

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2010-019

February 8, 2011

CITY OF EDMONTON

Case File Number F5194

Office URL: <http://www.oipc.ab.ca>

Summary: The Applicant made an access request to the City of Edmonton (the “Public Body”) under the *Freedom of Information and Protection of Privacy Act* (the “FOIP Act”) for information regarding the amount paid, since January 1, 1999, to settle each lawsuit against the Edmonton Police Service (“EPS”), the names of the claimants and an explanation for the amounts paid. The Applicant requested only that information that related to claims where the claimant had entered into a non-disclosure agreement. In response to the access request, the Public Body provided the Applicant with a severed copy of records. The Applicant requested a review of the Public Body’s decision.

The Adjudicator found section 17 (disclosure harmful to personal privacy) applied to the severed information. The Adjudicator ordered the Public Body not to disclose this information to the Applicant.

Statutes Cited: *Administrative Procedures and Jurisdiction Act*, R.S.A. 2000, c. A-3, ss. 11, 16; *Canadian Charter of Rights and Freedoms*, s. 2(b), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11; *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c.F-25, ss. 1(n)(i)-(ix), 17, 17(1), 17(4), 17(4)(g), 17(4)(g)(i), 17(4)(g)(ii), 17(5), 17(5)(a), 27, 72

Orders Cited: AB: FOIP Orders: 97-002, F2005-016, F2009-010

Cases Cited: *Calgary Police Service v. Alberta (Information and Privacy Commissioner)*, 2010 ABQB 82, *University of Alberta v. Pylypiuk* (2002), A.J. No. 445 (ABQB)

I. BACKGROUND

[para 1] On September 28, 2009, the Applicant made an access request to the Public Body under the FOIP Act. The Applicant requested information regarding the amount that was paid, since January 1, 1999, to settle lawsuits against the EPS. In that request, the Applicant requested information that related to both motor vehicle and non-motor vehicle accidents. As part of that request, the Applicant requested the name of the claimants and an explanation for the amounts paid. However, the Applicant limited his request to only that information that related to claims where the claimant had entered into a non-disclosure agreement.

[para 2] On October 26, 2009, the Public Body wrote to the Applicant confirming that the Applicant had verbally agreed to revise that portion of the access request that related to motor vehicle accident claims. The Public Body confirmed that the Applicant was now requesting information regarding motor vehicle accident claims whether or not the claims were subject to non-disclosure agreements.

[para 3] In that October 26, 2009 letter, the Public Body also extended the time to respond to the Applicant's request by 30 days. The Public Body stated that it needed the extension in order to respond to that portion of the request that related to non-motor vehicle claims. The Public Body stated that in order to respond to that part of the access request, it would need the names of the claimants. The Public Body stated that it would request this information from the EPS.

[para 4] On November 30, 2009, the Public Body wrote to the Applicant informing the Applicant that the EPS had not provided it with the names of claimants for non-motor vehicle accident settlements. As such, the Public Body informed the Applicant that it could only provide the Applicant with a copy of the records that related to the motor vehicle accident claims. The Public Body provided the Applicant with a copy of these records, severing the names of the claimants and other third party information.

[para 5] On December 9, 2009, the Applicant requested a review of the Public Body's decision. Mediation was authorized but did not resolve the issues.

[para 6] On March 22, 2010, the Applicant requested that the Commissioner conduct an inquiry into Public Body's application of section 17 to the records at issue.

[para 7] During the inquiry, the Public Body and the Applicant each submitted an initial and a rebuttal submission.

II. INFORMATION AT ISSUE

[para 8] The records consist of information related to EPS motor vehicle accident settlements. It includes records regarding both those settlements that were subject to non-disclosure agreements and those that were not subject to those agreements. The information at issue within the records consist of the names of third party claimants and other individuals involved in the motor vehicle accident claims, portions of third party addresses and limited descriptive information about the third parties.

III. ISSUES

[para 9] There was one issue outlined in the inquiry notice: Does section 17 of the FOIP Act (disclosure harmful to personal privacy) apply to the records/information?

[para 10] In the Applicant's request for review, the Applicant made "a complaint against the Edmonton Police Service", for failing to provide the Public Body with a list of claimants for non-motor vehicle settlements that were subject to non-disclosure agreements. The Applicant did not, however, identify this matter as an issue in its request for inquiry, nor was this matter identified as an issue within the inquiry notice. This matter is, therefore, not at issue in this inquiry.

[para 11] In the Applicant's submissions, the Applicant also alleges that the Public Body did not provide it with all of the information responsive to its request. The Applicant stated the Public Body did not provide the Applicant with information about whether the claims involved a high speed chase, whether the claims involved a breach of EPS policy or the law, whether an officer was responsible for more than one claim or whether the claimants were suspects in a law enforcement investigation. The Applicant also stated that the Public Body did not provide it with copies of pleadings that were filed in regard to these claims. In essence, the Applicant alleges that the Public Body has custody and/or control of additional records responsive to its access request and that the Public Body did not conduct an adequate search for these records. The Applicant did not, however, identify the adequacy of the Public Body's search as an issue in its request for inquiry, nor was this matter identified as an issue within the inquiry notice. As such, this matter is also not properly at issue in this inquiry and I will not make a determination in that regard.

[para 12] Lastly, in the Applicant's submissions, the Applicant suggested that section 2(b) of the *Canadian Charter of Rights and Freedoms* ("Charter") may guarantee access to the records at issue. After a review of these arguments, I find that I do not have the jurisdiction to consider whether the *Charter* guarantees the Applicant this right. Section 11 of the *Administrative Procedures and Jurisdiction Act*, R.S.A. 2000, c. A-3 states that a decision maker will only have the jurisdiction to consider a question of constitutional law if a regulation under section 16 of the that Act confers the jurisdiction on that decision maker:

11 Notwithstanding any other enactment, a decision maker has no jurisdiction to determine a question of constitutional law unless a regulation made under section 16 has conferred jurisdiction on that decision maker to do so.

[para 13] The Information and Privacy Commissioner has not been given the jurisdiction to address this issue under the *Administrative Procedures and Jurisdiction Act*. As such, I do not, as his delegate, have the jurisdiction to address whether the *Charter* guarantees this right.

IV. DISCUSSION: Does section 17(1) of the FOIP Act (disclosure harmful to personal privacy) apply to the records/information?

[para 14] The Public Body applied section 17 to the records.

[para 15] Section 17 is a mandatory (“must”) section of the FOIP Act. If section 17 applies, a public body must refuse to disclose the information. There is no discretion involved. There are two criteria that must be fulfilled under section 17:

- (a) the information must be personal information of a third party; and
- (b) the disclosure of the personal information must be an unreasonable invasion of a third party’s personal privacy.

1. Is the information the personal information of a third party?

[para 16] Personal information is defined under section 1(n) of the FOIP Act. Section 1(n) reads:

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;

[para 17] I find that the information severed from the records pursuant to section 17 consists of names, addresses and other recorded information about third parties. I find that this information is the personal information of third parties.

2. Would the disclosure of the personal information be an unreasonable invasion of a third party's personal privacy?

[para 18] Section 17(1) reads:

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(4)

[para 19] Section 17(4) lists a number of circumstances where a disclosure of personal information is presumed to be an unreasonable invasion of third party's personal privacy. I find that section 17(4)(g) is relevant in this inquiry.

[para 20] Sections 17(4)(g)(i) and (ii) read:

17(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

...

(g) the personal information consists of the third party's name when

(i) it appears with other personal information about the third party, or

(ii) the disclosure of the name itself would reveal personal information about the third party,

[para 21] I find that the third party personal information consists of third parties' names along with other personal information about those individuals. I find that section 17(4)(g)(i) applies to that information. In addition, I find that the disclosure of the third party names in the records would also reveal that those individuals were involved in a claim against the EPS. This is also the personal information of those third parties. I find that section 17(4)(g)(ii) applies to that information. I find that a presumption arises under both section 17(4)(g)(i) and section 17(4)(g)(ii) that a disclosure of this information would be an unreasonable invasion of privacy of those third parties.

Section 17(5)

[para 22] In determining whether the disclosure of personal information would constitute an unreasonable invasion of a third party's personal privacy under section 17(1), a public body must consider the relevant circumstances under section 17(5).

Section 17(5)(a) – Public Scrutiny

[para 23] Section 17(5)(a) reads:

17(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all of 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,

[para 24] If section 17(5)(a) is a relevant circumstance, it weighs in favour of disclosing a third party's personal information.

[para 25] In Order 97-002, the former Commissioner held that in order for section 17(5)(a) to apply, there must be evidence that the activities of the Government of Alberta or a public body have been called into question, which necessitates the disclosure of personal information. The former Commissioner also said the following:

- (i) It is not sufficient for one person to decide that public scrutiny is necessary;
- (ii) The applicant's concerns must be about the actions of more than one person within the public body; and
- (iii) If the public body had previously disclosed a substantial amount of information, the release of further personal information would not likely be desirable. This is particularly so if the public body had already investigated the matter.

[para 26] However, it is not necessary to meet all of the three criteria in order to establish that there is a need for public scrutiny. The overriding consideration under

section 17(5)(a) is whether the activities of the Government of Alberta or a public body have been called into question which necessitates a disclosure of personal information. In *University of Alberta v. Pylypiuk* (2002), A.J. No. 445 (ABQB), Justice Gallant stated that the reference to public scrutiny of government or public body activities under section 17(5)(a) requires some public component, such as public accountability, public interest and public fairness (Order F2005-016).

[para 27] The Applicant states that section 17(5)(a) applies to the information at issue. In its submission, the Applicant referred to various decisions including the Alberta Court of Queen's Bench decision of *Calgary Police Service v. Alberta (Information and Privacy Commissioner)*, 2010 ABQB 82.

[para 28] I find that section 17(5)(a) does not apply to the information at issue. After a review of all of the submissions of the parties I find that there is insufficient evidence that the activities of the Government of Alberta or a public body have been called into question which necessitates a disclosure of the names and other personal information of the third parties. There is insufficient evidence before me that a public body has acted in a manner that would fulfill the requirements of section 17(5)(a). There is insufficient evidence that a public body acted inappropriately or engaged in a type of misconduct or other behavior that would suggest that public scrutiny was necessary.

[para 29] I also find that there is insufficient evidence that a public body acted in a manner so as to engage the principles of public accountability, public interest or public fairness. Although the third party claims were presumably paid with public funds this, in and of itself, is not sufficient to fulfill section 17(5)(a). The majority of activities of a public body are funded by public funds. If I were to accept this argument, all third party information held by a public body in relation to any of these programs would fall within section 17(5)(a). I do not find that this is a proper interpretation of this section. While the use of public funds could, in combination with other factors, be relevant to section 17(5)(a), I do not find that its use of public funds in this case is sufficient to engage this section. This is particularly so given that the Public Body has already disclosed a substantial amount of information regarding the third party claims including the settlement amount for each claim as well as other information describing the claim.

[para 30] In its submission, the Applicant stated that as part of the civil litigation process, the EPS requires a third party claimant to sign a non-disclosure agreement. The Applicant further alleges that while these third parties generally do not ask for a non-disclosure agreement, they must sign these agreements in order to settle their case. The Applicant states this factor suggests that public scrutiny is warranted under section 17(5)(a).

[para 31] There is insufficient evidence before me as to whether either the EPS or any of the third parties requested a non-disclosure agreement. Regardless, I find that the third parties identified in the records have a right to negotiate and settle their claims as part of the civil litigation process. Whether a third party ultimately agrees to sign a non-

disclosure agreement is that third party's decision and is part of that process. I do not find that this is a relevant factor under section 17(5)(a).

Public Availability of the Information

[para 32] The Applicant states the personal information at issue is publicly available. The Applicant states the third parties publicly disclosed their personal information when they commenced their litigation against the EPS. The Applicant states that by disclosing their names to the public in this manner they have shown that they are not concerned about their privacy interest. The Applicant states that this is a relevant circumstance that weighs in favour of disclosure.

[para 33] In order for personal information to be considered publicly available under the FOIP Act, there must be a preexisting system of public access in place, in relation to the personal information, which is in addition to the FOIP Act (Order F2009-010). If such a system exists, the public availability of personal information could be considered a relevant circumstance which weighs in favour of the disclosure of the personal information.

[para 34] After a review of all of the submissions of the parties I find that there is insufficient evidence to conclude that the information at issue is publicly available. In coming to this conclusion, I took into account that there is insufficient evidence before me regarding whether the third parties settled their claims before or after filing a pleading, such as a statement of claim, with the courts. If a third party settled his or her claim prior to filing with the courts, his or her personal information would not be publicly available through the courts.

[para 35] In addition, even if a third party settled his or her claim after filing a pleading, generally, the pleading would not contain the same information that is found within the records. Although a pleading would contain the name of the third party and basis for the action, a pleading would generally not contain the amount ultimately agreed to as part of the settlement. Conversely, the disclosure of the third parties' names within the records at issue would reveal not only the third parties' names but would also correlate with corresponding settlement amounts, thereby disclosing the amount of each settlement. Given the foregoing, I find that the information that is publicly available in pleadings would differ from the information that would be revealed if the third parties' names within the records are disclosed. I note that although a document such as a settlement agreement could, arguably, be filed with the courts, there is no evidence that this was done in regard to the claims identified in the records.

[para 36] Lastly, I note that even if I had found that the information at issue was, in some limited circumstances, available through the courts, I question whether this circumstance would be sufficient to overcome the presumption against disclosure under section 17(4)(g)(i) and 17(4)(g)(ii).

3. Conclusion under section 17

[para 37] I find that section 17 applies to the personal information at issue. I have found that the disclosure of the personal information at issue is presumed to be an unreasonable invasion of the third parties' personal privacy pursuant to section 17(4)(g)(i) and 17(4)(g)(ii) and I conclude that there is insufficient evidence before me that relevant circumstances weighing in favour of disclosure under section 17(5) apply to the information. I find that the disclosure of the personal information at issue would be an unreasonable invasion of personal privacy under section 17 and must not be disclosed.

4. Section 27

[para 38] I also note that in the Public Body's initial submission, the Public Body suggested that the information at issue may be subject to a type of "blanket privilege". Section 27 of the FOIP Act addresses whether a public body may withhold information subject to a legal privilege. Section 27 was not identified as an issue in the inquiry notice. An issue therefore arises as to whether the Public Body should be permitted to raise this exception at the inquiry stage. However, as I have found that section 17 of the FOIP Act applies to the information at issue, I will not make a decision as to whether to permit the Public Body to raise section 27 at this stage of the inquiry.

V. ORDER

[para 39] I make the following order under section 72 of the FOIP Act.

[para 40] I find that section 17 applies to the information withheld from the records at issue. Disclosure of this information would be an unreasonable invasion of personal privacy as provided by section 17 and must not be disclosed. As such, I order the Public Body not to disclose this information to the Applicant.

Lisa McAmmond
Adjudicator