

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2014-12

February 21, 2014

ALBERTA JUSTICE AND SOLICITOR GENERAL

Case File Number F6465

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Summary: The Applicant made a request to Alberta Justice and Solicitor General (the Public Body) for access under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for investigation records relating to the loss of his personal effects from his cell while he was incarcerated in the Edmonton Remand Centre.

The Public Body identified responsive records and provided these to the Applicant. However, the Public Body withheld a video and a photograph from the Applicant under sections 17 (disclosure harmful to personal privacy) and 20 (disclosure harmful to law enforcement).

Once the new Edmonton Remand Centre was built, the Public Body reconsidered its decision to apply section 20, as disclosing video of the former Edmonton Remand Centre was unlikely to compromise security at the new Edmonton Remand Centre. The Public Body decided that it would withhold the features of inmates where they appeared in the photograph and the video under section 17. The Public Body provided a copy of the photograph, with the faces of inmates obscured, to the Applicant.

The Adjudicator confirmed the decision of the Public Body to sever the features of the inmates under section 17. She ordered the Public Body to obscure the features of the inmates in the video, as it proposed doing, and to provide the remainder of the video to the Applicant.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 6, 17, 20, 72

Authorities Cited: AB: Orders F2009-010

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

I. BACKGROUND

[para 1] The Applicant made a request to Alberta Justice and Solicitor General (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for access to investigation records relating to the loss of his personal effects from his cell.

[para 2] The Public Body responded to the Applicant's access request on August 20, 2012. The Public Body stated that it had located 35 responsive records, but was withholding some of the information under sections 17 and 20 of the FOIP Act. The Public Body provided some of the information in the records to the Applicant.

[para 3] The Applicant requested that the Commissioner review the Public Body's response.

[para 4] The Commissioner authorized mediation. As mediation was unsuccessful in resolving the dispute, the matter was scheduled for a written inquiry.

[para 5] In its initial submissions, the Public Body stated that it was reconsidering its initial decisions. It confirmed that it was no longer relying on section 20 of the FOIP Act to withhold information from the records, as a new Remand Centre was now operational and its previous concerns that disclosing the video would reveal flaws in its security were moot as a result. It decided to provide record 24 in its entirety. It also decided to provide record 35 (a photograph) to the Applicant with the faces of inmates removed. It also decided that it could provide the video file with the faces of inmates blurred and with some portions of the video that it considered nonresponsive removed. It asked for my authorization before doing so.

[para 6] On December 20, 2013, I responded to the Public Body's request for authorization. I said:

Before I can confirm the Public Body's decision to sever information from the records, I must be satisfied that an exception to disclosure applies to the information. It is also not clear to me that the first minute of the video is non-responsive, given that the Applicant did not limit his access request in the way suggested by the Public Body. Rather, he is seeking records "considered in the investigation" and it appears that the entire video was considered in the investigation.

The Public Body has not provided argument in relation to its application of section 17 to the videotape. It does not appear to have provided notice under section 30 of the FOIP Act to the inmates in the video or obtained their evidence as to whether they would be identifiable with or

without the severing the Public Body proposes. I have also not been told the factors the Public Body considered relevant to its decision to sever information under section 17(1).

Normally, evidence and argument of this kind should be provided in a public body's initial submissions. However, in this case, I ask the Public Body to provide evidence and argument of the kind I have described in the paragraph above by January 21, 2014, which is the date its rebuttal submissions are due. As the rebuttal submissions of the Public Body will likely contain new evidence, the Applicant need not provide rebuttal submissions until February 4, 2014.

[para 7] In its rebuttal submissions, the Public Body decided that it would not be possible to provide notice to any of the inmates. It argued that section 17 required it to withhold the images of the inmates. However, it also restated its position that it would be possible for it to obscure the faces of the inmates and to provide the remaining video to the Applicant.

II. RECORDS AT ISSUE

[para 8] A photograph, which is designated as record 35, and a video, which does not have a record number, are at issue.

III. ISSUE

Issue A: Did the Public Body properly apply section 17 of the Act (disclosure harmful to personal privacy) to record 35 and the video?

IV. DISCUSSION OF ISSUE

[para 9] 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

[...]

(b) the personal information is an identifiable part of a law enforcement record, except to the extent that the disclosure is necessary to dispose of the law enforcement matter or to continue an investigation,

[...]

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

(i) it appears with other personal information about the third party, 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 10] 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 Applicant 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 11] 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 12] In *University of Alberta v. Pylypiuk*, 2002 ABQB 22, the Court commented on the interpretation of what is now section 17. The Court said:

In interpreting how these sections work together, the Commissioner noted that s. 16(4) lists a set of circumstances where disclosure of a third party's personal information is presumed to be an unreasonable invasion of a third party's personal privacy. Then, according to the Commissioner, the relevant circumstances listed in s. 16(5) and any other relevant factors, are factors that must be weighed either in favour of or against disclosure of personal information once it has been determined that the information comes within s. 16(1) and (4).

In my opinion, that is a reasonable and correct interpretation of those provisions in s. 16. Once it is determined that the criteria in s. 16(4) is [*sic*] met, the presumption is that disclosure will be an unreasonable invasion of personal privacy, subject to the other factors to be considered in s. 16(5). The factors in s. 16(5) must then be weighed against the presumption in s. 16(4).

[para 13] 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 of the public body concludes that it would be an unreasonable invasion of the personal privacy of a third party to disclose his or her personal information.

[para 14] 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 Applicant, as required by section 6(2) of the FOIP Act.

[para 15] The Public Body has applied section 17(1) to withhold the images of inmates from a photograph and from a video. It has not applied section 17(1) to withhold the images of its employees from the photograph or the video as it takes the position that its employees are in the course of their duties and acting as its representatives. It therefore reasons that the images of its employees are not the employees' personal information.

[para 16] I agree with the Public Body that the images of its employees are not their personal information in this case as the images reveal nothing personal about them and would not have personal consequences for them. The video reveals only that they are conducting the business of the Public Body.

[para 17] I turn now to the question of whether the images of the inmates in the photograph and in the video constitute personal information within the terms of the FOIP Act. Section 1(n) of the FOIP Act defines “personal information”. It states:

I In this Act,

(n) “personal information” means recorded information about an identifiable individual, including

- (i) the individual’s name, home or business address or home or business telephone number,*
- (ii) the individual’s race, national or ethnic origin, colour or religious or political beliefs or associations,*
- (iii) the individual’s age, sex, marital status or family status,*
- (iv) an identifying number, symbol or other particular assigned to the individual,*
- (v) the individual’s fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,*
- (vi) information about the individual’s health and health care history, including information about a physical or mental disability,*
- (vii) information about the individual’s educational, financial, employment or criminal history, including criminal records where a pardon has been given,*
- (viii) anyone else’s opinions about the individual, and*
- (ix) the individual’s personal views or opinions, except if they are about someone else;*

[para 18] Information is personal information within the terms of the FOIP Act if it is recorded and is about an identifiable individual. The images of the inmates in the video are their personal information, as they would be identifiable to anyone who knows them on seeing the video or the photograph. The photographs and the video also reveal personal history, or information “about an identifiable individual,” as they reveal that the inmates were incarcerated in the Remand Centre on June 28, 2011, which is the day on which the video was recorded.

[para 19] As discussed above, if information is subject to a provision of section 17(4), then it is subject to a presumption that it would be unreasonable invasion of personal privacy to disclose the personal information.

[para 20] The Public Body argues that the images of the inmates are subject to the presumption created by section 17(4)(b). It argues:

A law enforcement investigation is an investigation that leads or could lead to a penalty or sanction even if the results of the investigation [do] not result in proceedings before a court or tribunal. It is the Public Body’s position that the records at issue are law enforcement records as the records were used for the purposes of the law enforcement investigation and disclosure of

third party personal information in the records at issue is presumed to be an unreasonable invasion of personal privacy. This argument is supported in Order F2008-020.

[para 21] “Law enforcement” is defined for the purposes of the FOIP Act in section 1(h). Section 1(h) states:

I In this Act,

(h) “law enforcement” means

- (i) policing, including criminal intelligence operations,*
- (ii) a police, security or administrative investigation, including the complaint giving rise to the investigation, that leads or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the investigation or by another body to which the results of the investigation are referred, or*
- (iii) proceedings that lead or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the proceedings or by another body to which the results of the proceedings are referred[...]*

[para 22] The Public Body did not explain why it believes the records would be identifiable as part of a law enforcement record within the terms of section 17(4)(b). The video that is at issue was reviewed by the Director of the Edmonton Remand Centre in order to find out what happened to the Applicant’s personal effects. I have not been given sufficient explanation of the process in place at the Remand Centre or the legislative authority on which this process was based in order to say that this process could have resulted in a penalty or sanction. From the description of the investigation provided by the Applicant it appears that the scope of the investigation was limited to finding out what had happened to the Applicant’s personal effects. As it was unknown whether the actions of an inmate or those of a prison guard had resulted in the disappearance of the Applicant’s personal effects, the investigation cannot be said to have been part of a disciplinary process for inmates or a disciplinary process for prison guards.

[para 23] As I am unable to find that the investigation conducted by the Director of the Remand Centre could have led to a penalty or sanction, I am also unable to find that the video and the photograph are subject to the presumption created by section 17(4)(b).

[para 24] I do find that the presumption created by section 17(4)(g) applies. Cited above, section 17(4)(g) states:

17(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[...]

[para 25] Section 17(4)(g) makes specific reference to the name of a third party. Neither the photograph nor the video at issue contains the names of the inmates who appear in it. However, in some cases, where the inmates look straight at the camera, their faces are clear enough to be recognizable to someone who knows them. To anyone who knows the inmates and could identify them on viewing the video or the photograph, the name would be available. Essentially, the name of an individual is associated with the individual when the individual is identifiable, as an individual's name is part of the individual's identity.

[para 26] As discussed above, anyone who views the video or the photograph and knows an inmate who appears in the video or photograph would also know the name of the individual and would be able to learn that the individual was an inmate at the Edmonton Remand Centre on June 28, 2011. The name of the individual is therefore associated with the images in the video and the photograph, in association with the fact that the individual was incarcerated in the Edmonton Remand Centre on a given day. I therefore find that section 17(4)(g) applies, as the information in the photograph and the video would effectively reveal to some persons the name of the individual in addition to other personal information about the individual.

Section 17(5) Factors

[para 27] The Applicant argues that sections 17(5)(a) and (c) apply and weigh in favor of disclosing the personal information in the records.

[para 28] Section 17(5)(a), cited above, is a factor that weighs in favor of disclosure. It applies when disclosing personal information would subject a public body's activities to public scrutiny.

[para 29] In *Pylypiuk*, (*supra*), the Court commented on the application of section 17(5)(a), saying:

In regards to [s. 17(5)(a)], the Commissioner concluded that disclosure of some of the personal information was desirable for the purpose of subjecting the activities of the public body to public scrutiny. In coming to this conclusion, he applied a test from his earlier decision (Order 97-002) in which he stated that to fulfill the requirements of [s. 17(5)(a)] there must be evidence that the activities of the Government of Alberta or a public body have been called into question which necessitates the disclosure of personal information. He also proposed a further three part test:

1. It is not sufficient for one person to decide that public scrutiny is necessary;
2. The applicant's concerns must be about the actions of more than one person within the public body, and

3. If the public body had previously disclosed a substantial amount of information, the release of further personal information would not likely be desirable. This is particularly so if the public body had already investigated the matter.

In coming to the conclusion that the public scrutiny factor weighed in favour of disclosing the personal information, the Commissioner conceded that only one person had decided that public scrutiny was necessary, but then went on to find that the other two elements of the test were met.

In my opinion, the Commissioner made two errors concerning this factor. First, having indicated that there must be evidence that the University's actions should be subject to public scrutiny, and that public scrutiny requires disclosure of the personal information, he provided no analysis of why the activities in question should be subject to public scrutiny. In this regard, I think it is helpful to consider the Commissioner's three part test within the context of [s. 17(5)(a)]. In my opinion, the reference to public scrutiny of government or public body activities in [s. 17 (5)(a)] speaks to the requirement of public accountability, public interest, and public fairness. In this case, we are not concerned with a public component. The Commissioner determined that Pylypiuk had no rights at stake that might raise an issue of fairness. The activities here were private, involving private correspondence, primarily concerned with individual educational programs.

In addition, having referred to no evidence or analysis regarding why the University's activities should be subject to public scrutiny, the Commissioner then moved on to his three part test. Pylypiuk did not meet the first part of that test. While it may not be necessary to meet all three parts of the test, the analysis should demonstrate some rationale as to why one person's decision that public scrutiny is necessary is sufficient to require disclosure, particularly where that person's rights are not affected by the disclosure under [s. 17(5)(c)]. I find that the Commissioner erred in finding that this was a factor that weighed in favour of disclosure. He also failed to adequately show that he considered the effect of the word "clearly" in [s. 32(1)(b)], that the University has a duty to disclose to an applicant information that is clearly in the public interest, except as to the excluded portions of records 16 and 17.

[para 30] The Court in *Pylypiuk* found that it was necessary to answer the question of why one person's decision that public scrutiny is called for is sufficient to require disclosure. As I noted in Order F2009-010, I do not interpret the Court as saying that it is automatically undesirable to subject personal information to public scrutiny if only one person has requested the information, or conversely, that it is automatically desirable to subject personal information to public scrutiny if more than one person requests the information. Rather, the Court means that when determining whether section 17(5)(a) applies to personal information, one must consider whether disclosing the personal information would serve a public interest, such as promoting fairness or accountability, as opposed to private interests only.

[para 31] In this case, I am unable to identify a public interest that would be served by disclosing the images of the inmates in the photograph or the video. While the Applicant argues that there is a public interest in the "proper and effective oversight of peace officers" and that this public interest would be served by disclosing the video and the photograph, it is only the images of inmates that are now at issue, as there is no question of withholding the images of the Public Body's employees. Disclosing the images of inmates in this case would not serve the public interest in the proper and effective oversight of peace officers.

[para 32] With regard to section 17(5)(c), (cited above), which applies when personal information is relevant to a fair determination of an applicant's rights, I am also unable to say that disclosing the images of the inmates would assist the Applicant in learning what happened to his personal effects. From my review of the photograph and the video, I find that none of the inmates appearing in the video or the photograph observed the Applicant's personal effects being moved, and none of them had any role in moving them. As a result, I find that section 17(5)(c) is not engaged.

[para 33] I find that there are no factors outweighing the presumption that it would be an unreasonable invasion of the inmate's personal privacy to disclose their images from the video.

Severing

[para 34] The Public Body proposed severing the images of the inmates from the video and the photograph in order that it could provide the remaining information to the Applicant.

[para 35] Section 6 of the FOIP Act states:

6(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record.

[para 36] If information that is subject to an exception to disclosure can be reasonably severed from a record, then an applicant has a right of access to the remaining information in the record.

[para 37] The Public Body has now provided a version of the photograph to the Applicant with the faces of inmates severed from it.

[para 38] The Public Body is also satisfied that it has the technology to blur the images of the inmates so that they will be unidentifiable. From my review of the video and the photograph, I am satisfied that blurring the faces of the inmates in this case will make it impossible to identify the inmates, particularly given that in many cases, the inmates do not look at the camera. Where the inmates do look at the camera, quite often their features are not very clear, so that additional blurring should also serve to render them unidentifiable.

[para 39] As the Public Body has already severed the images of inmates from the photograph and provided the remaining portion of the photograph to the Applicant, I will not order it to do so.

[para 40] I find that the Public Body's proposal to sever the information of the inmates from the video complies with section 6(2) of the FOIP Act and I will therefore order it to implement its proposal.

V. ORDER

[para 41] I make this Order under section 72 of the Act.

[para 42] I confirm the Public Body's decision to withhold the images of the inmates from the photograph and the video.

[para 43] I order the Public Body to obscure the images of the inmates from the video, and to provide the remainder of the video to the Applicant.

[para 44] 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.

Teresa Cunningham
Adjudicator