

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2012-13

June 22, 2012

UNIVERSITY OF CALGARY

Case File Number F5777

Office URL: www.oipc.ab.ca

Summary: The Applicant requested records located in the sexual harassment office of the University of Calgary (the Public Body) concerning a third party.

The Public Body informed the Applicant that it had identified responsive records in the sexual harassment office regarding a complaint made about him but that it was withholding these records under section 17 (disclosure harmful to personal privacy) and 18 (disclosure harmful to individual or public safety).

The Applicant requested review by the Commissioner of the Public Body's response to him.

The Adjudicator found that the Public Body had met its duties to the Applicant under section 12 (contents of a response) and that disclosure of the information in the records at issue would be an unreasonable invasion of the personal privacy of the third party. She confirmed the decision of the Public Body to withhold the records.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 12, 17, 18, 72;

Authorities Cited: **AB:** Orders 99-028, F2007-013, F2008-012,

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

I. BACKGROUND

[para 1] On April 4, 2011, the Applicant requested access from the Public Body to copies of all records concerning a third party held by the sexual harassment office, and to records held by the human resources department connected to the Applicant in any way.

[para 2] On May 13, 2011, the Public Body wrote the Applicant and stated that it would provide him with his human resources file, but would not grant access “to records pertaining to a sexual harassment complaint filed in connection with you”.

[para 3] The Applicant requested review by the Commissioner of the Public Body’s decision to withhold information under sections 17 and 18. He also requested review of the Public Body’s compliance with section 12 of the FOIP Act when it responded to him. The Commissioner authorized mediation to resolve the dispute. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

[para 4] The Public Body and the Applicant exchanged submissions for the inquiry. The third party whose personal information is contained in the records was identified as an affected party and invited to participate in the inquiry. The third party provided submissions for the inquiry which I accepted *in camera*.

RECORDS AT ISSUE

[para 5] The records at issue are those the Public Body has identified as the contents of “the file from the sexual harassment office”.

III. ISSUES

Issue A: Did the Public Body comply with section 12 of the Act (contents of a response)?

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

Issue C: Does section 18 of the Act (disclosure harmful to individual or public safety) apply to the information in the records?

IV. DISCUSSION OF ISSUES

Issue A: Did the Public Body comply with section 12 of the Act (contents of a response)?

[para 6] Section 12 establishes the kinds of information a public body should, and should not, include in a response. It states:

12(1) In a response 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,*
 - (ii) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and*
 - (iii) that the applicant may ask for a review of that decision by the Commissioner or an adjudicator, as the case may be.*

(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 7] The Applicant argues that the Public Body failed to provide a description of the records to which he has been denied access, and, for that reason, has failed in its duty to him.

[para 8] The Public Body relies on Order F2007-013, a decision of former Commissioner Work, which states:

Section 12 requires a public body to provide the following (see Order F2004-026):

- (i) A description of the responsive records - The public body must describe or classify the responsive records without revealing information that is to be or may be excepted. At a minimum, a public body should disclose the number of "records", or in other words the number of documents, withheld and the number of pages within each document.
- (ii) The statutory exception applied - A public body must provide the statutory exception for withholding the pages of records and tie those exceptions to the particular records. However, a public body does not, in every case, have to provide reasons in addition to a statutory exception. There are circumstances in which section 12(c)(i) may be fulfilled by naming the section number or describing the provision, as nothing more could be said without revealing information that may be excepted.

In this inquiry, the Public Body's response to the Applicant identified the statutory exceptions which were applied and clearly tied those exceptions to the pages that were withheld. Although the Public Body did not provide further reasons for withholding these records, I accept that nothing more could be said without revealing information that was excepted.

[para 9] The Public Body states that while it did not provide the number of pages withheld in its first response to the Applicant, it did so in correspondence dated July 22, 2011. The Public Body did not provide a copy of this letter for my review so I am unable to state on the basis of the evidence whether it did or did not do so. However, as the Applicant does not challenge the Public Body's statement that it provided the number of records to which it was applying sections 17 and 18 on July 22, 2011, I will accept that it did so. Moreover, I note that the Public Body's submissions establish that 40 records are at issue.

[para 10] In Order F2007-013, the Commissioner noted that a Public Body need only describe or classify responsive records to the extent that doing so would not disclose information subject to an exception. He also noted that there are circumstances in which providing reasons for not disclosing information would result in information subject to an exception being disclosed. As a result, he concluded that it is not always necessary to provide a description of the information being withheld, or explicit reasons for withholding it.

[para 11] In its response to the Applicant, the Public Body stated:

I am replying to your request of April 4, 2011 for access to all records pertaining to a sexual harassment complaint filed in connection with you and all records in your Human Resources file.

I am pleased to inform you that access is being provided to your Human Resources file. A copy of the file is attached.

Access to all other records has been denied under sections 17(1) and (18(1)(a) of the *Freedom of Information and Protection of Privacy Act*.

This letter also informed the Applicant that he could request review by the Commissioner if he were dissatisfied with this decision and included the name and contact information of an individual who could answer questions concerning it.

[para 12] The first paragraph of the Public Body's response contains a description of the records that are being withheld, as it explains that the records pertain to a sexual harassment complaint made by the third party named in the Applicant's access request. Any further descriptions of the records within the context provided by this description could only have the effect of providing additional, more detailed information of the kind the Public Body considered itself required to withhold under the FOIP Act.

[para 13] Section 12(1)(c)(i) requires a public body to provide reasons for withholding information, in addition to stating the provision of the FOIP Act on which the Public Body relies. In its response, the Public Body indicated that it was withholding the information from the sexual harassment office under section 17 and 18. While it did

not state its reasons for doing so clearly, I find that the first paragraph of the response amounts to the reasons for the Public Body's decision to withhold the records from the Applicant under these provisions as this paragraph has the effect of establishing that the information being withheld is personal information of a particular kind, which would enable the Applicant to understand why the Public Body withheld the information under the provisions it did. In addition, section 17(1) of the FOIP Act, which is the only provision of section 17 under which information may be withheld, applies when disclosing information would result in an unreasonable invasion of the personal privacy of an identifiable individual. The reasons for applying this provision are therefore inherent in the provision itself.

[para 14] In conclusion, I find that the Public Body provided a description of the kinds of records it was withholding, in addition to the section numbers of the sections on which it relied to withhold information, as well as adequate reasons, in the circumstances, for withholding the information.

[para 15] The Public Body also apparently provided the Applicant with the number of responsive records at a later date. Although it did not provide the number of records in its initial response, I find it was not required by section 12 to do so in the circumstances, given that providing the number of records would indicate something about the extent of the third party's contact with the sexual harassment office, which was the kind of information the Public Body was seeking to withhold under section 17.

[para 16] The Public Body also informed the Applicant that he had the right to request review by the Commissioner and provided the name and contact information of an employee who could answer his questions regarding the Public Body's response. I find that section 12 requires nothing further of the Public Body and that its requirements have been met.

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

[para 17] Section 17 requires a public body to withhold personal information when it would be an unreasonable invasion of a third party's personal privacy to disclose the third party's personal information. This provision 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

...

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

...

- (f) *the personal information has been supplied in confidence...*

[para 18] 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 19] 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 other relevant circumstances must be considered.

[para 20] 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 21] Section 17 requires a public body to withhold personal information when disclosing the information would be harmful to the personal privacy of an identifiable individual. However, it also contains provisions that establish situations when it would not be an unreasonable invasion of personal privacy to disclose personal information, such as when a provision of section 17(2) applies. I will first consider whether any of the provisions of section 17(2) apply to the information I have found to be the personal information of third parties. If the personal information severed from the records is not subject to a provision of section 17(2), I will consider whether the factors set out in section 17(5) weigh in favor of, or against, disclosing the personal information in the records.

[para 22] The Public Body argues the following:

Section 17(4)(g) applies where the personal information consists of the third party's name when it appears with other information about the third party, or the disclosure of the name itself would reveal personal information about the third party.

It is submitted by the University that section 17(4)(g) would apply to the third party personal information contained in the Records at Issue. Furthermore, it is submitted by the university that the disclosure of the third party personal information is presumed to be an unreasonable invasion of privacy pursuant to section 17(4)(g) of the Act.

...

The Records at Issue contain other information that is not third party personal information. However, it is submitted by the University that this other information is so intertwined with the third party personal information that it cannot reasonably be severed from the Records at Issue.

The Public Body argues that personal information of the third party is contained in the records and is subject to the presumption set out in section 17(4)(g) of the FOIP Act, as it consists of the third party's name in the context of other information about the third party. The Public Body also argues that there is some information in the records that is not, strictly speaking, the third party's personal information, but that this information is intertwined with the third party's personal information in such a way that it cannot be severed.

[para 23] I agree with the Public Body that the records contain the personal information of the third party and that this information is subject to the presumption set out in section 17(4)(g). However, I find that *all* the information in the records is the third party's personal information given that all the information reveals details about, and the subject matter of, a request for confidential advice that the third party made to the Public Body's sexual harassment office. As a result, I find that all information in the records *is* subject to section 17(4)(g), and is not merely "intertwined" with such information. Moreover, I find that the name of the third party cannot be severed from the records, as the identity of the third party would remain associated with the information, given that the Applicant knows her name and specifically requested her personal information.

[para 24] As I find that the information in the records is subject to a presumption that it would be an unreasonable invasion of personal privacy to disclose the information, I will consider whether there are any interests in disclosing the information under section 17(5) that would outweigh this presumption.

[para 25] The Applicant argues that he is not seeking the personal information of the third party. However, he also states:

Notwithstanding my earlier point, under section 17 the unreasonable invasion of a third party's personal privacy is not unreasonable if doing so relieves the requester of wrong doing that caused great losses and continues today to impact the requester's health and financial wellbeing. This does not mean that I justify the use of another person's personal information but only to use the information to extract the intent of that person to do harm to me.

[para 26] The Applicant argues that he requires the personal information in the records to learn the intent of the third party in harming him and to establish that he has not done anything wrong. This argument is consistent with an argument that the personal information is relevant to a fair determination of his rights for the purposes of section 17(5)(c). I will therefore consider whether this provision applies and weighs in favour of disclosing the information in the records.

[para 27] In Order F2008-012, I reviewed section 17(5)(c) and said:

If personal information is relevant to a fair determination of an applicant's rights, then this is a factor that weighs in favor of disclosing the information under section 17(5)(c). I interpret the term "fair" to refer to administrative fairness. The two basic requirements of administrative fairness -- the right to know the case to be met and the right to make representations, are set out in Jones and DeVillars, *Principles of Administrative Law*:

The courts have consistently held that a fair hearing can only be had if the persons affected by the tribunal's decision know the case to be made against them. Only in this circumstance can they correct evidence prejudicial to their case and bring evidence to prove their position. Without knowing what might be said against them, people cannot properly present their case. But knowing the case that must be met is not enough, of course; the opportunity to present the other side of the matter must also be allowed. (Jones and DeVillars, *Principles of Administrative Law* Third Edition (Scarborough: Thomson Canada Ltd. 1999) p. 260

If the personal information would assist an applicant to know the case to be met and to make representations in relation to a decision being made about the applicant's rights, then that is a factor weighing in favor of disclosure.

[para 28] Similarly, in Order 99-028, former Commissioner Clark said:

In Order P-312 (1992), the Ontario Assistant Commissioner stated that in order for the Ontario equivalent of section 16(3)(c), [now 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 which is 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 which is either existing or contemplated, not one which has already been completed;
- (c) the personal information which the appellant is seeking access to 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.

[para 29] Both Order F2008-012 and Order 99-028 require that there be a proceeding in which an applicant's rights are being decided and that the personal information that is under consideration be relevant to the determination that would be made in the proceeding.

[para 30] I find that the requirements of section 17(5)(c) are not met, as it has not been established that the Applicant's rights are being, or will be, decided in a proceeding, or that the information in the records would be relevant to such a determination.

[para 31] In addition, I note that in the Public Body's response to the Applicant, it refers to the records at issue as "a complaint filed against the Applicant". However, I do not consider this characterization of the third party's communications with the sexual harassment office to be entirely accurate. Rather, record 16, which documents the third party's reasons for contacting the sexual harassment office, indicates that she was seeking confidential advice regarding sexual harassment. Record 14 supports a finding that an employee of the sexual harassment office recognized the third party's communications with that office as requests for confidential advice.

[para 32] If the third party had filed a complaint of sexual harassment to the sexual harassment office, and required the Public Body to take action in relation to it, then arguably, the personal information in the records, to the extent that it documented a complaint affecting the Applicant's rights and the basis of it, would be relevant to a fair determination of the Applicant's rights. However, the records establish that the third party sought only confidential advice or counseling from the sexual harassment office. Moreover, records 25 and 32 support a finding that any steps taken by the Public Body in relation to the Applicant were not the consequence of the third party's decision to seek advice from the sexual harassment office or the advice she received from that office. As a result, I find that the records are not relevant to a fair determination of the Applicant's rights for this reason as well.

[para 33] Having reviewed the records and the submissions of the parties, I find that there are no factors under section 17(5) that weigh in favour of disclosure of the information in the records to the Applicant. Moreover, I note that the third party supplied her personal information to the sexual harassment office with an expectation of confidence within the terms of section 17(5)(f). The application of this factor strengthens the presumption that it would be an unreasonable invasion of the third party's privacy to disclose the information in the records. I therefore find that it would be an unreasonable invasion of the third party's personal privacy to disclose the information in the records to the Applicant.

Issue C: Does section 18 of the Act (disclosure harmful to individual or public safety) apply to the information in the records?

[para 34] As I have found that the Public Body is required by section 17(1) to withhold all the information in the records at issue, I need not consider whether section 18 applies to the information in the records.

V. ORDER

[para 35] I make this Order under section 72 of the Act.

[para 36] I confirm the decision of the Public Body to withhold the information in the records under section 17(1) and I confirm that it has met its duties to the Applicant under section 12.

Teresa Cunningham
Adjudicator