

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2014-17

April 15, 2014

ALBERTA HEALTH

Case File Number F6239

Office URL: www.oipc.ab.ca

Summary: Under the *Freedom of Information and Protection of Privacy Act* (the “Act”), the Applicant asked Alberta Health (the “Public Body”) for records relating to two third parties. The Public Body refused to confirm or deny the existence of responsive records, on the basis that doing so would be an unreasonable invasion of the third parties’ personal privacy under section 12(2)(b) of the Act. The Applicant requested a review.

The Adjudicator found that disclosing the existence of responsive records, should they exist, would not be an unreasonable invasion of the third parties’ personal privacy. He ordered the Public Body to respond to the access request without relying on section 12(2)(b).

Statute Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(n), 1(n)(vi), 1(n)(vii), 12, 12(2), 12(2)(b), 17, 17(2)(h), 17(4)(a), 17(4)(g), 17(5)(a), 17(5)(c), 17(5)(f), 72 and 72(3)(a).

Orders Cited: **AB:** Orders 99-014, 2000-016, F2003-014, F2009-029, F2010-029, F2011-010, F2013-45 and F2013-46.

I. BACKGROUND

[para 1] The Applicant was denied reimbursement from the Out-of-Country Health Services Committee (the “OOCHSC”) to cover the costs related to surgery that she received in the United States. The Applicant appealed the Oochsc’s decision to the Out-of-Country Health Services Appeal Panel (the “OOCHSAP”), which confirmed the decision of the Oochsc to deny reimbursement.

[para 2] In a letter dated April 2, 2012, the Applicant’s representative asked Alberta Health and Wellness, now known as Alberta Health (the “Public Body”), for information under the *Freedom of Information and Protection of Privacy Act* (the “Act”). The access request was as follows:

Specifically, we are requesting copies of records of information in any form, as defined in the FOIPP Act, which includes notes, documents, letters and papers and any other information that is written, in the possession of Alberta Health and Wellness that relate to the following, for the time period of January 1, 2010 to the present:

1. The applications by or on behalf of [Third Party No. 1] of Airdrie, Alberta to the Out-of-Country Health Services Committee (“OOCHSC”) and Out-of-Country Health Services Appeal Panel (“OOCHSAP”), for compensation in relation to [the same surgical procedure as the Applicant by a particular doctor at a particular clinic in a particular city in the United States].
2. The applications by or on behalf of [Third Party No. 2] of Fort McMurray, Alberta to Oochsc and Oochsap for compensation in relation to [the same surgical procedure as the Applicant by a particular doctor at a particular clinic in a particular city in the United States]; and
3. The payment of compensation to or on behalf of [Third Party No. 1] by Alberta Health and Wellness, the Minister of Health, Oochsc, Oochsap or any other body or person.

By e-mail dated April 11, 2012, the Applicant’s representative clarified that the Applicant sought records in the custody or under the control of the Public Body, not the Oochsc or Oochsap.

[para 3] By letter dated May 3, 2012, the Public Body refused to confirm or deny the existence of the requested information under section 12(2) of the Act.

[para 4] In correspondence dated June 1, 2012, the Applicant requested a review of the Public Body’s response. Mediation was authorized but was not successful. The matter was therefore set down for a written inquiry.

II. INFORMATION AT ISSUE

[para 5] The information at issue is the personal information of the Third Parties that would be revealed if it were known whether or not the records requested by the Applicant exist. I discuss the nature of this personal information later in this Order.

[para 6] The Public Body says that, because an application for funding out-of-country surgery is submitted to the OCHSC, and information pertaining to an application is provided directly to the OCHSAP in the case of an appeal, the Public Body would not have any records responsive to items 1 and 2 of the Applicant's access request even if either Third Party did, in fact, apply for compensation. Because its role is limited to paying compensation when it is granted by the OCHSC or OCHSAP, the Public Body says that it would only, if they exist, have records in response to item 3 of the access request.

[para 7] The Applicant's access request was not merely for applications to the OCHSC or OCHSAP that may have been made by the Third Parties. She asked for records that "relate" to any of the three items set out in her access request. It is therefore possible for the Public Body to have records responsive to items 1 and 2, if such records do exist.

III. ISSUE

[para 8] The Notice of Inquiry, dated June 28, 2013, set out the issue of whether the Public Body properly refused to confirm or deny the existence of a record, as authorized by section 12(2) of the Act.

IV. DISCUSSION

[para 9] Section 12 of the Act reads, in part, as follows:

12(1) In a response [to an access request] under section 11, the applicant must be told

- (a) whether access to the record or part of it is granted or refused,*
- (b) if access to the record or part of it is granted, where, when and how access will be given, and*
- (c) if access to the record or to part of it is refused,*
 - (i) the reasons for the refusal and the provision of this Act on which the refusal is based,*

...

(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 10] In this case, the Public Body specifically relies on section 12(2)(b) in order to refuse to confirm or deny the existence of records responsive to the Applicant's access request. The Public Body has the burden of proving that it properly relied on section 12(2) (Order F2009-029 at para. 11). Having said this, it is in the Applicant's best interest to also provide argument and evidence (Order 99-014 at para. 11; Order F2009-029 at para. 11).

[para 11] The test for properly applying section 12(2)(b) of the Act has been framed as follows:

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)

1. Did the Public Body conduct a search for the requested records?

[para 12] On my review of material submitted by the Public Body *in camera*, I am satisfied that it conducted a search for records so as to determine whether or not records responsive to the Applicant's access request exist. I cannot discuss my finding in any greater detail, as it would reveal to the Applicant whether or not there are records responsive to her access request.

2. If records existed, would confirming their existence reveal personal information of a third party?

[para 13] “Personal information” is defined in section 1(n) of the Act as “recorded information about an identifiable individual”, and it includes information about an individual’s health and health care history under section 1(n)(vi), and information about his or her financial history under section 1(n)(vii).

[para 14] If there are records responsive to the Applicant’s access request and the Public Body were to confirm this, the Public Body would be disclosing that either or both of the Third Parties underwent a particular surgical procedure by a particular doctor at a particular clinic in the United States, that either or both of them applied to the OCHSC and/or OCHSAP for compensation, and that Third Party No. 1 was paid compensation. All of the foregoing facts, if true, would be the Third Parties’ personal information.

[para 15] The Public Body submits that the purpose of section 12(2)(b) is to avoid situations where the disclosure of whether or not a record responsive to an access request exists would enable an applicant to indirectly obtain information that the Act prohibits a public body from providing directly. It adds that, where an access request and therefore any responsive records relate to identifiable individuals, there is no way to sever information so as to make any responsive records non-identifying.

[para 16] Indeed, because the Applicant’s access request in this case specifically refers to the two Third Parties by name, an indication that responsive records exist, should they exist, would reveal the personal information of the Third Parties, as described above. This does not automatically mean, however, that such an indication would be an unreasonable invasion of the Third Parties’ personal privacy and therefore be a prohibited disclosure, as argued by the Public Body. That question comes next in the analysis of whether section 12(2)(b) was properly applied.

3. If records existed, would confirming their existence be an unreasonable invasion of the third party’s personal privacy?

[para 17] In order to rely on section 12(2)(b), the Public Body must show that disclosing the existence of records responsive to the Applicant’s access request, if they do exist, would be an unreasonable invasion of the Third Parties’ personal privacy. The provisions regarding an unreasonable invasion of personal privacy under section 17 of the Act may be used as guidance (Order 2000-016 at para. 35).

[para 18] Section 17 reads, in part, as follows:

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

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

...

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

...

(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,

...

(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,

...

(c) the personal information is relevant to a fair determination of the applicant's rights,

...

(f) the personal information has been supplied in confidence,

...

I will review the application of section 12(2)(b) in this inquiry, using the guidance set out in section 17, under the headings that follow.

(a) *Presumptions in favour of refusing to confirm or deny the existence of records responsive to the Applicant's access request*

[para 19] The Public Body points to the presumptions against disclosure under sections 17(4)(a) and 17(4)(g). I agree that they arise here. If records responsive to the Applicant's access request exist, disclosure of their existence would relate to either or both of the Third Parties' medical history, diagnosis, condition, treatment or evaluation. Disclosure of their existence would also be comparable to disclosing the names of the Third Parties in conjunction with personal information about them.

(b) *Relevance of related inquiries involving the Applicant, OOCHSC and OOCHSAP*

[para 20] The Public Body notes that the Applicant made related access requests to the OOCHSC and OOCHSAP, and that these also became the subject of inquiries before this Office. The Public Body submits that the results of all three inquiries should be consistent. The Applicant says that each inquiry should be decided on its own merits, given that they deal with requests for different records in the possession of three different public bodies.

[para 21] In the matters that gave rise to Orders F2013-45 and F2013-46, the Applicant had requested, from the OOCHSC and OOCHSAP respectively, a copy of their decisions in relation to Third Party No. 1. Like the Public Body in this inquiry, the OOCHSC and OOCHSAP each refused to confirm or deny the existence of responsive records, on the basis that it would be an unreasonable invasion of the personal privacy of Third Party No. 1. In Orders F2013-45 and F2013-46, the Adjudicator required each of the OOCHSC and OOCHSAP to respond to the Applicant without relying on section 12(2)(b). This Office subsequently received letters from OOCHSC and OOCHSAP, indicating that they had complied with the Orders.

[para 22] Given that the OOCHSC and OOCHSAP have now responded to the Applicant's access requests to them without relying on section 12(2)(b), the Applicant now knows whether or not either of those bodies made a decision in relation to Third Party No. 1. If either body made a decision, the Applicant now knows whether or not Third Party No. 1 made an application for compensation, which is information that the Public Body in this inquiry refuses to confirm or deny in response to item 1 of the Applicant's access request to it. If the OOCHSC and/or OOCHSAP made a decision in relation to Third Party No. 1, and if the Applicant was given access to any and all existing decisions, she also now knows whether or not Third Party No. 1 was granted compensation. If he was granted compensation, it may be presumed that he was paid compensation. The Applicant would therefore also now know whether or not Third Party No. 1 was paid compensation, which is information that the Public Body in this inquiry refuses to confirm or deny in response to item 3 of the Applicant's access request to it.

[para 23] Conversely, if the OOCHSC and OOCHSAP's responses to the Applicant's access requests to those bodies indicate that they have no responsive records and

therefore made no decision in relation to Third Party No. 1, the Applicant now knows that Third Party No. 1 was not granted compensation and therefore was not paid compensation. However, if the foregoing is the case, it could still be that Third Party No. 1 made an application for compensation (i.e., the application did not proceed to a decision), meaning that the Applicant would not already know whether or not there are records in response to item 1 of her access request to the Public Body in this inquiry. Further, even if either the OCHSC or OCHSAP has informed the Applicant that it has a decision in relation to Third Party No. 1, the particular body may have decided not to give her access to that decision, in which case she does not know whether or not Third Party No. 1 was granted or paid compensation.

[para 24] Finally, the responses of the OCHSC and OCHSAP have no bearing on whether the Public Body properly refused to confirm or deny the existence of records relating to Third Party No. 2 in response to item 2 of the Applicant's access request in this inquiry, as the Applicant did not ask, from either the OCHSC or OCHSAP, for any records relating to Third Party No. 2.

[para 25] Given that the results of the related inquiries involving the OCHSC and OCHSAP do not provide a complete answer to the issue in this inquiry, I will go on to consider the circumstances that follow, insofar as they are relevant to the Public Body's decision to rely on section 12(2)(b) in this case.

(c) *Fair determination of the Applicant's rights*

[para 26] Under section 17(5)(c), a factor weighing in favour of the disclosure of third party personal information is that it is relevant to a fair determination of an applicant's rights. In order for section 17(5)(c) to be a relevant consideration, all four of the following criteria must be fulfilled: (a) the right in question is a legal right drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; (b) the right is related to a proceeding that is either existing or contemplated, not one that has already been completed; (c) the personal information to which the applicant is seeking access has some bearing on or is significant to the determination of the right in question; and (d) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing (Order F2010-029 at para. 133).

[para 27] The Applicant argues that the foregoing criteria are met in this inquiry because of the following: (a) she has a legal right to bring an application for judicial review of the decisions of the OCHSC and OCHSAP to deny reimbursement of the cost of her surgery received out-of-country; (b) the judicial review proceeding is underway and has not been completed; (c) the personal information of the Third Parties that is at issue in this inquiry has a bearing on her right to reimbursement, which is to be determined in the judicial review proceeding; and (d) this personal information of the Third Parties is required in order for the Applicant to prepare for the judicial review proceeding, as it will demonstrate that the OCHSC and OCHSAP erred in refusing to grant her request for reimbursement.

[para 28] I find that an indication by the Public Body of whether or not records responsive to the Applicant's access request exist is relevant to a fair determination of her rights, and weighs heavily in favour of a conclusion that such an indication would not be an unreasonable invasion of the Third Parties' personal privacy.

[para 29] The Applicant believes that she, Third Party No. 1 and Third Party No. 2 all had similar surgeries in the United States to resolve similar health conditions. She believes that Third Party No. 1 received compensation to cover the cost of his out-of-country surgery, while Third Party No. 2 did not.

[para 30] If responsive records exist in relation to items 1 and 3 of the Applicant's access request, and the Public Body were to confirm this, the Applicant would know that Third Party No. 1 applied for and received compensation for out-of-country surgery, and that his surgery was as she described it to be in her access request. That basic information would enable her to confirm, in the context of her judicial review application, that another individual who underwent allegedly similar surgery for an allegedly similar health condition received funding while she did not. In turn, she could support, at least to some extent, her argument that the OCHSC and OCHSAP erred in refusing to reimburse her for her own surgery. Secondly, if responsive records relating to Third Party No. 1 exist, the Public Body would be required to then decide whether or not the Applicant should be given access to any of the information appearing in those records. That process is also relevant to a fair determination of the Applicant's rights. While she may or may not be entitled to any of the information if it does exist, she is entitled, in my view, to a decision of the Public Body in that regard because it is relevant to, and may affect, her judicial review application. Finally, if the Public Body were to decide to give the Applicant access to information in any responsive records relating to Third Party No. 1, if such records do exist, the Applicant could go on to use some of that additional information to support her position before the Court. This is a third aspect of this matter that leads me to conclude that a response to the Applicant's access request by the Public Body, without its relying on section 12(2)(b), is relevant to a fair determination of the Applicant's rights.

[para 31] If responsive records exist in relation to item 2 of the Applicant's access request, and the Public Body were to confirm this, the Applicant would know that Third Party No. 2 applied for compensation for out-of-country surgery, and that his surgery was as she described it to be in her access request. While she believes that he was not successful in the application that he may have made, the Public Body would, as with any responsive information relating to Third Party No. 1's application and/or compensation, go on to decide whether or not the Applicant should be given access to information relating to Third Party No. 2's application, if he made one. If the Public Body were to decide to give the Applicant access to responsive information relating to Third Party No. 2, if such information exists, the Applicant could then go on to consider using that information for the purpose of her judicial review application. Even if Third Party No. 2 did not receive compensation for a similar surgery as the Applicant and for a similar health condition as her, and even if she were to decide not to present information relating to Third Party No. 2 to the Court, information pertaining to his application for funding, if

he made one, would still be relevant to a fair determination of the Applicant's rights. Information that may not be supportive of the Applicant's position in the judicial review application would still be relevant for the purpose of the Applicant's preparation for that proceeding.

[para 32] Finally, if the Public Body has no responsive records in relation to Third Party No. 1 and/or Third Party No. 2, and it were to indicate this, the Applicant would realize that she is mistaken in her belief that one or both of the Third Parties had similar surgery for a similar health condition as her. In turn, she would know that her argument, which is to the effect that the OCHSC and/or OCHSAP have erred by being inconsistent in their funding decisions in cases similar to hers, is misplaced. Accordingly, even an indication by the Public Body that records responsive to all or part of the Applicant's access request do not exist, if they do not exist, would also be relevant to a fair determination of the Applicant's rights in the judicial review proceeding.

[para 33] The Public Body argues that the third and fourth parts of the test to determine whether a disclosure of information is relevant to a fair determination of an applicant's rights are not met in this inquiry. It submits that the Applicant has not provided a full analysis or applied legal principles to demonstrate her need to know whether or not records responsive to her access request exist, or to demonstrate her ability to actually present such information, or information in any responsive records that exist if they exist, in the course of the judicial review proceeding. The Public Body says that the errors that the Applicant alleges to have been committed by the OCHSC and OCHSAP were not set out in her pleadings, and that the OCHSC and OCHSAP, as administrative tribunals, are not compelled to follow their past decisions. The Public Body adds that the Applicant would have to seek leave of the Court to adduce evidence other than what was before the OCHSC and OCHSAP in the course of her own application and appeal, and that the standard for admitting new evidence is very high.

[para 34] The foregoing does not alter my findings in this part of the Order. It is not for me to decide whether the arguments made by the Applicant fall within the scope of her pleadings in the judicial review application, or whether she would be able to adduce new evidence in that proceeding. She can try to make all of the points that she wants to make before the Court, and the Court can decide whether to hear those points and/or whether they affect the judicial review application, procedurally or substantively. All I need to find, for the purpose of this inquiry, is that an indication by the Public Body of whether or not records responsive to the Applicant's access request exist is "relevant" in such a manner as to affect a fair determination of the Applicant's rights. As noted by the Applicant, the third and fourth parts of the test articulated above requires only that a response to her access request by the Public Body, without its relying on section 12(2)(b), has "some bearing" on a fair determination of her rights and be for the purpose of her ability to "prepare" for the judicial review proceeding.

(d) *Information about the Third Parties allegedly publicly available*

[para 35] The Applicant submits that personal information about the Third Parties has already been made public in a manner that weighs against the Public Body's ability to refuse to confirm or deny the existence of records responsive to the Applicant's access request. She says that details about their surgeries, and about their applications and appeals to the OCHSC and OCHSAP for reimbursement of the associated costs, have been made public on numerous occasions through newspaper articles, and in the case of Third Party No. 1, through a website created by his supporters and a televised news story. The Applicant attached copies of the newspaper articles, printouts from the website relating to Third Party No. 1, and printouts from the website of the television network that aired the news story.

[para 36] The Public Body responds that the media reports are not conclusive proof of the facts conveyed in them, given that the alleged facts are not substantiated and there are even errors in the reported facts. It adds that the information that the Applicant alleges to be publicly available, whether in the media report or the website created by supporters of Third Party No. 1, is not publicly available in the sense that it is accessible to the general or an unrestricted public, or in the sense that there is a public mechanism for obtaining the information.

[para 37] For the purpose of making my finding in relation to the circumstance at issue in this part of the Order, I adopt the following comments made by the Adjudicator in Orders F2013-45 and F2013-46 (both at paras. 57 and 58). She wrote the following:

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.

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).

While the foregoing comments were referring only to the situation allegedly involving Third Party No. 1, I extend the comments to the situation allegedly involving Third Party No. 2.

[para 38] In this case, the news stories and printouts from websites that the Applicant includes in her material only indirectly suggest that the Third Parties applied to the OCHSC and OCHSAP for funding to cover the cost of out-of-country surgery, and that they were or were not successful in those applications. There are no clear statements to that effect. Even if there were, I agree with the above commentary in that the media reports and information on the websites, in this case, were not necessarily widely conveyed and/or that the information in them is not always attributable to a particular, let alone reliable, source.

[para 39] I similarly give the Applicant's view regarding the public availability of information limited weight in this inquiry.

(e) Information supplied by the Third Parties in confidence, if records existed

[para 40] Under section 17(5)(f), a relevant circumstance weighing against the disclosure of personal information about a third party is that the information was supplied in confidence. The Public Body submits that the circumstance is relevant here.

[para 41] I find that it may be relevant. The context in which third party personal information is given can make it reasonable to conclude that such information was supplied in confidence (Order F2003-014 at para. 18). As explained earlier in this Order, if there are records responsive to the Applicant's access request and the Public Body were to confirm this, the Public Body would be disclosing that either or both of the Third Parties underwent a particular surgical procedure by a particular doctor at a particular clinic in the United States, and that either or both of them applied to the OCHSC and/or OCHSAP for compensation. It is possible that either or both Third Parties would have supplied the information about their surgical procedures and made their applications in confidence at the time.

[para 42] For the purpose of deciding whether there would be an unreasonable invasion of the personal privacy of the Third Parties, if the Public Body were to tell the Applicant whether or not records responsive to her access request exist, I am prepared to assume that, if responsive records do exist, the Third Parties would have supplied the information pertaining to their applications to the OCHSC and/or OCHSAP in confidence.

(f) Conclusion regarding the application of section 12(2)(b)

[para 43] On my consideration of the presumptions against disclosure of whether or not records responsive to the Applicant's access request exist, along with my consideration of the relevant circumstances weighing in favour of disclosing whether or not such records exist, I find that such a disclosure would not be an unreasonable

invasion of the Third Parties' personal privacy under section 12(2)(b) of the Act. In my view, the fact that an indication by the Public Body, as to whether or not records responsive to the Applicant's access request exist, is relevant to a fair determination of her rights outweighs the possibility that, if responsive records do exist, the Third Parties may have supplied the information about their surgical procedures and made their applications for compensation in confidence.

[para 44] I accordingly conclude that the Public Body did not properly refuse to confirm or deny the existence of records responsive to the Applicant's access request.

[para 45] As set out earlier in this Order, the third part of the test for properly applying section 12(2) is that a public body must 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. Because I have concluded that the Public Body in this inquiry was not entitled to rely on section 12(2)(b) when responding to the Applicant's access request, there is no exercise of discretion on the Public Body's part for me to review. The Public Body did not have the discretion to rely on section 12(2)(b) in the first place.

[para 46] The Applicant argues that disclosure of whether or not records responsive to her access request exist would not be an unreasonable invasion of anyone's personal privacy, as such a disclosure would reveal details of a discretionary benefit of a financial nature granted to a third party by a public body, as contemplated by section 17(2)(h). The Applicant submits that an individual's receipt of compensation to cover the cost of out-of-country surgery, following a decision of the OCHSC and/or OCHSAP, would fall within the terms of section 17(2)(h).

[para 47] If information in response to items 1 or 2 of the Applicant's access request exists, this would mean only that Third Party No. 1 and/or Third Party No. 2 applied for funding to cover the cost of out-of-country surgery, not that either actually received funding. If information exists in response to item 3 of the Applicant's access request, this would mean that Third Party No. 1 received funding, which might arguably mean, in turn, that section 17(2)(h) is triggered. However, in view of my conclusion that the Public Body is not entitled to rely on section 12(2)(b) in any event, it is not necessary for me to decide whether section 17(2)(h) would, in fact, be triggered.

[para 48] The Applicant also points to the relevant circumstance in relation to public scrutiny, as set out in section 17(5)(a). Given that I have found that a fair determination of the Applicant's rights weighs sufficiently in favour of requiring the Public Body to disclose whether or not there are records responsive to her access request, it is likewise not necessary for me to consider the extent to which such a disclosure might also be desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny.

V. ORDER

[para 49] I make this Order under section 72 of the Act.

[para 50] I find that the Public Body did not properly refuse to confirm or deny the existence of records responsive to the Applicant's access request. Under section 72(3)(a), I order the Public Body to respond to the Applicant's access request without relying on section 12(2)(b).

[para 51] 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.

Wade Raaflaub
Adjudicator