

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2014-40

October 20, 2014

ALBERTA HEALTH SERVICES

Case File Numbers F6351 and F6989

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request to Alberta Health Services (the Public Body). The Public Body extended the time limit for responding to the access request. The Applicant requested review of this decision.

The Public Body responded to the access request, but applied section 17 (disclosure harmful to personal privacy) to withhold some information about its employees from the Applicant. It also withheld a record as non-responsive to the Applicant's access request.

The Applicant requested review of the Public Body's response.

The Adjudicator found that the Public Body had conducted a reasonable search for responsive records and had complied with section 14 of the FOIP Act when it extended the time for responding to the Applicant. The Adjudicator found that the information that was severed from the records was information about the Public Body's employees acting in their personal capacities and was properly withheld under section 17. The Adjudicator also found that the record that had been severed as non-responsive was non-responsive to the Applicant's access request.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 10, 11, 14, 17, 72

Authorities Cited: AB: Orders 2001-016, F2007-029, F2009-026, F2013-51, P2012-13

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

I. BACKGROUND

[para 1] On June 13, 2012, the Applicant made a request for access to records from Alberta Health Services (the Public Body). He requested any “Alberta Health Services email in which my name is mentioned or anything exists in relation to myself”. He specified that he was seeking records created between September 2010 and July 2011.

[para 2] On June 22, 2012, the Public Body wrote the Applicant and confirmed that it had received the Applicant’s access request on June 19, 2012.

[para 3] On July 17, 2012, the Public Body advised the Applicant that it would require an additional 30 days to process his access request, due to the large number of records it would have to search. The Public Body extended the period for responding by 30 days and informed the Applicant that he could request review of its decision to extend.

[para 4] On July 19, 2012, the Applicant requested review by the Commissioner of the Public Body’s decision to extend the time for responding to his access request.

[para 5] The Public Body responded to the Applicant’s access request on July 23, 2012. It informed him that it had located 87 pages of responsive records, but had severed some information from them under section 17 (disclosure harmful to personal privacy).

[para 6] The Applicant requested review of the Public Body’s severing decisions on March 21, 2013.

[para 7] The Commissioner authorized mediation to resolve the dispute between the parties. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

II. INFORMATION AT ISSUE

[para 8] The information the Public Body severed from the records is at issue.

III. ISSUES

Issue A: Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act (duty to assist applicants)?

Issue B: Does section 17 of the Act (disclosure harmful to personal privacy) apply to the information in the records?

Issue C: Did the Public Body properly sever information as non-responsive to the Applicant’s access request?

Issue D: Did the Public Body properly extend the time limit for responding to the request as authorized by section 14 of the Act?

IV. DISCUSSION OF ISSUES

Issue A: Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act (duty to assist applicants)?

[para 9] The Applicant adopted his previous submissions as his initial submissions in the inquiry. The Applicant's request for review contains the following argument relating to the issue of whether the Public Body met its duty to assist him. He states:

I do not feel that the Public Body's response to my access request was adequate.

[para 10] The affidavit of the Public Body's Information Access and Privacy Coordinator describes the steps the Public Body took to assist the Applicant. The affidavit states:

With regard to the specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request I depose the following:

On June 22, 2012 I sent an Urgent Call for Records to the Director of Human Resources in Calgary and to each of the six individuals named in the Applicant's access request. In a Call for Records specific instructions are given at point 2 that: "All record systems organized by name or individual identification number or description of the topic should be searched to locate responsive records. This would include hospital charts, clinic records, ADT systems, electronic databases, divisional file systems, office and administrative records."

That I received in total 550 pages of records from the seven individuals who were sent the Urgent Call for Records. Given that the Applicant was employed at AHS on 3 separate occasions for a total period of approximately 30 weeks, the high volume of the records (the majority of which it later transpired touched with post employment matters) and that the searches included the Director of Human Resources for the geographical zone where the Applicant was employed and Applicant's managers in each of his work assignments, I was satisfied that no other records existed.

Given the large number of records and the need to consult with Human Resources and Legal Services regarding legal privilege a time extension was made pursuant to section 14(1)(b) of the FOIP Act. Ultimately, 87 pages were deemed responsive records given the time period of the Applicant's request.

[para 11] Section 10 of the FOIP Act states, in part:

10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.

[para 12] Prior orders of this office have determined that the duty to make every reasonable effort to assist applicants includes the duty to conduct a reasonable search for responsive records. The Applicant's argument that the Public Body has not located all responsive records can be addressed under section 10.

[para 13] In Order 2001-016, the Commissioner said:

In Order 97-003, the Commissioner said that a public body must provide sufficient evidence that it has made a reasonable effort to identify and locate records responsive to the request to discharge its obligation under section 9(1) [now 10(1)] of the Act. In Order 97-006, the Commissioner said that the public body has the burden of proving that it has fulfilled its duty under section 9(1) [now 10(1)].

Previous orders ... say that the public body must show that it conducted an adequate search to fulfill its obligation under section 9(1) [now 10(1)] of the Act. An adequate search has two components: (1) every reasonable effort must be made to search for the actual record requested and (2) the applicant must be informed in a timely fashion about what has been done.

[para 14] As discussed in the foregoing excerpt, a public body bears the burden of proving that it conducted a reasonable search for responsive records.

[para 15] In Order F2007-029, former Commissioner Work explained the kinds of evidence that a public body must produce or adduce in an inquiry in order to establish that a search was conducted in a reasonable way. He said:

In general, evidence as to the adequacy of a search should cover the following points:

- The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
- The scope of the search conducted – for example: physical sites, program areas, specific databases, off-site storage areas, etc.
- The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
- Who did the search
- Why the Public Body believes no more responsive records exist than what has been found or produced

Did the Public Body complete a reasonable search for responsive records?

[para 16] The Public Body has explained the steps it took to locate responsive records, the scope of its search, the steps taken to locate all possible repositories, the areas involved in the search and its reasons for believing no more responsive records exist than have been located and produced. From its explanation, I am satisfied that it conducted a reasonable search for responsive records.

[para 17] As noted above, the Applicant's sole argument in relation to the Public Body's response is that it was inadequate. He does not indicate what it is about the Public Body's response that he considers to be deficient or challenge the Public Body's evidence regarding its search in any way. As the Public Body has submitted evidence that it conducted a reasonable search for responsive records and that no other responsive records are likely to exist, and this evidence has not been challenged, I find that the Public Body has complied with its duty under section 10.

Issue B: Does section 17 of the Act (disclosure harmful to personal privacy) apply to the information in the records?

[para 18] The Public Body applied section 17 to withhold the names of employees from the records. The Public Body's Information Access and Privacy Coordinator explained the decision to apply this provision in the following terms:

Pages 41, [62 and 63] were severed in accordance with sections 17 and 17(4)(g)(i). With regard to Record 41 although the information stems from the employment context there is a personal dimension inasmuch that an individual is raising an issue about their own personal employment concerns. Although the record in question would not be found on an employment file, the information that a grievance had been made and the subject matter of such a grievance would be. As such this information is particularly sensitive and as it fell within section 17(4)(g)(i) it was severed. Pages [62 and 63] were severed as an employee number being a unique identifier has a personal dimension. While the hours worked by an employee has a personal dimension as it goes beyond a job role or employment responsibilities but actually identifies where an individual was or was not at a given time.

[para 19] In Order P2012-13, an order made under the *Personal Information Protection Act*, the Adjudicator determined that information about an employee's hours of work, recorded for the purposes of payroll, is the personal information of the employee.

[para 20] In Order F2009-026, I said:

If information is about employees of a public body acting in a representative capacity the information is not personal information, as the employee is acting as an agent of a public body. As noted above, the definition of "third party" under the Act excludes a public body. In Order 99-032, the former Commissioner noted:

The Act applies to public bodies. However, public bodies are comprised of members, employees or officers, who act on behalf of public bodies. A public body can act only through those persons.

In other words, the actions of employees acting as employees are the actions of a public body. Consequently, information about an employee acting on behalf of a public body is not information to which section 17 applies, as it is not the personal information of a third party. If, however, there is information of a personal character about an employee of a public body, then the provisions of section 17 may apply to the information. I must therefore consider whether the information about employees in the records at issue is about them acting on behalf of the Public Body, or is information conveying something personal about the employees.

The Director of Adjudication applied the reasoning in the foregoing excerpt in Order F2013-51.

[para 21] If information about an employee's hours of work conveys something personal about the employee, then the information is personal information. In this case, the hours of work were recorded for the purposes of managing the employment relationship and to assist with payroll. From the information, the conditions of employment accepted by the employees can be determined. The information could also be used to draw inferences as to their income.

[para 22] I agree with the Public Body that the information about its employees that it severed from the records is the employees' personal information, although I disagree that it necessarily enables the reader to learn the whereabouts of the employees. The information has a personal dimension as it refers to their names and the fact that there are proceedings involving the employees in their own personal capacities (record 41) and their names, identification numbers, and hours of work as casual employees (records 62 and 63). As discussed above, the terms of employment and income information of employees has a personal dimension. With regard to the information on records 41, 62, and 63, the information is about the employees acting as themselves, rather than as representatives of the Public Body. The information is therefore personal information.

[para 23] As I find that the information that was severed is personal information, I must consider whether section 17 requires the Public Body to withhold it. Section 17 states, in part:

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

[...]

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

[...]

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

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

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

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

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,

(b) the disclosure is likely to promote public health and safety or the protection of the environment,

- (c) *the personal information is relevant to a fair determination of the applicant's rights,*
- (d) *the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,*
- (e) *the third party will be exposed unfairly to financial or other harm,*
- (f) *the personal information has been supplied in confidence,*
- (g) *the personal information is likely to be inaccurate or unreliable,*
- (h) *the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and*
- (i) *the personal information was originally provided by the applicant.*

[para 24] 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 25] 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 26] 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. [17(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. [17(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. [17(1)] and (4).

In my opinion, that is a reasonable and correct interpretation of those provisions in s. [17]. 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. [17(5)]. The factors in s. [17(5)] must then be weighed against the presumption in s. [17(4)].
[my emphasis]

[para 27] The information I have found to be personal information, is subject to the presumption created by section 17(4)(g) of the FOIP Act (reproduced above). I say this because the names of individual employees appear in the records in the context of other information about them.

[para 28] 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 29] 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.

[para 30] I am unable to identify any factors weighing in favor of disclosure of the personal information of the employees and none have been stated to me. I therefore find that the presumption created by section 17(4)(g) is not rebutted in relation to the information the Public Body severed from the records. I will therefore confirm the Public Body's decision to sever names and personally identifying information under section 17(1).

[para 31] In making this determination, I note that the Applicant requested that "AHS's response be struck in its entirety due to incomplete submissions and that the matter proceed ahead." Here, the Applicant refers to the fact that the Public Body's initial submissions inadvertently left out reference to section 17. In a letter dated August 22, 2014, I requested that the Public Body provide submissions explaining its decision to apply this provision. The Public Body provided the Information Access and Privacy Coordinator's affidavit in response.

[para 32] I requested the Public Body's evidence regarding its application of section 17 because I wanted to make my decision on the best evidence possible. Moreover, section 17 is a mandatory provision that applies to protect the rights of third parties. If a decision regarding its application is not made on the best evidence possible, the rights of third parties regarding their personal information may be undermined. For this reason, I have not disregarded the Public Body's submissions.

Issue C: Did the Public Body properly withhold information as non-responsive to the Applicant's access request?

[para 33] The Public Body severed an email from record 10 as non-responsive. I agree that this record is non-responsive as it does not refer or relate to the Applicant in any way and does not meet any of the requirements of his access request. As the email on record 10 is not a record requested by the Applicant, the Public Body properly determined that it was non-responsive.

Issue D: Did the Public Body properly extend the time limit for responding to the request as authorized by section 14 of the Act?

[para 34] Section 11 of the FOIP Act requires a Public Body to make every reasonable effort to respond to an access request not later than 30 days after receiving the access request unless it extends the time limit for responding under section 14. Section 11 states:

- 11(1) The head of a public body must make every reasonable effort to respond to a request not later than 30 days after receiving it unless*
- (a) that time limit is extended under section 14, or*
 - (b) the request has been transferred under section 15 to another public body.*
- (2) The failure of the head to respond to a request within the 30-day period or any extended period is to be treated as a decision to refuse access to the record.*

[para 35] Section 14 of the FOIP Act states:

- 14(1) The head of a public body may extend the time for responding to a request for up to 30 days or, with the Commissioner's permission, for a longer period if*
- (a) the applicant does not give enough detail to enable the public body to identify a requested record,*
 - (b) a large number of records are requested or must be searched and responding within the period set out in section 11 would unreasonably interfere with the operations of the public body,*
 - (c) more time is needed to consult with a third party or another public body before deciding whether to grant access to a record, or*
 - (d) a third party asks for a review under section 65(2) or 77(3).*

[...]

- (4) If the time for responding to a request is extended under subsection (1), (2) or (3), the head of the public body must tell the applicant*
- (a) the reason for the extension,*
 - (b) when a response can be expected, and*
 - (c) that the applicant may make a complaint to the Commissioner or to an adjudicator, as the case may be, about the extension.*

[para 36] The Public Body argues that its decision to extend the time for responding to the access request was reasonable. It points to the fact that the search it conducted resulted in 550 records being located, which then had to be reviewed to determine responsiveness.

[para 37] I find that the Public Body's decision to extend the time for responding to the Applicant complies with section 14(1)(b). Cited above, section 14(1)(b) authorizes a public body to extend the time for up to 30 days if there are a large number of records to be searched and responding within 30 days as set out in section 11 would unreasonably interfere with the operations of the public body. Although the Public Body did not expressly address the requirement that responding to the access request within 30 days would interfere with its operations, I infer from its evidence and from the records at issue that it would have had to hire and train more staff in order to respond within 30 days. This outcome would interfere with its operations.

[para 38] To conclude, I find that the Public Body's decision to extend the time limit for responding was authorized by section 14(1)(b) of the FOIP Act. I also note that its extension decision complied with the requirements of section 14(4), as it included the reasons for the extension, an expected date for a response, and information regarding the right of the Applicant to request review by the Commissioner. I will therefore confirm that the Public Body did not fail to meet its duty to the Applicant under section 11 of the FOIP Act.

V. ORDER

[para 39] I make this Order under section 72 of the Act.

[para 40] I confirm that the Public Body has met its duties to the Applicant under sections 10 and 11 of the Act.

[para 41] I confirm that the Public Body is required to withhold the information it severed from records 41, 62, and 63. I also confirm that the email it severed from record 10 is non-responsive to the Applicant's access request.

Teresa Cunningham
Adjudicator