

**ALBERTA**

**OFFICE OF THE INFORMATION AND PRIVACY  
COMMISSIONER**

**ORDER F2014-31**

August 7, 2014

**ALBERTA HUMAN SERVICES**

Case File Number F6935

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

**Summary:** An individual made an access request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) to Alberta Human Services (the Public Body), requesting access to documents regarding a named individual that the Applicant believed was a recipient of benefits from the Government of Alberta's Assured Income for the Severely Handicapped (AISH) program. The Applicant sought the information in order to use it in a legal proceeding involving the sibling of the named third party.

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 party's personal privacy under section 12(2)(b) of the FOIP Act.

The Adjudicator determined that the Public Body properly applied section 12(2)(b) when refusing to confirm or deny the existence of responsive records.

**Statutes Cited:** **AB:** *Assured Income for the Severely Handicapped Act*, S.A. 2006, c. A-45.1, s. 3; *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 12, 17, 72.

**Authorities Cited:** **AB:** Orders 96-008, 98-004, 98-009, 2000-016, F2007-025, F2008-012, F2008-031, F2009-029, F2010-028, F2011-010; **BC:** Order 01-40.

## I. BACKGROUND

[para 1] On December 23, 2012, an individual made an access request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) to Alberta Human Services (the Public Body), requesting access to documents regarding a named individual that the Applicant believed was a recipient of benefits from the Government of Alberta's Assured Income for the Severely Handicapped (AISH) program. Specifically, the Applicant sought confirmation of the named individual's address for a specified time, confirmation of the name of the next-of-kin designated by the individual, and the reason that the individual moved away from a given residence.

[para 2] The Public Body responded by letter dated February 19, 2013, and refused to confirm or deny the existence of responsive records, on the basis that doing so would be an unreasonable invasion of a third party's personal privacy under section 12(2)(b) of the FOIP Act.

[para 3] The Applicant requested a review of the Public Body's decision to refuse to confirm or deny the existence of a record. A portfolio officer was authorized to investigate and attempt to settle the matter; however, this did not resolve the Applicant's issue and an inquiry was requested.

## II. INFORMATION AT ISSUE

[para 4] The issue in this inquiry is whether the Public Body may refuse to confirm or deny the existence of a record. Therefore there are no records at issue, whether or not there were records responsive to the Applicant's request.

## III. ISSUE

[para 5] The Notice of Inquiry issued April 3, 2014 provides the sole issue at inquiry as follows:

**Did the Public Body properly refuse to confirm or deny the existence of a record, as permitted by section 12(2) of the Act?**

## IV. DISCUSSION OF THE ISSUE

[para 6] The Public Body relied on section 12(2)(b) to refuse to confirm or deny the existence of the records. This section 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*

...

*(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 7] The Public Body has the burden of proving that it properly relied on section 12(2) (Order F2009-029 at para. 11).

[para 8] In Order F2011-010, the adjudicator set out the test for properly applying section 12(2)(b) of the Act 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).

*Did the Public Body conduct a search for records?*

[para 9] The Public Body made *in camera* submissions addressing whether it conducted an adequate search for records and whether responsive records were identified. Based on that information, I find that the Public Body searched for responsive records. I cannot provide more detail than that without revealing if records exist or not.

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

[para 10] 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 11] The Public Body argues that:

The Applicant is seeking access to information that may be contained on an Assured Income for the Severely Handicapped (AISH) record, if any such record exists. Disclosure of the existence of any such record would automatically reveal that an individual was in receipt of income assistance in the form of AISH and as well would automatically disclose that an individual had a severe handicap.

[para 12] I agree if records existed, confirming their existence would reveal financial information of the third party, and information about the individual's disability status, which is personal information under sections 1(n)(vi) and (vii) of the Act.

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

[para 13] 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 that Order, former Commissioner Clark stated (at para. 15):

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.

[para 14] 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.*

[para 15] 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 party's 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).

#### *Section 17(2)*

[para 16] Section 17(2) sets out circumstances in which it is *not* an unreasonable invasion of privacy to disclose information of a third party. Neither the Public Body nor the Applicant have addressed this provision; however, I will address section 17(2)(h), which may on the face of it, appear to apply in this case. This section 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 17] The AISH benefit is a benefit provided by the Government of Alberta, in accordance with the *Assured Income for the Severely Handicapped Act* (AISH Act). The benefit might be said to be discretionary insofar as, by its terms, the director "may" provide a benefit to an individual in accordance with the Act and regulation (section 3(1) of the AISH Act).

[para 18] For section 17(2)(h) to apply, a benefit must not only be discretionary, but must also be granted by a public body. In Order F2007-025, the adjudicator noted that "grant" has a range of meanings; she concluded that in the context of section 17(2)(h),

... it appears that "grant" means to "give" or "confer" discretionary benefits of a financial nature, in situations where the grantor is not required to give or confer these benefits, or to consent or agree to provide them, but has discretion to do so. (at para. 25)

[para 19] In my view, this provision does not apply to benefits such as those provided under the AISH program. While the benefit might be described as discretionary because the provision uses the term "may", and is determined on a case-by-case basis, the eligibility criteria for the benefits, as well as what benefits may be provided, are set out in the AISH Act and regulation. In other words, although AISH benefits *may* be provided under the AISH Act, the assessment of whether a particular individual is entitled to the benefit, and the benefits to which an individual is entitled under the AISH Act, is determined by the legislation; the director under the AISH Act cannot decide, outside of

this statutory scheme, that a benefit will not be provided, or provide benefits in excess of those set out in the statutory scheme. This finding is consistent with Order 98-004 (at paras. 207-210), and BC Order 01-40 (at para. 36). Therefore, I find that section 17(2)(h) is not applicable in this case.

*Section 17(4)*

[para 20] The Public Body argues that sections 17(4)(a) and (c) are relevant to the inquiry. 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 21] By confirming the existence of records responsive to the Applicant's request (if such existed), the Public Body would be confirming whether a named third party had been a recipient of AISH benefits in the given time period. As these benefits are intended for individuals with a severe handicap, confirming the existence of any such requested records could also reveal medical information about the third party. This weighs against disclosing whether the records exist.

*Section 17(5)*

[para 22] 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, and any other relevant factors. 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 23] The Applicant states that he is currently involved in a legal proceeding with the third party's sibling, and that during the discovery process, the sibling lied about whether the third party lived with the Applicant and the sibling for a period of time. The Applicant argues that he requires the requested information in order to challenge this evidence. The Applicant's argument seems to fall within the scope of "fair determination of the applicant's rights" under section 17(5)(c).

[para 24] 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

The personal information is required in order to prepare for the proceeding or to ensure an impartial hearing. (Order F2008-012 at para. 55, Order F2008-031 at para. 112)

[para 25] The Applicant has a right to defend himself in a legal proceeding; further, the legal proceeding appears to be currently ongoing (and not yet completed). However, it is not clear that the personal information that would be revealed by confirming or denying the existence of the requested records is relevant to the proceeding, or that it is required for the proceeding.

[para 26] The proceeding itself appears to be a civil action between the Applicant and the third party's sibling, regarding an interest the sibling claims to have in the Applicant's property. As noted, the Applicant appears to want the requested information to challenge the sibling's statements made during a discovery process, in which the sibling indicated that the third party had not resided with the Applicant and the sibling. Other than to bring into question the sibling's credibility, the Applicant has not told me how the information might have a bearing on his ability to defend his position in the proceeding.

[para 27] In my view, the information that would be revealed by confirming or denying the existence of the requested records is not sufficiently connected to the legal proceeding to find that it has some bearing on, or is significant to, the right in question. It is not clear whether disclosing the existence of the records (or the records themselves, if they exist) would provide the Applicant with information that he could use in the proceeding, even to challenge the sibling's credibility. For instance, the Applicant states that the sibling drove the third party to a town 30 miles from the Applicant's home, to attend the AISH office for appointments. Even if the third party attended an AISH office, it seems at least possible that the third party did not list the Applicant's address as his place of residence (and therefore any related records, if they exist, may not contain the information sought by the Applicant).

[para 28] The Applicant might argue that he already knows that the third party is an AISH recipient and that he is only seeking records that prove what he already knows;



however, several past Orders have stated that the fact that an applicant knows information does not necessarily warrant disclosing information to the applicant (see Orders 96-008, and F2010-028). Further, in this case, the Applicant indicates that he intends to disclose the information (if any exists) in a court proceeding involving the sibling.

[para 29] The information that would be revealed by confirming or denying the existence of the requested records may have some relevance to a fair determination of the Applicant's rights, but that given the sensitive nature of the information that would be revealed by confirming whether responsive records exist, this factor is outweighed.

[para 30] Neither party has addressed any other factors under section 17(5). I do not see any other factors that weigh in favour of disclosing personal information that would be revealed by confirming or denying the existence of the requested records. There may be additional factors that weigh against confirming or denying the existence of the records; however, the factors raised by the Public Body under section 17(4) are sufficient to find that doing so would be an unreasonable invasion of a third party's privacy.

*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 31] The Public Body's *in camera* submission indicates that it did not identify any factors weighing in favour of confirming or denying the existence of the requested records. The submission also indicates that the Public Body considered the purpose of the provision, in making its determination. I am satisfied that the Public Body properly exercised its discretion in applying section 12(2)(b) in response to the Applicant's request.

## **V. ORDER**

[para 32] I make this Order under section 72 of the Act.

[para 33] I uphold the Public Body's decision to apply section 12(2)(b) in responding to the Applicant's request.

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Amanda Swanek  
Adjudicator