

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2011-001

June 13, 2011

ALBERTA CHILDREN AND YOUTH SERVICES

Case File Number F5424

Office URL: www.oipc.ab.ca

Summary: The Applicant requested information about his birth mother from Alberta Children and Youth Services (the Public Body). The Public Body provided information in the records regarding the Applicant's grandparents, on the basis that they had been deceased for more than 25 years, but refused to provide information regarding his birth mother on the basis that she had not been dead for 25 years and that it would be an unreasonable invasion of her personal privacy to disclose the information. The Public Body withheld the information about the Applicant's mother under section 17(1) of the *Freedom of Information and Protection of Privacy Act* (information harmful to personal privacy).

The Adjudicator found that given that the Applicant's birth mother had been deceased for fifteen years, any privacy interests she had had in the information in her lifetime were diminished. The Adjudicator also noted that there was no evidence that the privacy interests of other individuals would be affected by disclosure of the information in the records. She also noted that the Applicant had an interest in the records because they contained information relating to his family history and origins and his family medical history. In the circumstances of the case, the Adjudicator determined that it would not be an unreasonable invasion of personal privacy to disclose the information in the records.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 17, 72; *An Act for the Protection of Neglected and Dependent Children* S.A. 1909, c. 12; *Child Youth and Family Enhancement Act*, R.S.A. 2000, c. 12

Authorities Cited: AB: Orders 98-004, 2000-012, F2010-002 **ON:** Order M-50

Cases Cited: *University of Alberta v. Pylypiuk*, 2002 ABQB 22

I. BACKGROUND

[para 1] The Applicant made a request for access to information about his birth mother from Alberta Children and Youth Services (the Public Body). The Public Body released information to the Applicant about his maternal grandfather, as his maternal grandfather had been deceased for over 25 years. However, the Public Body denied the Applicant access to information about the Applicant's mother and maternal grandmother, because the dates of their deaths had not been established.

[para 2] The Applicant requested review by the Commissioner of the Public Body's response to his access request.

[para 3] The Commissioner authorized mediation to resolve the dispute. As mediation was unsuccessful, the matter was scheduled for a written inquiry. Both parties provided written submissions for the inquiry.

[para 4] In its submissions, the Public Body noted that the Applicant had established that his maternal grandmother had died more than 25 years ago. It therefore stated that it was now prepared to provide him with information from the records regarding his maternal grandmother. The Public Body maintains its position that disclosing the personal information of the Applicant's mother would be an unreasonable invasion of her personal privacy.

II. INFORMATION AT ISSUE

[para 5] Information about the Applicant's birth mother contained in records in the custody of Alberta Children and Youth Services is at issue.

III. ISSUES

Issue A: Does section 17(1) of the FOIP Act (disclosure harmful to personal privacy) require the Public Body to withhold the information in the records?

IV. DISCUSSION OF ISSUES

Issue A: Does section 17(1) of the FOIP Act (disclosure harmful to personal privacy) require the Public Body to withhold the information in the records?

[para 6] The Public Body withheld all the information in the records at issue under section 17.

[para 7] Section 1(1)(n) defines personal information under the Act:

- (n) *“personal information” means recorded information about an identifiable individual, including*
 - (i) *the individual’s name, home or business address or home or business telephone number,*
 - (ii) *the individual’s race, national or ethnic origin, colour or religious or political beliefs or associations,*
 - (iii) *the individual’s age, sex, marital status or family status,*
 - (iv) *an identifying number, symbol or other particular assigned to the individual,*
 - (v) *the individual’s fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,*
 - (vi) *information about the individual’s health and health care history, including information about a physical or mental disability,*
 - (vii) *information about the individual’s educational, financial, employment or criminal history, including criminal records where a pardon has been given,*
 - (viii) *anyone else’s opinions about the individual, and*
 - (ix) *the individual’s personal views or opinions, except if they are about someone else;*

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

[para 8] Section 17 states in part:

17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party’s personal privacy.

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

...

(c) *an Act of Alberta or Canada authorizes or requires the Disclosure...*

...

(i) *the personal information is about an individual who has been dead for 25 years or more...*

...

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

- (a) *the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation...*
- ...
- (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,*
- (h) *the personal information indicates the third party's racial or ethnic origin or religious or political beliefs or associations.*

(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 9] 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 10] 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. It is important to note that section 17(5) is not an exhaustive list and that other relevant circumstances must be considered.

[para 11] In *University of Alberta v. Pylypiuk*, 2002 ABQB 22, the Court commented on the interpretation of what is now section 17. The Court said:

In interpreting how these sections work together, the Commissioner noted that s. 16(4) lists a set of circumstances where disclosure of a third party's personal information is presumed to be an unreasonable invasion of a third party's personal privacy. Then, according to the Commissioner, the relevant circumstances listed in s. 16(5) and any other relevant factors, are factors that must be weighed either in favour of or against disclosure of personal information once it has been determined that the information comes within s. 16(1) and (4). In my opinion, that is a reasonable and correct interpretation of those provisions in s. 16. Once it is determined that the criteria in s. 16(4) is (*sic*) met, the presumption is that disclosure will be an unreasonable invasion of personal privacy, subject to the other factors to be considered in s. 16(5). The factors in s. 16(5) must then be weighed against the presumption in s. 16(4).

Section 17 requires the head of a public body to withhold personal information when the head concludes, after consideration of the factors under section 17(5), that disclosing the personal information would be harmful to the personal privacy of a third party.

Is the information severed from the records the personal information of an identifiable individual?

[para 12] The Public Body has elected to disclose some of the Applicant's mother's personal history, given that it elected to disclose personal information about the Applicant's mother's parents to the Applicant. The rationale for disclosing this personal information is that the Applicant's grandparents have been deceased for over twenty-five years, and so it would not be an unreasonable invasion of their personal privacy under section 17(2)(i). It appears that the Public Body did not consider whether this information also conveyed information about the Applicant's mother as an identifiable individual when it made this decision.

[para 13] The context in which the information about the Applicant's mother's parents appears in the records reveals their relationship to the Applicant's mother, and therefore has the effect of revealing something about her personal history. As their personal information describes their respective ethnic backgrounds, the personal information disclosed reveals the ethnic origins of the Applicant's mother. In essence, in disclosing the personal information of the Applicant's mother's parents, the Public Body has disclosed personal information about the Applicant's mother as an identifiable individual that would reveal something about the circumstances of her birth, her origins, events that happened in her life, and her relationship to her parents. I say that she is identifiable in relation to the information about her parents, as the Applicant was earlier given the name of his mother, and his request is for information about her held by the public body. Moreover, the information about the Applicant's mother's parents in the records is recorded for the purpose of defining their relationship to her and establishing

her personal history. The information of the Applicant's mother's parents, then, is her personal information falling under section 17(4)(g) and (h) of the FOIP Act. In addition, this information is also the Applicant's personal information in a sense, as it is about his own ethnic origins and family history.

[para 14] However, the Public Body continues to withhold information about the Applicant's mother from the records in its custody, including her birth date, medical history, family history, and personal history.

[para 15] The information regarding the Applicant's mother's medical history is personal information falling under section 17(4)(a). The remaining information about the Applicant's mother is personal information falling under section 17(4)(g). Consequently, there is a presumption that disclosing this information would be an unreasonable invasion of a third party's personal privacy. I must therefore consider whether there are any factors in the circumstances of this case that would have the effect of rebutting this presumption under section 17(5).

Would it be an unreasonable invasion of a third party's personal privacy to disclose the information in the records to the Applicant?

[para 16] The Public Body notes that the Complainant's mother died in 1996. As she has not been dead for twenty-five years, the Public Body correctly points out that section 17(2)(i) does not apply to personal information about her. If section 17(2)(i) applied, it would not be an unreasonable invasion of personal privacy to disclose the personal information and it would be unnecessary to weigh competing interests under section 17(5). However, the converse is not true: it does not follow from the fact that section 17(2)(i) does not apply that disclosure is an unreasonable invasion of personal privacy.

[para 17] The Public Body also argues that given that the records at issue relate to actions taken under *An Act for the Protection of Neglected and Dependent Children*, S.A. 1909, c. 12, and that such records are therefore not sealed records under the *Child Youth and Family Enhancement Act*, R.S.A. 2000, c. 12, neither Act authorizes nor requires disclosure of the information in the records for the purposes of section 17(2)(c) of the FOIP Act.

[para 18] I agree with the Public Body that none of the provisions of section 17(2) apply to the information in the records at issue. I must therefore consider whether the Public Body has applied and weighed all relevant considerations under section 17(5).

What considerations are relevant and weigh in favor of withholding or disclosing personal information under section 17(5) in this case?

[para 19] The Applicant made the following argument in his rebuttal submissions:

I also quarrel with the assumption that you do not have to prove that this disclosure will be harmful to the personal privacy of my first mother....

The Applicant then noted that the disclosure of his mother's personal information will not affect her personally now, as she has been dead for fifteen years. The Applicant also argues that it is the duty of the Public Body to consider "the best interests of the child". He reasons that as his mother's information is at issue, and because he considers it to be in his best interests as her child to learn information about her, this principle should be considered in the Public Body's decision regarding whether it would be an unreasonable invasion of personal privacy to disclose his mother's personal information.

[para 20] The Applicant concluded his initial submissions by stating:

Here while I am merely reflecting on our lives, [my mother] bore the heavy lifting burdens of both her life as a child and those of our short time together as mother and son, all those long years ago. "Life," said Horace Walpole, "is a comedy to those who think, a tragedy to those who feel."

So [my mother] and I have come together once again at the end of our lives. The inadequacy of past Alberta adoption documentation procedures and the Post Adoption reunion process kept me from ever meeting [her]. Please remove the current barrier of secrecy that prevents me from knowing her more completely now.

[para 21] In its submissions, the Public Body rejects the arguments put forward by the Applicant and states the following:

The Public Body submits that the Applicant has not met any of the criteria established by the Information and Privacy Commissioner, and therefore, there is no rights issue that would prevail over the protection of personal privacy.

The Public Body acknowledges that the Applicant may feel aggrieved by [societal attitudes] and by the Public Body's adoption practices and procedures as they existed at that time. However, s. 17(5)(c) does not apply where an applicant is claiming a moral right to personal information, as opposed to a legal right.

[para 22] The Public Body argues that disclosing the personal information in the records would not have the effect of subjecting the activities of the Public Body to public scrutiny for the purposes of section 17(5)(a) and argues that there is no public interest component to the information it has decided to withhold. The Public Body also notes that it is irrelevant that the Applicant already knows the name of his mother.

[para 23] The Public Body largely confined its comments in relation to the weighing of information under section 17(5) to challenging the arguments of the Applicant and did not explain the factors that led it to conclude that there are no interests at stake in this case that would prevail over the privacy interests of the Applicant's mother, or how its decision to withhold personal information would promote those interests. From the Public Body's response of April 19, 2010, it appears that the only factor it considered relevant under section 17(5) was the fact that the Applicant's mother had not been dead for twenty-five years.

[para 24] The Public Body did not explain in its response, or in its submissions for the inquiry, what privacy interests it considered the Applicant's deceased mother to have in relation to the information it withheld. Moreover, the Public Body has not explained the factors it considered relevant to its determination that it would be an unreasonable invasion of the Applicant's mother's personal privacy to disclose her personal information. As the Public Body takes the position that none of the factors enumerated under section 17(5) apply, I infer that it considered that there are no factors outweighing the presumptions created by section 17(4)(a) and (g). However, as noted above, section 17(5) does not contain an exhaustive list of factors to be considered and requires a public body to consider all relevant circumstances.

[para 25] As the Applicant points out, his mother has been dead for fifteen years. As already noted, section 17(2) states that it is not an unreasonable invasion of personal privacy to disclose the personal information of an individual who has been dead for 25 years or more. However, it does not follow that it is automatically an unreasonable invasion of personal privacy to disclose the personal information of a person who has been dead for a lesser period of time.

[para 26] The former Commissioner made this point in Order 98-004. He said:

The Public Body says that a deceased's privacy rights are circumscribed by two sections of the Act: (1) section 16(4)(i), [now 17(2)(i)] which says that it is not an unreasonable invasion of personal privacy to disclose the personal information of someone who has been dead for 25 years or more; and (2) section 79(1)(a) of the Act, which allows the deceased's personal representative to exercise any right or power that the deceased would have had under the Act, but only if the purpose is to administer the deceased's estate. The Public Body appears to be of the view that a deceased's personal information is not to be disclosed in any other circumstances.

However, the Act does not say that it is always an unreasonable invasion of a deceased's personal privacy to disclose the deceased's personal information before 25 years have passed. In my view, during the period of time from the deceased's death up until 25 years after death, a public body has to determine whether relevant circumstances exist, such that it would not be an unreasonable invasion of the deceased's personal privacy to disclose the personal information.

In this case, there are a combination of unusual relevant circumstances that weigh in favour of disclosing part of the deceased's personal information...

[para 27] In that case, the former Commissioner rejected an approach to severing personal information that held that it is always an unreasonable invasion of personal privacy to disclose a third party's personal information if the third party has not been dead for 25 years or more.

[para 28] In Order 2000-012, the former Commissioner said:

At this stage, I must consider the nature and quality of the privacy rights of a deceased person who may or may not have received social welfare benefits, and weigh those rights against the relevant circumstances that are asserted by the Applicant.

The Act strikes a complex balance between the privacy rights of the dead and the needs of the living. The Act is clear that privacy rights do not end when a person dies. The definition of

“personal information” in the Act does not limit the protection of the Act to persons who are alive: it includes all “identifiable persons”, whether alive or dead.

...

Section 16(2)(i) [now 17(2)(i)] of the Act says that where an individual has been dead for 25 years or more, disclosure of personal information would no longer be an unreasonable invasion of a third party’s personal privacy under the Act. By implication, this section of the Act extends privacy rights to deceased persons. But such rights are not absolute. In Order 98-004, at paragraph 171, I stated that the Act does not say that it is always an unreasonable invasion of a deceased’s personal privacy to disclose the deceased’s personal information before 25 years have passed from the date of death. During that 25-year period, a public body has to determine whether relevant circumstances exist, such that it would not be an unreasonable invasion of the deceased’s personal privacy to disclose the personal information.

[para 29] In my view, section 17(2)(i) acknowledges that some privacy interests may continue after the death of an individual, but that any such interests end, absolutely, after 25 years. Under section 17(5) then, relevant circumstances as to whether the presumption created by section 17(4) is rebutted when the personal information is about a deceased person, would include consideration of the kinds of privacy interests the deceased person had in the information at issue in his or her lifetime, the extent to which those interests continue to exist, whether the deceased’s personal information is also the personal information of someone else, and whether there is another interest, such as a public interest, that may outweigh privacy interests or strengthen them.

[para 30] In Order M-50, in referring to factors relevant to determining whether it would be an unjustifiable invasion of personal privacy to disclose the personal information of an individual, the former Information and Privacy Commissioner of Ontario said:

In the circumstances of this appeal, I feel that one such unlisted factor is that one of the individuals whose personal information is at issue is deceased. Although the personal information of a deceased individual remains that person’s personal information until thirty years after his/her death, in my view, upon the death of an individual, the privacy interest associated with the personal information of the deceased individual diminishes. The disclosure of personal information which might have constituted an unjustified invasion of personal privacy while a person was alive, may, in certain circumstances, not constitute an unjustified invasion of personal privacy if the person is deceased.

The former Information and Privacy Commissioner of Ontario considered that the fact that an individual is deceased is a factor to be weighed when deciding whether it would be an unreasonable or unjustifiable invasion of personal privacy to disclose personal information. In his view, that an individual is deceased, while only one of several factors he considered in that case, was nevertheless a factor weighing in favor of disclosure. I agree with this analysis and share the view that individual privacy interests diminish after death. If privacy interests do not diminish following death and over time, it would be entirely arbitrary for the legislature to determine that privacy rights end after twenty-five years when they do not after twenty-four years and eleven months, for example.

[para 31] In the circumstances of this case, the Applicant's mother has been deceased for approximately fifteen years. I also note that there is no evidence that the Applicant's mother provided instructions or expressed wishes as to whether the Public Body should withhold her personal information from, or disclose it to, her son should he request it. Her views as to whether she wanted her personal information in the records to be protected are unknown. That the Applicant's mother has been dead for fifteen years is a factor weighing in favor of disclosure. That her views regarding the disposition of her personal information are unknown, is a neutral factor neither supporting nor weighing against the presumption that it would be an unreasonable invasion of personal privacy to disclose her personal information.

[para 32] In Order F2010-002, I considered the situation in which an individual's personal information may also be the personal information of an applicant. I said:

In Order MO-1323, a decision of the Office of the Information and Privacy Commissioner of Ontario, the Adjudicator noted that public bodies should not deny access to an applicant for the applicant's own personal information if to do so would result in an absurd result that would undermine a primary purpose of the freedom of information and protection of privacy legislation. She said:

In Order M-444, former Adjudicator John Higgins found that non-disclosure of information which the appellant in that case provided to the Metropolitan Toronto Police in the first place would contradict one of the primary purposes of the Act, which is to allow individuals to have access to records containing their own personal information unless there is a compelling reason for non-disclosure. This approach has been applied in a number of subsequent orders and has been extended to include not only information which the appellant provided, but information which was obtained in the appellant's presence or of which the appellant is clearly aware (Orders M-451, M-613, MO-1196, P-1414, P-1457 and PO-1679, among others).

...

In my view, it is the "higher" right of an individual to obtain his or her own personal information that underlies the reasoning in Order M-444 which related to information actually supplied by the requester. Subsequent orders have expanded on the circumstances in which an absurdity may be found, for example, in a case where a requester was present while a statement was given by another individual to the Police (Order P-1414) or where information on a record would clearly be known to the individual, such as where the requester already had a copy of the record (Order PO-1679) or where the requester was an intended recipient of the record (PO-1708).

In all cases, the "absurd result" has been applied only where the record contains the appellant's personal information. In these cases, it is the contradiction of this higher right of access which results from the application of an exemption to the information...

I agree with this reasoning. In my view, the fact that information is the personal information of an applicant, even though it may also be the personal information of another third party, is a relevant factor that must be weighed under section 17(5) when deciding whether it would be an unreasonable invasion of personal privacy to disclose the information. I say this because a purpose of the FOIP Act, as set out in section 2(c) is to enable individuals to obtain their own personal information in the custody or control of public bodies. Further, section 17(1) does not operate so as to authorize or require a public body to withhold an applicant's own personal information. Consequently, the competing interests of access to personal information and

personal privacy must be balanced in a way that that the right to privacy does not defeat another purpose of the FOIP Act unnecessarily.

When determining whether it would be an unreasonable invasion of personal privacy to disclose personal information for the purposes of section 17(5), the fact that the information is also the personal information of the requestor may be, and is in this case, a relevant circumstance to be considered.

[para 33] As discussed above, the personal information in the records contains the mother's health information and her personal history. However, the mother's health information is also, in a sense, the Applicant's health information, as it is information regarding his family medical history.

[para 34] The information, as it appears in the context of the records, does not refer to the Applicant. However, the Applicant has interests in this information that are greater than those of members of the general population, given that the information would tell him something about his own family medical history and origins. Were the Applicant required to provide information as to whether he has a family history of certain illnesses so that a health practitioner could assess the Applicant's likelihood of developing various conditions, the information in the records would be relevant. Regardless of whether the Applicant's name is associated with the information in the records or not, it remains information about his family medical history. Moreover, he knows that the information in the records is about his parents, which means that he would be able to identify the information in the records to be about his own family medical history. The information regarding the Applicant's mother's medical history, then, is information about the Applicant, for the purposes of sections 1 and 17(4)(a) of the FOIP Act.

[para 35] I find that the fact that the personal health information of the Applicant's mother in the records is also the Applicant's family medical history weighs strongly in favour of disclosure. I also find that the fact that there is no other source from which he could obtain this information also weighs strongly in favour of disclosure.

[para 36] The remaining information in the records is information that includes the Applicant's mother's name in the context of information about her personal history and circumstances. I find that this information is also information about the Applicant, given that he is aware of his relationship to his mother and that disclosing the information to him would enable him to identify his own family history and origins. The information in the records is therefore the Applicant's own personal information for the purposes of section 1 and 17(4)h). I find that this is a factor that also weighs strongly in favor of disclosure. Again, as there is no other means for the Applicant to obtain this information about his personal history, I find that this is also a factor weighing in favor of disclosure.

[para 37] I note that there is nothing to suggest that the information in the records is the information of an individual other than the Applicant's grandparents, his mother, or himself. As a result, there appear to be no other competing privacy interests in relation to the information, in the sense that there is no other individual whose privacy would be affected by disclosure of the information. In my view, one of the reasons that the FOIP

Act applies to the personal information of deceased persons is because the personal information of one individual is often the personal information of another individual. For example, disclosing information about a deceased parent may also be a disclosure affecting the privacy of the parent's child. However, in the circumstances of this case, it appears that the only surviving relative of the Applicant's mother is the Applicant. As a result, the only privacy interests of a living individual in relation to the records at issue would appear to be the Applicant's.

[para 38] In weighing all relevant considerations under section 17(5), I find that the factors weighing in favor of disclosing the information in the records to the Applicant outweigh any remaining privacy interests in withholding the information. The privacy interests of the Applicant's mother are substantially diminished, given that she has been dead for fifteen years. Moreover, there are no other individuals whose privacy would be unreasonably invaded by disclosing her personal information. Finally, the information in the records at issue is also, in a sense, information about the Applicant that is significant to his personal health and his personal sense of identity, given that it is about his family medical history and his family origins. The factors weighing in favor of disclosure in this case should not be taken as outweighing privacy considerations in all cases, particularly in situations where the subject of the information is living, or there are other individuals who have privacy interests in the information. However, in the circumstances of this case, I find that it would not be an unreasonable invasion of the Applicant's mother's personal privacy to disclose the personal information in the records to the Applicant.

V. ORDER

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

[para 40] I order the Public Body to disclose the information in the records to the Applicant in its entirety.

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

Teresa Cunningham
Adjudicator