

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2008-010

April 7, 2008

ALBERTA FINANCE AND ENTERPRISE
(formerly Alberta Finance)

Case File Number 3850

Office URL: www.oipc.ab.ca

Summary: In an access request to Alberta Finance and Enterprise (the “Public Body”) under the *Freedom of Information and Protection of Privacy Act* (the “Act”), the Applicant asked for copies of contracts awarded to two named individuals. One of the individuals later consented to disclosure of the whole of the records that related to him. The other individual consented to the release of his two contracts, provided that his salary information and home address were withheld.

The Public Body provided the Applicant with the requested records but withheld the annual salary, monthly salary and home address of the second individual, on the basis that disclosure would be an unreasonable invasion of his personal privacy under section 17 of the Act.

Although the Applicant suggested that public scrutiny of the salary information was desirable, the Adjudicator found that he presented insufficient evidence to show that the activities of the Public Body had been called into question, or that there was a public component that warranted disclosure of the third party’s salary. Moreover, the salary range of the third party was publicly available.

The Adjudicator found that there was a factor weighing against disclosure of the third party’s home address, as it is generally understood that employees supply their home addresses to their employers in confidence.

As the Applicant did not establish that the withheld information should be disclosed, the Adjudicator confirmed the decision of the Public Body to refuse access.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(n), 1(n)(i), 2(a), 16, 17, 17(2), 17(2)(e), 17(2)(f), 17(4), 17(4)(d), 17(4)(g), 17(5), 17(5)(a), 17(5)(e), 17(5)(f), 30(1)(b), 30(4)(c), 71(1), 71(2), 72 and 72(2)(b); *Public Service Act*, R.S.A. 2000, c. P-42, ss. 28 and 29.

Authorities Cited: AB: Orders 97-002, 97-011, 99-028, 2000-026, F2004-014, F2004-015, F2004-026, F2004-028, F2005-016, F2006-007 and F2006-008; *University of Alberta v. Pylypiuk*, 2002 ABQB 22; *Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner)*, 2006 ABQB 515.

I. BACKGROUND

[para 1] By letter dated July 14, 2006, the Applicant made a request under the *Freedom of Information and Protection of Privacy Act* (the “Act” or “FOIP Act”) to Alberta Finance, which is now called Alberta Finance and Enterprise (the “Public Body”). He asked for copies of all contracts awarded to two named individuals for the period beginning January 1, 2004.

[para 2] By letter dated September 19, 2006, the Public Body gave the Applicant access to most of the requested records but severed certain information on the basis that disclosure would be an unreasonable invasion of a third party’s personal privacy under section 17 of the Act.

[para 3] By letter dated October 17, 2006, the Applicant requested that this Office review the Public Body’s decision to sever information from the records. Mediation was authorized but was not successful. The matter was therefore set down for a written inquiry.

[para 4] When one of the third parties received a copy of the Notice of Inquiry, he consented to disclosure of the requested records that were in relation to himself and his business. The Public Body therefore gave the Applicant complete access to these records, by letter dated February 14, 2008.

II. RECORDS AT ISSUE

[para 5] As some of the requested records have now been released to the Applicant in their entirety, the remaining records at issue consist of severed information in two separate contracts of one named individual. In each of the two contracts, the severed information consists of an annual salary, a monthly salary and a home address.

III. ISSUE

[para 6] The only issue in this inquiry is whether section 17 of the Act (disclosure harmful to a third party's personal privacy) applies to the records/information.

[para 7] Although the Notices of Inquiry, dated January 15 and February 28, 2008, also identified an issue in relation to section 16 of the Act (business information), that section is no longer in issue, given the Public Body's subsequent release of information about the only relevant business to the Applicant.

IV. DISCUSSION OF ISSUE

[para 8] Section 17 of the Act requires a public body to withhold personal information if disclosure would be an unreasonable invasion of a third party's personal privacy. The provisions that are relevant to this inquiry are as follows:

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

...

(e) the information is about the third party's classification, salary range, discretionary benefits or employment responsibilities as an officer, employee or member of a public body or as a member of the staff of a member of the Executive Council,

(f) the disclosure reveals financial and other details of a contract to supply goods or services to a public body,

...

(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,*

...

(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,*

(f) *the personal information has been supplied in confidence,*

...

[para 9] Under section 71(1) of the Act, the Public Body has the burden of proving that the Applicant has no right of access to the information that it has withheld. In the context of section 17, this means that the Public Body must establish that the severed information is the personal information of a third party and that disclosure would be an unreasonable invasion of the third party's personal privacy. Despite this burden, section 71(2) states that if the severed record contains personal information about a third party, it is up to the Applicant to prove that disclosure would not be an unreasonable invasion of the third party's personal privacy.

1. Personal information of a third party

[para 10] For section 17 of the Act to apply, there must be personal information of a third party. In this inquiry, the severed information consists of an annual salary, a monthly salary and a home address, in two places each.

[para 11] I find that all of the severed information in the records at issue is the personal information of a third party. An individual's home address is expressly personal information under section 1(n)(i) of the Act. The annual salary and monthly salary are also personal information on the basis that they are "recorded information about an identifiable individual" under section 1(n). Here, the third party is identifiable, as the Applicant specifically requested records in relation to him by name, and his name accordingly appears in the contracts.

2. Exact salary in an employment relationship

[para 12] Under section 17(2)(e) of the Act, a disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if the information is about the third party's salary range. The severed information in the records at issue is the

third party's exact salary, which does not fall within "salary range" for the purpose of section 17(2)(e) (Order F2005-016 at para. 36).

[para 13] Under section 17(2)(f) of the Act, a disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if the disclosure reveals financial details of a contract to supply services to a public body. Whether a contract falls under section 17(2)(f) depends on the terms of the contract and the nature of the relationship between the third party and the public body; a contract may fall under section 17(2)(f) if the individual is paid on a fee-for-service basis or is an independent contractor (Order F2004-014 at paras. 26 and 27).

[para 14] Here, I find that the two contracts in question are not contracts to supply services under section 17(2)(f) of the Act. The third party was not paid on a fee-for-service basis and was not an independent contractor. He was hired into a position that was no different from other positions in which members of the public service are in an employer-employee relationship with the Public Body. The third party was hired into the employment position by way of a contract because he was a former employee who had retired and begun to receive his pension.

[para 15] Sections 28 and 29 of the *Public Service Act* authorize the Public Body to hire individuals. Whereas section 28 contemplates a "contract of employment", section 29 contemplates "employment on a fee-for-service basis". The Public Body provides evidence that its relationship with the third party, who was a pensioner, was through a contract of employment under section 28 of the *Public Service Act*, rather than by way of employment on a fee-for-service basis under section 29. It attached a policy entitled *Administration of Contracts for the Re-Employment of Pensioners in the Public Service Pension Plan and the Management Employees Pension Plan*, which indicates that the authority to enter into such contracts lies under section 28 of the *Public Service Act*.

[para 16] While I find that the third party's two contracts are not contracts to supply services under section 17(2)(f) of the *FOIP Act*, I do so primarily in reference to the terms of the contracts themselves, the third party's position, and the nature of the relationship between him and the Public Body. Although the Public Body cites that its authority for the contract was section 28 of the *Public Service Act*, this is not determinative. There may be times when a contract purports to have been made under section 28 but really was not, or when a document labeled a "contract of employment" is nonetheless a contract to supply services. In other words, the authority for a contract and its title are less relevant than its actual terms and the nature of the relationship between the parties.

[para 17] I conclude that the information in the records at issue falls under neither section 17(2)(e) (salary range) nor section 17(2)(f) (contract to supply services) so as to indicate that disclosure of the severed information in the records at issue would not be an unreasonable invasion of the third party's personal privacy. However, this does not mean that exact salary in the context of an employment relationship cannot be disclosed, as all

presumptions and relevant circumstances must also be considered under sections 17(4) and 17(5) of the Act (Order F2005-016 at para. 40).

3. Presumptions and relevant circumstances

[para 18] In its submissions, the Public Body briefly refers to section 17(4) of the Act, which sets out situations where the disclosure of a third party's personal information is presumed to be an unreasonable invasion of personal privacy. In doing so, it suggests that the presumption under section 17(4)(g) of the Act applies in this inquiry (name plus personal information). I do not find that section 17(4)(g) applies, as it sets out a presumption where the information that has not been disclosed consists of a third party's name, and the name of the third party in this inquiry has not been withheld in the records at issue.

[para 19] The Public Body alludes to the possibility that disclosure of the severed information in the records at issue would unfairly expose the third party to financial or other harm, which is a factor weighing against disclosure under section 17(5)(e) of the Act. As the Public Body provides no explanation for this suggestion, I do not find that the circumstance under section 17(5)(e) is relevant to this inquiry.

(a) *Factors relating to the third party's salary*

[para 20] The Public Body suggests that the salary information in the records at issue relates to "employment history" and that disclosure is therefore presumed to be an unreasonable invasion of personal privacy under section 17(4)(d) of the Act. I do not agree. Salary information has been found not to fall within "employment history", as it is not an event, and would not form part of a chronology of a person's working life (Order F2006-007 at para. 20 and Order F2006-008 at para. 24, each referring to the definition of "employment history" given in Order F2004-026 at footnote 47).

[para 21] Moreover, I think it would be odd for disclosure of a salary range *not to be* an unreasonable invasion of third party personal privacy under section 17(2)(e) of the Act, but then for disclosure of an exact salary to be *presumed to be* an unreasonable invasion under section 17(4)(d). Likewise, it would be odd for disclosure of the financial details of a contract to supply services, which details could reveal actual income, *not to be* an unreasonable invasion of third party personal privacy under section 17(2)(f), but then for disclosure of a salary to be *presumed to be* an unreasonable invasion under section 17(4)(d).

[para 22] Sections 17(2)(e) and 17(2)(f) have the specific objective of making public expenditures transparent (Order F2004-014 at para. 38). While there are limits to the scope of those sections, the Act's general objective of transparency would be significantly hindered, in my view, if one were to conclude that information falling just short of that contemplated in sections 17(2)(e) and 17(2)(f) consequently becomes information falling under "employment history" – the disclosure of which gives rise to a presumption of an unreasonable invasion of personal privacy under section 17(4)(d). A

certain gap in achieving transparency under the Act has been identified where there is an employee relationship, an exact salary, but no salary range (Order F2005-016 at para. 39). It would only serve to widen that gap in transparency if disclosure of one's actual salary were statutorily presumed to be an unreasonable invasion of personal privacy.

[para 23] Although I find no presumption against the disclosure of an employee's exact salary, disclosure may still amount to an unreasonable invasion of personal privacy. Here, the Public Body submits that disclosure of the third party's exact salary would be an unreasonable invasion of his personal privacy because it would reveal how the Public Body rated his qualifications, evaluated his experience, and valued him as an employee. I agree that an employee has a privacy interest in his or her actual salary. There is an even greater factor weighing against disclosure in this inquiry, as the third party's salary appears in two successive contracts of employment. Disclosure of the change in his salary, if any, would show the extent to which he progressed financially and thereby indirectly reveal how the Public Body viewed his performance.

(b) *The desirability of public scrutiny*

[para 24] While the Applicant did not make submissions in this inquiry, his initial request for review, which the Public Body attached to its submissions, suggested that the relevant circumstance under section 17(5)(a) of the Act applies in this inquiry (desirability of public scrutiny). He stated that he wished to know the salary of the third party in order to shed light on the practice known as "double dipping" – where employees retire, collect their pensions and return to paid work with the same employer. He argued that public debate is required in order to determine whether Albertans are well-served by this practice and essential to this debate is knowing the amount paid to the retirees.

[para 25] For the relevant circumstance relating to public scrutiny to apply, there must be evidence that the activities of a public body have been called into question, which necessitates the disclosure of a third party's personal information in order to subject the activities of the public body to public scrutiny (Order 97-002 at para. 94; Order F2004-015 at para. 88). The reference to public scrutiny of government or public body activities under section 17(5)(a) requires some public component, such as public accountability, public interest or public fairness (*University of Alberta v. Pylypiuk* at para. 48; Order F2005-016 at para. 104).

[para 26] I do not find that the Applicant has provided sufficient evidence to establish that section 17(5)(a) is applicable in this inquiry. First, he failed to make formal submissions. Second, his brief arguments in his request for review do not explain how or why the activities of the government or the particular Public Body in this inquiry have been called into question, or why knowledge of the third party's exact salary (as opposed to a salary range, for instance) is required for public scrutiny or accountability. He has not demonstrated to me that disclosure would be in the interest of public fairness, or that there has been public interest in knowing this particular third party's or any other

pensioner's salary. I accordingly conclude that the desirability of public scrutiny is not a relevant circumstance in this inquiry.

[para 27] Even where an applicant does not establish that public scrutiny is desirable in the particular case, one of the objectives of the Act is nonetheless transparency and accountability in the administration of public affairs [*Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner)* at paras. 40 to 42, citing section 2(a) of the Act]. The need for a proper degree of transparency has been specifically noted regarding the expenditure of public funds for employment and the purchase of services (Order F2004-014 at para. 38). Moreover, a gap has been identified under sections 17(2)(e) and 17(2)(f) of the Act, as there does not appear to be a mechanism for achieving transparency where there is no salary range in order to warrant disclosure in reference to section 17(2)(e), and no contract to supply services in order to warrant disclosure in reference to section 17(2)(f) (Order F2005-016 at paras. 38 and 39).

[para 28] The foregoing is to say that, in certain cases, disclosure of a third party's exact salary may meet the objectives of the Act, and thereby not constitute an unreasonable invasion of personal privacy. However, I do not find that the aforementioned gap in section 17's mechanisms for transparency, regarding the expenditure of public funds, presents itself in this inquiry. The Public Body points out that the salary range of the third party is available to the Applicant, as the third party's position classification was disclosed in the records provided to him and the Government of Alberta publishes salary ranges for all classifications. I verified myself that the third party's salary range for the applicable years is publicly available.

[para 29] The fact that a degree of transparency exists – indeed the very degree of transparency contemplated in respect of salary ranges under section 17(2)(e) of the Act – militates against disclosure of the third party's exact salary in this inquiry.

(c) *Factors relating to the third party's home address*

[para 30] The Applicant raised no factors or relevant circumstances suggesting that the third party's home address should be disclosed. Factors relating to public scrutiny and government transparency do not apply. Conversely, the Public Body submits that disclosure of the third party's home address would be an unreasonable invasion of his personal privacy because it is generally understood that a home address is provided to one's employer in confidence.

[para 31] The nature of information, and the context in which it is provided, may show that it was supplied in confidence (Order 99-028 at para. 30). In this inquiry, it is reasonable to conclude that the third party provided his home address to the Public Body on the understanding that it would only be used by the Public Body for employment-related purposes and would not be disclosed to others. I accordingly find that the home address was supplied in confidence, which is a relevant circumstance weighing against disclosure under section 17(5)(f) of the Act.

(d) *The third party's refusal to consent to disclosure*

[para 32] On receipt of the Applicant's access request, the Public Body notified the third party under section 30(1)(b) of the Act. As contemplated by section 30(4)(c), the third party then made representations to the Public Body. In an e-mail dated August 17, 2006, he agreed that his two contracts could be provided to the Applicant, but only if the information concerning his salary and home address was deleted. The Public Body indicates that the third party verbally advised, at a later date, that he still objected to disclosure.

[para 33] The list of relevant circumstances under section 17(5) of the Act is not exhaustive. A third party's refusal to consent to the disclosure of his or her personal information is a factor weighing against disclosure (Order 97-011 at para. 50; Order F2004-028 at para. 32).

4. Weighing the relevant circumstances

[para 34] As discussed earlier in this Order, I do not find that any of the situations warranting disclosure under section 17(2) of the Act exist in this inquiry. Likewise, I do not find that any of the presumptions against disclosure under section 17(4) apply.

[para 35] In considering the relevant circumstances in this inquiry under section 17(5) of the Act, I find that they weigh against the disclosure of the third party's annual and monthly salary. While not determinative, the third party refused, on two occasions, to consent to the release of that information. The Public Body suggested that disclosure of the third party's exact salary, in successive employment contracts, would unreasonably invade his personal privacy by revealing his performance level and value as an employee within the Public Body. The Applicant did not establish that the third party's salary should be disclosed in the interest of public scrutiny. Finally, the Act's objective of transparency is met as a result of information, publicly available to the Applicant, regarding the third party's salary range.

[para 36] I recognize that the exact salaries of third parties have been ordered to be disclosed in other inquiries before this Office (e.g., Orders F2006-007 and F2006-008). However, those inquiries involved third parties in higher-level government positions, the terms of their contracts suggested that their base salaries might be disclosed, and more importantly, the applicants in those inquiries established that disclosure of the salaries was desirable for the purpose of subjecting government activities to public scrutiny. In the present inquiry, the Applicant has failed to prove, in accordance with section 71(2) of the Act, that disclosure of the third party's salary would not be an unreasonable invasion of his personal privacy.

[para 37] I also find that the relevant circumstances in this inquiry weigh against the disclosure of the third party's home address. The Applicant raised no factors suggesting that it should be disclosed, while the Public Body cited the confidential nature of an employee's home address as a reason why it should be withheld. The third party also

refused to consent to the release of that information. Moreover, the disclosure of a third party's home or personal address has previously been found to constitute an unreasonable invasion of personal privacy (Order 2000-026 at para. 66; Order F2006-008 at paras. 39 and 40).

[para 38] Given the foregoing, I conclude that the Public Body considered all of the relevant circumstances and correctly decided that disclosure of the third party's personal information, that the Public Body withheld in the records at issue, would be an unreasonable invasion of personal privacy under section 17 of the Act.

V. ORDER

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

[para 40] I find that the Public Body properly applied section 17 when it concluded that disclosure of the annual salary, monthly salary and home address of the third party would be an unreasonable invasion of his personal privacy, and therefore severed that information from the records provided to the Applicant. Under section 72(2)(b) of the Act, I confirm the Public Body's decision to refuse access.

Wade Riordan Raaflaub
Adjudicator