

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2015-28

September 30, 2015

CALGARY POLICE SERVICE

Case File Number F6882

Office URL: www.oipc.ab.ca

Summary: An applicant sought information regarding a book entitled “The Wolf and the Sheepdog.” The Applicant believes that the book was authored by an employee of the Calgary Police Service (the Public Body) and made an access request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) to the Public Body, for records relating to the book and author and investigations or other similar actions concerning the book and author.

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

The Adjudicator determined that the Public Body did not properly apply section 12(2)(b) when refusing to confirm or deny the existence of responsive records. She ordered it to respond to the Applicant’s request without relying on section 12(2) of the Act.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 12, 17, 72.

Authorities Cited: AB: Orders 98-009, 2000-016, F2007-003, F2009-029, F2011-010.

I. BACKGROUND

[para 1] An applicant sought information regarding a book entitled “The Wolf and the Sheepdog.” By letter dated January 9, 2013, the Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) to the Calgary Police Service (the Public Body), which stated:

It is the information of [the Applicant] that [Constable X] authored the book “The Wolf and the Sheepdog”. In that book, [Constable X] claims that the events are true and that names were changed to protect him and his partner. He claims in his report that he and, at times, his partner, committed criminal assaults, committed obstruction of justice and perjury, committed dangerous driving, conducted an illegal search, committed kidnapping, uttered a death threat, and endangered the life of a prisoner. All of these situations were of the most serious of variety.

My information is that this book was brought to the attention of the Calgary Police Service and that some steps were taken by the Calgary Police Service as a result. I am informed that [Constable X] was assigned to some sort of job which would mean that he would have no contact with members of the public.

I also understand that concerns were raised with the Chief Crown Prosecutor, [...], and other prosecutors and that the Calgary Crown was in discussions with the Calgary Police Service about the problem. I understand that one of the issues that was discussed was the investigation of [Constable X] and his partner for criminal conduct.

This is a *FOIPP Act* application for copies of all records which relate to the above described matter and issues.

[para 2] The Public Body responded by letter dated February 6, 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. An investigation was authorized to attempt to resolve the matter; this was not successful and the matter was set down for inquiry.

[para 4] The Public Body’s initial and rebuttal submissions each included a portion that was exchanged with the Applicant and a portion that was provided to me *in camera*. The *in camera* portions of these submissions reveal whether or not records exist and could not be provided to the Applicant for this reason.

II. INFORMATION AT ISSUE

[para 5] 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 6] The Notice of Inquiry, dated May 28, 2015, provides the sole issue at inquiry as follows:

Did the Public Body properly refuse to confirm or deny the existence of a record as authorized by section 12(2) of the Act (contents of response)?

IV. DISCUSSION OF THE ISSUE

[para 7] 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 8] The Public Body has the burden of proving that it properly relied on section 12(2) (Order F2009-029 at para. 11).

[para 9] 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 10] 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 11] 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 12] The Public Body characterizes the Applicant’s request as making three assertions:

- a) [Constable X] authored the book “The Wolf and the Sheepdog” that purports to recount true events that implicate him and his partner in criminal activity and serious misconduct;
- b) The CPS took disciplinary or other employment related steps against [Constable X] as a result; and
- c) The CPS discussed a criminal investigation of [Constable X] and his partner with the Crown’s office. (Initial submission at para. 14)

[para 13] The Public Body also argues that “confirming the existence (or absence) of responsive records would disclose, among other things, whether or not [Constable X] had disciplinary or other employment related steps taken against him and whether [Constable X] and his partner were the subject of a criminal investigation.” (Initial submission at para. 15)

[para 14] I agree that *if* confirming or denying the existence of responsive records revealed the information as described by the Public Body, that information would be personal information of Constable X. I also agree that confirming or denying the existence of responsive records would reveal *some* personal information about Constable X.

[para 15] However, I disagree that confirming or denying the existence of responsive records would disclose the information described by the Public Body. The Applicant's access request was broad, referring to "all records which relate to the above described matter and issues." Responsive records may exist if Constable X wrote the book or was suspected of writing the book, even if no investigation or disciplinary action ever took place. Indeed, an email or other record that states that Constable X *did not* write the book, if such existed, would be a responsive record.

[para 16] The fact that Constable X did or did not write the book could be his personal information; it is less clear whether an *allegation* that he wrote the book would be, although it could possibly be characterized as an opinion about him, and therefore his personal information. Further, if there are responsive records, their existence would appear to confirm that Constable X works or worked for the Public Body, which is personal information about him; however, this latter information has been confirmed by the Public Body in its exchanged submissions and therefore is not personal information that would be revealed by confirming or denying the existence of responsive records.

[para 17] The Applicant has provided evidence that indicates the information about Constable X noted above is in the public domain. In his rebuttal submission, the Applicant provided printouts from a blog written by a criminal defense lawyer in Alberta; this blog discusses the book and asserts that it was written by Constable X. The blog includes a link to an online Maclean's magazine article regarding film and book reviews for 2008. The blog quotes from the comments section of that article, which included a comment purportedly written by Constable X. The commenter refers to "The Wolf and the Sheepdog" and states that he (Constable X) wrote the book. The comment also includes contact information purportedly for Constable X, including an email address that appears to be an email address of the Public Body.

[para 18] The Applicant also provided another online printout entitled "CWC Author Events Guide, December 2009" that publicizes two book signings that indicate Constable X authored "The Wolf and the Sheepdog".

[para 19] It might be the case that Constable X did not write the comment on the Maclean's online site linking him to the book, and it might be the case that the online book signing advertisement was a joke or fraudulent – in other words, the evidence offered by the Applicant is not definitive proof that Constable X authored the book. However, whether or not Constable X wrote the book is irrelevant; the Applicant has provided sufficient evidence that Constable X has been linked to the book in a public manner.

[para 20] Confirming the existence of records (if they exist) would also reveal that the Public Body knew about the link between Constable X and the book. However, this is not information about Constable X. To give an example, if Bob knows that Sue owns a dog, the fact that Sue owns a dog is information about Sue, but the fact that Bob knows about Sue's dog ownership is information about Bob. Similarly, the fact that the Public Body knows something about Constable X is not information about Constable X; rather, it is information about the Public Body.

[para 21] While I disagree that confirming or denying the existence of responsive records would reveal the type of personal information the Public Body describes above, i.e. “whether or not [Constable X] had disciplinary or other employment related steps taken against him and whether [Constable X] and his partner were the subject of a criminal investigation”, it would still reveal some personal information of Constable X. Specifically, the information that would be disclosed by revealing the existence of records (if any existed) would be that the constable wrote the book or was suspected of writing the book. As the Applicant has shown, this information is already in the public domain; therefore, confirming the existence of responsive records (if they exist) would not reveal information about Constable X that is not already in the public domain. Information in the public domain does not cease to be personal information simply because it’s in the public domain; however, it is a factor that weighs in favour of disclosure, as I will discuss below.

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

[para 22] 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 23] 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 24] 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 a 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 25] 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 has addressed this provision, and none of the circumstances outlined in that provision appear to apply.

Section 17(4)

[para 26] The Public Body argues that sections 17(4)(b), (d) and (g) 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

...

(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,

....

(d) the personal information relates to employment or educational history,

...

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

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

(ii) the disclosure of the name itself would reveal personal information about the third party,

...

[para 27] The Public Body argues that by confirming the existence of records responsive to the Applicant's request (if such existed), it would be confirming whether or not Constable X "had disciplinary or other employment related steps taken against him and whether [Constable X] and his partner were the subjects of a criminal investigation." (Initial submission, at para. 23). The Public Body further argues that this type of information would be part of their law enforcement record and employment record under sections 17(4)(b) and (d), if it existed.

[para 28] Regarding section 17(4)(g), the Public Body states that the Applicant's access request "contains [Constable X's] name and would involve disclosure of his partner's name, if any, in the context of allegations made about them." (Initial submission at para. 26).

[para 29] As discussed above, it is my view that confirming the existence of responsive records (if they exist) would not reveal the personal information the Public Body argues it would. Any record that mentions the book and Constable X may be responsive to the Applicant's request, even information that refutes the link between the book and Constable X or mentions it in a merely conversational way. The existence of responsive records (if they exist) would not necessarily indicate that the Public Body conducted any criminal, disciplinary, or other investigation. Nor could the existence of records reveal the name of Constable X's partner.

[para 30] That said, confirming the existence of responsive records (if any) would link Constable X's name with other information about him, namely that he has been linked with the book. Therefore, section 17(4)(g) weighs against confirming or denying the existence of records.

[para 31] I find that there are no factors other than section 17(4)(g) that weigh against confirming or denying the existence of responsive records. I will also determine whether factors in 17(5) weigh in favour of or against confirming or denying the existence of responsive records.

Section 17(5)

[para 32] The Applicant has argued that section 17(5)(a) weighs in favour of confirming or denying the existence of responsive records. Neither party has considered the application of other factors listed in section 17(5); however, sections 17(5)(e) and (h) may be relevant. These sections state:

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,

...

(e) the third party will be exposed unfairly to financial or other harm,

...

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant,

...

[para 33] Further, the fact that the personal information about Constable X that may be revealed if the Public Body confirms the existence of records (if they exist) is already in the public domain (i.e. Constable X has been publicly linked with the book) weighs in favour of confirming or denying the existence of records. I will discuss the factors weighing against confirming or denying the existence of records first (sections 17(5)(e) and (h)), then the factors weighing in favour.

Section 17(5)(e) and (h) – unfair financial or other harm and unfair reputational damage

[para 34] It seems to me that that harm that may be done by confirming the existence of responsive records – namely, that the Public Body has records acknowledging a link between Constable X and the book – has already occurred by way of the online information that links Constable X with the book. If responsive records exist, acknowledging their existence would not confirm that Constable X authored the book or that the Public Body investigated that possibility. Therefore, I find that confirming or denying the existence of responsive records would not *lead to* a harm described in sections 17(5)(e) or (h).

Information in the public domain

[para 35] In Order F2007-003, the Director of Adjudication considered a situation similar to this case, in which an applicant requested records related to the investigation of a particular

incident involving named police officers. The applicant in that case showed that the relevant incident was publicly reported in the press and that the named officers were reported to have been involved. The Director stated:

Revealing whether the records exist would not reveal whether or not [the incident] happened. It would reveal only whether the police made any records relative to their involvement, and whether they kept them if they made them.

[para 36] A similar statement can be made in this case: revealing whether records exist would not reveal whether Constable X authored the book, or whether the Public Body conducted an investigation (criminal or disciplinary) into whether Constable X authored the book. Disclosing whether responsive records exist would reveal only that the Public Body has records relating to the link that has been publicly made between Constable X and the book. In other words, confirming the existence of records (if they exist) would reveal that the Public Body was aware of information that was in the public domain and that it has written records in relation to the matter.

[para 37] I find that this is a factor that weighs heavily in favour of disclosing whether or not responsive records exist. The only factor weighing against confirming or denying the existence of records is section 17(4)(g). In my view, the personal information that would be disclosed if the Public Body confirms the existence of records (if any exist) is not sensitive information; it does not reveal anything definitive about Constable X, only a possible link between him and a book with which he has already been publicly linked. I find that the fact that this information is in the public domain outweighs the factor against confirming the existence of responsive records (if any exist). I therefore do not need to consider whether any other factors, such as section 17(5)(a), weigh in favour of confirming or denying the existence of records.

V. ORDER

[para 38] I make this Order under section 72 of the Act.

[para 39] I order the Public Body to respond to the Applicant's request without relying on section 12(2) of the Act.

[para 40] 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.

Amanda Swanek
Adjudicator