required every submission to have been individually opened and reviewed to determine if the contents were for the requested area. This would have taken a minimum of 10 minutes per submission, and all 5000 submissions would have had to have been reviewed.
>
> In November 2009, the request was reviewed with the understanding that all files received up to Sept 2009 had been successfully loaded into the database (Over 10,000). It was concluded that no well test submissions under the original FOIPP request were missing from the information supplied to the requestor in July 2008.

[para 17] I understand the Groundwater Data Management Technologist to depose that the electronic database of well test submissions was not a completely effective or efficient search tool at the time the Applicant made her access request. For that reason, he searched the database again in November 2009 once those problems with the database had been resolved. However, the new search did not locate any additional responsive records.

[para 18] The Applicant contends that the Public Body has censored information. This contention is based on her view that specific information should have been contained in the records but was not. Her submissions are critical of the Public Body's policies and its methodology in relation to water testing and management. For example, the Applicant states:

> When [a named individual] was testing my well, he knew full well, he was not collecting "general information records" and on that day, he blamed me for the contamination because I did not use enough water. Three days later, in the meeting with the Minister on March 6, AENV blamed me for the contamination because I used too much water. Thus why these data are so vital, and why it is very suspicious and mysterious that AENV is withholding this data!
>
> [The named individual] was very concerned about his test results on my well while he was testing it. He told me this at the time. He was gathering his data while AENV staff were running my well. The issue that AENV are now trying to claim was a "control" issue, was one tap that they had left dripping very slightly. When I showed the very slight dripping to [the named individual] he said that it would not have caused the problems that he was detecting with my well, and would in no way have affected the data he collected that day on my well. I specifically asked him this before he left for the day.

[para 19] In rebuttal, the Public Body notes that the Applicant's submissions address the quality of the information contained in the records at issue, and do not address the issues for inquiry.

[para 20] The scope of this portion of the inquiry is to consider whether the Public Body assisted the Applicant by responding to her access request openly, accurately, and completely, which includes consideration of whether the Public Body conducted a reasonable search for responsive records and whether it took steps to clarify the kinds of information the Applicant was seeking. Even if I had the requisite expertise to determine whether the Public Body had appropriately tested the water in the Applicant's well, I lack jurisdiction to make such a determination. It is not my role to tell the Public Body to conduct testing in a manner that would generate the particular records the Applicant seeks. This portion of the inquiry is not a review of the Public Body's scientific methodology or an inquiry into the Public Body's conduct in assessing the water in the Applicant's well; rather, its purpose is to determine whether the Public Body met its duty to assist the Applicant under the FOIP Act by conducting a reasonable search for responsive records within its custody and control, and responding to the Applicant openly, accurately and completely.

[para 21] The Applicant questions why elevation data, which she alleges was obtained by an employee of the Public Body on June 14, 2006, is not contained in the records at issue.

> Also withheld and very important data are the elevation data collected by [an individual] on June 14, 2006 by entry on my property without any prior reasonable notice, and any other data collected without letting me know on other dates. This is vital data and must be released to me because in their dismissing the contamination in my water, the ARC mapped my water well incorrectly and used incorrect elevation data for my well! I witnessed the [employee] collect this data. With him at the time was [another employee] also of the Public Body.

[para 22] Having reviewed the Applicant's access request, I am not satisfied that the Applicant made a request for elevation data, or, if it were her intent to request this kind of information, that this intent would have been understood by the Public Body on reading her request. In relation to data collected by the Public Body, the Applicant requested " all data and analysis so far collected by AENV… *on any water well and any gas well or facility* in all sections of TWP 27-RGE 22 W4M and all sections of TWP 27-RGE 21 W4M, with copies of any related correspondence…" However, elevation data is data regarding the topography of an area and would not necessarily be understood to be "data *on* any water well," particularly in light of the fact that the majority of the access request refers to testing the *contents* of water and gas wells. While I do not disagree that the elevation of the area in which her well is located may be relevant to the Applicant's dispute regarding her well water, it is not clear from the Applicant's access request that elevation data regarding her well would be responsive.

[para 23] The Applicant also points to record 696, which is a request for analysis form. The Applicant states:

> 696 – is the laboratory analysis request sheet that was signed by AENV and the lab specifying sulphur reducing and iron bacteria analysis on my water. Yet these results remain withheld and the public body claims that bacteriological testing was not done on my well. Refer also to Part 8 in my supporting documents, letter dated March 2, 2006 [a compliance investigator] with AENV, to myself, listing these specific bacteriological tests to be done on my well. On [the] day these tests were done, [the compliance investigator] attended and discussed with me, that these would be comprehensive bacteriological tests. He insisted if they were going to do BARTS, which are not comprehensive, he would have specified so in his letter. [The compliance officer], and myself witnessed these bacteriological samples being taken, and put into AENV's storage cooler and sealed and signed by [the compliance officer] for chain of custody. These data remain withheld. These are vital data because AENV and the ARC suggested that I was to blame for the contamination in my water because I did not shock chlorinate my well. I did regularly shock chlorinate my well, and informed AENV and the ARC of this. Before, during and after testing, AENV was blaming the methane in my water on bacteria but will not release their bacteriological test results on my water or their notes stating that I did not shock chlorinate my well.

[para 24] I note that records 697 – 704 contain the same chain of custody number and lab work order number as record 696. I find that these records constitute the results of the testing requested on record 696. I also find that they were provided to the Applicant in response to her access request and were not withheld. These results do not contain bacteriological testing; however, it is clear that these records contain the results produced in response to the request in record 696 and are responsive to the Applicant's access request. While bacteriological testing may have been intended or desirable, records 697 – 704 indicate that testing other than bacteriological testing was conducted

on the samples referred to in record 696. The Public Body has provided those results to the Applicant as they are responsive to her access request. The FOIP Act does not require anything more of the Public Body in this regard.

[para 25] The Applicant also questions why she has not been provided with notes of employees of the Public Body that state she did not shock chlorinate her well. From the evidence before me, I am unable to conclude that employees made notes stating that she did not shock chlorinate her well, or were likely to have taken notes stating that she did not do so. In addition, on review of the Applicant's access request, I am not satisfied that she has requested information of this kind. The Applicant requested data and analysis of water wells and gas wells as well as copies of correspondence; it is not clear that a compliance officer's notes regarding whether an individual shock chlorinated his or her well would fall under either category.

[para 26] As the former Commissioner noted in Order 97-020, determining whether records are responsive is an important component to responding to an access request. He said:

> In Ontario Order P-880, the Office of the Information and Privacy Commissioner of Ontario had the following to say about "responsiveness":
>
> In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to the request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request.
>
> "Responsiveness" must mean anything that is reasonably related to an applicant's request for access. In determining "responsiveness", a public body is determining what information or records are relevant to the request. It follows that any information or records that do not reasonably relate to an applicant's request for access will be "non-responsive" to the applicant's request.

[para 27] "Responsiveness" is a term coined to describe records falling within the parameters of an applicant's access request. There is no duty for a Public Body to search for or grant access to information under section 6 if an applicant has not first made a request for access to that information. A Public Body is not required to provide a response in relation to all information in its custody or under its control to an Applicant; only information that reasonably relates to the access request. Essentially, a Public Body's duties to an applicant in relation to responding to an access request are not engaged until an applicant asks for the information.

[para 28] In the present case, the information the Applicant points to as missing from the records at issue is information that does not appear to be within the scope of her access request dated March 29, 2007. I also note that the notes of the FOIP Advisor establish that he took steps to clarify the scope of the Applicant's access request with her.

Neither the notes nor the Applicant's submissions indicate that the Applicant ever clarified that she was seeking elevation data or an officer's notes as part of her access request.

[para 29] Having reviewed the evidence of the Public Body, I am satisfied that all the evidentiary requirements set out in Order F2007-029 are addressed and establish that the Public Body conducted a reasonable search for responsive records. While the Public Body did not explain why it considered there to be no further responsive records, I infer from the evidence and notes of the FOIP Advisor that he reasonably believed that all possible areas had been searched and that the search of these areas was exhaustive. I infer from the evidence of the Groundwater Data Management Technologist that he believes no further responsive records exist because he checked again for responsive records once the database problems had been resolved. I therefore find that the Public Body conducted a reasonable and thorough search for responsive records. In addition, having reviewed the evidence of the parties, including the notes of the FOIP Advisor, I am satisfied that the Public Body responded to the Applicant openly, accurately, and completely. I therefore find that the Public Body met its duty to assist the Applicant under section 10 of the FOIP Act.

Issue B: Does section 17 of the Act (personal information harmful to the personal privacy of a third party) apply to the information in the records?

[para 30] The Public Body has severed personally identifying information of third parties, such as their names and addresses, from the records under section 17(1).

[para 31] Section 1(n) defines personal information under the Act:

1 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 32] Section 17 states in part:

17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy…

…

(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if…

…

(g) the personal information consists of the third party's name when
(i) it appears with other personal information about the third party, or
(ii) the disclosure of the name itself would reveal personal information about the third party…

(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny
(b) the disclosure is likely to promote public health and safety or the protection of the environment,
(c) the personal information is relevant to a fair determination of the applicant's rights,
(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,
(e) the third party will be exposed unfairly to financial or other harm,
(f) the personal information has been supplied in confidence,
(g) the personal information is likely to be inaccurate or unreliable,
(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and
(i) the personal information was originally provided by the applicant.

[para 33] Section 17 does not say that a public body is *never* allowed to disclose third party personal information. It is only when the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy that a public body must refuse to disclose the information to an applicant under section 17(1). Section 17(2) (not reproduced) establishes that disclosing certain kinds of personal information is not an unreasonable invasion of personal privacy.

[para 34] When the specific types of personal information set out in section 17(4) are involved, disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. To determine whether disclosure of personal information would be an unreasonable invasion of the personal privacy of a third party, a public body must consider and weigh all relevant circumstances under section 17(5), (unless section 17(3), which is restricted in its application) applies. It is important to note that section 17(5) is not an exhaustive list and that other relevant circumstances must be considered.

[para 35] In *University of Alberta v. Pylypiuk*, 2002 ABQB 22, the Court commented on the interpretation of what is now section 17. The Court said:

> In interpreting how these sections work together, the Commissioner noted that s. 16(4) lists a set of circumstances where disclosure of a third party's personal information is presumed to be an unreasonable invasion of a third party's personal privacy. Then, according to the Commissioner, the relevant circumstances listed in s. 16(5) and any other relevant factors, are factors that must be weighed either in favour of or against disclosure of personal information once it has been determined that the information comes within s. 16(1) and (4). In my opinion, that is a reasonable and correct interpretation of those provisions in s. 16. Once it is determined that the criteria in s. 16(4) is (sic) met, the presumption is that disclosure will be an unreasonable invasion of personal privacy, subject to the other factors to be considered in s. 16(5). The factors in s. 16(5) must then be weighed against the presumption in s. 16(4).

[para 36] The Public Body withheld the names of individuals and their addresses from the records. This information is personal information as defined by section 1(n) of the FOIP Act. Moreover, it is information falling under section 17(4)(g) of the FOIP Act, as it consists of the names of individuals in the context of other information about them. As a result, there is a presumption that disclosing the names and addresses of the third parties would be an unreasonable invasion of their personal privacy.

[para 37] The Applicant argues that the information she has requested is public information, as the names of well owners and legal land descriptions are available to the public.

[para 38] In rebuttal, the Public Body notes that the information of occupants was severed from the records, as opposed to the information of landowners or well owners. The Public Body also made the following argument:

> The Public Body agrees that certain water well ownership data is public information. The Public Body notes that some of the sources of information that the Applicant refers to are sites operated by commercial entities (for example "The Groundwater Center"). Their information and records are not subject to the same legislative regime as the Public Body. Information that may be available from sites not operated by the Public Body, may because of the requirement of the

> Public Body to comply with the Act, and specifically the sections with respect to the disclosure of personal information, not be available from the Public Body.

[para 39] Section 17 of the FOIP Act does not specifically address public availability of personal information. However, I agree with the Public Body that a public body must consider whether section 17 of the FOIP Act permits or prohibits giving access to personal information to an applicant before it may disclose personal information to an applicant, even in situations where the information may be publicly available. In Order F2009-010, I said:

> If there is no preexisting system of public access in relation to personal information, personal information is not in fact publicly available for the purposes of the FOIP Act. Consequently, considering public availability to be a factor weighing in favor of disclosure under section 17(5) in such circumstances would be improper. On the other hand, if there is a system of public access in place in relation to personal information, in addition to making an access request under the FOIP Act, then personal information is publicly available. However, when determining whether this information should be disclosed to an applicant who has made an access request under the FOIP Act, public availability would be only one factor to weigh under section 17(5) of the FOIP Act and could be outweighed by other factors weighing against disclosure.

In the present circumstances, information regarding legal land descriptions and landowners is publicly available. However, information regarding occupants and their mailing addresses, in conjunction with the results of water testing on the property they occupy, is not publicly available. Further, the Public Body severed information regarding occupants and mailing addresses, rather than information such as legal land descriptions. Consequently, the public availability of the information severed is not a factor that applies in this case.

[para 40] I find that none of the factors under section 17(5) apply or weigh in favor of disclosure in this case. I therefore find that the presumption arising under section 17(4)(g) is not rebutted and section 17(1) applies to the personal information withheld by the Public Body.

V. ORDER

[para 41] I make this Order under section 72 of the Act.

[para 42] I confirm that the Public Body met its duty to assist the Applicant.

[para 43] I confirm the decision of the Public Body to refuse access to the personal information contained in the records.

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Teresa Cunningham
Adjudicator