

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2018-31

July 31, 2018

CITY OF LETHBRIDGE

Case File Number 002616

Office URL: www.oipc.ab.ca

Summary: The Applicant made a request to the City of Lethbridge (the Public Body) for access to his personal information under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act). Specifically, he requested information regarding a human resources investigation that had been conducted by the Public Body as a result of a complaint he had made, including the report of the Public Body's investigator's findings.

The Public Body located responsive records but severed information from them under section 17 (disclosure harmful to personal privacy) and section 24 (advice from officials) of the FOIP Act.

The Applicant requested review by the Commissioner of the Public Body's severing decisions.

The Adjudicator issued Order F2014-23. She found that the statements made by an officer who was the subject of the investigation for which the access request was made were the officer's personal information. However, she found that it had not been established that this information had been properly weighed under section 17(5) as relevant factors had not been considered, while irrelevant considerations had been. She did not confirm the Public Body's decision to sever the officer's statements, but directed it to make a new decision taking into consideration relevant factors. With regard to the remaining information to which the Public Body had applied section 17(1) the

Adjudicator was unable to find that the information had a personal dimension. She directed the Public Body to make a new decision regarding that information as well.

The Public Body informed the Adjudicator that it had complied with the Order. The Applicant subsequently requested review of the Public Body's new response.

The Adjudicator found that there was no indication that the Public Body had complied with the directions in Order F2014-23. The Adjudicator ordered the Public Body to give the Applicant access to the records.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 17, 24, 68, 71, 72, 73

Authorities Cited: AB: Orders F2013-51, F2014-23

I. BACKGROUND

[para 1] The Applicant made a request to the City of Lethbridge (the Public Body) for access to his personal information under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act). Specifically, he requested information regarding a human resources investigation that had been conducted by the Public Body as a result of a complaint he had made, including the report of the Public Body's investigator's findings.

[para 2] The Public Body located responsive records but severed information from them under section 17 (disclosure harmful to personal privacy) and section 24 (advice from officials) of the FOIP Act.

[para 3] The Applicant requested review by the Commissioner of the Public Body's severing decisions.

[para 4] The Commissioner authorized mediation to resolve the dispute. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

[para 5] On June 12, 2014, I issued Order F2014-23. I found that the statements made by an officer who was the subject of the investigation for which the access request was made were the officer's personal information. However, I found that it had not been established that this information had been properly weighed under section 17(5) as relevant factors had not been considered, while irrelevant considerations had been. I did not confirm the Public Body's decision to sever the officer's statements, but directed it to make a new decision taking into consideration relevant factors. With regard to the remaining information to which the Public Body had applied section 17(1) I was unable to find that the information had a personal dimension. I directed the Public Body to make a new decision regarding that information as well. I made the following order:

[para 82] I require the Public Body to make a new decision regarding the application of section 17 in view of the following:

- that only personal information of identifiable individuals may be withheld under section 17;
- that information about employees acting in a representative capacity that lacks a personal dimension is not information to which section 17 applies;
- that a relevant consideration under section 17(5) is that the findings of the investigator have already been provided to the Applicant;
- that notice under section 30 of the FOIP Act should be provided to individuals whose personal information is in the records in order to gather their views and evidence regarding disclosure;
- that there may be other considerations, such as its own policies or fairness that may support disclosing personal information and that it must determine whether these apply;
- that the Public Body consider only factors that have been established as applying.
- If, once the Public Body has made its new decision, it finds it necessary to consider severing information, it must consider whether it is possible to sever personally identifying information and to provide the remainder to the Applicant.

[para 83] I order the Public Body to provide the information in the records referring to a member of an external police service to the Applicant.

[para 84] I order the Public Body to reconsider its decision to withhold the contents of emails from records 77 and 78. The new decision should consider whether the deliberations in the emails were intended to be disclosed to the Applicant or were disclosed to the Applicant.

[para 122] *sic* I further order the Public Body to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

[para 6] The Public Body did not apply for judicial review of this order. Rather, it informed this office on February 4, 2015 that it had complied with the Order. It stated:

The City of Lethbridge has complied with Paragraphs 82, 83, and 84 of Order F2014-23, Case File F6373. The revised decision was sent out on November 4, 2014. I trust this concludes the matter.

[para 7] The Applicant requested review of the Public Body's response. In a letter dated March 16, 2016, the Applicant, through his representative, stated:

Reduced to its core, the issue is that the items disclosed to [the Applicant] by the City of Lethbridge are not complete and their response resulting from [Order F2014-23] is not satisfactory. The Order indicates in paragraph 82 that the Public Body make a new decision regarding the application of Section 17 in so far as, "only personal information of identifiable individuals may be withheld under section 17". Rather than redacting only that which is referred to above the Public Body has withheld pages 89 through 159 of their report – including all notes and statements from witnesses.

It is our position that though there may be information within those notes and statements that are subject to vetting or redaction, they are not appropriately withheld in their entirety. We seek to have possession of pages 89 through and including 159 of their investigative report. Their result has not addressed the direction given and is not satisfactory to [the Applicant] or to the Lethbridge Police Association representing him.

[para 8] The Commissioner referred the Applicant's request for review to inquiry and delegated the authority to conduct the inquiry to me.

II. RECORDS AT ISSUE

[para 9] The information the Public Body severed under section 17(1) is at issue.

III. ISSUE

Does section 17 of the Act (disclosure harmful to personal privacy) require the Public Body to withhold the information to which it applied this provision?

[para 10] 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.

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

(a) the third party has, in the prescribed manner, consented to or requested the disclosure, [...]

...

(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 11] 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 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 12] 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 13] 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 exercise, the head of the public body concludes

that it would be an unreasonable invasion of the personal privacy of a third party to disclose his or her personal information.

[para 14] Once the decision is made that a presumption set out in section 17(4) applies to information, 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 15] However, it is important to note that section 17(1) is restricted in its application to *personal information*. Before a public body may apply section 17(1), it must first determine whether the information in question is personal information or that it is likely to be so.

[para 16] In Order F2013-51, the Director of Adjudication found herself unable to find that the information in the same records that are now before me was personal information, without more evidence. She said:

As well, the Public Body has severed information, partly in reliance on section 17, that may be properly characterized as 'work product'. For example, it has severed the questions asked by an investigator, in addition to the answers of those interviewed. It has also withheld what is possibly a line of inquiry which the investigator means to follow (the note severed from record 1-151). While some of the questions and notes may reveal the personal information of witnesses, it does not appear that it is always the case that they do, and it appears possible that the Public Body withheld information on the basis that it may reveal something about the investigator performing duties on its behalf, rather than personal information about third parties.

The Public Body has also withheld notes of an interview by the Public Body's investigator of the University of Calgary's legal counsel, in part in reliance on section 17. Information about the legal counsel's participation in the events surrounding the Applicant's complaint to the University is not her personal information unless it has a personal aspect, which was not shown.

As well, it may be that some of the information of persons interviewed in the third volume relating to the Applicant's 'retaliation' complaint, which was withheld in reliance on section 17, may be information about events in which these persons participated in a representative rather than a personal capacity. Again, to be personal in such a context, information must be shown to have a personal dimension.

In Order F2009-026, the Adjudicator 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.

In that case, the Adjudicator found that information solely about an employee acting as a representative of a public body was information about the public body, and not information about the employee as an identifiable individual. In *Mount Royal University v. Carter*, 2011 ABQB 28, Wilson J. denied judicial review of Order F2009-026.

In Order F2011-014, the Adjudicator concluded that the name and signature of a Commissioner for Oaths acting in that capacity was not personal information, as it was not information about the Commissioner for Oaths acting in her personal capacity. She said:

Personal information under the FOIP Act is information about an identifiable individual that is recorded in some form.

However, individuals do not always act on their own behalf. Sometimes individuals may act on behalf of others, as an employee does when carrying out work duties for an employer. In other cases, an individual may hold a statutory office, and the actions of the individual may fulfill the functions of that statutory office. In such circumstances, information generated in performance of these roles may not necessarily be about the individual who performs them, but about the public body for whom the individual acts, or about the fulfillment of a statutory function.

I find that the names and other information about employees of the Public Body and the University of Calgary acting in the course of their duties, as representatives of their employers, cannot be withheld as personal information, unless the information is at the same time that of an individual acting in the individual's personal capacity.

I turn to the notes made by the Public Body's investigator of interviews with witnesses, which comprise a large part of the information that was withheld from the Applicant. With regard to the records in Volume 1, many pages of these notes record information which would possibly be identifiable only by reference to the names that are noted on the first of a series of pages recording a particular witness's statements and answers. It is possible that some of the statements would identify their maker from their content or their context quite apart from their names, but for much of this information, this is by no means clear. However, it appears that in making its decision as to what information to provide, rather than severing names and providing otherwise unidentifiable information, the Public Body provided only the names as written in the top margin of the notes, and, further, also provided these names and the associated page numbers of the notes in the index of records. The consequence is that though it might have been possible to disclose some of the information to the Applicant because the person being interviewed was not identifiable, the Public Body's disclosure of the names means that information cannot be disclosed on this basis.

However, this did not happen for some of the records that record witness interviews, for example, in Volume 3. For these notes, there remains a possibility that the people whose statements are being recorded in interviews are not identifiable, hence some of this information may not be "personal information" within the terms of the Act if the names are severed.

I note further that it may not have been possible for the person who performed the severing in this case to determine whether or not the interview notes would identify the person being interviewed if the name were severed. Indeed the only way it may have been possible to try to determine this would have been to ask the maker of the statements, and/or the person who made the notes. Conversely, some of the items of information, such as individuals' telephone numbers and an email address, are clearly their personal information. (Though the names might

be severable, the Applicant could presumably try to discover whose phone numbers or email addresses they are by calling the numbers.)

Given this lack of clarity, I cannot determine whether much of the information that was withheld in part on the basis of section 17 was the personal information of an identifiable individual. I will deal below with how this problem can be addressed. [my emphasis]

[para 17] In Order F2013-51, the Director of Adjudication directed the Public Body to make new decisions under section 17(1) addressing the question of whether the information in the records was personal information. She directed that if the Public Body determined that the information was personal information, it was to consider relevant factors under section 17(5) in deciding whether to withhold the information from the Applicant or not.

[para 18] As the Director of Adjudication was unable to determine whether the information to which the Public Body had applied section 17(1) was personal information, other than personal telephone numbers and email addresses, was personal information, and the same records and severing are before me, I must first consider whether the information at issue (other than the statements of the officer under investigation, which I have found to be personal information) is personal information.

[para 19] Section 17 requires a public body to withhold the personal information of a third party if disclosing the personal information would invade the third party's personal privacy.

[para 20] The Public Body explains its new decision to find that the information in the records is personal information in the following terms:

This inquiry originates back to an application by [the Applicant] on May 24, 2012. The City of Lethbridge provided a response by June 4, 2012. Subsequently, there was a request for a review by the Office of the Information and Privacy Commissioner of Alberta (OIPC). A decision was issued on February 22, 2013, which in part states the following.

“It is my opinion that ...CL [City of Lethbridge] correctly applied sections 17(1) and 17(4)(b) to the information withheld from the records and CL correctly applied section 24(1)(b) of the FOIP Act.”

A request for an inquiry was made on March 26, 2013 by Mr. Kramer. No submissions were made by the Applicant (either initial submission or rebuttal).

An Order was issued by OIPC on June 12, 2014 (F2014-23). It found there were two issues in this inquiry:

1. Were sections 17(1), 17(4)(b), and 17(5)(f) of the Act properly applied by the Public Body; and
2. Was section 24(1)(b) of the Act properly applied by the Public Body?

The Order required the Public Body to make a new decision regarding the application of section 17.

The City of Lethbridge issued a response on August 25, 2014 which unredacted an additional 5

pages of the records. It again was sent to OIPC on November 4, 2014 and February 4, 2015 because OIPC maintained they had not received it.

OIPC allowed an appeal to be filed against the new response. However, the City did not receive any written notification until April 26, 2018. The appeal does not provide any evidence that the procedures were incorrect; all it states that it is not satisfactory. The initial submission dated May 5, 2018 provides no arguments or evidence why the records should be released

Is the information severed by the Public Body under section 17(1) personal information?

[para 21] As noted above, I found that while the statements made by the officer who was the subject of the investigation were his personal information, I found that the Public Body did not establish that any of the other information to which it applied section 17(1) was personal information.

[para 22] Personal information is defined by section 1(n) of the FOIP Act as information “about an identifiable individual”.

[para 23] In Order F2014-23, I did not uphold the Public Body’s decision as to whether the information it had withheld under section 17(1) met the terms of section 1(n), except for the statements of the officer under investigation. However, rather than order disclosure, I directed the Public Body to determine whether the information to which it applied section 17(1) had a personal dimension. If it had a personal dimension, then the Public Body was directed to make a new decision applying only relevant considerations under section 17.

[para 24] In its submissions, the Public Body does not indicate that it took the steps it was directed to take in F2014-23 to determine whether information in the records was personal information. Instead, it relies on the report of a portfolio officer who was authorized to investigate and attempt to settle the Applicant’s original request for review, and the fact that the Applicant has not made extensive submissions for the inquiry. The Public Body has provided the same records and decisions that were the subject of Order F2014-23 and provided no explanation as to why it considers the information it severed to be personal information.

[para 25] The report of the portfolio officer, is not, as the Public Body suggests in its submission, a final decision of this office. Such reports are issued under section 68 of the FOIP Act, and are provided as attempts “to settle the matter” within the terms of that provision. The final decision, in this case, was Order F2014-23, which was made under section 72 of the FOIP Act. Under section 73 of the FOIP Act, decisions of the Commissioner made under section 72 are final and are not subject to appeal.

[para 26] If I were empowered to overturn F2014-23, which I am not empowered to do, given that it is a final decision under section 73 of the FOIP Act, I would come to the same conclusion at which I originally arrived. I found I was unable to find that the information in the records was personal information without evidence as to the context in which information about individuals appears in the records. I am similarly unable to determine whether the information about individuals that appears in the records is about

them acting in a personal capacity or a representative capacity. Indeed, in many places, the Public Body has disclosed some identifying information, which suggests that the individuals were acting in a representative capacity, but then withheld items of information from the same record without explanation.

[para 27] The Public Body appears in its submissions to hold the view that the Applicant bears the burden of proof in this inquiry, as it remarks on the Applicant's lack of extensive submissions. However, the Public Body, not the Applicant, bears the burden of proof in this inquiry under section 71(1). Section 71 states:

71(1) If the inquiry relates to a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part of the record.

(2) Despite subsection (1), if the record or part of the record that the applicant is refused access to contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.

(3) If the inquiry relates to a decision to give an applicant access to all or part of a record containing information about a third party,

(a) in the case of personal information, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy, and

(b) in any other case, it is up to the third party to prove that the applicant has no right of access to the record or part of the record.

Sections 71(2) and (3) do not apply in this case, as it is unknown whether the information the Public Body has severed is the personal information of a third party. Instead, section 71(1) applies, as the Public Body has made a decision to refuse access under section 17.

[para 28] I turn to the statements of the officer under investigation, with respect to which the burden in section 71(2) and (3) could be said to apply. However, in Order F2014-23 I found that the evidence in the records established that there were relevant factors weighing in favor of disclosure that the Public Body had failed to consider and I did not confirm the Public Body's decision to sever the statements. I found that it had made its decision based on irrelevant considerations and I directed it to make a new decision based on relevant considerations. If the Public Body has made a new decision, there is nothing before me to enable me to now conclude that interests in protecting privacy outweighed interests in disclosing the statements of the officer in Order F2014-23.

[para 29] In Order F2014-23, I was asked to find that the information severed from the records was personal information. I determined that this finding was not one that

could be made based solely on the evidence of the records and directed the Public Body to make new decisions based on contextual evidence. Where I did find the information was personal information, I was asked to find that the Public Body properly withheld the information under section 17(1), and concluded that I could not do so.

[para 30] In this present inquiry, the records are the same, the decision of the Public Body is the same, as are the issues. The records have once again been left to speak for themselves and the Public Body did not obtain any additional evidence or make a new decision with it, as directed. It is therefore not open to me to arrive at a different conclusion than I did in Order F2014-23 as to the classification of the information in the records and the appropriateness of the Public Body's severing decisions. However, as there appears to be no benefit to directing the Public Body to make new decisions, I have decided that I must order the Public Body to give the Applicant access to the records.

V. ORDER

[para 31] I make this Order under section 72 of the Act.

[para 32] I order the Public Body to give the Applicant access to the records in their entirety, without reference to section 17(1).

[para 33] I order the Public Body to inform me within 50 days of receiving this order, that it has complied with it.

Teresa Cunningham
Adjudicator