ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2018-74

December 10, 2018

EDMONTON POLICE COMMISSION

Case File Number 001251

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Summary: The Applicant made a request for access under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to the Edmonton Police Commission (the Public Body). The Applicant requested records in relation to:

1. the ending of the employment relationship between a former employee of the Public Body and the Public Body,
2. all communications between members and employees of the Public Body and members and employees of the Edmonton Police Service which criticize the performance of the former employee,
3. all communications, reports, or records within the Public Body which were critical of the former employee's performance or refer to criticism of the former employee by third parties, including the Edmonton Police Service and employees or members of the Edmonton Police Service,
4. any records referring to the reasons for ending the employment relationship between the former employee and the Public Body,
5. and the amount of money paid to the former employee in relation to the ending of the employment relationship.

The Public Body conducted a search for responsive records. It informed the Applicant that it had located 46 records responsive to categories 1 and 4. It provided one record in its entirety, but severed the remaining records under section 17(1) of the FOIP Act. The

Public Body refused to confirm or deny the existence of any records responsive to categories 2, 3, and 5, citing section 12(2) of the FOIP Act.

The Applicant requested review by the Commissioner. It argued that the records it had requested related to a matter of public interest. It also argued that the Public Body had failed in its duty to assist it, as it had not asked the former employee who was the subject of the records whether he had consented to disclosure of his personal information.

The Adjudicator found that it would be an unreasonable invasion of the former employee's personal privacy were the Public Body to confirm the existence of responsive records (should any responsive records exist) and that it would be an unreasonable invasion of personal privacy to disclose the information to which the Public Body had applied section 17.

The Adjudicator determined that the Public Body was not required to contact the former employee prior to refusing to give access to his personal information.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 10, 12, 18, 17, 20, 72

Authorities Cited: AB: Orders F2013-51

Cases Cited: *Merck Frosst v. Canada (Minister of Health)* [2012] 1 SCR 23, 2012 SCC 3 (CanLII)

I. BACKGROUND

[para 1] On March 18, 2015, the Applicant made a request for access under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to the Edmonton Police Commission (the Public Body). The Applicant requested records in relation to:

1. the ending of the employment relationship between a former employee of the Public Body and the Public Body,
2. all communications between members and employees of the Public Body and members and employees of the Edmonton Police Service which criticize the performance of the former employee,
3. all communications, reports, or records within the Public Body which were critical of the former employee's performance or refer to criticism of the former employee by third parties, including the Edmonton Police Service and employees or members of the Edmonton Police Service,
4. any records referring to the reasons for ending the employment relationship between the former employee and the Public Body,
5. and the amount of money paid to the former employee in relation to the ending of the employment relationship.

[para 2] The Public Body conducted a search for responsive records. It informed the Applicant that it had located 46 records responsive to categories 1 and 4. It provided

one record in its entirety, but severed the remaining records under section 17(1) of the FOIP Act. The Public Body refused to confirm or deny the existence of any records responsive to categories 2, 3, and 5, citing section 12(2) of the FOIP Act.

[para 3] The Applicant requested by the Commissioner of the Public Body's application of section 17(1) to the records and its decision to apply section 12(2).

[para 4] The Commissioner authorized a senior information and privacy manager to investigate and attempt to the matter. Following this process, the Applicant requested an inquiry.

[para 5] The grounds for requesting an inquiry are the following:

> 1. Failure to apply s. 17(5)(a) and, if it was, to apply it reasonably.
> 2. Failure to apply or reasonably apply discretion in regard to the application of s. 12(2).
> 3. The Edmonton Police Commission failed, under s. 10(1), to ask [the former employee] if [the former employee] consented to the disclosure.

II. RECORDS AT ISSUE

[para 6] The records the Public Body has withheld from the Applicant under section 17(1) are at issue.

III. ISSUES

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

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

Issue C: Did the Public Body meet its duty to assist the Applicant under section 10(1) of the Act?

IV. DISCUSSION OF ISSUES

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

[para 7] 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.*

17(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

> *[…]*
>
> *(d) the personal information relates to employment or educational history,*
>
> *[…]*
>
> *(f) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations,*
>
> *(g) the personal information consists of the third party's name when*
>
> > *(i) it appears with other personal information about the third party, or*
> >
> > *(ii) the disclosure of the name itself would reveal personal information about the third party[…]*

(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 8] 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 9] 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 10] Section 17(1) requires a public body to withhold personal information once all relevant interests in disclosing and withholding the information have been weighed under section 17(5) and the conclusion is reached that it would be an unreasonable invasion of the personal privacy of a third party to disclose his or her personal information.

[para 11] The Applicant argues in its rebuttal submissions that section 17(5)(a) applies in this case and weighs in favor of disclosure. It states:

> It is beyond debate that activities of the Police Service and the oversight of the police are subject to a high degree of public interest. For example, [the Applicant] cites *Plimmer v. Calgary (City) Police Service*, 2004 ABCA 175 […] at paragraph 32:
>
> > The purpose of [the *Police Act*] generally is to provide for an adequate and effective level of policing in the province. To accomplish that purpose, [the *Police Act*] provides for the establishment of the [Law Enforcement Review] Board and police commissions and sets out procedures for dealing with complaints and discipline. The particular purpose of the hearing and appeal provisions at issue in this appeal, is to allow an avenue for public complaint and a mechanism for inquiring into such complaints, with a view to balancing the need for public confidence with the employment rights of the officer in the context of the safe, efficient and effective operation of the police service. In furtherance of those purposes, [the *Police Act*] allows the chief to discipline an officer who is the subject of a complaint. The chief's choice of punishment is

> discretionary, within the limits of the punishments prescribed by the regulations, and is subject to an appeal to the [Law Enforcement Review] Board whose remedial powers are broad.
>
> […]
>
> In this case, access to EPC records is necessary for the CTLA to engage in meaningful public debate on the conduct of the EPC in terminating the employment of the [former employee]. This is a matter of public importance. The [former employee's role] is a key actor in the matter of oversight of the applicable police service, in this case the Edmonton Police Service. Obviously, if the Edmonton Police Service and its former member, the Executive Director of the Police Commission, […], became dissatisfied that [the former employee] was perform his job to the detriment of the Edmonton Police Service, when he was only properly fulfilling his function, and influence was exerted on the EPC to terminate him without cause, that is a matter of very serious public concern.
>
> As can be seen from the attached pages found on the EPC website, the [former employee's position] fulfills an important role in regard to complaints against the Edmonton Police Service. This dovetails with the work of the EPC Professional Standards Committee. It is obvious that the [former employee's position] and the Police Commission must be independent from the EPS and not influenced improperly by the Edmonton Police Service regarding the [employee's position].

[para 12] The Public Body argues that consideration of all factors set out in section 17(5) leads to the conclusion that it would be an unreasonable invasion of the former employee's personal privacy to disclose the former employee's personal information. It states:

> […] the Public Body submits that a full consideration of the factors set out in section 17(5), including consideration of whether the disclosure may unfairly damage the reputation of any person referred to in the Request pursuant to section 17(5)(h), does not weigh in favour of disclosure of the personal information.
>
> The responsive records contain clearly personal information which is precisely the kind of information for which disclosure would be presumed to be an unreasonable invasion of privacy pursuant to section 17(4), and the Public Body's decision to withhold that information is appropriate in accordance with the *Act*.

[para 13] The information the Applicant has requested is information about a former employee of the Public Body. Such information is about the employee as an individual, and therefore falls within the terms of section 17(4)(g). As section 17(4)(g) applies, disclosure of the personal information the Applicant has requested is presumptively an invasion of the terminated employee's personal privacy.

[para 14] I note that the Public Body argues that section 17(4)(f) applies to the information it severed under section 17, i.e. the information it has confirmed exists, but over which it is asserting section 17. Section 17(4)(f) would apply to evaluative information responsive to items 2 and 3 of the Applicant's access request, should such information exist. However, the Public Body elected not to confirm or deny the existence of responsive evaluations pursuant to section 12(2) of the FOIP Act, but only confirmed the existence of information meeting the terms of items 1 and 4. In my view, section 17(4)(g), cited above, applies to the personal information meeting the terms of items 1

and 4 of the access request, given that it applies to the name of an identifiable individual where the name would enable a requestor to learn other information about the individual.

[para 15] As I find that a provision of section 17(4) applies, I must consider whether the presumption against disclosure has been rebutted. Section 17(5) contains a non-exhaustive set of factors, which, if relevant, may either rebut or reinforce the presumption. I turn now to consideration of the factors applicable in this case.

Relevant factors

Section 17(5)(h)

[para 16] As noted in the background, above, the Public Body declined to confirm or deny the existence of records responsive to items 2, 3, and 5 of the Applicant's access request. Items 2, 3, and 5 are the portions of the access request that are for information or assessments critical of the former employee's performance in his position, or for records documenting a settlement resulting from the termination of the employment relationship. As a result, the information withheld under section 17(1) is that responsive to items 1 and 4 of the access request only; that is, information about the ending of the employment relationship between the former employee and the Public Body or information referring to the reasons for ending the employment relationship, but which is not critical of the employee and does not refer to a settlement.

[para 17] As noted above, the Public Body argues that section 17(5)(h) applies and is a factor weighing against disclosure. I find that section 17(5)(h) is not a relevant factor in this case. I make this finding on the basis that the information to which the Public Body has applied section 17 is that information I have described above: information generally about the ending of the employment relationship, but not responsive to items 2, 3, and 5 of the access request. Without more, the fact that the relationship ended would not be likely to harm the reputation of anyone.

Does section 17(5)(a) apply to the personal information the Applicant has requested?

[para 18] To accept the Applicant's argument that the public interest is engaged by the termination of the former employee, I would have to find that there is a question as to whether the public interest has been properly served by the Public Body following the departure of the former employee. There is no evidence before me to that effect. Instead, the Applicant advances the theory that the former employee served the public interest in his role, and that the Public Body terminated his employment because it was dissatisfied with some of the ways in which the employee carried out his duties. Assuming this theory to be true, and if it were the case that the way in which the former employee performed his duties was the only way in which the public interest could be served, and there was evidence that the Public Body has not served the public interest in the years following the employee's termination, then it would be arguable that section 17(5)(a) applies to the information the Applicant has requested. However, there is no evidence before me to allow me to find this to be the case.

[para 19] Even assuming that the Applicant's theory is correct, and the Public Body terminated the former employee after consultation with the Edmonton Police Service and learning of its concerns, this fact alone would not support finding that the Public Body acted contrary to the public interest in doing so. Rather, one might expect communication between these two entities as to whether the manner in which the Public Body performed its oversight function was effective.

[para 20] As it stands, there is no evidence before me that would enable me to find that the public interest is engaged by the ending of the former employee's employment. I find that section 17(5) (a) is not a relevant factor in this case.

Conclusion

[para 21] I find that the provisions of section 17(5) that the parties have argued are relevant do not apply in this case. As I find section 17(4)(g) applies, and as I find there are no relevant factors weighing in favor of disclosure, it follows that I find that section 17(1) requires the Public Body to withhold the former employee's personal information from the Applicant.

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

[para 22] Section 12 of the FOIP Act sets out the kinds of information a public body's response to an applicant must contain. This provision states:

> *12(1) In a response under section 11, the applicant must be told*
>
> *(a) whether access to the record or part of it is granted or refused,*
>
> *(b) if access to the record or part of it is granted, where, when and how access will be given, and*
>
> *(c) if access to the record or to part of it is refused,*
>
> *(i) the reasons for the refusal and the provision of this Act on which the refusal is based,*
>
> *(ii) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and*
>
> *(iii) that the applicant may ask for a review of that decision by the Commissioner or an adjudicator, as the case may be.*

(2) Despite subsection (1)(c)(i), the head of a public body may, in a response, refuse to confirm or deny the existence of

(a) a record containing information described in section 18 or 20, or

(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 23] Section 12(2) creates an exception to the requirement created by section 12(1)(c)(i) that a public body provide reasons for refusing to disclose information and to cite the provision on which a refusal is based. Section 12(2)(a) may be applied when the record contains information described in sections 18 or 20. Section 12(2)(b) may be applied when the requested record contains personal information and disclosing the existence of the information would in itself be an unreasonable invasion of personal privacy.

[para 24] The Public Body argues that section 12(2)(b) applies in this case. I turn now to the question of whether section 12(2)(b) authorizes the Public Body to refuse to confirm or deny the existence of responsive records.

Would confirming the existence of responsive records disclose the personal information of a third party?

[para 25] If the Public Body were to confirm the existence of records responsive to items 2, 3, and 5, then the Public Body would possibly be confirming one or more of the following statements:

- communications between members and employees of the Public Body and members and employees of the Edmonton Police Service criticized the performance of the terminated employee,

- communications, reports, or records within the Public Body were critical of the employee's performance or referred to criticism of the employee by third parties, including the Edmonton Police Service and employees or members of the Edmonton Police Service,

- the employee did not leave his employment with the Public Body voluntarily.

[para 26] As discussed above, section 12(2)(b) may be applied only when it would be an unreasonable invasion of a third party's privacy to disclose the existence of personal information. It is therefore necessary to consider section 17 of the FOIP Act, reproduced above, which sets out the circumstances when it is, and when it is not, an invasion of a third party's personal privacy to disclose a third party's personal information.

[para 27] If the information the Applicant requested exists, it would be subject to the presumptions created by section 17(4)(d) and (f), as it would be about the former employee's employment history with the Public Body, and would be information consisting of evaluations of the former employee's performance.

[para 28] The question becomes whether the presumption created by the application of sections 17(4)(d) and (f) is rebutted. I have already rejected the Applicant's argument that the public interest is engaged by the facts it alleges and that the activities of the public body should be subjected to public scrutiny. It follows that the presumption that it would be an unreasonable invasion of the former employee's privacy to confirm the existence of responsive records, should such exist, is not rebutted. As the presumption is not rebutted, I must confirm the Public Body's decision to apply section 12(2) to the records.

Issue C: Did the Public Body meet its duty to assist the Applicant under section 10(1) of the Act, despite not contacting the former employee?

[para 29] Section 10 of the FOIP Act requires public bodies to take all reasonable steps to assist applicants. It states:

> *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 30] The Public Body argues:

> The Applicant has argued that the Public Body failed in its duty to assist the Applicant pursuant to section 10(1) of the *Act*, because it should have asked the Third Party whether he consented to the disclosure of personal information.
>
> However, this argument ignores the language of section 30 of the *Act* in relation to notifying the third party:
>
> > 30(1) When the head of a public body is considering giving access to a record that may contain information
> >
> > > (a) that affects the interests of a third party under section 16, or
> > >
> > > (b) the disclosure of which may be an unreasonable invasion of a third party's personal privacy under section 17,
> >
> > the head must, where practicable and as soon as practicable, give written notice to the third party in accordance with subsection (4).
> >
> > (1.1) Subsection (1) does not apply to information that the head of a public body may refuse to disclose in accordance with section 29.
> >
> > (2) Subsection (1) does not apply to a record containing information described in section 17(2)(j).
> >
> > (3) <u>If the head of a public body does not intend to give access to a record that contains information excepted from disclosure under section 16 or 17, the head may give</u>

> written notice to the third party in accordance with subsection (4). [emphasis added in original]
>
> (4) A notice under this section must
>
> > (a) state that a request has been made for access to a record that may contain information the disclosure of which would affect the interests or invade the personal privacy of the third party,
> >
> > (b) include a copy of the record or part of it containing the information in question or describe the contents of the record, and
> >
> > (c) state that, within 20 days after the notice is given, the third party may, in writing, consent to the disclosure or make representations to the public body explaining why the information should not be disclosed.
>
> It is important to note that section 30(3) expressly states that in circumstances where the head of the public body does not intend to give access to a record containing information excepted from disclosure pursuant to section 17, the head *may* give written notice to the third party.
>
> In circumstances such as this, where the Public Body is not releasing any personal information, section 30 clearly does not require the Public Body to make any inquiry of the third party.
>
> OIPC Order 2001-025 at paras. 87 and 105 […]
>
> As a result, the Public Body had no duty to ask the Third Party whether he consented to the disclosure of personal information, and there is no basis for suggesting the Public Body has failed to meet its duty to assist under section 10(1) of the *Act*.

[para 31] Section 30 of the FOIP Act sets out the circumstances in which a public body is required to give notice to a third party and when it is not. It states, in part:

> *30(1) When the head of a public body is considering giving access to a record that may contain information*
>
> > *(a) that affects the interests of a third party under section 16, or*
> >
> > *(b) the disclosure of which may be an unreasonable invasion of a third party's personal privacy under section 17,*
>
> *the head must, where practicable and as soon as practicable, give written notice to the third party in accordance with subsection (4).*
>
> *(1.1) Subsection (1) does not apply to information that the head of a public body may refuse to disclose in accordance with section 29.*
>
> *(2) Subsection (1) does not apply to a record containing information described in section 17(2)(j).*
>
> *(3) If the head of a public body does not intend to give access to a record that contains information excepted from disclosure under section 16 or 17, the head*

> *may give written notice to the third party in accordance with subsection (4).* [my emphasis]

[para 32] The Applicant argues:

> The EPC is correct that giving notice is discretionary, however, where that discretion has been exercised unreasonably or if there are no reasons for refusing to exercise that discretion or the reasons lack transparency and intelligibility, the decision will be unreasonable: *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47.
>
> In this case, no reasons were given.
>
> The only reasonable inference from the submissions of the EPC on this point is that the EPC never had any intention to give access to the record for reasons that had nothing to do with protecting the privacy interests of [the former employee] so there is no merit to the EPC's argument that it was acting under section 17 to protect the privacy interests of [the former employee]. Instead, it was declining to disclose to protect the interests of the Edmonton Police Commission.

[para 33] In *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) the Supreme Court of Canada stated at paragraph 71:

> In considering a request for disclosure of third party information under the Act, the institutional head has four main possible courses of action (aside from the exercise of discretion under s. 20(6)), two of which engage the notice provisions. He or she may decide to (i) disclose the requested information without notice; (ii) refuse disclosure without notice; (iii) form an intention to disclose severed material with notice; or (iv) give notice because there is reason to believe that the record requested might contain exempted material. I will review each option briefly.

[para 34] I agree with the Public Body that section 30 does not require the Public Body to give notice to a third party when the head of the Public Body is not considering giving an applicant access to personal information.

[para 35] The Applicant argues that the Public Body had discretion whether to contact the former employee and the fact that the Public Body did not contact the former employee to determine whether he consented to the disclosure of his personal information, means that the Public Body had ulterior motives in applying section 17. Because the Applicant believes that the Public Body's decision serves its own interests, it argues that the Public Body did not meet its duty to assist it under section 10(1).

[para 36] It may be the case that the Public Body's decisions serve its own interests, in addition to complying with its duties under the FOIP Act in relation to the personal information of the former employee. The interests of a public body and a third party are not necessarily opposed. Moreover, most of the exceptions in the FOIP Act are intended to protect a public body's interests. While section 17 is intended to protect an individual's privacy interests, it may have the incidental effect of serving a public body's interests at the same time. That being said, there is no evidence before me in this case to suggest that the Public Body had motives other than those it states it had when it made the decision to withhold the former employee's information without contacting him.

[para 37] I turn now to the argument that the Public Body did not appropriately exercise its discretion when it elected not to contact the former employee.

[para 38] I note that in Order F2013-51, the Director of Adjudication set out the circumstances in which a public body should obtain evidence, including from individuals who are the subject of information, in order to support its application of section 17. She stated:

> In her submissions of January 4, 2012, the Applicant stated:
>
> > The Applicant would also like to note that third parties (e.g. witnesses interviewed during the AHR investigations) were not contacted to determine if they consented to disclosure of records which pertained to themselves. For example, the Applicant's husband […] provided information to the AHR investigator […] and presumably the notes of his interview would be contained within the withheld documents. Yet the applicant's husband was never contacted to provide his consent to disclose such records, and would have given consent if asked. Therefore, some sections of the Act may allow for disclosure if consent is provided.
>
> In response, the Public Body stated:
>
> > […] the applicant states that consent was not sought for the disclosure of third party personal information. The Public Body's review of the personal information in the records, determined that sections 17, 18, and 20 would be applied to the information. The factors considered, in regard to those sections, were such that the disclosure of this information would not be made regardless if consent was obtained. As such, third party notice was not required.
>
> For the reasons given above, I have found that sections 18, 20, and 27 do not apply to the information severed by the Public Body under those provisions. However, the Public Body's decision to withhold information under section 17, even where it is possible that the individuals who are the subject of the personal information would consent to its disclosure, was based in part on its view that these provisions also applied and would prevent disclosure in any event. If individuals consent to the disclosure of their personal information, the personal information cannot be withheld under section 17.
>
> It appears that the Public Body has not gathered factual information to support its consideration of factors under section 17(5), but has given weight to factors that have not been established as applying, such as the possibilities that personal information was supplied in confidence or that reputations would be damaged by disclosure. [my emphasis]
>
> In Order F2012-24, I noted that section 17(5) imposes a duty on a public body to consider and weigh relevant circumstances when deciding whether disclosing personal information would be an unreasonable invasion of personal privacy. As I found that the public body had considered factors that had not been established as applicable as weighing against disclosure, and because it had not considered factors weighing in favor or disclosure, and had not obtained the views of third parties regarding disclosure of their information, I ordered the public body in that case to make a new decision under section 17(5). I said:
>
> I note first, however, that although my views about the relevant factors and how they apply differ on some points from those of the Public Body, it is not my intention in this case to substitute my decision as to whether disclosure would be an unreasonable invasion of privacy for that of the Public Body.

> This is so despite the fact that in past orders in which adjudicators have found that a public body has failed to take into account what the adjudicator has regarded as a relevant factor in favour of disclosure, the adjudicator has refused to confirm the public body's decision and has ordered the records to be disclosed. (See, for example, Order F2010-031.)
>
> In this case I have decided that rather than performing the weighing exercise myself taking into account these additional factors and points as to how they are to be applied, I will ask the Public Body to do so, and to make a new decision as to which portions of the personal information should be disclosed and which withheld. I have chosen this approach for the following reasons.
>
> By the terms of the Act, my task is to review the decisions of public bodies rather than to make decisions in the first instance, Though the Act gives me the ability to substitute my own decision for that of a public body, section 17(5) also places a positive duty on public bodies to make the decision initially, taking into account all relevant factors, including information from the Applicant and from third parties. My review is to be done with the benefit of the reasoning of the public body as to why particular items of information were withheld, and as well on the basis that the public body has gathered relevant factual information before making its decision. In this case I do not find it either practical or possible to conduct a "review" of the Public Body's decision at this time.
>
> The primary reason for this is that all the factors that the Public Body says in its submission that it applied in this case by reference to section 17(5) were factors that weighed against disclosure, whereas I believe that there are two significant factors, which I will discuss below, that apply in favour of disclosure of the information that has not yet been disclosed.
>
> In my view, this approach has merit in this inquiry as well. There may or may not be factors weighing in favor of disclosing the personal information of third parties in this case. However, the fact the Public Body appears not to have had the benefit of their views means it may be lacking relevant information weighing in favor of (or against) disclosure. If the Public Body were to contact the third parties, it could learn whether they consent to disclosure, with the result that section 17(2)(a) would apply. It might also be able to determine which information could identify the third parties, and which information could not. As well, it may be able to determine, if the individuals were acting in a representative capacity, whether the information that was recorded about them had a personal dimension, or not.
>
> Ordering the Public Body to make a new decision under section 17 is also necessary because for many of the records, I am unable to determine whose personal information has been withheld. The notes do not always refer to the name of the individual who is the source of the information in the records. I cannot tell whether it is about an employee of the Public Body acting in the course of their duties, or whether an individual can be identified from the withheld information at all.
>
> […]
> To conclude, I am not at present in a position to review the Public Body's decision. I must therefore require it, under section 72(3)(a), to make a new decision under section 17, that also reflects the requirement that a public body will sever information where possible, as required by section 6. The Public Body must also try to contact third parties whose personal information appears in the records to obtain their views regarding disclosure, to the extent this is practicable. Finally, when making the new decision, the Public Body should weigh only considerations that have been established as relevant.

[para 39] In the foregoing order, the Director of Adjudication was unable to confirm the public body's decisions regarding the application of section 17(1), as the public body had not gathered sufficient evidence to determine whether the information it had withheld

from the applicant was personal information, and if so, whether it would be an unreasonable invasion of personal privacy to give the applicant access to it. The Director of Adjudication noted also that the public body in that case had not consulted persons who could reasonably be expected to consent to the disclosure of information, due to their relationships with the applicant, but instead relied on factors weighing in favor of withholding their information, even though the relevance of these factors had not been established.

[para 40] In contrast, in the case before me, the parameters of the Applicant's access request, in addition to the information to which the Public Body applied section 17(1), is clearly personal information, and personal information giving rise to a presumption that it would be an unreasonable invasion of the former employee's personal privacy to confirm the existence of responsive records (if any such exist) or to give access to the information in records that the Public Body confirmed exist. There is nothing before me to support finding that the former employee would be likely to consent to the Applicant being given access to the requested personal information.

[para 41] As the requested information in this case is clearly personal information and subject to a strong presumption under section 17(4) that it would be an unreasonable invasion of personal privacy to disclose it or to confirm or deny the information's existence, the Public Body need not contact the subject of the information to determine whether he would consent to the Public Body giving the Applicant access to it or to confirm or deny its existence, given the terms of section 30.

[para 42] In my view, exercising discretion under section 30 is unrelated to the duty to assist. In many cases it may not be practicable to contact individuals, such as when the public body does not have the contact information of the individual. In addition, a public body has no control over an individual's response. If it were the case that section 10 requires a public body to contact individuals to obtain their consent to disclose information, prior to withholding it under section 17, a public body would fail to meet the duty to assist if it were unable to contact the individual, or lacked the resources to contact each and every individual whose personal information was in the record.

[para 43] Finally, if section 10 included a duty to contact third parties, even when the head of a Public Body is not considering giving an applicant access to records, then section 30(3) of the FOIP Act, which makes it *discretionary* for the head of a Public Body to give notice to a third party when the head does not intend to provide access, would be nugatory.

[para 44] As no other grounds have been raised in relation to the duty to assist, I find that the Public Body has met its duty under section 10 of the FOIP Act.

V. ORDER

[para 45] I make this Order under section 72 of the Act.

[para 46] I confirm the decision of the Public Body to neither confirm nor deny the existence of responsive records.

[para 47] I confirm the decision of the Public Body to apply section 17(1) to information in the records.

[para 48] I confirm that the Public Body has not failed in its duty to assist the Applicant in its application of the exceptions to disclosure.

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Teresa Cunningham
Adjudicator