ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2014-33

August 14, 2014

CALGARY POLICE SERVICE

Case File Number F6491

Office URL: www.oipc.ab.ca

Summary: The Applicant made a request to the Calgary Police Service (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for access to the contents of his cell phone. The contents of his cell phone included a video of the death of his former girlfriend (the murder victim), for whose murder the Applicant was convicted and sentenced to prison.

The Public Body provided copies of most of the information found on the cell phone to the Applicant, but withheld all information about the murder victim, including the video.

The Adjudicator noted that the records at issue appeared to be "information in a court file" within the terms of section 4(1)(a). However, as the issue had not been raised by the Public Body and had not been added to the inquiry, she did not make a decision in that regard.

The Adjudicator found that it would be an unreasonable invasion of the murder victim's personal privacy within the terms of the FOIP Act to disclose the personal information of the murder victim to the Applicant. She confirmed the decision of the Public Body.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 2, 4, 6, 17, 72

Authorities Cited: AB: Orders F2007-021, F2011-001, F2012-24 **ON:** Order P-995

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

I. BACKGROUND

[para 1] The Applicant made a request to the Calgary Police Service (the Public Body) for access to the contents of his cell phone. The contents of his cell phone included a video of the death of his former girlfriend (the murder victim), for whose murder the Applicant was convicted and sentenced to prison. The cell phone and its contents were introduced into evidence by the Crown at the Applicant's trial for murder.

[para 2] The Public Body provided copies of most of the information found on the cell phone to the Applicant, but withheld all information about the murder victim, including the video.

[para 3] The Commissioner authorized mediation. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

II. INFORMATION AT ISSUE

[para 4] The information at issue is information about the murder victim obtained from the Applicant's cell phone.

III. ISSUE

Issue A: Does section 17(1) (disclosure harmful to personal privacy) require the Public Body to withhold the information it severed from the records?

[para 5] Prior to addressing the issue of whether section 17 requires the Public Body to withhold information from the Applicant, I find it necessary to comment on section 4(1)(a), which excludes certain kinds of records and information from the scope of the FOIP Act. Section 4(1)(a) states:

> *4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:*
>
> > *(a) information in a court file, a record of a judge of the Court of Appeal of Alberta, the Court of Queen's Bench of Alberta or The Provincial Court of Alberta, a record of a master of the Court of Queen's Bench of Alberta, a record of a justice of the peace other than a non-presiding justice of the peace under the Justice of the Peace Act, a judicial administration record or a record relating to support services provided to the judges of any of the courts referred to in this clause;*

[para 6] The evidence and submissions of the parties establish that the Applicant's cell phone and its contents were entered into evidence at the Applicant's trial. Both the trial judge and the Court of Appeal cited the contents of the cell phone in their judgments, which supports finding that the contents of the cell phone were accepted into evidence. In my view, information that is accepted into evidence at trial is information in a court file within the terms of section 4(1)(a).

[para 7] I draw support for this view from Order P-995, an Order of the Office of the Information and Privacy Commissioner of Ontario, which similarly concludes that evidence and trial exhibits constitute "information in a court file". The Inquiry Officer in that case stated:

> In the current appeal, the Ministry indicates that the second portion of Part One refers to "evidence" used against the appellant in a prosecution. The Ministry submits that these records, if they exist, are located in the official court file at the Ontario Court (Provincial Division) and as such, are not subject to the Act.
>
> Similar to my findings in Order P-994, I find that evidence produced at trial, whether in the nature of documentary exhibits or by way of recorded oral testimony, is clearly the type of information which would fall within the scope of documents which would properly be contained in a court file related to an action. In accordance with my reasons in Order P-994, therefore, I find that the requested records, to the extent that they exist in the court file, are not in the custody or under the control of the Ministry, and are therefore not subject to the Act.

The Inquiry Officer in that case also stated the view that an institution or public body would lack custody or control of evidence, given that the ability to dispose of the evidence at issue in that case was given to the Chief Justice of Ontario by statute.

[para 8] In this case, the Public Body has made copies of the recorded information on the Applicant's cell phone in order to respond to the Applicant's access request. In my view, the copies would remain information subject to section 4(1)(a). I adopt the reasoning of the Adjudicator in Order F2007-021, where he said:

> When a party files documents with a court, the party usually takes in several copies, all of which are stamped as "filed" and certain of which are retained by the party for its own use and for service on other parties. A "filed" stamp essentially means that the document was notionally once on the court file and then immediately "taken back" by the party that filed it. To put the point another way, the records are exact versions of the records in the court file. Either way, I find that copies of court-filed documents emanate from a court file and are excluded from the application of the Act under section 4(1)(a).

The records at issue in this case are reproductions of the information on the Applicant's cell phone, which was accepted into evidence in a court proceeding. Applying the reasoning in Order F2007-021, copies of evidence would be subject to section 4(1)(a).

[para 9] Even though it appears that the records at issue are outside the scope of the FOIP Act by virtue of section 4(1)(a), the Public Body did not cite this provision when it responded to the Applicant, and the issue was not added to the inquiry. I considered adding the issue of the application of section 4(1)(a) to the inquiry; however, as the

outcome is the same whether I decide the issue on the basis of section 17, which is the issue originally set for inquiry, or on the basis of section 4(1)(a), which was not, I will not reach a conclusion as to whether section 4(1)(a) applies.

[para 10] The Public Body has applied section 17 to withhold information about the murder victim, for whose murder the Applicant has been convicted. The Public Body withheld the video of the victim's murder, as well as any other information about her located on the cell phone.

[para 11] Section 17 requires a public body to withhold the personal information of an identifiable individual when it would be an unreasonable invasion of the individual's personal privacy to disclose his or her personal information.

[para 12] Section 1(n) of the FOIP Act defines personal information. It states:

> *1 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 13] Information is personal information within the terms of the FOIP Act if it is recorded and is about an identifiable individual.

[para 14] Information about an identifiable individual is personal information within the terms of section 1(n). I find that the information severed by the Public Body is personal information about the murder victim.

[para 15] 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.*
>
> (2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
>
> …
>
> > *(i) the personal information is about an individual who has been dead for 25 years or more, […]*
>
> …
>
> *(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 16] 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) establishes that disclosing certain kinds of personal information is not an unreasonable invasion of personal privacy.

[para 17] Section 17(2)(i) establishes that it is not an unreasonable invasion of personal privacy to disclose information about a deceased person if the person has been dead for more than 25 years. The implication of this provision is that it must first be decided whether it would be an unreasonable invasion of personal privacy to disclose the personal information of a person who has been dead for a lesser period of time, before disclosing such a person's personal information.

[para 18] 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 19] 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 20] 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 21] 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 22] The information about the murder victim in the records is identifiable as part of a law enforcement record within the terms of section 17(4)(b), given that the records indicate they were created by the Calgary Police Service Technical Crimes Team. Moreover, the presumption set out in section 17(4)(g) applies, given that the name of the murder victim is inferable from her image, telephone number, and nick names where they appear in the records to anyone with sufficient knowledge about her and the facts of the murder case, such as the Applicant. I therefore find that the presumption created by section 17(4) applies.

[para 23] The Public Body severed information about the victim from the records and provided the remainder of the information to the Applicant. Information about the Applicant is also contained in the video, and it can be said to contain his personal information as well. Section 2(c) of the FOIP Act establishes that a purpose of the Act is to allow individuals, subject to limited and specific exceptions, to obtain personal information about themselves held by a public body. However, section 2(b) establishes that another purpose of the FOIP Act is to control the disclosure by a public body of personal information. The question is whether it would be an invasion of the victim's personal privacy to disclose the information the Applicant has requested to the Applicant. For the reasons that follow, I find that it would be.

[para 24] The Applicant argues that the video, along with the other contents of his cell phone, were entered into evidence in open court. I understand the Applicant to argue that the contents of his phone, and the video, were made public at his trial. He reasons

that there would be limited expectations of privacy in relation to this information, given its release in public proceedings.

[para 25] The Public Body argues:

> The Public Body submits that the video was shown in court (made public) for the sole purpose of assisting in the prosecution of the Applicant, and that this limited public access or description of the contents of the video in no way diminished the personal nature of the information therein or in the Victim's right to the protection of her privacy under the Act.

[para 26] I agree with the Public Body that the fact that the video was shown in open court does not remove the privacy interests in the murder victim's personal information. While members of the public could have attended the trial and learned about the contents of the Applicant's cell phone at that time, this information is no longer available to the public. It would be reasonable to maintain expectations of confidentiality in the information, despite its brief exposure at trial. Although the published Court decision contains a description of the relevant information on the cell phone, the Court decision does not describe all the information on it. Moreover, the description by the Court is verbal, and lacks the visual dimension, which the records at issue contain.

[para 27] For these reasons, I find that the public nature of the trial proceedings has not been established as a relevant circumstance within the terms of section 17(5).

[para 28] The Applicant also argues that the privacy interests of deceased persons diminish over time and cites Order F2012-24 as authority for this position. In Order F2012-24, the Director of Adjudication stated:

> I note that the Public Body says it considered as a factor in its exercise of discretion under section 17(5) that the Applicants did not appear to have any "pressing need for any third party personal information", but I do not know how it reached this conclusion. If the personal information of a third party can help inform the next of kin of the circumstances surrounding the death of a family member, and can help to make that death understandable, the family quite possibly does have a "pressing need" for it. Further, as discussed in Order MO-2404, a deceased's family is likely in a better position to decide what information will be helpful to it than is a public body, even if the information is or includes that of a third party.
>
> Before leaving this factor I will comment on the significance to the issue in this case of section 17(2)(i), since the Public Body has cited this provision with reference to the application of section 17 (at paras 3 and 23). Section 17(2)(i), provides that it is not an unreasonable invasion of privacy to disclose the personal information of someone who has been dead for 25 years or more. It is not the case, however, that the expectation of privacy of an individual does not change once the individual has died.
>
> In Order F2011-001 the Adjudicator said:
>
> > The Public Body notes that the Complainant's mother died in 1996. As she has not been dead for twenty-five years, the Public Body correctly points out that section 17(2)(i) does not apply to personal information about her. If section 17(2)(i) applied, it would not be an unreasonable invasion of personal privacy to disclose the personal information and it would be unnecessary to weigh competing interests under section

> 17(5). However, the converse is not true: it does not follow from the fact that section 17(2)(i) does not apply that disclosure is an unreasonable invasion of personal privacy.

In other words, section 17(2)(i) does not operate 'in reverse', and the fact that an individual has not been dead for twenty-five years does not mean that it would necessarily be an unreasonable invasion of the individual's personal privacy to disclose information about the individual.

The Adjudicator also found in Order F2011-001 that the privacy interests of deceased individuals diminish over time and that this may be a consideration under section 17(5). She said:

> The former Information and Privacy Commissioner of Ontario considered that the fact that an individual is deceased is a factor to be weighed when deciding whether it would be an unreasonable or unjustifiable invasion of personal privacy to disclose personal information. In his view, that an individual is deceased, while only one of several factors he considered in that case, was nevertheless a factor weighing in favor of disclosure. I agree with this analysis and share the view that individual privacy interests diminish after death. If privacy interests do not diminish following death and over time, it would be entirely arbitrary for the legislature to determine that privacy rights end after twenty-five years when they do not after twenty-four years and eleven months, for example.

I agree that the privacy interests of a deceased person may diminish over time. In the case before me, the Applicants' daughter has been dead for over five years. Disclosing her personal information now would not necessarily be an invasion of her personal privacy to the same extent that it would have been in her lifetime. That is another consideration that is relevant to the application of section 17(5) in this case.

I have reviewed the withheld records, and see there is information in them that has not been provided to the Applicants that would allow them to know more about the circumstances and events surrounding their daughter's death than they presently know. At the same time, not all the information about the daughter and others in the records would serve this purpose. A considerable amount of the information is extraneous to the central issue that concerns them. However any information in the records about events and activities that may shed light on what happened to her, including the theories the police developed and investigated regarding her death, and whether and why they were discounted, would enable the Applicants to understand more about the circumstances. Records 26 – 28, 33 – 37, 38 – 43, 44, paragraph 4 and part of paragraph 6 on record 85, 91, and records 168 – 170 are some examples of records containing information that would serve this purpose.

[para 29] Orders F2011-001 and F2012-24 both take the position that a deceased individual's privacy interests in his or her personal information diminish over time. However, neither order should be taken as standing for the position that the personal information of a deceased person should be disclosed by virtue of the fact that the individual is deceased. Rather, these cases hold that the diminishing privacy interests of a deceased person may give way to interests weighing strongly in favor of disclosure, such as the need of an individual to obtain his own family and medical history (Order F2011-001) or the need of a family to understand the circumstances surrounding the sudden death of a family member (Order F2012-24).

[para 30] While the privacy interests of the murder victim may arguably have diminished since her death, there are no factors weighing in favor of disclosure in this case. The Public Body's submissions contain extensive and thorough analysis of the

factors under section 17(5) and it concludes that none of these apply. I agree with its reasoning and its conclusion and find that the presumption created by section 17(4) is not rebutted. I will therefore confirm the Public Body's decision to withhold the murder victim's personal information from the Applicant.

[para 31] The Public Body has provided the Applicant with the information he requested where it would not involve providing the Applicant with the murder victim's personal information. I agree with the Public Body that it cannot sever the murder victim's personal information from the video. I therefore find that the Public Body has met the requirements of section 6(2) of the FOIP Act.

IV. ORDER

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

[para 33] I confirm the decision of the Public Body to withhold the information to which it applied section 17(1) from the Applicant.

_____

Teresa Cunningham
Adjudicator