

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2012-20

July 31, 2012

CALGARY POLICE SERVICE

Case File Number F5778

Office URL: www.oipc.ab.ca

Summary: The Applicant requested records about an incident, including a copy of a video, from the Calgary Police Service (the Public Body). The video was one he had asked a neighbour to make of another neighbour climbing on to her roof to throw things onto the Applicant's roof. The Applicant called the police and told them about the video. The police collected the video as evidence.

The Public Body denied access to the video under section 17(1) of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) (disclosure harmful to personal privacy).

The Adjudicator agreed with the Public Body that the video contained personal information of a third party. However, she found that the personal information had been supplied to the Public Body by the Applicant and that the Public Body had already disclosed the contents of the video in the paper records it had supplied to the Applicant, and that these contained greater detail than that provided by the video itself. She decided that these factors outweighed the presumption that it would be an unreasonable invasion of the third party's personal privacy to disclose the video. She ordered the Public Body to provide the video to the Applicant.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 17, 20, 72

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

I. BACKGROUND

[para 1] On June 7, 2010, the Applicant made a complaint to the Calgary Police Service, (the Public Body) that his next door neighbour had used a ladder to climb to the roof of her home and had then thrown branches from there onto his roof. Another neighbour used a video camera to record the activity on the roof at the request of the Applicant. When police officers came to investigate the complaint, the Applicant told them about the video his neighbour had taken, and the police officers took the video as evidence.

[para 2] On March 23, 2011, the Applicant made a request for access to records from the Public Body relating to his complaint. He also requested the video his neighbour had made.

[para 3] The Public Body granted access to the paper records relating to the Applicant's complaint, although it severed some of the names of individuals from the records under section 17 and also withheld other information under section 20. The Public Body denied access to the video on the basis of section 17(1).

[para 4] The Applicant requested review of the Public Body's decision to deny access to the video. The Commissioner authorized a mediator to investigate and try to settle the matter. As the matter was not settled in this process, a written inquiry was scheduled.

[para 5] The individual who is the subject of the video was given notice of the inquiry but did not participate. The Applicant and the Public Body exchanged written submissions.

II. RECORDS AT ISSUE

[para 6] A video to which the Public Body applied section 17(1) is in issue.

III. ISSUE

Issue A: Does section 17(1) (disclosure harmful to personal privacy) apply to the video?

IV. DISCUSSION OF ISSUE

Issue A: Does section 17(1) (disclosure harmful to personal privacy) apply to the video?

[para 7] Section 1(n) defines personal information under the Act:

I 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 8] On its own, the video at issue would not enable one unfamiliar with the circumstances of this case to identify the figure that can be seen climbing a ladder. Not only is the person obscured by a tree for much of the video, but the video is taken at a distance that makes identification impossible. In addition, no street address or landmark is visible. The video on its own would not enable an observer who lacked knowledge of the case to determine the location of the house in question or to guess the identity of the individual on the ladder. However, the records that the Public Body supplied to the Applicant contain the address of the Applicant and confirm that he is the next door neighbour of the subject of the video. The records also contain the name of the third party and her confirmation that she is the individual that may be seen climbing the ladder in the video. (The Public Body severed the third party’s name from some of the records it provided to the Applicant, but not others, and it is possible to determine from them that she is the individual in the video.)

[para 9] As the Applicant knows the details of the complaint he made, and observed the third party climbing the ladder, and as the video was taken at his request, it follows that he will be able to identify the third party in the video. Moreover, anyone who received a copy of the records, as the Applicant did, would be able to determine the identity of the individual depicted in the video. I therefore find that the video contains the personal information of an identifiable individual.

[para 10] 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.

(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

(a) the third party has, in the prescribed manner, consented to or requested the disclosure,

...

(i) the personal information is about an individual who has been dead for 25 years or more...

...

(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...

(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 11] Section 17 does not say that a public body is *never* allowed to disclose third party personal information to an applicant. 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 the applicant under section 17(1). Section 17(2) establishes that disclosing certain kinds of personal information is not an unreasonable invasion of personal privacy.

[para 12] 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 13] 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 14] 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), and is, instead, subject to a provision of section 17(4), I will consider whether the factors set out in section 17(5) outweigh the

presumption that it would be an unreasonable invasion of personal privacy to disclose the information, or reinforce it.

[para 15] The Public Body argues that none of the provisions of section 17(2) apply and I agree. The Public Body also argues that the video is part of a law enforcement record, as it was used by the police in a criminal investigation, and is therefore subject to the presumption created by section 17(4)(b). I agree that the personal information in the video is a part of a law enforcement record, given that the police used the video to conduct a criminal investigation.

[para 16] Section 17(4)(b) applies to personal information that is “an identifiable part of a law enforcement record” in order for this information to be subject to the presumption created by this provision. The requirement that the information be identifiable as being part of a law enforcement investigation recognizes that such information *may* be more sensitive, and therefore more deserving of protection.

[para 17] In my view, section 17(4)(b) also recognizes that there is no benefit in attaching a presumption that it would be an unreasonable invasion of personal privacy to disclose personal information associated with a law enforcement investigation, if it is not possible to associate the personal information under consideration with a law enforcement investigation. The requirement that personal information be an “identifiable part” of a law enforcement record, means that it must be possible, on viewing the personal information, to identify the personal information as compiled or created as part of a law enforcement proceeding.

[para 18] In the case before me, the video, and the personal information it contains, were compiled by police officers for an investigation. However, on its own, without additional context, it cannot be said that the personal information in the video is identifiable as being part of a law enforcement investigation. Nevertheless, the Applicant’s knowledge of the complaint he made and the circumstances giving rise to it, his role in the creation of the video, and the contents of the records that the Public Body has already provided to the Applicant, serve to make the personal information in the video identifiable by him as being part of a law enforcement investigation. I therefore find that the presumption in section 17(4)(b) applies.

[para 19] I will now consider whether there are factors under section 17(5) that would outweigh the presumption created by section 17(4)(b).

[para 20] In its submissions, the Public Body reviews all the provisions set out in section 17(5) and argues that none of them apply. With regard to section 17(5)(i), which requires consideration of whether an applicant has supplied information to a public body, the Public Body states:

The Public Body submits this section has no application since the video was collected from the individual who recorded it, and not from the Applicant.

Section 17(5)(i) requires consideration to be given to whether the Applicant has provided a third party's information to the public body. If the Applicant is the source of the third party information in a public body's possession, then this is a factor weighing in favor of finding that it would not be an unreasonable invasion of personal privacy to disclose this information to an applicant.

[para 21] The records the Public Body provided to the Applicant in its response establish on page 7 that the video was taken by a neighbour at the request of the Applicant. In addition, the police officers who responded to the Applicant's complaint state on record 8:

[The Applicant] informed me that his neighbour had also taken a video evidence of [the third party] doing such actions this morning.

The video was taken at the request of the Applicant. Moreover, the Applicant referred the police to the neighbour in order that they could collect the video for use in the investigation.

[para 22] The Public Body takes the position that section 17(5)(i) does not apply because the neighbour took the video and it was she who provided the video to the police. However, were it not for the request of the Applicant, she would not have made the video, and had the Applicant not told the police that she had done so, the police would not have known of the video or known where to obtain it. Section 17(5)(i) requires that the applicant "provide" the personal information in question to a public body. I find that the Applicant's actions of having the video taken and directing the police to the neighbour so that they could collect it from her amounts to "providing" the third party's personal information to the police within the terms of section 17(5)(i). I therefore find that section 17(5)(i) applies and weighs in favor of disclosing the video.

[para 23] Section 17(5) does not contain an exhaustive list of factors, and other relevant factors may also be considered. In the facts of this case, I find that it is relevant that the Public Body has, in a sense, already described the contents of the video in more detail through its submissions, and through its disclosure of paper records to the Applicant, than the video itself contains.

[para 24] For example, the Public Body states in its submissions:

The video is a total of 4 minutes and 10 seconds long. The video was shot approximately 100 meters away from a neighbour's home. It shows an image of an individual on a roof of a home with a ladder leaning against the home. It is difficult to ascertain the activities of the individual as a large tree blocks the person's movements. While the image does not clearly identify the person on the roof as any individual, the Applicant lives in an adjacent home. The individual in the video is not the Applicant.

[para 25] The records disclosed by the Public Body, which are contained in the Public Body's submissions, confirm the identity of the individual on the ladder and her own description of the activities in which she engaged while on the roof of her house.

[para 26] I find the fact that the contents of the video are known to the Applicant also weighs against the presumption that it would be an unreasonable invasion of the third party's personal privacy to disclose the information in the records to the Applicant.

[para 27] I find the fact that the video was taken at the request of the Applicant, was effectively supplied to the Public Body by the Applicant, and has already been disclosed to him by the Public Body, albeit in writing, outweigh the presumption that it would be an unreasonable invasion of the third party's personal privacy to disclose the video to the Applicant. I will therefore order the Public Body to disclose the video to the Applicant.

V. ORDER

[para 28] I make this Order under section 72 of the Act.

[para 29] I order the Public Body to provide the video to the Applicant in its entirety.

[para 30] 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