ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2013-39

October 24, 2013

ALBERTA JUSTICE AND SOLICITOR GENERAL

Case File Number F6030

Office URL: www.oipc.ab.ca

Summary: The Applicant requested records from Alberta Justice and Solicitor General (the Public Body) relating to a complaint he had made to the Public Body. The Public Body responded but severed records pursuant to sections 17 and 26 of the *Freedom of Information and Protection of Privacy Act* (the Act).

The Adjudicator found that the Public Body had met its obligations under section 10 of the Act, but had improperly applied sections 17 and 26 of the Act to the records.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 4, 10, 17, 26, and 72.

Authorities Cited: AB: Orders 99-028, 2001-016, F2004-016, F2007-029, and F2009-016.

I. BACKGROUND

[para 1] On October 31, 2011, the Applicant made an access request pursuant to the *Freedom of Information and Protection of Privacy Act* (the Act) to Alberta Justice and Solicitor General (the Public Body) for records relating to a complaint he had made to the Public Body's Human Resources department on October 3, 2011. Specifically, his access request stated:

> On October 3rd, 2011, I made a complaint to human resources with regards to harassment experienced at the hands of [a named employee of the Public Body], the inspector and some of the staff sergeants such as [another named employee of the Public Body]. An investigation occurred by human resources about my complaint. I wish to receive any and all material, documentation, transcripts pertaining [to] the above occurrence. Please provide all information to me.

[para 2] At the time of the alleged harassment, the Applicant was a student at a college run by the Public Body.

[para 3] On November 23, 2011, the Public Body responded to the Applicant and provided him with records that were responsive to his access request. Some of the information in the records was severed in reliance on sections 4, 17 and 26 of the Act.

[para 4] On December 20, 2011, the Office of the Information and Privacy Commissioner (this Office) received a Request for Review from the Applicant, asking that it review the response of the Public Body. Mediation was authorized by the Commissioner but was not successful in resolving the issues between the parties. However, on February 1, 2012, the Public Body provided five additional responsive records to the Applicant. On April 18, 2012, the Applicant requested that an inquiry be held.

[para 5] The Applicant chose to rely on his request for review, access request and the Public Body's response as his initial submission. I also received initial submissions from the Public Body and rebuttal submissions from both parties. During the course of reviewing the records at issue in this inquiry, I also identified a number of Affected Parties and invited them to participate in this inquiry as undisclosed Affected Parties. I received no submissions from the Affected Parties.

II. INFORMATION AT ISSUE

[para 6] The information at issue in this inquiry is the portions of the responsive records which were severed by the Public Body pursuant to sections 4, 17, and 26 of the Act.

III. ISSUES

[para 7] The issues stated in the Notice of Inquiry dated March 28, 2013 are as follows:

> **Issue A: Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act (duty to assist applicants)? In this case, the Adjudicator will consider whether the Public Body conducted an adequate search for responsive records.**

Issue B: Is information in the records excluded from the application of the Act by section 4(1)(g)(question that is to be used on a test)?

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

Issue D: Did the Public Body properly apply section 26 of the Act (testing procedures, tests and audits) to the information in the records?

[para 8] As part of his submissions, the Applicant requested that I consider a "schedule A" document that he had prepared for another inquiry (F6031) as he felt that it was relevant to this inquiry. The Public Body does not believe that it is appropriate for me to consider this additional information because it mostly consists of the Applicant's complaint about a portfolio officer's findings in another matter, which is not relevant to this inquiry. As well, the Public Body notes that an inquiry is not a review of the decision of a portfolio office but a *de novo* hearing. I note, however, that the Public Body's initial submissions contain a sworn affidavit which details the findings of the portfolio officer in the present matter.

[para 9] Despite the inconsistency between the Public Body's argument regarding the Applicant's submissions and its evidence, I agree with the Public Body that this is a *de novo* written inquiry, and that the portfolio officer's findings on another file are not relevant to this inquiry. However, just as the Public Body's affidavit also contains other relevant information, the Applicant's schedule A document refers more generally to his argument about what "reasonable" means in the context of section 10 of the Act, which is relevant to this order. Therefore, I will consider the Applicant's schedule A document in relation to his arguments about reasonableness and the Public Body's affidavit, but only to the extent they do not relate to what occurred at mediation.

IV. DISCUSSION OF ISSUES

Issue A: Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act (duty to assist applicants)?

[para 10] Section 10(1) of the Act states:

> 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 11] In Order 2001-016, the then Commissioner stated:

> Previous orders…say that the public body must show that it conducted an adequate search to fulfill its obligation under section 9(1) [now section 10(1)] of the Act. An adequate search has two components: (1) every reasonable effort must be made to search for the

actual record requested and (2) the applicant must be informed in a timely fashion about what has been done.

(Order 2001-016 at para 13)

[para 12] Many previous orders issued by this office have stated that evidence as to the adequacy of a search should cover the following points:

- The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
- The scope of the search conducted - for example: physical sites, program areas, specific databases, off-site storage areas, etc.
- The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
- Who did the search
- Why the Public Body believes no more responsive records exist than what has been found or produced

(Order F2007-029 at para. 66)

[para 13] In its initial submissions, the Public Body provided an affidavit sworn by its FOIP Advisor stating that:

- The FOIP Advisor processed the Applicant's request.
- The FOIP Advisor contacted the Public Body's Human Resource department to locate records.
- On being advised of this Office's involvement in reviewing the Public Body's response to the Applicant's request, the FOIP Advisor asked Human Resources if there were further records. As a result of this second search further records were recovered and provided to the Applicant.

[para 14] The Public Body's submissions further stated that the FOIP Advisor contacted the Human Resources employee involved in the Applicant's investigation who had knowledge of the records responsive to the Applicant's request, both when the initial request was received and when the second search was done.

[para 15] The Public Body did not provide evidence or argument on:

- The scope of the search conducted - for example: physical sites, program areas, specific databases, off-site storage areas, etc.
- The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
- Why the Public Body believes no more responsive records exist than what has been found or produced.

[para 16] As a result of the deficiencies in the Public Body's evidence, I asked that it provide further evidence on the points mentioned above; as well, I asked the Public Body to confirm if audio recordings were made of other witness statements.

[para 17] The Public Body replied that three other individuals were interviewed and that these interviews were recorded but the recordings were withheld entirely from the Applicant (presumably pursuant to section 17 of the Act), which would explain why neither I nor the Applicant received copies of the severed versions of these records.

[para 18] The Public Body also responded that:

- Only the Human Resources branch of the Public Body was searched, because of the wording of the Applicant's request;
- There was an additional search performed which uncovered e-mails from the Human Resources investigator. The Public Body concedes that it was an oversight that these e-mails were not provided to the Applicant initially;
- The Public Body believes that its search was thorough given the narrow parameters of the Applicant's request and so no other responsive records exist.

[para 19] The Applicant's Request for Review dated December 1, 2011, which forms part of his initial submission, states that he does not believe that he has received all records responsive to his request. He specifically mentions not receiving a copy of his dismissal letter dated October 21, 2011, doctor's note dated October 7, 2011, and audio information from the Human Resources investigation of October 3, 2011.

[para 20] The Public Body submits that the dismissal letter and doctor's note were not part of the investigation file and that the Applicant has received all of the audio information (though the audio information was severed).

[para 21] The Applicant's initial request (as outlined in the background section of the order) was narrow. In his reply to the Public Body's response to the questions I posed, he stated that he did not mean for his request to be narrow but only to be used as a guideline. However, I think that the wording of his request is clear and I understand why the Public

Body processed his request as it did. The Applicant clearly stated he wanted records relating to the Human Resources investigation – not all records in the custody and control of the Human Resources department, relating to him. Therefore, I accept the Public Body's evidence and argument as to why the records the Applicant feels were missing from the Public Body's response were not responsive to the Applicant's request (other than the audio information which he did not receive) and find that the Public Body met its duty pursuant to section 10 of the Act.

Issue B: Is information in the records excluded from the application of the Act by section 4(1)(g)(question that is to be used on a test)?

[para 22] In its submissions, the Public Body advised that it was no longer relying on section 4(1)(g) of the Act to sever the information on page 6 of the responsive records and, instead, would be applying section 26 of the Act to the information. Therefore, I will consider the information on page 6 of the responsive records when I discuss the Public Body's application of section 26 of the Act, below.

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

[para 23] Section 17 of the Act prohibits a Public Body from disclosing personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy. Section 17(1) states:

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

(a) Did the Public Body withhold "personal information?

[para 24] As a prerequisite to section 17 of the Act applying, the information severed by the Public Body must be personal information. Personal information is defined in the Act as follows:

> *1(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 25] Much of the information that was severed consisted of names, and educational and employment history, of third parties. I find that the information severed was personal information of third parties.

(b) Would the disclosure of the third parties' personal information be an unreasonable invasion of their personal privacy?

[para 26] Section 17(4) of the Act sets out when the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy. The Public Body argues that section 17(4)(g) of the Act applies to the information at issue. Section 17(4)(g) of the Act states:

17(4)(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 27] From my review of the records at issue, third parties' names were severed along with their employment information. Therefore, section 17(4)(g) (i) of the Act applies and creates a presumption that disclosure of the third parties' personal information would be an unreasonable invasion of their personal privacy.

(c) Do any section 17(5) factors apply?

[para 28] Although there is a presumption created by the application of section 17(4)(g)(i) of the Act, the Public Body must still weigh all the factors listed in section 17(5) of the Act and any other relevant factors to determine if it is appropriate to withhold the information at issue. Section 17(5) of the Act states:

> *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 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 29] The Public Body submits that section 17(5)(c), (e), (f), and (h) of the Act weigh in favour of not disclosing the information and only section 17(5)(i) of the Act weighs in favour of disclosing the information.

i. Section 17(5) factors weighing in favour of disclosure:

[para 30] I agree that section 17(5)(i) (information provided by the Applicant) weighs in favour of disclosing the information. Much of the information that was severed by the

Public Body was provided to the Public Body by the Applicant – specifically, all the information he provided in his statement to the Public Body and on the audio recording of his interview (of which he received a severed version). This factor weighs heavily in favour of disclosure.

[para 31] In addition, I note that the information severed pursuant to section 17 of the Act consisted of names and employment information of employees of the Public Body. While this is not an enumerated factor, several orders issued by this Office have found that if the information severed consists of business contact information or records of activities of employees of a Public Body acting in their official capacities, this is a factor that weighs in favour of disclosure (see F2009-016 at para 17-18 for example).

[para 32] The third parties whose information was severed were all employees of the Public Body. They were involved in the Applicant's complaint in their official capacities. Therefore, I find this is a factor that weighs in favour of disclosing the information at issue.

ii. Section 17(5) factors weighing against disclosure:

[para 33] The Public Body argues that section 17(5)(c) (information relevant to a fair determination of the Applicant's rights) does not apply and therefore weighs in favour of not disclosing the information at issue. I agree that section 17(5)(c) of the Act is not applicable. In order for section 17(5)(c) of the Act to apply the following four factors must be met:

1. 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;

2. The right is related to a proceeding which is either existing or contemplated, not one which has already been completed;

3. The personal information which the applicant is seeking access to has some bearing on or is significant to the determination of the right in question; and

4. The personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

(Order 99-028 at para 32)

[para 34] The Applicant offered no evidence that there is a proceeding which is either existing or contemplated for which he needs or wants the information at issue. Therefore, section 17(5)(c) of the Act does not apply. However, the fact that it does not apply does not mean that this factor weighs in favour of severing the information as the Public Body argues; it is simply not applicable to the information at issue.

[para 35] The Public Body also argues that section 17(5)(e) of the Act (the third party will be exposed to financial or other harm) weighs in favour of severing the information at issue. The Public Body submits:

> The Public Body has a reasonable belief that the Applicant *may* unfairly targeted (*sic*) third party individuals by making unfair accusations regarding their motives and integrity, which *possibly could* result in unfair damage to the personal reputation and employment of these third parties…[emphasis added]

[para 36] In support, the Public Body cites Order F2004-016 in which the Adjudicator found evidence that the Applicant would likely make unwanted contact with third parties whose information was severed from the records at issue.

[para 37] The Public Body's arguments under section 17(5)(e) involve assertions about harm to reputation, which is more properly the subject of section 17(5)(h) – which deals specifically with reputational harm. I will deal with that part of its argument under that heading.

[para 38] As to the potential of disclosure of the information to cause "financial or other harm" to third parties, to meet the terms of this provision there must be more than the mere possibility of harm.

[para 39] The Public Body suggests that if the Applicant is given access to the information, he may "target" the third parties (which could result in harm to reputation). There is no evidence before me that supports this speculation that the Applicant would "target" the third parties in the sense of making unwanted contact with them. As for making unfair accusations regarding their motives and integrity, that is an issue relating to damage to reputation which I will deal with below. I reject the idea that the prospect of unwanted contact, or any other form 'targeting' might take, weighs against disclosing the information by reference to section 17(5)(e).

[para 40] The Public Body also argues that section 17(5)(f) of the Act (information supplied in confidence) applies to the information at issue and weighs in favour of not disclosing the information. The Public Body submits:

> These records are used as a tool to determine a recruit's ability to pass the training course as well as their suitability as an employee with the Public Body and are considered confidential. Third parties submitting information had a reasonable expectation that their information was being collected for a specific purpose and that it would be treated as confidential. Therefore, it is the position of the Public Body, taking under consideration the sensitive nature of the information, that the third parties implicity considered their personal information to have been supplied in confidence.

[para 41] Previous orders from this Office have found that confidentiality does not have to be explicit and can be implied from the circumstances. However, I was confused by the

Public Body's argument that the information at issue was used by the Public Body to determine the Applicant's suitability for employment, because in the information that was disclosed to the Applicant (specifically the audio recording), the Public Body made it clear that the fact the Applicant had made a harrassment complaint would not hinder his chances of successfully completing his program. Therefore, it seems unlikely that the information in the responsive records would have been used in the way the Public Body suggests.

[para 42] That being said, I asked the Public Body for evidence of what the person accused of harrassment, and the witnesses were told about the confidentiality of information they were providing to the Public Body during the course of the investigation. The Public Body responded that at the beginning of the interviews the Applicant and the other individuals were advised that the information they provided in the interviews would be confidential and would be shared with others only as needed or as required by law. The Public Body further argued that the final investigation report was completed with the information from these interviews and, therefore, the information in the final investigation report would be considered to be provided in confidence.

[para 43] Based on the information before me, the information severed from the interviews could be said to have been supplied in confidence.

[para 44] Finally, the Public Body argued that section 17(5)(h) of the Act (disclosure may unfairly damage reputation) weighed in favour of severing the information at issue. As already described above, it argued that the Applicant could use the severed information to make unfair accusations against the persons making the statements, which could damage their reputations. In my opinion, even if the makers of particular statements in the records are identified, none of the information these individuals provided – their individual recollections of the events related to the alleged harassment given in response to questions asked in the investigation – could be used by the Applicant to unfairly damage their reputations or their employment. Further, there is nothing to suggest the Applicant would be inclined to try to do this. Therefore, I find that section 17(5)(h) does not apply as a factor in favour of disclosure.

iii. Conclusion on section 17(5):

[para 45] Based on the evidence and argument before me, I find that the only section 17(5) factor that weighs in favour of withholding the information at issue is that some of the information was provided in confidence. However, I also find that much of the information that was severed was supplied by the Applicant and all of the information that was severed was information about employees of the Public Body acting in their official capacities, and that section 17(5)(e) and 17(5)(h) of the Act did not apply. Therefore, I find that the Public Body ought to disclose all of the information it severed pursuant to section 17 of the Act.

Issue D: Did the Public Body properly apply section 26 of the Act (testing procedures, tests and audits) to the information in the records?

[para 46] Section 26 of the Act states:

> *26 The head of a public body may refuse to disclose to an applicant information relating to*
>
> > *(a) testing or auditing procedures or techniques,*
> >
> > *(b) details of specific tests to be given or audits to be conducted, or*
> >
> > *(c) standardized tests used by a public body, including intelligence tests,*
>
> *if disclosure could reasonably be expected to prejudice the use or results of particular tests or audits.*

[para 47] Section 26 of the Act was used to sever part of a sentence from a summary of an interview of the Applicant by the Public Body done during the course of its investigation into the Applicant's harrassment complaint. The incident that led to the Applicant's making his complaint was that, during an exam, the Applicant asked an instructor a question about a particular exam question. In the summary, the type of question, the number of the question and, in very general terms, what the subject matter of the question was were all severed.

[para 48] The Public Body argues that the information severed is information relating to a standardized test that it still uses. It further argues that the disclosure of the information would reasonably expected to prejudice the future use of the exam. No further argument or evidence is given on this point.

[para 49] The information severed is limited. While the specific question number is noted as is the format of the question, it does not say what the question actually said (only, generally, what its subject matter was) or what the answer to the question was. I fail to see how disclosing this limited and general information would prejudice the use of this test by the Public Body. Therefore, I find that the Public Body did not properly apply section 26 of the Act to the information at issue.

V. ORDER

[para 50] I make this Order under section 72 of the Act.

[para 51] I find that the Public Body met its obligations under section 10 of the Act.

[para 52] I find that the Public Body improperly severed information from the responsive records pursuant to section 17 of the Act and order the Public Body to disclose that information to the Applicant.

[para 53] I find that the Public Body improperly severed information from the responsive records pursuant to section 26 of the Act and order the Public Body to disclose that information to the Applicant.

[para 54] I order the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that it has complied with the Order.

Keri H. Ridley
Adjudicator