

**ALBERTA**

**OFFICE OF THE INFORMATION AND PRIVACY  
COMMISSIONER**

**ORDER F2014-07**

January 30, 2014

**BOW VALLEY COLLEGE**

Case File Numbers F6165, 6172

**Office URL:** [www.oipc.ab.ca](http://www.oipc.ab.ca)

**Summary:** The Complainant made a complaint to the Commissioner that Bow Valley College (the Public Body) had disclosed his personal information in contravention of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act). He also requested a review of the Public Body's decision to sever personal information from records it had located when it responded to an access request he had made.

The Adjudicator found that the Complainant had not adduced sufficient evidence to establish that the Public Body had used or disclosed his personal information. The Adjudicator also determined that the Public Body was required by section 17 of the FOIP Act (disclosure harmful to personal privacy) to withhold from the Complainant the information it had severed. The Adjudicator confirmed the Public Body's severing decision and found that it had not been established that the Public Body had contravened Part 2 of the FOIP Act.

**Statutes Cited:** **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 6, 17, 72;

**Authorities Cited:** **AB:** P2006-008

**Cases Cited:** *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 112; *University of Alberta v. Pylypiuk*, 2002 ABQB 22

## **I. BACKGROUND**

[para 1] The Complainant made a complaint to the Commissioner that the Public Body had disclosed his personal information contrary to Part 2 of the FOIP Act (file F6165).

[para 2] The Complainant also made a request to Bow Valley College (the Public Body) for access to information related to his withdrawal, and for an assessment test (file F6172). The Public Body located responsive information but severed the names of two individuals from an email dated September 28, 2011. The Complainant requested review by the Commissioner of the Public Body's response to his access request.

[para 3] The Commissioner authorized mediation. As mediation did not resolve the dispute, the matter was scheduled for a written inquiry.

## **II. INFORMATION AT ISSUE**

[para 4] The information at issue are the names of individuals severed by the Public Body under section 17 from an email dated September 28, 2011.

## **III. ISSUES**

**Issue A: Did the Public Body use or disclose the Complainant's personal information in contravention of Part 2 of the Act?**

**Issue C: Does section 17 (disclosure harmful to personal privacy) require the Public Body to withhold the information it severed from the records?**

## **IV. DISCUSSION OF ISSUES**

**Issue A: Did the Public Body use or disclose the Complainant's personal information in contravention of Part 2 of the Act?**

[para 5] Included in the Complainant's submissions is a referral letter created for him by a program coordinator of the Public Body. This letter indicates that it is a referral to the mobile response team so that it may conduct a mental health assessment. The Complainant makes references in his submissions to the Public Body having disclosed his personal information to students and to the Iranian government, although he does not provide details of these disclosures.

[para 6] The Public Body states:

On September 19, 2011, the Complainant met with three College employees [...] The meeting was called to discuss the Complainant's behavior in the classroom.

During the meeting, the College employees indicated to the Complainant that they wanted for him to see a medical professional in relation to his mental health and requested he attend upon the Sheldon Chumir Centre for a mental health assessment.

The College employees requested the Complainant sign a consent form that would have permitted health information to be shared by the Sheldon Chumir Health Centre to the College. The Complainant signed a consent form in front of the three College employees.

The Complainant would not allow the College to take a copy of the consent form for their records.

One of the College employees provided the Complainant with both a referral document to the Sheldon Chumir Centre and the consent form which the Complainant took to the Sheldon Chumir Health Centre.

It is the understanding of the College that the mental health assessment never took place. Accordingly, no information regarding the Complainant was ever shared between the Sheldon Chumir Health Centre and the College.

The College denies that it ever disclosed any personal information relating to the Complainant to any of the Complainant's classmates or to the Iranian regime.

It is the position of the College that the only time the Complainant's personal information was disclosed by the College employees was during a team meeting and that the personal information discussed was kept between the College employees. The purpose of the disclosure by the College employees was to assess the Complainant's educational needs and to discuss possible safety issues. It is the position of the College that the disclosure between the College employees fits under the permitted disclosure in section 40(1)(h) of the FOIP Act as it was necessary to carry out their duties of employment. Furthermore, the College is permitted to use the personal information of the Complainant for the purpose for which it was disclosed.

In regard to alleged disclosure by the College to a nurse, the college provided the consent form and referral forms to the Complainant. The Complainant was not assessed by any health professionals and, as such, no reporting or sharing of information regarding the Complainant was made by any health professional to the College.

Finally, the College simply does not have, nor did it ever have, in its possession any documentation that demonstrates sharing of the Complainant's personal information with his classmates or the Iranian regime. The Complainant, in his submissions, has not provided any documentation that would demonstrate that this kind of disclosure has occurred.

I agree with the Public Body that the Complainant has not adduced any evidence to support finding that the Public Body disclosed his personal information to medical professionals, students, or to the Iranian Government. I also find, for the reasons that follow, that the Complainant has not met the evidential burden of adducing evidence to support his contention that the Public Body disclosed his personal information.

[para 7] In Order P2006-008, the Commissioner explained the burden of proof in relation to complaints made under the *Personal Information Protection Act* in the following way:

Relying on these criteria in Order P2005-001, I stated that a complainant has to have some knowledge of the basis of the complaint and it made sense to me that the initial burden of proof

can, in most instances, be said to rest with the complainant. An organization then has the burden to show that it has authority under the Act to collect, use and disclose the personal information.

This initial burden is what has been termed the “evidential burden”. As I have said, it will be up to a complainant to adduce some evidence that personal information has been collected, used or disclosed. A complainant must also adduce some evidence about the manner in which the collection, use or disclosure has been or is occurring, in order to raise the issue of whether the collection, use or disclosure is in compliance with the Act.

[para 8] In *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 112 Yamauchi J. approved this approach to the burden of proof for complaints made under the FOIP Act. He said:

FOIPPA s. 71 deals with the burden of proof when a person seeks access to records. In some cases, the burden rests on the applicant. In others, the burden rests on the head of the public body. However, FOIPPA does not contain any provision that tells us on whom the burden of proof rests when a person lodges a complaint with the OIPC alleging that they believe a public body has used or disclosed their personal information in contravention of FOIPPA Part 2.

Thus, the usual principle of "he who alleges must prove" applies. The OIPC takes this approach on these types of matters, see e.g. Order F2002-020: Lethbridge Police Service (August 7, 2002) at para. 20, which said:

... in this inquiry, the Complainant has the burden of proving that his personal information was disclosed by the Public Body. The Complainant has not met this burden of proof. Before I am able to find that a breach of Part 2 of the Act has occurred, there must be a satisfactory level of evidence presented in support of the allegation. If this were not the case, a public body could be put into the untenable position of proving a negative (e.g. that a breach did not occur) based on any allegation raised by a complainant.

But see, Order P2006-008: Lindsay Park Sports Society (March 14, 2007) at paras. 9-21, where the OIPC said that complainants under FOIPPA do not have a legal burden, but an evidential burden. Once the complainant satisfies the evidential burden, the burden shifts to the public body to show “that it has the authority ... to collect, use or disclose personal information,” at para. 20. Because of FOIPPA’s structure, this Court agrees with the Lindsay Park analysis of the burden of proof and evidentiary burden.

[para 9] The authors of *The Law of Evidence* 2nd Edition describe the evidential burden in the following way:

A party... may satisfy an evidential burden without doing anything; for example, a witness called by the Crown testifies to facts, which raise the issue of self-defence. Thus, a party may discharge an evidential burden by pointing to some evidence already on the record. In these circumstances, the defendant does not adduce evidence but rather, the issue is raised by the evidence...

[para 10] The term “evidential burden” means that a party has the responsibility to insure that there is sufficient evidence of the existence or non-existence of a fact or of an issue on the record to pass the threshold test for that particular fact or issue.

[para 11] A complainant bears the initial burden of adducing or pointing to evidence that establishes his or her information was collected, used or disclosed, depending on the nature of the complaint. If it were not so, a public body would be placed in the impossible position of attempting to provide evidence that disclosure was authorized without knowledge of the circumstances in which disclosure is being alleged.

[para 12] In the present case, the Complainant has not pointed to any evidence that would support a finding that the Public Body has disclosed his personal information, or disclosed it to the parties he claims. It is also unclear what the Complainant considers to be the circumstances in which the disclosures he alleges were made.

[para 13] The Public Body also pointed out that the referral its Program Coordinator created for the Complainant, and which the Complainant has included in his submissions, was provided to the Complainant so that he could provide it himself to the mobile response team if he elected to do so. The Public Body also notes that there is no evidence that the Complainant ever provided the referral to the mobile response team. Even assuming that the Complainant attended the referral and provided the letter of referral, this would not amount to a disclosure of the Complainant's personal information *by* the Public Body. Rather, any disclosure in that circumstance would be made by the Complainant himself.

[para 14] The Public Body also acknowledges that some of its instructors met to discuss and address among themselves some of the problems the Complainant's classroom behavior presented. However, the Public Body denies that the instructors ever disclosed any of the information discussed at this meeting outside the meeting.

[para 15] It is not clear to me that an internal discussion about the Complainant's behavior among instructors amounts to a disclosure in this case. In any event, the Complainant's submissions do not indicate that a meeting to discuss his behavior is the subject of his complaint. Rather, the decision to create the referral letter appears to have given rise to the complaint.

[para 16] The notice of inquiry issued by this office indicates that the Public Body's use of the Complainant's personal information was also set as an issue for this inquiry. However, neither party has addressed this issue in their submissions. As the Complainant has not pointed to or adduced any evidence regarding a use of his personal information that he considers to have been improper, the Public Body is not in a position to defend itself on this issue. In any event, there is simply no evidence before me that would enable me to find that the Public Body used the Complainant's personal information in contravention of Part 2 of the FOIP Act.

[para 17] For these reasons, I find that it has not been demonstrated that the Public Body used or disclosed the Complainant's personal information in contravention of Part 2 of the FOIP Act.

**Issue B: Does section 17 (disclosure harmful to personal privacy) require the Public Body to withhold the information it severed from the records?**

[para 18] The Public Body severed the names of individuals under section 17 of the FOIP Act where these appear in an email dated September 28, 2011.

[para 19] Section 17 sets out the circumstances in which a public body may or must not disclose the personal information of a third party in response to an access request. It states, in part:

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

*[...]*

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

*(g) the personal information consists of the third party's name when*

*(i) it appears with other personal information about the third party, or*

*(ii) the disclosure of the name itself would reveal personal information about the third party[...]*

*(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether*

*(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 20] Section 17 does not say that a public body is *never* allowed to disclose third party personal information. It is only when the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy that a public body must refuse to disclose the information to an applicant (such as the Complainant in this case) under section 17(1). Section 17(2) (not reproduced) establishes that disclosing certain kinds of personal information is not an unreasonable invasion of personal privacy.

[para 21] 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 any other relevant circumstances must be considered.

[para 22] 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). [my emphasis]

[para 23] Section 17(1) requires a public body to withhold information only once all relevant interests in disclosing and withholding information have been weighed under section 17(5) and, having engaged in this process, the head concludes that it would be an unreasonable invasion of the personal privacy of a third party to disclose his or her personal information.

[para 24] Once the decision is made that a presumption set out in section 17(4) applies to information, then it is necessary to consider all relevant factors under section 17(5) to determine whether it would, or would not, be an unreasonable invasion of a third

party's personal privacy to disclose the information. If the decision is made that it would be an unreasonable invasion of personal privacy to disclose the personal information of a third party, the Public Body must then consider whether it is possible to sever the personally identifying information from the record and to provide the remainder to the Complainant, as required by section 6(2) of the FOIP Act.

[para 25] As noted above, the Public Body severed the names of individuals from the records. I find that this information is subject to the presumption created by section 17(4)(g), as the information includes the names of individuals in the context of other information about them.

[para 26] I am unable to identify any factors under section 17(5) weighing in favor of disclosure that would apply to the information the Public Body severed. As a result, I find that the presumption created by section 17(4)(g) is not outweighed. I therefore find that section 17(1) requires the Public Body to sever the information it withheld from the records.

[para 27] I also note that the Public Body severed the names and provided the remaining information to the Complainant. I therefore find that the Public Body met its duty under section 6(2) of the FOIP Act.

## **V. ORDER**

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

[para 29] I find that the Public Body is required to withhold the names of the individuals that it severed from the records and I confirm its decision to sever this information.

[para 30] I confirm that the Public Body used the Complainant's personal information in accordance with the Act.

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Teresa Cunningham  
Adjudicator