

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2010-020

January 26, 2011

ALBERTA ADVANCED EDUCATION & TECHNOLOGY

Case File Number F5076

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Summary: The Complainant made a complaint to the Commissioner that Alberta Advanced Education and Technology (the Public Body) had disclosed personal information, in particular, information from line 150 of her tax return, to her daughter when her daughter applied online for a student loan. The Complainant complained that this disclosure was contrary to Part 2 of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act).

The Public Body conceded that it had disclosed the Complainant's personal information. However, it argued that it had disclosed the Complainant's personal information in compliance with Part 2 of the FOIP Act. The Public Body argued that it was not an invasion of personal privacy to disclose the personal information, that it had disclosed the information for the purpose for which it had been collected, and that it had implicit authority under the Student Financial Assistance Regulation (the Regulation) to disclose the Complainant's information to her daughter.

The Adjudicator found that it was an invasion of the Complainant's personal privacy to disclose the Complainant's personal information from her tax return to her daughter and that the Public Body had not established that it had statutory authority to disclose the Complainant's personal financial information. She also found that the Public Body had not established that it disclosed the Complainant's personal information for the purpose of determining her daughter's entitlement to student financial assistance, or for a purpose consistent with determining entitlement. She therefore found that the Public body had not

established that it disclosed the Complainant's personal financial information for the purpose for which it had been collected. The Adjudicator found that the Public Body had not established that it disclosed the Complainant's personal financial information in compliance with Part 2 of the FOIP Act.

The Adjudicator ordered the Public Body to cease disclosing the Complainant's personal information.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 17, 40, 72; Student Financial Assistance Regulation, Alberta Regulation 298/2002 ss. 8, 14, and 15, Freedom of Information and Protection of Privacy Regulation 200/1995 s. 6

Authorities Cited: AB: Order P2006-008

Sopinka, John, et al. *The Law of Evidence in Canada* 2nd ed. Markham: Butterworths, 1999.

Cases Cited: *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 112

I. BACKGROUND

[para 1] On August 19, 2009, the Complainant made a complaint to the Commissioner that Alberta Advanced Education and Technology (the Public Body) had disclosed her income information, which it required her to provide in order to process her daughter's student loan application, to her daughter:

I was advised that when I complete my financial information – whether on this (attached) form or on the parental information form, it is added to her application and she has full access to this information.

So all these years we have gone the extra mile and completed the paperwork separately from each other and from our daughter, only to now realize that all these years she has had full access to our private financial information!

[para 2] The Commissioner authorized mediation to resolve the complaint. As mediation was unsuccessful, the matter was scheduled for a written review.

[para 3] Both parties provided initial and rebuttal submissions.

II. ISSUE

Issue A: Did the Public Body disclose the Complainant's personal information in contravention of Part 2 of the FOIP Act?

III. DISCUSSION OF ISSUE

Issue A: Did the Public Body disclose the Complainant's personal information in contravention of Part 2 of the FOIP Act?

[para 4] In Order P2006-008, the Commissioner explained the burden of proof in relation to complaints made under the *Personal Information Protection Act* in the following way:

Relying on these criteria in Order P2005-001, I stated that a complainant has to have some knowledge of the basis of the complaint and it made sense to me that the initial burden of proof can, in most instances, be said to rest with the complainant. An organization then has the burden to show that it has authority under the Act to collect, use and disclose the personal information. This initial burden is what has been termed the "evidential burden". As I have said, it will be up to a complainant to adduce some evidence that personal information has been collected, used or disclosed. A complainant must also adduce some evidence about the manner in which the collection, use or disclosure has been or is occurring, in order to raise the issue of whether the collection, use or disclosure is in compliance with the Act.

[para 5] In *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 112, Yamauchi J. approved this approach to the burden of proof in complaints made under the FOIP Act. He said:

FOIPPA s. 71 deals with the burden of proof when a person seeks access to records. In some cases, the burden rests on the applicant. In others, the burden rests on the head of the public body. However, FOIPPA does not contain any provision that tells us on whom the burden of proof rests when a person lodges a complaint with the OIPC alleging that they believe a public body has used or disclosed their personal information in contravention of FOIPPA Part 2. Thus, the usual principle of "he who alleges must prove" applies. The OIPC takes this approach on these types of matters, see *e.g.* Order F2002-020: *Lethbridge Police Service* (August 7, 2002) at para. 20, which said:

... in this inquiry, the Complainant has the burden of proving that his personal information was disclosed by the Public Body. The Complainant has not met this burden of proof. Before I am able to find that a breach of Part 2 of the Act has occurred, there must be a satisfactory level of evidence presented in support of the allegation. If this were not the case, a public body could be put into the untenable position of proving a negative (*e.g.* that a breach did not occur) based on any allegation raised by a complainant.

But see, Order P2006-008: *Lindsay Park Sports Society* (March 14, 2007) at paras. 9-21, where the OIPC said that complainants under FOIPPA do not have a legal burden, but an evidential burden. Once the complainant satisfies the evidential burden, the burden shifts to the public body to show "that it has the authority ... to collect, use or disclose personal information," at para. 20. Because of FOIPPA's structure, this Court agrees with the *Lindsay Park* analysis of the burden of proof and evidentiary burden.

[para 6] The authors of *The Law of Evidence* 2nd Edition describe the evidential burden in the following way:

A party... may satisfy an evidential burden without doing anything; for example, a witness called by the Crown testifies to facts, which raise the issue of self-defence. Thus, a party may discharge

an evidential burden by pointing to some evidence already on the record. In these circumstances, the defendant does not adduce evidence but rather, the issue is raised by the evidence...

The term “evidential burden” means that a party has the responsibility to insure that there is sufficient evidence of the existence or non-existence of a fact or of an issue on the record to pass the threshold test for that particular fact or issue.

[para 7] A complainant bears the initial burden of adducing or pointing to evidence that establishes his or her information was collected, used or disclosed, depending on the nature of the complaint.

[para 8] In the present case, the Complainant complains that when she completed forms documenting her financial resources for her daughter’s previous student loan applications, she was not informed that this information was then made available to her daughter online. Consequently, if there is some evidence on the record that the Complainant’s personal financial information was disclosed in those years, then the burden will shift to the Public Body to establish that these disclosures were made in compliance with Part 2 of the FOIP Act.

[para 9] In its initial submissions, the Public Body states:

The Public Body concedes that the Complainant’s personal information was disclosed to her daughter, but contends disclosure was authorized under the Student Financial Assistance Regulation.

As the Public Body concedes that it disclosed the Complainant’s personal information, it now bears the burden of establishing that this disclosure was made in compliance with Part 2 of the FOIP Act.

[para 10] In tab 4 of its submissions, the Public Body explained that the disclosure occurred in the following circumstances:

Students that apply for financial assistance using a paper application are required to have their parent(s) complete and sign Schedule 1 – Parental Personal and Financial Information of the application. The information is collected to “determine and verify the applicant’s eligibility for financial assistance in accordance with the *Student Financial Assistance Act* (Alberta), the *Canada Student Loans Act* and the *Canada Student Financial Assistance Act*. The student generally attaches Schedule 1 to their application, but the schedule may also be mailed under separate cover.

Students that apply for financial assistance on-line are required to read, sign and return a paper Confirmation of Financial Information form. If they are a dependent student, the signature of their parent(s) is also required on the form. The Notice of Assessment letter received by the student states: “Your child electronically applied for financial assistance from Students Finance. The following personal information was submitted on your behalf. By signing below you confirm the accuracy of the information and confirm you have read and consented to the declaration and consents in the Parent/Step-Parent/Sponsor Declaration and Consent on the reverse side of his page.” As the student may unknowingly misrepresent the “personal information”, a signed confirmation is required of the parent(s).

In either case, the student may become privy to the parent(s) income as indicated on line 150 of their Income Tax Return. To avoid sharing their Income Tax Return amounts, parent(s) may choose to mail either form directly to avoid the student viewing it, but unless otherwise informed by the parent(s) their personal information will be visible to the student when using on-line inquiry. Phone numbers to the Student Funding Contact Centre are provided on both forms to answer questions about the collection and use of this information.

[para 11] Section 40 of the FOIP Act sets out the circumstances in which a public body may disclose personal information in accordance with Part 2 of the FOIP Act. The Public Body argues that its disclosure of the Complainant's personal information was made in compliance with section 40. The provisions of section 40 relevant to this inquiry are the following:

40(1) A public body may disclose personal information only

...

- (b) *if the disclosure would not be an unreasonable invasion of a third party's personal privacy under section 17,*
- (c) *for the purpose for which the information was collected or compiled or for a use consistent with that purpose,*
- (d) *if the individual the information is about has identified the information and consented, in the prescribed manner, to the disclosure,*

...

- (f) *for any purpose in accordance with an enactment of Alberta or Canada that authorizes or requires the disclosure...*

[para 12] Section 40(4) of the FOIP Act authorizes a public body to disclose information under section 40(1), but only to the extent necessary to meet its purposes under those subsections in a reasonable way. It states:

40(4) A public body may disclose personal information only to the extent necessary to enable the public body to carry out the purposes described in subsections (1), (2) and (3) in a reasonable manner.

[para 13] By implication, it would be a contravention of this provision, and therefore of Part 2 of the FOIP Act, if a public body disclosed more information than is necessary for meeting the purposes contemplated by section 40(1) in a reasonable way.

[para 14] I will therefore consider whether the provisions of section 40(1) of the FOIP Act, on which the Public Body relies, apply to the disclosure of the personal information in the Complainant's personal income information to her daughter. If so, I will consider whether it disclosed only the personal information necessary to meet its purposes in a reasonable manner under section 40(4) of the FOIP Act.

Was the disclosure of the Complainant's personal information an unreasonable invasion of the Complainant's personal privacy within the terms of section 17 of the FOIP Act?

[para 15] The Public Body argues that it was not an unreasonable invasion of the Complainant's personal privacy to disclose her financial information from the Parental Declaration form to her daughter.

[para 16] Section 40(1)(b) authorizes a public body to disclose personal information if it would not be an unreasonable invasion of a third party's personal privacy to do so. Section 17 of the FOIP Act, (previously section 16), establishes the circumstances when it is, and when it is not, an invasion of a third party's personal privacy to disclose the third party's personal information.

[para 17] 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.

...

(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

- (e) the personal information was collected on a tax return or gathered for the purpose of collecting a tax...*
- (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

...

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

...

- (i) the personal information was originally provided by the applicant.*

[para 18] 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 in certain circumstances is not an unreasonable invasion of personal privacy.

[para 19] 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. In the present case, the personal information in question is information from line 150 of the Complainant's tax return, and is therefore personal information falling under section 17(4)(e) of the FOIP Act. In addition, Complainant's personal information falls under section 17(4)(g) of the FOIP Act, as it contains the Complainant's name in the context of other personal information about her.

[para 20] To determine whether disclosure of personal information subject to a presumption or presumptions under section 17(4) 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 and is not reproduced here) applies. Section 17(5) is not an exhaustive list and any other relevant circumstances weighing for or against disclosure must also be considered and weighed.

[para 21] The Public Body argues that section 17(5)(i) applies in this case, and that its disclosure of the Complainant's personal information was therefore not an unreasonable invasion of the Complainant's personal privacy.

The Public Body also contends that subsection 40(1)(b) of the FOIP Act supports disclosure if the disclosure is not an unreasonable invasion of a third party's personal privacy under section 17 – specifically subsection 17(5)(i) which allows disclosure if the third party's personal information had been originally supplied by the individual.

[para 22] In my view, the Public Body has misstated the effect of the application of section 17(5)(i) in its argument. Section 17(5)(i) does not “allow disclosure” as the Public Body argues. Should section 17(5)(i) apply to the Complainant's personal financial information in this case, it would be only one factor to be considered in deciding whether the presumptions created by sections 17(4)(e) and (g) have been outweighed by factors weighing in favor of disclosure. If I were to find that section 17(5)(i) applied in this case, I would not necessarily find that this factor outweighed the strong privacy interests associated with maintaining the confidentiality of an individual's tax return information.

[para 23] However, in this case, I find that the Public Body has not established that section 17(5)(i) applies. First, the Complainant established in her complaint that she submitted her financial information and not her daughter. Second, I note that section 17(5)(i) refers to information that has been supplied by an “applicant”. Even if I had found that the Complainant's daughter had supplied the Complainant's financial information to the Public Body, I would not necessarily find that section 17(5)(i) would apply. In the context of section 17, “applicant” refers to a person who has made a request for access to information under the FOIP Act. It is by no means clear that in a situation such as the present, (in which section 17 is being considered for the purpose of deciding whether section 40(1)(b) authorized the Public Body to disclose personal information), the Complainant's daughter, as the person to whom the information was disclosed, is to, in effect, step into the shoes of person who would be an applicant in an access request within the terms of section 17(5)(i). There is no evidence that the daughter made an

access request for the Complainant's financial information under the FOIP Act. Consequently, it is unclear whether section 17(5)(i) can be a factor that is relevant for determining whether section 40(1)(b) of the FOIP Act authorizes the disclosure of the Complainant's personal information in this case.

[para 24] I also note that the Complainant indicated in her complaint that she sent her financial information separately and with an expectation that this information would be kept confidential from her daughter. Therefore, section 17(5)(f) would apply and weigh in favour of withholding the Complainant's personal information under section 17.

[para 25] As the Public Body has not established that any of the factors weighing in favor of disclosure under section 17(5) apply in this case, I find that the presumptions weighing in favor of withholding the Complainant's personal information have not been rebutted. Consequently, I find that it was an unreasonable invasion of the Complainant's personal privacy to disclose the Complainant's personal information under section 17(1), and that, as a consequence, section 40(1)(b) does not apply to the disclosure.

Did the Public Body disclose the Complainant's personal information for the purpose for which the information was collected or compiled or for a use consistent with that purpose under section 40(1)(c) of the FOIP Act?

[para 26] The Public Body argues that section 40(1)(c) applies to its disclosure of the Complainant's income tax information. It reasons:

The Public Body also contends that section 40(1)(c) of the FOIP Act, which allows disclosure for the purpose for which the information was collected or compiled or for a use consistent with that purpose, also supports disclosure of personal information to a student. Parental financial information was collected for the purpose of determining whether or not the student qualified for financial assistance and disclosure would be part of that process.

[para 27] The Public Body argues that because it collected information for the purpose of determining a student's eligibility for financial assistance, disclosing that information necessarily serves this same purpose. However, the Public Body has not explained how disclosing a parent's financial information to a student would assist it in the determination as to whether a student is eligible for financial assistance. I accept that there are situations in which the Public Body must clarify or confirm parental income amounts in order to determine eligibility; however, logically, the clarification or confirmation would come from the person the information is about, i.e., the parent, rather than someone else, such as the student. In any event, there is no evidence before me that the Public Body disclosed the Complainant's personal financial information to her daughter in order to determine the daughter's eligibility for financial assistance, or that doing so met such a purpose or was consistent with it.

[para 28] For these reasons, I find that the Public Body has not established that section 40(1)(c) applies to its disclosure of the Complainant's personal information.

Was the disclosure made in accordance with an enactment of Alberta or Canada that authorizes or requires the disclosure?

[para 29] The Public Body argues that section 8 of the Student Financial Assistance Regulation AR 298/2002 (the Regulation) contains implicit authorization for its disclosure of the Complainant's personal information to her daughter.

[para 30] Section 8 of the Regulation states, in part:

8(1) Subject to other provisions of this Schedule, a student, to qualify for assistance, must...

...
(e) establish to the Minister's satisfaction that the student is in financial need, taking into account the financial resources available to the student...

...
(2) For the purposes of subsection (1)(e), the financial resources of the student's parents, spouse and common law partner are deemed to be available to the student.

[para 31] The Public Body argues:

The Public Body contends that implicit authority to disclose parental information to a student is found in the Student Financial Assistance Regulation – Part 1 subsection 8(1)(e)...

The amount of funding depends upon the resources available to a student, including parental contributions. The Public Body is accountable to the student, and the public, as to how such decisions are made, and it can be argued that a student has the right to access information used to make a decision about the student. This is supported by subsection 40(1)(f) of the FOIP Act that allows for the disclosure of personal information for any purpose in accordance with an enactment of Alberta that authorizes the disclosure. The Public Body concedes that disclosure, while implicitly authorized under the Student Financial Regulation, is not required and therefore the Public Body would have discretion as to whether or not to disclose parental information to a student. The approach that the Public Body has decided on is to alert parents that their information will be shared unless they request otherwise. This is in recognition that there may be occasions where it is necessary, for example, due to circumstances between parents.

I accept that section 8(2) of the Regulation may authorize the Minister to *collect* parental financial information in order to determine that a student is in need of financial assistance, given that this provision has the effect of deeming a parent to be providing financial support to a student. However, I find no authority or discretion, implicit or otherwise, in section 8 of the Regulation for the Minister to *disclose* a parent's financial information to a student.

[para 32] I note that the Public Body indicates that it has adopted a process by which it alerts parents that it will disclose their financial information to the student unless they ask the Public Body not to do so. However, from the evidence, I understand that this practice was implemented after the Complainant's complaint, and that she had no option

to have her personal information withheld from her daughter. Rather, her personal information was disclosed before she could state her position.

[para 33] While the Public Body argues that principles of fairness require the student to be able to access information used to make decisions, I find that section 8 does not address disclosure or fairness principles or implicitly require disclosure for reasons of fairness. Rather, section 15 of the Regulation addresses the kinds of documents a student is entitled to see and in what circumstances. This provision states, in part:

15(3) A student who applies for assistance may appeal against the decision to a committee appointed from among members of the public by the Minister if

- (a) either*
 - (i) no assistance is awarded, or*
 - (ii) the assistance awarded is less than the amount applied for, and*
- (b) subsection (1) does not apply.*

(4) The committee is responsible for hearing an appeal under subsection (3) and for making recommendations on the appeal to the Minister.

...

(6) Unless otherwise specified by the Minister, with respect to appeals under subsection (3),

- (c) the committee and the appellant are to be provided with all relevant material before the hearing, including a summary outlining the situation and any action taken to date and, in the case of the committee, all documents provided by the appellant,*
- (d) before the hearing, each party is to be given an opportunity to review the material provided to the committee,*
- (e) the appellant is to be allowed to participate in the hearing by appearing in person or by counsel or an agent or by means of a conference call...*

[para 34] Given that section 15 of the Regulation serves the purpose of ensuring that students are made aware of information relevant to their applications, once they have made an appeal, it would be redundant, and contrary to the language of section 8, to interpret section 8 as accomplishing this same function. In the present case, it is clear that the Complainant's personal information was not disclosed in the circumstances contemplated by section 15.

[para 35] Section 8(2) of the Regulation indicates that the financial resources of a parent are deemed to be available to a student when the Minister is making a determination regarding financial need. I do not interpret this as indicating that personal information regarding a parent's finances or tax return information may be made available to the student or may become the personal information of the student; rather, it

means that the Regulation creates a presumption that a parent will provide financial assistance to a child and that this presumption will be taken into account when determining eligibility for a student loan.

[para 36] I have also considered whether provisions of the Regulation not addressed by the Public Body in its arguments provide the necessary authority to disclose a parent's personal financial information to a child who has applied for student financing. For example, I note that section 14(1) states:

14(1) The Minister may direct a student to provide any information or documents to verify any statement made in the student's application for assistance.

At first blush, this provision might appear to suggest that the Minister may require a student to verify any statement made as part of the student's application, which could potentially include verifying parental financial information. However, it would be nonsensical to provide statements made by a parent regarding the parent's financial resources to a student to verify them, given that information about the parent's financial resources would not necessarily, or even be likely to, be within the knowledge of the student. Moreover, assuming this provision gives the Minister the ability to direct a student to provide any information or documents that would verify statements made by a parent, exercising this authority would not require the Minister to disclose to the student prior statements made by the parent, but simply to require the student to ensure that the Minister receives satisfactory documentation from the parent regarding the parent's income.

[para 37] Consequently, I find that section 14(1) of the Regulation was not authority for the Public Body to disclose the Complainant's personal financial information to her daughter within the terms of section 40(1)(f) of the FOIP Act.

[para 38] As noted above, the Public Body states that it now alerts parents that their personal financial information will be disclosed to the student unless the parent, or parents, requests otherwise. In my view, this approach is contrary to Part 2 of the FOIP Act, as the Public Body has not established that it has authority to disclose this information. It is not open to the Public Body to disclose the personal financial information of parents to students unless they object, as it lacks authority under section 40 of the FOIP Act to make the disclosure in the first instance. If the Public Body is to disclose the personal financial information of parents to students, this disclosure must be authorized by a subsection of section 40 of the FOIP Act and comply with section 40(4). While the Public Body could potentially obtain the consent of parents to disclose the personal financial information under section 40 (1)(d), it would first be necessary to comply with the requirements of this provision (reproduced above) and obtain consent in the manner prescribed by section 6 of the Freedom of Information and Protection of Privacy Regulation before disclosing the information.

IV. ORDER

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

[para 40] I order the head of the Public Body to cease disclosing the Complainant's tax return information. Compliance with this order may be achieved by ensuring that the Public Body does not disclose the financial information of a student's parents, spouse or common law partner that it collects when it evaluates student loans to the student, unless the disclosure is authorized by a provision of Part 2 of the FOIP Act.

[para 41] I further order the head of the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that it has complied with the Order.

Teresa Cunningham
Adjudicator