

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2013-34

October 2, 2013

UNIVERSITY OF ALBERTA

Case File Number F6027

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Summary: Pursuant to the *Freedom of Information and Protection of Privacy Act* (the Act), the Applicant made a request of his former employer, the University of Alberta (Public Body) for information relating to a former student of his who had complained about him (the Affected Party). The Public Body responded but severed information pursuant to sections 17 and 24 of the Act and also removed information from some of the records that was not responsive to the Applicant's request.

The Applicant asked the Office of the Information and Privacy Commissioner (this Office) to review the Public Body's response.

The Adjudicator found that the Public Body properly severed the Affected Party's name and e-mail address and another third party's name pursuant to section 17 of the Act but improperly severed other information that was not "personal information". The Adjudicator also found that the Public Body properly applied section 24(1)(b) of the Act to the records and properly withheld limited information that was not responsive to the Applicant's request.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 17, 24, and 72.

Authorities Cited: AB: Orders 96-006, F2011-018, F2012-07, F2012-26,

I. BACKGROUND

[para 1] The Applicant was a sessional instructor in the Department of English and Film Studies at the University of Alberta (the Public Body). According to the Public Body, on March 31, 2011, it was determined that the Applicant would not be offered a sessional teaching contract for the Fall 2011 term. The Public Body communicated this decision to the Applicant on May 24, 2011.

[para 2] On May 19, 2011, a student of the Applicant (the Affected Party) attended the University of Alberta Sexual Assault Centre to discuss comments made by the Applicant which she felt were inappropriate. After this discussion, the Affected Party decided to make an informal complaint about the Applicant's conduct. A meeting was held on May 30, 2011, in which her informal complaint was presented to the Student Ombud Service and the Associate Chair of the Department of English and Film Studies.

[para 3] As a result of the complaint, the Public Body conducted an informal resolution process which resulted in the issuance of a letter to the Applicant on June 2, 2011.

[para 4] On September 2, 2011, the Applicant made an access request to the Public Body which stated:

Looking for records in any format – notes, emails, reports, etc. pertaining to complaints or opinions regarding to [sic] my teaching of [a specified English course] in Winter, 2011. Records may likely exist with English Chair, Associate Chair and Ombudsperson.

[para 5] On October 3, 2011, the Public Body responded, releasing the responsive records, which it partially severed pursuant to sections 17 and 24 of the *Freedom of Information and Protection of Privacy Act* (the Act). Some information was severed because it was not responsive.

[para 6] The Applicant complained to the Office of the Information and Privacy Commissioner that the information that the Public Body withheld ought to be disclosed to him. Mediation was authorized but failed to resolve the issues between the parties. As a result, the Applicant requested and was granted an inquiry. I received initial and rebuttal submissions from the Applicant, Public Body and Affected Party. In addition, I allowed the parties to make an additional submission on an issue that the Applicant raised regarding video surveillance footage.

II. INFORMATION AT ISSUE

[para 7] The information at issue is the severed and withheld portions of the records provided to the Applicant by the Public Body. I note that during the course of this inquiry, the Public Body disclosed some information that had been previously severed. For the purpose of this inquiry, I will not look at information that was initially withheld

by the Public Body but will confine my findings to the information that is currently being withheld by the Public Body.

III. ISSUES

[para 8] The Notice of Inquiry dated November 13, 2012 lists the issues in this inquiry as follows:

- 1. Did the Public Body properly withhold information as non-responsive to the Applicant's request?**
- 2. Does section 17 of the Act (disclosure harmful to personal privacy) apply to the information/records?**
- 3. Did the Public Body properly apply sections 24(1)(b) and (d) of the Act (advice from officials) to the information/records?**

[para 9] A large part of the Applicant's submissions related to his displeasure with the Public Body as an employer, alleged unfairness in the Public Body's decision to not offer him a contract, and his opposition to the informal complaint process which was used by the Public Body to resolve the Affected Party's complaint. These are not issues which I will address in this order because I do not have jurisdiction over the Public Body's hiring and disciplinary processes.

[para 10] As well, there was an issue raised by the Applicant regarding the existence of video surveillance footage taken in the classroom where he taught the Affected Party. Although the relevance of the footage was not clear from the Applicant's submissions, because I thought it might be related to an issue of adequacy of search, I allowed the parties to make further submissions on the existence of such footage. The Applicant's submissions once again focused mainly on the alleged wrongdoings of the Public Body in its treatment of him. He pointed to a record in which his conduct during his class was described as proof that the video footage existed and was viewed. The Public Body provided affidavit evidence stating that no footage exists. As there are other probable sources of the information in the record to which the Applicant refers, I accept the Public Body's evidence that no such footage exists. Therefore, I have decided not to include adequacy of search as an issue in this inquiry.

IV. DISCUSSION OF ISSUES

- 1. Did the Public Body properly withhold information as non-responsive to the Applicant's request?**

[para 11] The Public Body submits that, contrary to its initial response to the Applicant and its Index of Records, only information severed from page 113 of the responsive records is non-responsive.

[para 12] As mentioned above, the Applicant's request was for:

...records in any format – notes, emails, reports, etc. pertaining to complaints or opinions regarding to [sic] my teaching of [a specified English course] in Winter, 2011...

[para 13] Page 113 of the responsive records appears to be a screen printout of an e-mail message. While the e-mail message itself is responsive to the Applicant's request, the side bar of the printout contains a list of names which do not appear to have anything to do with the information the Applicant requested. Therefore, I agree with the Public Body that this information is not responsive to the Applicant's request and was properly withheld.

2. Does section 17 of the Act (disclosure harmful to personal privacy) apply to the information/records?

[para 14] Section 17 of the Act prohibits public bodies from disclosing a third party's personal information when the disclosure of that information would be an unreasonable invasion of the third party's personal privacy.

a. Do the records contain personal information?

[para 15] Personal information is defined by section 1(n) of the Act as follows:

1(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;

[para 16] The information on pages 34, 36, 40, 46, 53, 60, 72, 115, 134, 140, and 164 was severed pursuant to section 17 of the Act. The information severed from these pages does contain information about the Affected Party's work history and her educational history. However, her name was not used in the particular e-mail correspondence and it has been severed from every other record in the responsive records. Therefore, the information in the e-mail on these pages is not about an "identifiable" individual because the Affected Party could not be identified from the information that was severed.

[para 17] Large sections of the responsive records were severed from pages 37, 38, 42, 43, 44, 49, 50, 51, 55, 56, 57, 58, 59, 66, 67, 68, 69, 70, 104, 116, 118, 119, 120, 121, 122, 123, 159, 160, and 161 pursuant to section 17 and also pursuant to section 24 of the Act. While these severed portions do contain the Affected Party's name and some information about her educational history, the greatest part of the information severed was not her personal information. Therefore, I will continue with the section 17 analysis of this the information on these pages only insofar as the Affected Party's name and educational history are concerned.

[para 18] Pages 138, 142, 143, 148, 149, 154, and 162 contained information that was severed pursuant to section 17 of the Act only. These sections of severed information contain the Affected Party's name and e-mail address, which are her personal information. However, the remainder of the information severed pursuant to section 17 of the Act was not personal information because, without the Affected Party's name, it was not information about an identifiable individual.

[para 19] For the information on the pages noted above, to which section 24 of the Act was also applied, for reasons which I will state in more detail below, I believe that section 24 of the Act was properly applied to this information. Therefore, the remainder of the information severed on these pages will be discussed in relation to section 24 of the Act.

[para 20] Finally, throughout the responsive records, the Affected Party's name and e-mail address were severed along with the name of a third party who was acting, in her personal capacity, to provide support for the Affected Party. Names are listed as personal information under section 1(n)(i) of the Act and previous orders from this office have found that personal e-mail addresses are also personal information (see Order F2012-07 at para 8). This information is also about an identifiable individual and is the personal information of the Affected Party and the third party.

[para 21] The Public Body also severed educational history and work history of the Affected Party. Without her name, this information alone would not identify the Affected Party. As I will explain below, the Public Body properly severed the Affected Party's name, so even though educational and employment history is included in the list of examples of personal information in section 1(n)(vii) of the Act, without the Affected

Party's name, it is not information about an identifiable individual. Therefore, this information is not personal information.

[para 22] As a result, for the remainder of the section 17 analysis, I will deal only with the Affected Party's name and e-mail address and the name of the third party, with one exception. The exception is regarding the information severed from pages 127, 128, 129 and 130, which is all information about the Affected Party's educational history, and could identify her even without her name. Therefore, I find that all of the information severed on pages 127, 128, 129 and 130 is the Affected Party's personal information.

b. Is there a presumption that disclosure would be an unreasonable invasion of a third party's personal privacy?

[para 23] Section 17(2) of the Act lists circumstances in which the disclosure of information would not be an unreasonable invasion of personal privacy. None of those circumstances apply in this inquiry.

[para 24] Section 17(4) of the Act lists circumstances in which the disclosure of a third party's personal information is presumed to be an unreasonable invasion of the third party's personal privacy. The portions of section 17(4) of the Act which are potentially relevant in this inquiry 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 25] The personal information that was severed relates to a complaint the Affected Party made about her professor's conduct toward her during the time that he taught her a class when she was attending university. Given the student/teacher relationship between the Affected Party and the Applicant at the time the alleged harassment occurred, I believe that the records at issue relate to the Affected Party's educational history and that as a result, the personal information that was severed relates to the Affected Party's educational history.

[para 26] As well, disclosing the Affected Party's name would itself reveal additional personal information about the Affected Party, such as other aspects of her educational history (that she attended a particular class at the university, that was taught by the Applicant).

[para 27] Therefore, I find that, pursuant to sections 17(4)(d) and 17(4)(g)(ii) of the Act, there is a presumption that disclosing the Affected Party's personal information would be an unreasonable invasion of the Affected Party's personal privacy.

[para 28] The presumption under section 17(4)(g)(i) of the Act also applies to the third party who provided support for the Affected Party, because the third party's name appears in the responsive records along with information about her employment, which is also her personal information.

c. Do any section 17(5) factors apply?

[para 29] Although section 17(4) of the Act creates a presumption that the disclosure of the Affected Party's personal information would be an unreasonable invasion of her personal privacy, the Public Body must still examine the factors listed in section 17(5) of the Act to determine if the disclosure of the information would be an unreasonable invasion of the Affected Party's personal privacy. These factors must also be weighed in relation to the third party's personal information. Section 17(5) of the Act states:

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

(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.

i. Factors weighing against disclosure:

[para 30] The records make it clear that the Affected Party was assured that her identity would be kept from the Applicant insofar as that was possible given the small class size and the presumption that the alleged incident would be one that the Applicant would remember. It is also clear from the records and the submissions of the Affected Party that had she known her personal information would be disclosed to the Applicant, she would not have proceeded with the complaint. I find, based on the evidence before me, that the Affected Party supplied her personal information to the Public Body in confidence and that that factor weighs in favour of severing her personal information from the records at issue pursuant to section 17(5)(f) of the Act.

[para 31] Although the Applicant views this procedure as unfair and unjust, it is the procedure which the Public Body had in place. Presumably the Public Body has its own reasons for providing a complainant with the option of making an anonymous, informal complaint, instead of a formal complaint which would result in the complainant's name being made known to the professor who is the subject of the complaint. Such reasons may include encouraging students to come forward with complaints without fear of reprisal by a professor. However, it is not within my jurisdiction to make orders on the fairness of the Public Body's complaint system.

[para 32] There was also some suggestion that disclosing the Affected Party's personal information may expose her to harm. Given the evidence before me, I understand why this argument was made but do not believe that there is enough evidence to find that the Affected Party *would* be exposed to harm, which is the test for section 17(5)(e) of the Act to apply.

ii. Factors weighing in favour of disclosure:

[para 33] The Applicant seems to suggest that section 17(5)(a) of the Act (disclosure is desirable for the purpose of subjecting the activities of the Public Body to public scrutiny) is applicable. Specifically, he feels that the actions of the Public Body in dealing with complaints is not fair or just. He feels that he should be allowed to face his accuser and that his accuser should be held accountable for the accusations that she has made, which he believes are false.

[para 34] The Public Body correctly submits that in order for section 17(5)(a) of the Act to apply, there must be some sort of public component. As the Adjudicator in Order F2012-26 stated:

There is an insufficient public component in this case, as the concerns raised by the Applicant are in relation to her own personal dispute with the Public Body and her former supervisor.

(Order F2012-26 at para 57)

[para 35] In this case, I have no evidence that anyone other than the Applicant is concerned with scrutinizing the activities of the Public Body. It seems clear from the Applicant's own submissions that he is primarily concerned with how he was treated and took his treatment as a personal attack. Although he does suggest that there is a problem with "political correctness" in academia in general, I believe that his desire to have access to the Affected Party's personal information is not about unveiling a systemic problem in which the public may be interested. Therefore, in this case I find that section 17(5)(a) of the Act does not weigh in favour of disclosure.

[para 36] There was also an argument made that the complaint may have resulted in or contributed to the Public Body not renewing the Applicant's contract. If this were the case, presumably the Applicant would want the Affected Party's personal information so that he could refute the complaint. As well, if there were a way in which he could appeal the decision of the Public Body, or sue for wrongful dismissal, there might be an argument that section 17(5)(c) (information relevant to a fair determination of the Applicant's rights) would weigh in favour of disclosure. However, I have no evidence that there is a process by which the Applicant could grieve or sue for the loss of his contract.

[para 37] In any event, it was the English department that decided not to renew the Applicant's contract. The Public Body has provided ample evidence that the decision not to renew the Applicant's contract was made well in advance of English department officials having knowledge of the Affected Party's complaint. In fact, the Applicant himself was made aware that the decision not to renew his contract had been made on May 24, 2011, six days before the Affected Party met with a representative from the English department. It was at this meeting that the English department was first made aware of the Affected Party's complaint. Therefore, the Applicant's having the Affected Party's personal information would have no bearing on any such action he might take against the Public Body, because it is clear that the complaint played no role in the decision not to renew his contract.

[para 38] As a result, I find that section 17(5)(c) of the Act does not weigh in favour of disclosure.

[para 39] Having weighed all the relevant 17(5) factors, I find that there are no factors that would rebut the presumption that disclosing the Affected Party's personal information would be an unreasonable invasion of her personal privacy. I do find that section 17(5)(f) of the Act weighs against disclosure.

[para 40] I also find that no section 17(5) factors are applicable in favour of disclosing the third party's personal information. Therefore, I find the presumption that disclosing the third party's personal information would be an unreasonable invasion of her personal privacy governs.

[para 41] In conclusion, I find that the Public Body properly withheld the Affected Party's name and e-mail address and the personal information of the third party contained in the records from the Applicant.

3. Did the Public Body properly apply sections 24(1)(b) and (d) of the Act (advice from officials) to the information/records?

[para 42] In its submissions, the Public Body advised that it is applying only sections 24(1)(a) and 24(1)(b) of the Act to the responsive records, and is no longer relying on section 24(1)(d) of the Act.

[para 43] Section 24(1)(a) and 24(1)(b) of the Act state:

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,

(ii) a member of the Executive Council, or

(iii) the staff of a member of the Executive Council,

...

[para 44] Order 96-006 established the test to determine if section 24(1)(a) of the Act applies as follows:

Accordingly, in determining whether section 23(1)(a) [now section 24(1)(a)] will be applicable to information, the advice, proposals, recommendations, analyses or policy options ("advice") must meet the following criteria.

The advice should:

1. be sought or expected, or be part of the responsibility of a person by virtue of that person's position,
2. be directed toward taking an action,
3. be made to someone who can take or implement the action.

(Order 96-006)

[para 45] While some of the information that was severed may pass this test, I think section 24(1)(b) of the Act is the more appropriate section for the Public Body to have relied on. The applicability of section 24(1)(b) of the Act is different from that of section 24(1)(a) in that it covers consultations and deliberations rather than just "advice". Therefore, it applies to the process of officers and employees of a public body exchanging ideas to come to a decision. The Adjudicator in Order F2011-018 summarized the applicability of section 24(1)(b) of the Act as follows:

Section 24(1)(b) gives a public body the discretion to withhold information that could reasonably be expected to reveal consultations or deliberations involving officers or employees of a public body, a member of the Executive Council, or the staff of a member of the Executive Council (which I will refer to as "consultations/deliberations"). A "consultation" occurs when the views of one or more of the persons described in section 24(1)(b) are sought as to the appropriateness of particular proposals or suggested actions; a "deliberation" is a discussion or consideration of the reasons for and/or against an action (Order 96-006 at p. 10 or para. 48; Order 99-013 at para. 48). The test for information to fall under section 24(1)(b) is the same as that under section 24(1)(a) in that the consultations or deliberations must (i) be sought or expected from or be part of the responsibility of a person, by virtue of that person's position, (ii) be directed toward taking an action, and (iii) be made to someone who can take or implement the action (Order 99-013 at para. 48; Order F2004-026 at para. 57).

(Order F2011-018 at para 58)

[para 46] The information to which the Public Body applied section 24(1)(b) of the Act (which is the same information to which it applied section 24(1)(a) of the Act) involved employees of the Public Body discussing, proposing, and suggesting ways to respond to the Affected Party's complaint. The submission of the Public Body, along with its supporting affidavit prove that:

- a. the consultations/deliberations were sought by employees of the Public Body whose responsibility it was to implement the decision of the Public Body;
- b. the consultations/deliberations were directed at taking action - specifically in responding to the complaint and addressing the Applicant; and
- c. the consultations/deliberations were made by an employee of the Public Body who then implemented the decision of the Public Body as to how to deal with the complaint and the Applicant;

[para 47] Therefore, I find that section 24(1)(b) of the Act is applicable.

[para 48] However, in order to have properly applied section 24(1)(b) of the Act, the Public Body must show that it exercised its discretion under section 24 of the Act appropriately, keeping in mind the purposes of the Act and the circumstances of the particular case (Order F2011-018 at para 68).

[para 49] The Public Body submitted that it took into consideration the Applicant's right of access and weighed that against the need for the Public Body to carry out similar complaint processes in the future and the potential that consultations would be less candid if the parties involved understood the content of the consultations/deliberations would be made public. The Public Body also considered whether the disclosure of the consultations/deliberations would satisfy any need for public scrutiny, and that employees of the Public Body expected that the information would be kept confidential.

[para 50] On the basis of these submissions, I find that the Public Body properly exercised its discretion under section 24(1)(b) of the Act.

V. ORDER

[para 51] I make this Order under section 72 of the Act.

[para 52] I find that the Public Body properly severed the Affected Party's name and e-mail address, and the third party's personal information, pursuant to section 17 of the Act.

[para 53] I find the Public Body improperly severed information that was not personal information on pages 34, 36, 40, 46, 53, 60, 72, 115, 134, 138, 140, 142, 143, 148, 149, 154, 162, and 164 and order the Public Body to disclose that information to the Applicant as per my findings at paragraphs 16-22.

[para 54] I find the Public Body properly severed information from the records pursuant to section 24(1)(b) of the Act.

[para 55] I further order 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.

Keri H. Ridley
Adjudicator