ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2010-002

June 29, 2010

EDMONTON POLICE SERVICE

Case File Number F4902

Office URL: www.oipc.ab.ca

Summary: The Applicant made a request for access to the Edmonton Police Service (the Public Body) to a record containing details of an incident in which she was involved in October 1983. The Public Body identified a responsive record and provided it to the Applicant with portions of an address it contained redacted under section 17(1) (information harmful to a third party's personal privacy).

The Adjudicator found that the address information was not personal information under the FOIP Act, as it was not about an identifiable individual other than the Applicant. She therefore found that section 17(1) could not be applied to the information withheld by the Public Body.

The Adjudicator ordered the Public Body to disclose the severed address information to the Applicant.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 2, 7, 17, 71, 72; **ON:** *Freedom of Information and Protection of Privacy Act* R.S.O. 1990, c. F-31, s. 2

Authorities Cited: AB: Orders F2004-025, F2006-006, F2006-027 **ON:** Orders MO-1323; **ON:** PO-2191, MO-1323

Cases Cited: *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner*, [2001] O.J. No. 4987; *Ontario (Attorney General) v. Pascoe*, [2002] O.J. 4300; *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342k *University of Alberta v. Pylypiuk*, 2002 ABQB 22

I. BACKGROUND

[para 1] On March 10, 2009, the Applicant made a request for access to the following information from the Edmonton Police Service (the Public Body):

> I am looking for anything that can be found that relates to the incident of the police being called to my former home at [redacted]. The police first attended at the home of the neighbors who called the police and then the police attended at my home. The police drove from the home of the people who called them to my home and parked in front of [redacted] where the neighbors recall seeing them.

[para 2] The Public Body located a case file from 1983 as responsive to the Applicant's access request. The Public Body severed portions of the address of the location from which the police were contacted under section 17(1).

[para 3] The Applicant requested review by the Commissioner of the Public Body's decision to sever the address information under section 17(1). The Commissioner authorized mediation to resolve the dispute. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

[para 4] The parties exchanged initial and rebuttal submissions. In her rebuttal submissions, the Applicant indicated that she knew the details of the information severed by the Public Body. In its rebuttal submissions, the Public Body argued that I ought not to exercise my discretion to hear this matter, as it takes the position that the issue for the inquiry is moot. I will address the issue of mootness at the conclusion of the order.

II. RECORDS AT ISSUE

[para 5] Address information in a "General Occurrence Report" prepared by a member of the Public Body in 1983 is at issue.

III. ISSUES

Issue A: Does section 17(1) of the Act (information harmful to a third party's personal privacy) apply to the information severed by the Public Body from the records?

IV. DISCUSSION OF ISSUES

Issue A: Does section 17(1) of the Act (information harmful to a third party's personal privacy) apply to the information severed by the Public Body from the records?

[para 6] Section 1(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. The definition is not exhaustive and therefore includes other kinds of recorded information about identifiable individuals that are not enumerated in section 1(n) of the FOIP Act.

[para 7] Section 17(1) states:

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

Section 17(1) applies to the personal information of a third party. Therefore, the first question is whether the information at issue is the personal information of a third party. As section 1(r) of the FOIP Act defines "third party" as excluding "an applicant", section 17(1) cannot be applied to withhold the personal information of an applicant.

[para 8] The Public Body argues that the Applicant bears the burden of proof in this inquiry. It states:

> Generally, when a Public Body's decision to deny access to a record or a portion thereof results in an Inquiry, s. 71(1) of FOIPPA requires that the Public Body demonstrate that the Applicant has no right to access the record in question.
>
> However, if the record to which the Applicant has been denied access contains the personal information of a third party, then s. 71(2) of FOIPPA shifts the burden to the Applicant to prove that the disclosure of this information would not result in an unreasonable invasion of the third party's privacy.
>
> Accordingly, once the EPS establishes that the Applicant is not entitled to access the record because it contains the personal information of a third party, then the Applicant has the onus of demonstrating that the third party's privacy would not be unreasonably invaded were the information to be disclosed.

[para 9] I agree with the Public Body that while section 71(2) of the FOIP Act establishes that an applicant has the burden of proving that it would not be an unreasonable invasion of a third party's personal privacy if the applicant is refused access to a record containing the personal information of a third party, a public body bears the burden of establishing that a record contains personal information.

[para 10] In *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner*, [2001] O.J. No. 4987, the Ontario Divisional Court held that the test for determining whether information is personal for the purposes of section 2 of Ontario's *Freedom of Information and Protection of Privacy Act* is whether there is a reasonable expectation that the individual can be identified from the information. The Court said:

> While the records in question do not name the physician, it is common ground that the records may themselves, or in combination with other information, identify the individual even if he or she is not specifically named. The test is accepted as follows:
>
> > If there is a reasonable expectation that the individual can be identified from the information, then such information qualifies under subsection 2(1) as personal information…
>
> The test then for whether a record can give personal information asks if there is a reasonable expectation that, when the information in it is combined with information from sources otherwise available, the individual can be identified. A person is also identifiable from a record where he or she could be identified by those familiar with the particular circumstances or events contained in the record.

The Ontario Court of Appeal dismissed the Attorney General of Ontario's appeal of this decision in *Ontario (Attorney General) v. Pascoe* [2002] O.J. No. 4300. The Ontario Court of Appeal noted that a public body must establish on the balance of probabilities that the information it seeks to sever is personal information.

[para 11] Like the definition of "personal information" in Alberta's FOIP Act, section 2(1) of Ontario's *Freedom of Information and Protection of Privacy Act* is not exhaustive and defines "personal information" as "recorded information about an identifiable individual".

[para 12] As noted above, the Public Body withheld a portion of an address from the record at issue. I will therefore determine whether this information is the personal information of an identifiable individual or individuals.

[para 13] The Public Body argues the information severed from the records is the personal information of third parties. It argues that the partial address information severed from the records is the personal information of an identifiable individual:

> The severed portion of the Responsive Record contains part of an individual's home address. Thus the redacted portion of the Responsive Record fits squarely within the definition of "personal information".
>
> Furthermore, it bears emphasizing that if the severed information is disclosed, the Applicant intends to use it to locate the individual who allegedly called the police the evening the Responsive Record was created. Her intention in this regard clearly demonstrates how an individual's home address is information that is inextricably linked to that individual, and as such, qualifies as the personal information of a third party.

[para 14] The Applicant, in her rebuttal submissions, argues:

> Order F2004-025 specifically states in paragraph 21, "I find that some other portions of the information severed by the Public Body [are] not third party personal information such as certain locations where incidents occurred."

The Applicant takes the position that the reasoning in Order F2004-025 applies in this case, as the address information severed from the record is the address of an incident.

[para 15] While the Public Body states that the address information it severed from the record at issue is an individual's home address, the question it must answer is whether the address, when combined with other available sources of information, could be reasonably expected to serve to identify an individual.

[para 16] The record refers to a resident, whom the Applicant asked to call police, but there is no reference to the name of the individual, or any other personally identifying information about the individual in the record. Further, as the Applicant notes, there is no information to indicate the relationship between the individual described as "the resident" in the report, and the address. The report does not indicate whether the resident rented, owned, or was staying temporarily at the address in question.

[para 17] I note that in Order PO-2191, an order of the Office of the Information and Privacy Commissioner of Ontario, the Adjudicator determined that address information is not personal information if it not referable to an identifiable individual. The Adjudicator said:

> The first is the specific house number on an identified street (the address number). The street name has been disclosed to the appellant, and it is only the address number which remains at issue in this appeal.

> It is clear from both the Ministry's representations and the records that the address number referred to in the records is included in the records simply as a reference point for the purpose of the investigation into the incident. The incident is an accident involving the appellant's vehicle, and the police were involved in investigating the accident. For the purpose of identifying the location of the accident, an address number was used; however, there is no indication from either the records or the representations that the address number is referable to an identifiable individual, nor is there any suggestion that any individual at that address was in any way involved in the incident.
>
> As set out above, "personal information" is defined in the *Act* as recorded information about an identifiable individual, including,
>
> (d) the address … of the individual,
>
> In the circumstances of this appeal, the street number (address) is not referable to any individual. Whether any individual lived at that address at the time of the incident, or currently lives there, or whether it is or was used as a business address, has no relevance to this appeal. The street number is simply the reference point used by the Police in their investigation. Indeed, one of the references to the street number in the records refers to the location of the incident as "east of [the identified number]'. In my view, the street number in this appeal is not recorded information about an identifiable individual, and does not constitute the personal information of an identifiable individual for the purpose of the *Act*.

[para 18] I agree with the reasoning of the Adjudicator in Order PO-2191 that an address must be referable to an identifiable individual to be personal information. Similarly, the contents of the record at issue in the case before me indicate that the address is included in the record to explain where police met with the Applicant. The records at issue indicate that there was a resident at the address; however, no information is contained in the record to render the resident identifiable.

[para 19] I do not accept the Public Body's argument that the intention it attributes to the Applicant transforms partial address information into the personal information of an identifiable individual. Even assuming that the Applicant has the intention the Public Body attributes to her, i.e. that the Applicant would seek to learn the identity of the individual who was there in October 1983 if the complete address were disclosed to her, it has not provided any evidence to lead me to believe that disclosing the address could reasonably be expected to enable her to do so.

[para 20] I also note that the Public Body's argument in support of its view that section 17(5)(c) does not apply to the address information undercuts its argument that the address information is the personal information of the resident referred to in the record. It argues:

> While it is possible that the individual who occupied the address in question in 1983 was indeed the individual who contacted the police on the night in question, it is far from certain, or even probable, that that individual is: still alive, recalls the incident with any degree of clarity or reliability, or can be located at all given the amount of time that has passed and the likelihood that the occupant of the address has changed over the nearly three decades since the incident occurred.

While I find it unnecessary for the purposes of this inquiry to consider whether section 17(5)(c) is a factor weighing in favor of disclosure, I agree with the Public Body that it would be unlikely that disclosing the address information it severed would enable the Applicant to identify the resident who was there at the date of the incident.

[para 21] I find that if the complete address of the residence attended by police in October of 1983 were disclosed to the Applicant, it could not reasonably be expected that this disclosure would serve to identify the individual described as "the resident" in the General Occurrence report. As a result, I find that the address information severed by the Public Body is not the address of an "identifiable individual" for the purposes of section 1(n)(i) of the FOIP Act. Therefore, I find that section 17(1) cannot be applied to this information.

[para 22] If I am wrong that the address referred to in the Occurrence Report is not personal information, I will consider whether section 17(1) would apply to this information if it were the personal information of an identifiable individual.

[para 23] 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…*
>
> …
> *(b) the personal information is an identifiable part of a law enforcement record, except to the extent that the disclosure is necessary to dispose of the law enforcement matter or to continue an investigation…*
> …
> *(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…

…

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

[para 24] 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 25] 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). Section 17(5) is not an exhaustive list and therefore, other relevant circumstances must be considered.

[para 26] 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 27] The Public Body argues that sections 17(4)(b) and (g) apply to the address information.

[para 28] In Order F2006-027, the Commissioner considered the meaning of "law enforcement record" for the purposes of section 17(4)(b). He said:

> The Public Body says the Section 17 Records contain personal information that is an identifiable part of a law enforcement record under section 17(4)(b) of FOIP. If so, the presumption that disclosure would be an unreasonable invasion of a third party's personal privacy would apply to the personal information. The definition of "law enforcement" in FOIP is:
>
> 1(h) "law enforcement" means

> (i) policing, including criminal intelligence operations,
>
> (ii) a police, security or administrative investigation, including the complaint giving rise to the investigation, that leads or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the investigation or by another body to which the results of the investigation are referred, or
>
> (iii) proceedings that lead or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the proceedings or by another body to which the results of the proceedings are referred.

> Orders issued from the Office under FOIP say that "law enforcement" includes activities of a public body that are directed towards investigation and enforcing compliance with standards and duties imposed by a statute or regulation (Order 96-006 (page 5)). "Law enforcement" exists where the legislation imposes sanctions and penalties for non-compliance and for breach of the applicable law (Order F2002-024 (para 31)). "Investigation" means "to follow up step by step by patient inquiry or observation; to trace or track; to examine and inquire into with care and accuracy; to find out by careful inquisition; examination; the taking of evidence; a legal inquiry" (Order 96-019 (para 15)).

As the address information was recorded as part of a police investigation into a complaint, I find that this information would fall under section 17(4)(b) if it were personal information.

[para 29] I find that section 17(4)(g) would not apply, as the address information does not consist of a name and is not associated with a name of an individual within the terms of this provision.

[para 30] As discussed above, section 17(4)(b) presumes that disclosing the personal information it contemplates would be an unreasonable invasion of a third party's personal privacy. I will therefore consider whether any relevant factors outweigh this presumption as required by section 17(5).

[para 31] In Order F2006-006, the Adjudicator noted that section 17(1) is only to be applied if it would be an unreasonable invasion of a third party's personal privacy to disclose his or her personal information. He also noted that a Public Body must consider the context and the source of information when determining whether disclosing personal information is an unreasonable invasion of personal privacy under section 17(5). He said:

> In reviewing the records and severing information, it appears that the Public Body paid more attention to the form or type of information rather than the actual content or the context in which it appeared. The Public Body appears to have gone through the file and simply severed the names of all third parties, as well as pronouns referring to them, without considering whether disclosure was actually excepted under the Act on the basis of an unreasonable invasion of their personal privacy. At other times, the Public Body disclosed information that, in my view, would identify a third party or improperly convey his or her personal information**,** even though the words did not contain a name or other obvious clue. I remind the Public Body that it is often the context of disclosure that must

> be considered. A failure to consider context results in severing that is both over- and under-inclusive.

[para 32] I agree with the Adjudicator in Order F2006-006 that the context in which personal information appears and its source can be relevant to making a determination as to whether it would be an unreasonable invasion of personal privacy to disclose personal information. It is clear from the record at issue that the address information severed by the Public Body is known to the Applicant as she was at this location when the police responded to her complaint.

[para 33] The address appears twice in the record. The first time to indicate where the police met with the Applicant, and the second time in a statement attributed to the Applicant. Context therefore indicates that the Applicant either knows the information contained in the report or knew it at one time. Further, context indicates that it is likely that the Applicant was the source of the information recorded by the officers who prepared the report, given that the address appears in a statement attributed to her.

[para 34] In Order MO-1323, a decision of the Office of the Information and Privacy Commissioner of Ontario, the Adjudicator noted that public bodies should not deny access to an applicant for the applicant's own personal information if to do so would result in an absurd result that would undermine a primary purpose of the freedom of information and protection of privacy legislation. She said:

> In Order M-444, former Adjudicator John Higgins found that non-disclosure of information which the appellant in that case provided to the Metropolitan Toronto Police in the first place would contradict one of the primary purposes of the Act, which is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure. This approach has been applied in a number of subsequent orders and has been extended to include not only information which the appellant provided, but information which was obtained in the appellant's presence or of which the appellant is clearly aware (Orders M-451, M-613, MO-1196, P-1414, P-1457 and PO-1679, among others).
> …
> In my view, it is the "higher" right of an individual to obtain his or her own personal information that underlies the reasoning in Order M-444 which related to information actually supplied by the requester. Subsequent orders have expanded on the circumstances in which an absurdity may be found, for example, in a case where a requester was present while a statement was given by another individual to the Police (Order P-1414) or where information on a record would clearly be known to the individual, such as where the requester already had a copy of the record (Order PO-1679) or where the requester was an intended recipient of the record (PO-1708).
>
> In all cases, the "absurd result" has been applied only where the record contains the appellant's personal information. In these cases, it is the contradiction of this higher right of access which results from the application of an exemption to the information…

[para 35] I agree with this reasoning. In my view, the fact that information is the personal information of an applicant, even though it may also be the personal information of another third party, is a relevant factor that must be weighed under section 17(5) when deciding whether it would be an unreasonable invasion of personal privacy to disclose the

information. I say this because a purpose of the FOIP Act, as set out in section 2(c) is to enable individuals to obtain their own personal information in the custody or control of public bodies. Further, section 17(1) does not operate so as to authorize or require a public body to withhold an applicant's own personal information. Consequently, the competing interests of access to personal information and personal privacy must be balanced in a way that that the right to privacy does not defeat another purpose of the FOIP Act unnecessarily.

[para 36] As the Adjudicator noted in Order MO-1323, an example of a situations in where it would be absurd to withhold the personal information of an applicant on the basis that it is the personal information of a third party is where an applicant is already aware of the information a record contains. Such circumstances will almost always outweigh a presumption that disclosing information would be an unreasonable invasion of a third party's personal privacy.

[para 37] In the present case, all the personal information severed by the Public Body is the personal information of the Applicant and the record itself reveals that she is aware of the information. The severed address information is the Applicant's personal information because it is the location where the police met with her when they responded to her complaint. It is therefore information about her as an identifiable individual.

[para 38] I find that withholding the address information from the Applicant would result in the absurd consequence that the Public Body has withheld her personal information in a situation when the information is obviously known to her. I make this finding not only because the Applicant has established through her submissions that she knows the severed information, but also because the information in the record on its own supports a finding that she is aware of the information it contains. In my view, this is a factor that weighs strongly in favor of disclosure under section 17(5).

[para 39] In weighing whether it would be an unreasonable invasion of a third party's personal privacy to disclose the address information at issue, I find that the factors weighing in favor of disclosure, i.e., that the information is the Applicant's personal information, that she knows the information, and that withholding the information would therefore defeat a purpose of the FOIP Act unnecessarily, would outweigh the presumption raised by section 17(4)(b) in relation to the resident's address, which appears to have been included in the police report only as a point of reference. I therefore find that section 17(1) would not apply to the address information even if I had found it to be the personal information of a third party.

[para 40] The Public Body argues that the issue of whether section 17(1) applies to the information it withheld from the records is moot because the Applicant is already aware of the personal information it withheld under section 17(1).

[para 41] In *Borowski v. Canada (Attorney General),* [1989] 1 S.C.R. 342 Sopinka J., speaking for the Court explained the doctrine of mootness in the following way:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot.

The Court in that case found that the appellant's appeal was moot as the legislation he sought to challenge on constitutional grounds had already been struck down in a previous case.

[para 42] Applying the principles in *Borowski*, I find that the controversy between the parties remains unresolved. The fact that Applicant is aware of the information does not negate her right to request her personal information or render her request moot.

[para 43] In most cases, applicants who make access requests for their personal information will have knowledge of facts about themselves. For example, knowledge of one's own name and date of birth does not negate a public body's duty to provide this information subject to limited and specific exceptions or render this issue moot. The purpose of the right to gain access to personal information in the custody or control of a public body is not necessarily to enable applicants to learn information about themselves, although disclosure may sometimes have this effect, but to enable them to determine the information about themselves that a public body has in its custody or in its control, and in what context.

[para 44] In the case before me, the Applicant requested a record containing her personal information from the Public Body under section 7 of the FOIP Act. As noted above, section 2(c) of the FOIP Act establishes that a purpose of the Act is to give applicants a right of access to their own personal information. The Public Body responded to the Applicant as required by the FOIP Act, but severed the address information under section 17(1) of the FOIP Act. The Applicant requested review of a portion of that decision. The Public Body continues to withhold the address information under section 17(1). While the Applicant acknowledges that she is aware of the information, and the Public Body has, in its submissions, confirmed that she is correct, the Public Body has not provided a copy of the record to the Applicant containing the complete address information. Consequently, the Applicant's right of access to her personal information in the custody and control of the Public Body remains in issue.

[para 45] The purpose of this inquiry is to determine whether the FOIP Act requires the Public Body to withhold or disclose the address information. The position of the Applicant is that the FOIP Act imposes a duty on the Public Body to provide her with the address information, while the position of the Public Body is that the FOIP Act imposes a duty on it to withhold the address information. The order I make under section 72 of the

FOIP Act will therefore have the effect of disposing of a live, unresolved issue between the parties. As a result, I find that the issue is not moot.

V. ORDER

[para 46] I make this Order under section 72 of the Act.

[para 47] I order the Public Body to disclose the severed address information to the Applicant.

[para 48] I further order the Public Body to notify me, in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

_____
Teresa Cunningham
Adjudicator