ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2013-07

March 1, 2013

ALBERTA HEALTH SERVICES

Case File Number F6046

Office URL: www.oipc.ab.ca

Summary: An individual received numerous harassing telephone calls to her home from the Peter Lougheed Centre hospital (PLC) in Calgary between May 2008 and September 2008. Many of the calls were made from a bank of payphones at PLC; Alberta Health Services (the Public Body) conducted an internal investigation and terminated one employee for the harassment.

The individual made a request to the Public Body dated October 11, 2011, stating the following: "I require and request the name of a former [Public Body] employee working at the PLC-Calgary (terminated @mid Sept. 2008) in order to lay public information (charges) against them in accordance with my Chartered rights." The Applicant also attached several pages with the request form. The Public Body responded to the request by creating a list of 45 employees terminated in September 2008. The Public Body refused access to this record under section 17 of the *Freedom of Information and Protection of Privacy Act* (FOIP Act, or the Act). The Applicant requested a review of this response.

The Adjudicator determined that the Public Body failed to properly characterize the Applicant's request or clarify the request and as a result, the record created by the Public Body is not responsive. The Adjudicator ordered the Public Body to respond again to the Applicant's request, taking into account the context of the request.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 10, 12, 17, 30, 72, **Can**: *Criminal Code,* R.S.C. 1985, c. C-46, ss. 264, 264.1, 504.

Authorities Cited: AB: Order 97-006, F2004-026, F2011-020.

I. BACKGROUND

[para 1] An individual received over 100 unsolicited and harassing telephone calls to her home from the Peter Lougheed Centre hospital (PLC) in Calgary between May 2008 and September 2008. Many of the calls were made from a bank of payphones at PLC; PLC is operated by Alberta Health Services (the Public Body). The Public Body conducted an internal investigation and terminated one employee for the harassment.

[para 2] The individual made a request to the Public Body dated October 11, 2011, stating the following: "I require and request the name of a former [Public Body] employee working at the PLC-Calgary (terminated @mid Sept. 2008) in order to lay public information (charges) against them in accordance with my Chartered rights." The Applicant also attached several pages with the request form.

[para 3] The Applicant has provided me with copies of records she received as a result of a later access request the she had made to the Public Body, as well as copies of correspondence between the Applicant and the Calgary Police Service (CPS) regarding the alleged harassment. Included in these records is a page which the Applicant describes as an extract from the Investigative Details file from the CPS (there is no indication on the page that it is from the CPS, although it does appear to be from a police file), as well as many pages from the Public Body's internal investigation such as written notes of an interview with one of the alleged callers. These and other records provided to me by the Applicant indicate that the Public Body's internal investigation revealed the name of an employee of the Public Body who was responsible for many of the harassing phone calls to the Applicant from PLC.

[para 4] The Applicant also provided me with a copy of a letter dated October 4, 2011 to her from the Public Body; in this letter the Public Body confirmed that its internal investigation found that one Public Body employee was primarily responsible for the harassing phone calls made to the Applicant, and that person's employment had been terminated. It is the name of this former employee that the Applicant states she was seeking in making her access request. However, the Public Body responded to the request by creating a list of 45 employees terminated in September 2008. The Public Body refused access to this record under section 17 of the *Freedom of Information and Protection of Privacy Act* (FOIP Act, or the Act).

[para 5] The Applicant requested a review from this office. The Commissioner authorized a portfolio officer to investigate and to try to settle the matter. This was not successful, so the matter was set down for a written inquiry.

II. RECORDS AT ISSUE

[para 6] The record at issue consists of one page of names of former Public Body employees who worked at PLC and who were terminated in September 2008.

III. ISSUES

[para 7] The issue set out in the Notice of Inquiry, dated May 4, 2012, is as follows:

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

[para 8] In the course of the inquiry, both parties made arguments as to whether the Public Body properly characterized the Applicant's request, and therefore whether the record at issue is actually responsive to that request. By letter dated September 5, 2012, I requested submissions from both parties on the following issue:

2. **Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act (duty to assist)?**

[para 9] In the same letter, I asked both the Public Body and the Applicant to provide further information as to the contents of the Applicant's request (i.e. whether the request included only the request form or also additional attachments); if there were attachments, how the record at issue is responsive to the request; and whether the Public Body clarified the request with the Applicant.

[para 10] I will consider the duty to assist issue first. For the reasons discussed below, I find that the record at issue is not responsive to the Applicant's request and for that reason I will not consider the application of section 17 to any information contained in the record.

IV. DISCUSSION OF ISSUES

1. **Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act (duty to assist)?**

[para 11] A public body's obligation to respond to an applicant's access request is set out in section 10, which states in part:

> *10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.*

[para 12] The duty to assist includes responding openly, accurately and completely, as well as conducting an adequate search. The Public Body bears the burden of proof with respect to its obligations under section 10(1), as it is in the best position to describe the steps taken to assist the Applicant (see Order 97-006, at para. 7). The duty to assist also includes the duty to clarify the request, if the situation calls for clarification (see Order F2004-026, at para. 30 and F2011-020, at para. 23).

[para 13] In her rebuttal submission, the Applicant indicates that while the Public Body created a list of 45 names in response to her request, this is not the information she had requested. The Applicant states that she is seeking the name of the individual who the Public Body had determined had made the harassing phone calls to the Applicant and who was terminated for doing so. The Applicant states that the Public Body incorrectly characterized her request.

[para 14] The Applicant had attached to her access request several other pages (five pages of copies of the Applicant's witness statements made to the Public Body's Protective Services area, fourteen pages of emails regarding the Applicant's harassment complaints and resulting investigations by the Public Body and Calgary Police Service, as well as six pages of handwritten log notes relating to the harassing phone calls). Although the Public Body's initial submission indicated that it had received only the access request *form*, the Public Body confirmed, in response to my questions, that it had in fact received the additional documents with the Applicant's access request (the Public Body had included a copy of the Applicant's request as an attachment to its initial submission; however, that attachment included only the access request form (without the additional documents).

[para 15] Additionally, the Applicant stated on the request form that "[t]his [access request] form was provided to me by [a named] HR analyst Calgary Zone after my complaint was directed to [the Public Body's CEO]." The above-mentioned October 4, 2011 letter sent by the Public Body to the Applicant regarding her harassment complaint was sent by the HR analyst named in the Applicant's request. This letter from the HR analyst references a meeting between the Applicant, HR analyst, and other individuals, regarding the Applicant's harassment complaint. The letter states that the information sought by the Applicant during that meeting in relation to the Applicant's harassment complaint would have to be submitted via a formal FOIP request and states that the Public Body's access request form was enclosed with the letter. The letter also states that the Public Body's internal investigation into the Applicant's complaint had resulted in the termination of one Public Body employee as the individual primarily responsible for the harassment, and that there was insufficient evidence to indicate the involvement of other Public Body employees.

[para 16] None of the attachments to the Applicant's access request indicate that an employee of the Public Body was terminated as a result of the harassment complaint or investigation, so the request form alone may not have had sufficient information for the Public Body to properly characterize the request. However, the Applicant's statement on her access request referring to an existing complaint, along with the 25 pages attached to

the access request form, should have alerted the Public Body that the Applicant had made prior complaints and that her access request related to those prior complaints. The attachments clearly indicate to which complaint the request related. The Applicant points out that the attachments to her request name more than one Public Body employee involved in the harassment complaint, and that the Information and Privacy Coordinator (Coordinator) responding to her request could have contacted any or all of those employees in an effort to clarify the request. In fact, the Applicant provided me with copies of emails between various employees of the Public Body (obtained by her from the Public Body in response to a separate access request), which indicate that the Coordinator emailed an HR employee to discuss the Applicant's request. The emails also suggest that this particular HR employee had knowledge of the Applicant's harassment complaint.

[para 17] It also seems to me that the Public Body's response to my questions sent September 5, 2012, indicate that the Public Body was aware that the Applicant sought the name (or names) of the individual(s) involved in the harassment. For example, in response to my question: "Is there a reason to expect that the Public Body should have understood the scope of the request to be limited to a particular individual?", the Public Body responded [emphasis added]:

> There is no reason to expect that the Public Body should have understood the scope of the request to be limited to a particular individual. In fact, the opposite is true; there are reasons the Public Body should have understood the scope of the request is not limited to a particular individual, but to more than one individual terminated in mid-September 2008 as evidenced by:
>
> a. The wording of the request itself – while the request starts as "the name of a former AHS employee" (singular), the request sentence ends in "in order to lay public information (charges) against them["] (plural). Had the Applicant intended the request to be limited to a particular individual, the working of the end of the request should have read (… to lay public information (charges) against "him" (singular)[)]. **The Applicant knew the individual was male as evidenced in the attachments.** The use of the word "them" may indicate more than one individual.
>
> b. On the first page of the attachments under the heading "Regarding the attachments:", the Applicant wrote "They document in excess of 100 unsolicited and unwanted telephone calls… by individual(s)…". The word "individual(s)" indicates plurality may exist.
>
> c. A review of the Witness Statements and emails themselves (for example the Sept. 25, 2008 @ 08:13 email) provide evidence that the Applicant suspected more than one particular individual was involved.

[para 18] With respect to points "b" and "c" above, the Applicant agrees that she believes that more than one individual was involved in making the harassing telephone

calls; however, she was told by the Public Body of only one who was terminated as a result. The Applicant's request refers to an individual who was terminated.

[para 19] However, even if it were reasonable to conclude that the Applicant may be seeking the names of several individuals, clearly those individuals would also have been related to the harassment complaint. Yet the Public Body informs me that the record of employees terminated in September 2008, created in response to the request, *might not include the name of the particular individual sought by the Applicant*. Specifically, the Public Body states that

> [i]t is by no means certain that the individuals on the list who might fit this criterion [individuals terminated by the Public Body in mid-September 2008] would actually include the individual the identity of which the Applicant seeks.

[para 20] Even were it reasonable to interpret the Applicant's request to include the names of several individuals, it is not at all reasonable to interpret the request to include the names of individuals who were not in any way related to the harassment complaint. It is therefore perplexing that the Public Body is now not aware of whether the list of 45 names even contains the name of the person terminated for harassing her.

[para 21] The Public Body's initial submission continues:

> It is submitted that it would be an unreasonable invasion of personal privacy to disclose a list of employees who were terminated so that the Applicant can then determine whether any of those individuals identified in the records may be the individual in question.

[para 22] The Public Body knows the name of the individual, while the Applicant does not. The Public Body appears to have been aware that the Applicant's request was aimed at obtaining the name of the individual(s) involved in, and terminated for, the harassment. It is not clear to me what possible reason the Public Body could have had for considering a list of all names of individuals whose employment was terminated in September 2008 to be responsive to the request instead of *only the name of the individual terminated for the harassment*. If the Applicant does not already know the name, it is unclear how a list of 45 names would be of use to her.

[para 23] I find the Public Body's conclusion regarding the scope of the access request to be unreasonable. The Public Body acknowledges that the Applicant's request was for "*a* former employee" and that the attachments included with the request form point to one male individual, yet the Public Body interpreted the request to be for the names of all PLC[1] employees terminated in the relevant time frame without regard as to whether the individuals were in any way related to the Applicant's harassment complaint.

[1] It is not even clear that the list of names is limited to former PLC employees, as the Public Body's response to my questions states "the record at issue is responsive to the request as it contains the names of former AHS employees, **including** those working at the PLC who were terminated @ mid Sept. 2008" (my emphasis).

[para 24] Further, were the Public Body confused by the Applicant's apparently inconsistent use of singular and plural nouns in her access request, it could have clarified the request with the Applicant. In response to my question whether the Public Body had sought clarification, the Public Body responded as follows:

> The Public Body did not seek clarification. Clarification is sought when a request is not clear or precise enough or more information is needed to clarify it before processing can commence. The request was neither vague or [sic] overly general. Clarification was not needed with respect to providing a fee estimate. The processing of the request was able to commence immediately and responsive records containing the names of former AHS employees who were terminated at mid-September 2008 were found. Therefore, the criteria for seeking clarification was not met and therefore, not sought.

[para 25] Without the attachments, possibly the Applicant's request did not clearly identify that the Applicant was seeking the name of the individual terminated for harassing her, especially if the Public Body employee responsible for responding to the request (the Coordinator) did not have knowledge of the incident. However, as noted above, the request and attachments should have alerted the Coordinator that the Applicant's request related to a particular incident.

[para 26] Further, the Coordinator communicated with an HR employee with respect to responding to the request and that HR employee appears to have had at least some knowledge of the Applicant's harassment complaint. I find, on the balance of probabilities, that the Public Body improperly characterized the Applicant's request and failed to seek clarification.

[para 27] As the Public Body states that it does not know whether the name of the individual the Applicant seeks is contained in the record at issue, even part of the record cannot be considered to be responsive to the Applicant's request.

[para 28] I intend to order the Public Body to respond again to the Applicant's request, taking into account the context of the request as outlined in this order.

2. Does section 17 of the Act (disclosure harmful to personal privacy) apply to the information/records?

[para 29] Section 17 states the following:

> *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,*

(b) there are compelling circumstances affecting anyone's health or safety and written notice of the disclosure is given to the third party,

(c) an Act of Alberta or Canada authorizes or requires the disclosure,

(d) repealed 2003 c21 s5,

(e) the information is about the third party's classification, salary range, discretionary benefits or employment responsibilities as an officer, employee or member of a public body or as a member of the staff of a member of the Executive Council,

(f) the disclosure reveals financial and other details of a contract to supply goods or services to a public body,

(g) the information is about a licence, permit or other similar discretionary benefit relating to

(i) a commercial or professional activity, that has been granted to the third party by a public body, or

(ii) real property, including a development permit or building permit, that has been granted to the third party by a public body,

and the disclosure is limited to the name of the third party and the nature of the licence, permit or other similar discretionary benefit,

(h) the disclosure reveals details of a discretionary benefit of a financial nature granted to the third party by a public body,

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

(j) subject to subsection (3), the disclosure is not contrary to the public interest and reveals only the following personal information about a third party:

(i) enrolment in a school of an educational body or in a program offered by a post-secondary educational body,

(ii) repealed 2003 c21 s5,

(iii) attendance at or participation in a public event or activity related to a public body, including a graduation ceremony, sporting event, cultural program or club, or field trip, or

(iv) receipt of an honour or award granted by or through a public body.

(3) The disclosure of personal information under subsection (2)(j) is an unreasonable invasion of personal privacy if the third party whom the information is about has requested that the information not be disclosed.

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

(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,

(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,

(c) the personal information relates to eligibility for income assistance or social service benefits or to the determination of benefit levels,

(d) the personal information relates to employment or educational history,

(e) the personal information was collected on a tax return or gathered for the purpose of collecting a tax,

(e.1) the personal information consists of an individual's bank account information or credit card information,

(f) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations,

(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,

or

(h) the personal information indicates the third party's racial or ethnic origin or religious or political beliefs or associations.

(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 30] As the Public Body states that it does not know whether the name of the individual the Applicant seeks is contained in the record at issue, it could not have properly applied the Act in determining whether to withhold or disclose that information. In other words, the Public Body has not had the opportunity to consider the application of any of the exceptions to access to the information that is properly responsive to the Applicant's request, so I do not have a reviewable decision before me and therefore

cannot make a finding as to whether an exception was properly applied. The Public Body must make the determination as to the application of section 17, or any other exception under the Act, to the information that is responsive to the Applicant's request.

[para 31] That said, I offer the following guidance as to what factors may apply, since the Public Body failed to properly consider all of the possible factors in favour of, or against, the disclosure of the information in the record which it regarded as responsive. I will focus on the application of section 17, since this is the only section applied by the Public Body to the 45 names in the record currently before me, and since section 17 could presumably apply to a different record containing the name being sought by the Applicant.

[para 32] The Public Body argued, with respect to the record it believed to be responsive, that "had the search results contained 1 name, 2 names, or multiple names, the severing applied would have been the same for all three results." In my view, had the search results contained *the name* of the individual terminated for harassing the Applicant, the factors to be considered in determining whether to release *that* name would have been different from the factors to be considered in determining whether to release any or all of the 45 names in the record the Public Body did create.

[para 33] In its application of section 17 to the information in the record the Public Body considered to be responsive, the Public Body appears, based on its submissions, to have failed to consider any factors in section 17(5) in making its determination to withhold the record which it regarded as responsive. In considering whether the name requested by the Applicant should be disclosed to her, the Public Body **must** consider the factors listed in section 17(5), as well as any other relevant factor.

[para 34] The Applicant (who argues for only the disclosure of the name of the individual terminated for harassing her) has argued that sections 17(5)(a) and (c) would weigh in favour of the disclosure of the information

[para 35] The Applicant states that the purpose for which she is requesting the name of the individual whose employment was terminated by the Public Body as a result of the Applicant's harassment complaint is so that she may lay an information against that individual pursuant to section 504 of the *Criminal Code*, which states the following:

> *504. Any one who, on reasonable grounds, believes that a person has committed an indictable offence may lay an information in writing and under oath before a justice, and the justice shall receive the information, where it is alleged*
>
> > *(a) that the person has committed, anywhere, an indictable offence that may be tried in the province in which the justice resides, and that the person*
> >
> > > *(i) is or is believed to be, or*
> > >
> > > *(ii) resides or is believed to reside,*
> >
> > *within the territorial jurisdiction of the justice;*

> *(b) that the person, wherever he may be, has committed an indictable offence within the territorial jurisdiction of the justice;*
>
> *(c) that the person has, anywhere, unlawfully received property that was unlawfully obtained within the territorial jurisdiction of the justice; or*
>
> *(d) that the person has in his possession stolen property within the territorial jurisdiction of the justice.*

[para 36] The Applicant argues that the harassing phone calls constitute a crime under sections 264 (criminal harassment) and 264.1 (uttering threats) of the *Criminal Code*.

[para 37] If the fair determination of a right includes the ability to lay a private information pursuant to the *Criminal Code*, then section 17(5)(c) would weigh in favour of disclosing the name of the individual terminated for harassing the Applicant (although it may not outweigh other factors against disclosure).

[para 38] Even if the power to lay a private information and (possibly) pursue a private prosecution under the *Criminal Code* does not fit within an enumerated factor in section 17(5), the Public Body may still consider, as an additional factor under section 17(5), whether the Applicant has a pressing need for the information (for example, to exercise the ability to lay a private information) that would weigh in favour of disclosure.

[para 39] My last suggestion to the Public Body in responding to the Applicant's request, is that the Public Body consider its obligations under section 30(1)(b) of the Act, which requires a public body to provide notice, where practicable, to a third party if the public body is considering providing access to information to which section 17 may apply:

> *30(1) When the head of a public body is considering giving access to a record that may contain information*
>
> *…*
>
> *(b) the disclosure of which may be an unreasonable invasion of a third party's personal privacy under section 17,*
>
> *the head must, where practicable and as soon as practicable, give written notice to the third party in accordance with subsection (4).*

V. ORDER

[para 40] I make this Order under section 72 of the Act.

[para 41] I find that the Public Body did not fulfill its duty to respond to the Applicant under section 10(1). I order the Public Body to properly respond to the Applicant's request by selecting the records responsive to the request appropriately, by considering whether they should be withheld or disclosed according to the terms of the Act, and by communicating this decision to the Applicant in accordance with section 12.

[para 42] 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.

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Amanda Swanek
Adjudicator