

ALBERTA
OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER

ORDER F2003-014

March 16, 2004

ALBERTA SOLICITOR GENERAL

Review Number 2485

Office URL: <http://www.oipc.ab.ca>

Summary: The Applicant requested access under the *Freedom of Information and Protection of Privacy Act* (the “Act”) to any and all statements made by him or by third parties about him pertaining to a harassment investigation initiated by the Applicant. The Public Body provided the Applicant with most of the records but withheld some records on the grounds that disclosure would be an unreasonable invasion of third party personal privacy and that disclosure would reveal advice given to, or consultations or deliberations involving, the Public Body. The Adjudicator upheld the Public Body’s decision to withhold those records from the Applicant.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(n),(i),(viii),(ix), 17(1), 17(2), 17(4)(d),(g), 17(5), 17(5)(f), 24(1)(a),(b), 71(2), 72 and 85.

Authorities Cited: AB: Orders 96-017, 97-014 and 98-007.

I. BACKGROUND

[para 1] On May 30, 2002 the Applicant applied to the Alberta Solicitor General (the “Public Body”) under the *Freedom of Information and Protection of Privacy Act* (the “Act”) for access to any and all statements made by him or by third parties about him pertaining to a harassment investigation initiated by the Applicant.

[para 2] On June 21, 2002, the Public Body replied to the Applicant stating that it had identified 48 pages of records that were responsive to the request. The Public Body however had withheld seven pages of notes from third party interviews, a memorandum and the concluding paragraph from the investigation report. The Public Body cited sections 17 and 24 of the Act, dealing with privacy of third parties and advice from officials, as authority for withholding information.

[para 3] The Public Body on July 5, 2002, sent the Applicant a supplementary response that contained an unedited 22-page transcript of the audio-taped statement made by the Applicant during the investigation.

[para 4] The Applicant wrote to the Commissioner on July 11, 2002, requesting a review. Mediation was authorized between the Applicant and the Public Body, but was not successful.

[para 5] The Applicant requested an inquiry into the matter. No submissions from the Affected Parties were received. Only the Public Body and the Applicant provided submissions.

[para 6] I subsequently requested a supplemental submission from the Public Body as it had failed to address the mandatory considerations required by section 17(5) of the Act. I further required that it provide me with copies of audio tapes taken during the interviews of third parties as part of the investigation process.

II. RECORDS AT ISSUE

[para 7] The records at issue consist of:

- (i) third party interview notes
- (ii) audio tape interviews of third parties
- (iii) a memorandum
- (iv) the concluding paragraph from the investigation report.

III. ISSUES

[para 8] There are two issues in this inquiry:

- A. Does section 17 of the Act (personal information of third parties) apply to the records/information?
- B. Did the Public Body properly apply section 24 of the Act (advice from officials) to the records/information?

IV. DISCUSSION OF THE ISSUES

ISSUE A: Does section 17 of the Act (personal information of third parties) apply to the records/information?

[para 9] Section 17 of the Act requires a public body to refuse disclosure of personal information if it would be an unreasonable invasion of a third party's personal privacy.

[para 10] Section 1(n) of the Act defines "personal information" in part as:

- 1(n) "personal information" means recorded information about an identifiable individual including*
- (i) the individual's name...*
 - (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 11] The Public Body states that the seven pages withheld in their entirety consist of notes made from the interviews of third parties taken as part of the investigation process. The interviewees are personally identified in the notes and although the names of the interviewees are identified elsewhere in the disclosed records, there is no instance in which their statements are disclosed and attributed specifically to them.

[para 12] Where there is sufficient evidence, a presumption may arise that disclosure would be an unreasonable invasion of a third party's personal privacy. The Public Body in this instance has submitted that the withheld third party interview notes disclose third party personal information relating to employment history and where the third party's names appear, they appear with other personal information about the third parties. As such the Public Body contends that sections 17(4)(d) and (g) of the Act apply. The sub-sections state:

- 17(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,*
 - (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 13] The Applicant states that such personal information can be severed from the records. The Public Body contends that the information about the Applicant contained in the third party statements is so inextricably intertwined with third party personal information that any attempt to sever this information, with a view to disclosing the remainder, would render the records meaningless.

[para 14] I have examined the severed records and the audio-tapes that underpin them, keeping in mind sub-section 17(4) and also section 1(n)(viii) of the Act which states that anyone else's opinion about an individual is also personal information of that individual. I have found that, where opinions are expressed by third parties, most deal with their own employment situation and do not touch upon the Applicant. In the very few instances where an opinion is offered about the Applicant, that information is intertwined with third party personal information so that any attempt to sever such information would render the records meaningless.

[para 15] In determining whether disclosure of personal information would be an unreasonable invasion of a third party's personal privacy under sections 17(1) and 17(4), the head of a public body must also consider all of the relevant factors under section 17(5). It was the failure of the Public Body in its initial argument to address these mandatory considerations that led to my request for further submissions.

[para 16] The Public Body, in its supplemental submission, contends that section 17(5)(f) is the sole relevant factor that must be considered. Section 17(5)(f) reads:

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...

(f) the personal information has been supplied in confidence...

[para 17] The Public Body has argued that even absent a direct statement that information was being supplied in confidence, there was an expectation by the third parties during the investigation that their personal information would remain confidential. In support of this position, the Public Body placed in evidence the booklet "*Sexual and Workplace Harassment Information Booklet*" issued by the Personnel Administration Office, Government of Alberta, which at page 15 states that all discussions and documented material will be held in confidence. In addition, I have had the opportunity of reviewing the audio tapes made during the third party interviews wherein the interviewer impressed upon each interviewee that personal information would be kept confidential.

[para 18] In Order 98-007, the Commissioner stated that the primary concern of section 17(5)(f) is to honour promises of confidentiality made to individuals providing personal information and to protect their privacy and the privacy of others to whom the

information relates. The context in which the third party personal information was given was an investigation wherein interviewees were told that such information supplied would be treated confidentially and a government publication available to such staff that reflected a similar policy. It is therefore reasonable to conclude that such information was supplied in confidence. I find that section 17(5)(f) is a relevant consideration that weighs in favour of non-disclosure of the third parties' personal information.

[para 19] The Public Body has successfully raised the presumption that disclosure of personal information under sections 17(4)(d) and (e) would be an unreasonable invasion of a third party's personal privacy. The burden of proof, according to section 71(2) of the Act, therefore shifts to the Applicant to show that disclosure would not be an unreasonable invasion of a third party's personal privacy.

[para 20] The Applicant contends that the personal information can be severed from the records requested. For the reasons previously stated in this Order, this cannot be the case. The Applicant has not argued the applicability of any of the circumstances in section 17(2), nor is there anything on the face of the records that cause me to conclude that any circumstances in section 17(5) that would weigh in favour of disclosure apply. The Applicant therefore has not met the burden of proof by presenting any evidence that disclosure of the third party interview notes would not be an unreasonable invasion of a third party's personal privacy.

[para 21] This conclusion would equally apply to the audio-taped interviews. I find that section 17 of the Act applies to the third party interview notes and the audio tapes.

ISSUE B: Did the Public Body properly apply section 24 of the Act (advice from officials) to the records/information?

[para 22] The Public Body relied on the exceptions in section 24(1)(a) to withhold the investigation report's conclusion, and section 24(1)(b) to withhold the memorandum.

[para 23] Section 24 reads in part:

- 24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*
- (a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,*
 - (b) consultations or deliberations involving
 - (i) officers or employees of a public body...**

[para 24] In Order 97-014 the Commissioner stated, at paragraph 15:

...to correctly apply section 23(1)(a) [now section 24(1)(a)], there must be advice, proposals, recommendations, analyses, or policy options ("advice"), and the "advice" must meet the following criteria:

- i. be sought or expected, or be part of the responsibility of a person by virtue of that person's position
- ii. be directed toward taking action
- iii. be made to someone who can take or implement the action.

[para 25] With regard to the investigation report's conclusion, the mandate of the investigating panel as stated in its "Terms of Reference" was to investigate the complaint and provide its findings to the Assistant Deputy Minister (the "ADM"), Correctional Services Division and Executive Director, Human Resource Services. Additionally, the interview transcript of the Applicant and the audio tapes demonstrate that the written report to the ADM and Executive Director would form the factual basis on which further action would be implemented. The ADM and Executive Director, through the draft delegation of authority instrument placed in evidence by the Public Body, were responsible for determining what that action would be. It is clear from the evidence that the investigating panel was responsible to make findings of fact and to communicate its conclusions to the ADM and Executive Director, who had authority to take whatever action they deemed necessary.

[para 26] Therefore the concluding paragraph from the investigation report meets the criteria for section 24(1)(a).

[para 27] With regard to the memorandum, this was an exchange between two senior members of the Young Offender Branch and dealt entirely and exclusively with the apology the Applicant agreed to make at his place of work. The memorandum contained an analysis of disciplinary action and was directed to senior management who could implement further action. The memorandum was a full and frank deliberation between employees of a public body and accordingly meets the criteria for section 24(1)(b).

[para 28] Section 24(1) is a discretionary section. Consequently, even if it applies, the Public Body may nevertheless decide to release the information. In Order 96-017, the Commissioner stated that to properly exercise discretion under the Act, a public body must take into consideration the access provisions of the Act.

[para 29] The Public Body gave evidence regarding its exercise of discretion. The discretion not to disclose in relation to these documents was undertaken by the Executive Director, Human Resource Services. The Executive Director was authorized to exercise discretion by the Ministerial Order submitted in evidence that delegated this power from the head of the Public Body pursuant to section 85 of the Act. It was clear that disclosure of the investigation report's conclusion would reveal advice developed for a public body. With regard to the memorandum, the Public Body states that consideration was given to whether or not disclosure of this information would reduce the candid and comprehensive exchange of advisory information making the deliberations regarding the management of personnel less open and frank, or otherwise limit the Public Body's ability to manage its administrative processes. The Public Body quite reasonably found that it would.

[para 30] I find that the Public Body properly exercised its discretion regarding both documents.

[para 31] I therefore find that the Public Body properly applied section 24 of the Act to the memorandum and the investigation report's conclusion.

V. ORDER

[para 32] I make the following Order under section 72 of the Act:

[para 33] Section 17 of the Act applies to the third party interview notes and audio tapes. I require the Public Body not to disclose them to the Applicant.

[para 34] The Public Body properly applied section 24 of the Act to the memorandum and the investigation report's conclusion. I confirm the Public Body's decision not to disclose them to the Applicant.

Dave Bell
Adjudicator