ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2013-45

October 31, 2013

OUT-OF-COUNTRY HEALTH SERVICES COMMITTEE

Case File Number F6052

Office URL: www.oipc.ab.ca

Summary: The Applicant requested records from the Out-of-Country Health Services Committee (the Public Body) pursuant to the *Freedom of Information and Protection of Privacy Act* (the Act) about a decision she believes it made. The access request named a third party and gave details of the third party's medical history. In response, the Public Body refused to confirm or deny the existence of responsive records pursuant to section 12(2) of the Act.

The Adjudicator found that the personal privacy of the third party would not be unreasonably invaded if the Public Body were required to respond to the request without relying on section 12(2)(b). She ordered the Public Body to respond in this way.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 10, 12, 17, 32, and 72;

Authorities Cited: AB: Orders 98-009, F2004-026, F2011-010, F2011-020 and F2013-07.

I. BACKGROUND

[para 1] The Applicant had a medical procedure performed in the United States at her own expense. She applied to the Out-of-Country Health Services Committee (the Public Body) for reimbursement of her costs. The Public Body denied her application.

[para 2] The Applicant believes that the Public Body provided reimbursement to another individual (the third party) for the same procedure. She wrote to the Public Body

and made the following request pursuant to the *Freedom of Information and Protection of Privacy Act* (the Act):

> Specifically, we are requesting a copy of the decision made by the [Public Body] regarding [the third party] of Airdrie, Alberta, who underwent the same [procedure] as our client, in the United States at the same clinic … in December of 2009.

[para 3] In response, the Public Body refused to confirm or deny the existence of responsive records in reliance on section 12(2) of the Act.

[para 4] The Applicant wrote to the Office of the Information and Privacy Commissioner (this Office) and requested a review of the Public Body's response. The Commissioner authorized mediation to investigate and attempt to settle the issues between the parties. The mediation was not successful and the Applicant requested an inquiry. I received submissions from both the Applicant and the Public Body.

II. INFORMATION AT ISSUE

[para 5] The information at issue is the personal information of the third party that would be revealed if it were known whether or not the records requested by the Applicant exist.

III. ISSUES

[para 6] The Notice of Inquiry for this matter dated November 15, 2012 sets out the issue in this inquiry as follows:

A. Did the Public Body properly refuse to confirm or deny the existence of a record as authorized by section 12(2) of the Act?

[para 7] In addition to this issue, I will also discuss a preliminary issue relating to the Public Body's duty under section 10 of the Act.

[para 8] As well, the Applicant states that another issue in this inquiry is:

> Did the Public Body … err in failing to disclose and allow access of the requested record to the Applicant?

[para 9] This is not an issue in this inquiry. The Public Body's response was to neither confirm nor deny the *existence of* responsive records. The Public Body has not made a decision to *deny* the Applicant access to records, if any exist. If I conclude that the Public Body did not properly apply section 12(2) of the Act, I will order it to respond to the Applicant's access request, and if records exist, and if the Applicant is not satisfied with the Public Body's response, the Applicant can request a review of the Public Body's decision. Failure to disclose records, if any exist, is not an issue in this inquiry.

IV. DISCUSSION OF ISSUES

Preliminary Issue:

[para 10] In its submissions, the Public Body states that the Applicant's access request was for the Public Body's *decision* on a particular matter but in her initial submissions, the Applicant refers to needing the Public Body's *reasons*. The Public Body argues that its decisions would be separate and distinct records from its reasons. It says that as a result, the Applicant has not made an access request for reasons, and therefore that the denial of reasons (if such exist) is not properly before me in this inquiry.

[para 11] The Applicant states that she was unaware that the Public Body's decisions and reasons were not the same record. This is understandable. Given the context of the access request and the access request itself, it seems clear that the Applicant is looking for a precedent in which the Public Body had facts before it similar to her own case but decided the reimbursement issue in a different way. It seems likely she intended to request not only the Public Body's decision but its reasons as well, as without the reasons, the record would have less persuasive value.

[para 12] In its rebuttal, the Public Body states:

> It is not the role of this Inquiry to correct the errors and omissions of the Applicant as to what records they actually want disclosed by the Respondent.

[para 13] Even if it were not obvious to the Public Body that the Applicant was requesting both a decision and reasons supporting a decision, her request was at the least unclear. The Public Body has an important duty under section 10 of the Act, which the Public Body's argument does not take into account. Section 10 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 14] Whether or not the Public Body is right that it is not my role to "correct" the Applicant's access request, it is most certainly the Public Body's role to assist the Applicant, including by clarifying the scope of her access request (see orders F2004-026 at para 30, F2011-020 at para 23, and F2013-07 at para 12). Section 10 of the Act is not an issue in this inquiry. I do not need to make a decision on this point because the issue is limited to the proper application of section 12(2) of the Act. However, I would suggest that in responding to future access requests, the Public Body be mindful of its obligation under section 10(1) of the Act to clarify requests that appear to be ambiguous or unclear.

A. Did the Public Body properly refuse to confirm or deny the existence of a record as authorized by section 12(2) of the Act?

[para 15] Section 12(2) of the Act states:

12(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 16] Specifically, the Public Body claims that it relied on section 12(2)(b) of the Act. Order F2011-010 set out the steps a public body must follow in order to apply section 12(2)(b) properly. The Adjudicator stated:

> In order for a public body to properly apply section 12(2)(b) of the Act, it must do each of the following: (a) search for the requested records, determine whether responsive records exist and provide any such records to this Office for review; (b) determine that responsive records, if they existed, would contain the personal information of a third party and that disclosure of the existence of the information would be an unreasonable invasion of the third party's personal privacy; and (c) show that it properly exercised its discretion in refusing to confirm or deny the existence of a record by considering the objects and purpose of the Act and providing evidence of what was considered (Order 98-009 at paras. 8 to 10; Order 2000-016 at paras. 35 and 38).
>
> Part (b) of the foregoing test was recently re-worded as requiring the public body to show that confirming the existence of responsive records, if they existed, would reveal the personal information of a third party, and to show that revealing this personal information (that the records exist, if they exist) would be an unreasonable invasion of the third party's personal privacy (Order F2010-010 at para. 14).
>
> (Order F2011-010 at paras 9-10)

[para 17] Based on the information that the Public Body provided to me *in camera*, I find that the Public Body searched for responsive records. I cannot provide more detail than that without revealing if records exist or not; therefore, the remaining questions in this inquiry are whether:

1. confirming the existence of the responsive records, if any, will reveal personal information about a third party;

2. revealing the personal information above would be an unreasonable invasion of the third party's personal privacy; and

3. the Public Body properly exercised its discretion in refusing to confirm or deny the existence of a record by considering the objects and purpose of the Act.

1. *If the records exist, would confirming the existence of responsive records reveal personal information about the third party?*

[para 18] The Act defines personal information in section 1(n) of 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 19] The Public Body argues that the records, if they existed, would contain the third party's name, health care number, and details about his medical history and financial circumstances. It submits that this would all be personal information.

[para 20] This would likely be true of the contents of any possible responsive records. However, the question is whether revealing the existence of the record alone would reveal personal information about a third party, not whether the records, if they existed, would contain personal information.

[para 21] As stated above, the Applicant requested:

> …a copy of the decision made by the [Public Body] regarding [the third party] of Airdrie, Alberta, who underwent the same [procedure] as our client, in the United States at the same clinic…in December of 2009.

[para 22] The Applicant's request was very specific. The Applicant did not ask generally for decisions made by the Public Body regarding a particular medical procedure (the one the Applicant underwent). Instead, in her request, the Applicant named a third party, where he lived, a specific medical procedure he had undergone, and where and when that procedure had been performed.

[para 23] By wording her access request so specifically, if there were responsive records and the Public Body were to confirm this, the Public Body would be confirming that a named third party underwent a specific procedure in the United States at a named clinic in December of 2009, that he applied to the Public Body to be reimbursed, and that the Public Body made a decision. This would be his personal information.

2. *Would revealing the third party's personal information be an unreasonable invasion of his personal privacy?*

[para 24] In Order 98-009, the former Commissioner stated that when a public body uses section 12(2) of the Act, section 17 of the Act provides guidance as to whether disclosing a third party's personal information would be an unreasonable invasion of that third party's personal privacy. In Order 98-009 the former Commissioner stated:

> I agree with the Public Body's use of section 16 [now section 17] to provide guidance for determining whether the disclosure constitutes an unreasonable invasion of a third party's personal privacy. However, the focus of the analysis must be on whether the disclosure of the existence [my emphasis] of the information, rather than whether the disclosure of the information itself, would constitute an unreasonable invasion of a third party's personal privacy.
>
> (Order 98-009 at para 15)

[para 25] Section 17(1) of the Act 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.*

Section 17(2)(h)

[para 26] Section 17(2) of the Act lists circumstances where the disclosure of personal information would not be an unreasonable invasion of a third party's personal privacy. The Applicant argues that section 17(2)(h) of the Act applies to any existing information she requested from the Public Body. Section 17(2)(h) of the Act states:

> *17(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if*

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

[para 27] The Applicant submits that because the Public Body is not required to pay for out of country health services, when it decides to do so, it is conferring a discretionary benefit.

[para 28] The Public Body argues that its governing regulation does not give it enough discretion to meet the criteria for a discretionary benefit.

[para 29] As I stated above, the information with which this inquiry is dealing is the information that would be revealed if the Public Body confirmed that responsive records exist (if they do in fact exist), not the information in any records responsive to the Applicant's request.

[para 30] While the Applicant appears to believe that the Public Body made a decision relative to the third party that was favourable in terms of granting funding, her access request does not suggest this – it merely asks for any such decision, regardless of the outcome. Thus, if records (a decision) existed, confirming their existence would not entail revealing details of a discretionary benefit (although such a decision might, depending on its nature, itself do so). Therefore, I do not believe that section 17(2)(h) of the Act applies to the personal information at issue in this inquiry.

Section 17(4)

[para 31] Section 17(4) of the Act lists personal information, which if disclosed, is presumed to be an unreasonable invasion of a third party's personal privacy. Section 17(4) of the Act states:

> *17(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.*

[para 32] By confirming the existence of records responsive to the Applicant's request (if such existed), the Public Body would be confirming that a named third party had a specified medical procedure at a specified clinic and applied to have it funded by the Public Body, and that the Public Body made a decision about funding. Sections 17(4)(a) and 17(4)(g)(i) of the Act would apply to the personal information that would be revealed by such a confirmation.

Section 17(5)

[para 33] Although a presumption exists that confirming the existence of records that are responsive to the Applicant's request would be an unreasonable invasion of the third party's personal privacy, that presumption can be overridden by factors set out in section 17(5) of the Act. Section 17(5) 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 34] The Applicant argues that sections 17(5)(a) and 17(5)(c) of the Act apply to the personal information in question. As well, the Applicant argues that the information has already been made public in various newspapers and in television interviews. She provided me with copies of articles which detail the third party's symptoms and the procedure he underwent, and some of the articles mention that funding was eventually provided by Alberta Health Services. Therefore, the Applicant believes that disclosing any such information would not be an unreasonable invasion of the third party's personal privacy.

[para 35] The Public Body argues that the Applicant's argument on this point constitutes a suggestion that the third party has somehow consented to the disclosure of his personal information by making it public.

[para 36] It is unclear if the Applicant meant to argue that the public availability was equivalent to the third party giving consent for further disclosure of his personal information. If this is what the Applicant was arguing, I would find that it is not a convincing argument, as these are distinct ideas.

[para 37] The Applicant may instead have been arguing that the fact that the information is no longer private is a factor to consider when determining if disclosing the third party's personal information would be an unreasonable invasion of his personal privacy. Section 17(5) of the Act is not an exhaustive list and I believe this can be a relevant additional factor.

[para 38] I will consider each of the Applicant's arguments in more detail below, including whether to accept this argument as one weighing in favour of revealing the information at issue.

a. Is disclosure desirable to subject the activities of the Public Body to scrutiny?

[para 39] The Applicant relies in part on section 17(5)(a), arguing "[t]he decisions of the [Public Body] should be open to public scrutiny so that the public can understand how this public body makes its decisions and the grounds upon which its decisions are made." The Applicant goes on to state that making decisions public would lead to the Public Body being accountable, transparent and consistent.

[para 40] The Public Body argues that the Applicant has failed to show that there is a broad public concern. It also states:

> …the Legislature should have created an open tribunal process with a mandate to publish its decisions – by not doing so the Legislature has signaled its intent on these issues.

[para 41] The Public Body also states that the Applicant's arguments are more appropriately made under section 32(1) (information must be disclosed if it is in the public interest).

[para 42] Reliance on section 12(2) in a situation in which an applicant claims to need records for the purpose of public scrutiny can raise important questions about the interpretation of section 12(2)(b) – in particular, whether the content of records themselves, if there are any, comes into play in deciding whether section 12(2) can be relied upon. This is because there might be a situation in which the confirmation that records exist would not assist with public scrutiny to a sufficient degree to justify revealing this information, whereas the content of the records themselves would do so.

[para 43] However, as I make my decision in this case on the basis of another of the factors under section 17(5) (as discussed in the section subsequent to this one), I will not consider this interpretation question in the context of section 17(5)(a) in the present case.

b. Is the personal information relevant to the determination of the Applicant's rights?

[para 44] Past orders issued by this Office have found that the following criteria need to be met in order to establish that personal information is relevant to the fair determination of the Applicant's rights:

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.

[para 45] The Applicant argues that the records she requests (if any) would be relevant to a fair determination of her rights. She explains that the Public Body denied her claim for reimbursement, and that she then appealed that decision to the Out-of-Country Health Services Committee Appeal Panel who denied reimbursement as well. She has now applied for judicial review of those decisions. The Applicant believes that the Public Body or the Out-of-Country Health Services Committee Appeal Panel granted the third party reimbursement for the same procedure.

[para 46] The Public Body states that its decision, if it exists, would be new evidence that would be admissible on judicial review only by application by the Applicant.

[para 47] The Applicant wants a copy of what she believes to be the Public Body's decision regarding the third party to present to the Court on judicial review. She hopes to show the Court that the Public Body had similar facts before it but made a different decision. I assume she thinks this would persuade the Court that the Public Body was incorrect when it denied her application.

[para 48] The only information about the Public Body's decision (if any) that the Applicant would come to know if the Public Body were not permitted to rely on section 12(2) is whether such a decision (with respect to the third party) had been made. She would not learn what the outcome of any such decision had been.

[para 49] However, I believe that this limited information is still of significant utility to the Applicant in her judicial review application. If there were records, I presume this could be of interest to the Court, which might wish to discover the degree to which the Public Body was being reasonable in its decision-making. Knowing whether the records exist would allow the Applicant to decide what further steps, if any, she needed to take with regard to any such information to enable her to use it in furtherance of her judicial review proceeding or to know that any further efforts on her part in this regard would not be fruitful.

[para 50] The Applicant's judicial review proceeding is a legal proceeding. I find that all the criteria listed in para 44 are met in relation to the information as to whether the records exist, and that it is therefore information relevant to the fair determination of the Applicant's rights within the terms of section 17(5)(c).

[para 51] Before leaving this section, I note that there may be circumstances in a different case in which information as to whether records exist is not of sufficient utility to an applicant to justify revealing it, but records do exist, and these records would be sufficiently useful to an applicant to justify invasion of a third party's privacy. In such a case, it would be necessary to decide whether the content of the records themselves (if they exist) were to be taken into account in deciding whether section 12(2) can be relied upon. However, this is not such a case.

c. Was the personal information supplied in confidence?

[para 52] The Public Body argues that if the third party provided his personal information to it, the third party did so in confidence and this is a factor that weighs in favour of withholding the information.

[para 53] Confidentiality can either be express or implied from the circumstances in which the information was provided.

[para 54] I agree with the Public Body that in circumstances in which a person such as the third party was applying to it for funding, this would be done in confidence given the nature of the application. However, I do not see it as sensible to discuss this question in the present case, in which it cannot be openly discussed whether the application was made or not; if the application was not made, the idea it was made in confidence cannot be a factor. I will say, however, that even if confidentiality were a factor that could be considered in this case, it would not be one that would outweigh the importance of giving the Applicant information that is relevant to having her rights fairly determined.

d. If the information is public, is this a factor weighing in favour of disclosure?

[para 55] The Applicant argues that the third party's personal information was made public by him in newspapers, news stories and a website (which is no longer accessible) dedicated to raising money to fund his procedure. Because of this, the Applicant believes that the information at issue is no longer private and the disclosure of the information would not be an unreasonable invasion of the third party's personal privacy. In support of this argument, the Applicant provided newspaper clippings and internet printouts with details of the third party's medical history.

[para 56] The Public Body argues that the Applicant provided insufficient evidence that the source of the information was the third party. It correctly points out that there are no sources mentioned. The Public Body focuses most of its arguments about this point on whether the public disclosure of information could amount to some sort of consent or authorization, arguing that it could not.

[para 57] I acknowledge there might be situations in which information is known widely enough that it would weigh in favour of disclosure of a third party's personal information. I do not believe this is so in this inquiry. The evidence provided to me by the Applicant indicates that some information about the third party and his medical

history was public. The amount of information in the articles was limited but did include information about his symptoms and the treatment he sought. They also mentioned that the third party's family was seeking reimbursement from Alberta Health Services but was not hopeful that their expenses would be covered. A later article noted that the third party's family had been refunded after a panel determined that the treatment was not elective, but gave no indication what the source of this information was. The Applicant also provided a copy of information posted on a website, presumably by the third party's family. It goes into further detail about the third party's struggles with his illness.

[para 58] I do not know how widely the information on the website was viewed. Given the limited information in the articles, and the fact that I do not know how widely the website was viewed, I believe that the fact that some of the information described above was public in a limited way is a factor that weighs somewhat, though not heavily, in favour of requiring the Public Body to respond without relying on section 12(2).

[para 59] Weighing the factors discussed in the foregoing, because the information as to whether records exist is relevant to a fair determination of the Applicant's rights, and because much of the information that would be revealed by revealing that records exist (if they do) would be the same information that was made public to at least to some degree (for example that the third party had a medical condition and sought treatment), I find that the personal privacy of the third party would not be unreasonably invaded by revealing whether records exist.

3. *Did the Public Body properly exercise its discretion in refusing to confirm or deny the existence of a record by considering the objects and purpose of the Act?*

[para 60] Given my conclusion in the previous paragraph, the conditions for the Public Body to exercise its discretion to rely on section 12(2) have not been met.

[para 61] In view of my balancing of the relevant factors for and against disclosure, and of the fact that the conditions for exercising discretion under section 12(2)(b) have not been met in this case, I will order the Public Body to respond to the Applicant's request without relying on section 12(2) of the Act.

V. ORDER

[para 62] I make this Order under section 72 of the Act.

[para 63] I order the Public Body to respond to the Applicant's request without relying on section 12(2) of the Act.

[para 64] I further 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.

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Keri H. Ridley
Adjudicator