

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2013-40

October 24, 2013

ALBERTA JUSTICE AND SOLICITOR GENERAL

Case File Number F6031

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request pursuant to the *Freedom of Information and Protection of Privacy Act* (the Act) to Alberta Justice and Solicitor General (the Public Body) for records relating to a written reprimand that was issued to him while he was attending a program run by the Public Body. The Applicant was not satisfied with the Public Body's response to his access request and asked that the Office of the Information and Privacy Commissioner (this Office) review the Public Body's response.

The Adjudicator found that the Public Body performed an adequate search for responsive records and, therefore, satisfied its obligations under section 10 of the Act. The Adjudicator further found that the Public Body properly severed personal information of third parties from the responsive records pursuant to section 17 of the Act.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 10, 17, and 72.

Authorities Cited: AB: Orders 2001-016, F2003-016, F2004-016, and F2007-029.

I. BACKGROUND

[para 1] The Applicant was a student at a college run by Alberta Justice and Solicitor General (Public Body). On October 21, 2011, the Applicant was reprimanded. On

October 31, 2011, the Applicant made an access request to the Public Body pursuant to the *Freedom of Information and Protection of Privacy Act* (the Act). His request stated:

On Oct. 21st, 2011, I was notified by [an employee of the Public Body] of being previously counseled and disciplined. This never occurred and I have never been counseled or disciplined in relation to anything. I was issued a written reprimand out of the blue without the employer properly investigating the matter on Oct. 7, 2011 and I wish to see all documentation and relevant notes pertaining [to] such occurrence which I believe stems out of vindictiveness and ill will.

[para 2] On November 23, 2011, the Public Body responded, summarizing the Applicant's request as follows:

Specifically, you have requested access to a copy of all documents and relevant notes regarding a written reprimand issued to you, for the time period October 6-7, 2011.

[para 3] The Public Body provided the Applicant with two pages of responsive records. Some of the information in the records was severed pursuant to section 17 of the Act.

[para 4] On December 20, 2011, the Office of the Information and Privacy Commissioner (this Office) received a Request for Review from the Applicant stating that he did not believe he had received all the information he had requested.

[para 5] Mediation was authorized but was not successful in resolving the issues between the parties and on March 29, 2012, this Office received a Request for Inquiry from the Applicant. Attached to the request, was a document titled, "Schedule A", which, among other things, detailed the Applicant's disapproval with the mediator's findings. The Applicant relied on this document as part of his initial submissions.

[para 6] I received initial and rebuttal submissions from both the Applicant and the Public Body.

II. INFORMATION AT ISSUE

[para 7] The information at issue consists of the severed portions of the records that are responsive to the Applicant's request.

III. ISSUES

[para 8] The Notice of Inquiry dated March 28, 2013 lists the issues in this inquiry as follows:

Issue A: Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act (duty to assist applicants)? In this case, the Adjudicator will consider whether the Public Body conducted an adequate search for responsive records.

Issue B: Does section 17 of the Act (disclosure harmful to personal privacy) apply to the information in the records?

[para 9] As a preliminary issue, the Public Body raised a concern it had with the Applicant's relying on the "Schedule A" that was attached to his Request for Inquiry as part of his initial submissions. The Public Body argued that I should disregard the document because it is essentially a review of the mediator's findings and this inquiry is a *de novo* process. Despite its objections, I note that the Public Body's initial submissions contain a sworn affidavit which details the findings of the portfolio officer in this matter.

[para 10] The Public Body is correct in stating that this inquiry is a *de novo* process and not a review of the mediation process or the mediator's findings. I will, therefore, not rely on any parts of the Applicant's or Public Body's submissions which relate to what occurred at mediation. However, the Applicant made other arguments in his Schedule A document that refer to his interpretation of the Act more generally, such as his views on what the term "reasonable" means. I will take his arguments on those points into consideration.

IV. DISCUSSION OF ISSUES

Issue A: Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act (duty to assist applicants)? In this case, the Adjudicator will consider whether the Public Body conducted an adequate search for responsive records.

[para 11] Section 10(1) of the Act states:

10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.

[para 12] In Order 2001-016, the then Commissioner stated:

Previous orders... say that the public body must show that it conducted an adequate search to fulfill its obligation under section 9(1) [now section 10(1)] of the Act. An adequate search has two components: (1) every reasonable effort must be made to search for the actual record requested and (2) the applicant must be informed in a timely fashion about what has been done.

(Order 2001-016 at para 13)

[para 13] Many previous orders issued by this office have stated that evidence as to the adequacy of a search should cover the following points:

- The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request

- The scope of the search conducted - for example: physical sites, program areas, specific databases, off-site storage areas, etc.
- The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
- Who did the search
- Why the Public Body believes no more responsive records exist than what has been found or produced

(Order F2007-029 at para. 66)

[para 14] In its initial submissions, the Public Body provided an affidavit sworn by its FOIP Advisor stating that:

- The FOIP Advisor processed the Applicant's request.
- The FOIP Advisor contacted the employee who reprimanded the Applicant to locate records.
- On being advised of this Office's involvement in reviewing the Public Body's response to the Applicant's request, the FOIP Advisor asked the employee who reprimanded the Applicant if there were further records. The employee advised that there were no additional records.

[para 15] The Public Body did not provide evidence or argument as to:

- The scope of the search conducted - for example: physical sites, program areas, specific databases, off-site storage areas, etc.
- The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
- Why the Public Body believes no more responsive records exist than what has been found or produced.

[para 16] As a result of the deficiencies in the Public Body's evidence, I asked that it provide further evidence on the points mentioned above.

[para 17] On the information before me, it also appeared as though the Public Body may have narrowed the Applicant's request. His access request mentioned that he had been told he had been counseled and disciplined prior to the October 7, 2011 reprimand, but in the Public Body's response to the Applicant, it summarized the Applicant's request as being only for records relating to the October 7, 2011 reprimand. I suspected that the Public Body may have narrowed the Applicant's request because his access request specifies the time period of October 7, 2011. Due to this possible inconsistency, I asked

the Public Body to clarify if there were other records relating to the Applicant being counseled or disciplined prior to the reprimand.

[para 18] The Public Body responded:

- The search focused on the records in possession of the employee who actually issued the written reprimand and was, therefore, understood to be the primary holder of all responsive records.
- It was the employee that issued the reprimand that did the actual search, using the parameters provided by the Applicant.
- The Public Body searched for records twice. Once when the initial access request was received and again on learning that the Applicant made a Request for Review to this Office. Based on these searches, the Public Body believes that no further responsive records exist.
- In addition, the Public Body confirmed that it did not search for records relating to prior counseling or discipline because the Applicant's access request specified a time frame and the October 7, 2011 reprimand was the only one to found to have occurred during that time frame.

[para 19] The Applicant argues that his access request was not meant as a specific direction. I believe that the Applicant's access was clear and that it was reasonable for the Public Body to narrow the search to the timeframe the Applicant specified in his access request. I note in addition that it appeared that the Applicant himself would not have expected there to be records pre-dating the October 7 time frame since he asserted that no prior counseling or discipline had in fact taken place.

[para 20] Based on the evidence before me, I find that the Public Body performed an adequate search for records responsive to the Applicant's request and fulfilled its obligations pursuant to section 10 of the Act.

Issue B: Does section 17 of the Act (disclosure harmful to personal privacy) apply to the information in the records?

[para 21] As noted above, the Public Body severed information from the responsive records pursuant to section 17 of the Act. Section 17(1) of the Act states:

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.

(a) Did the Public Body withhold “personal information?”

[para 22] In order for section 17 of the Act to apply, the information severed by the Public Body must be personal information. Personal information is defined in 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 23] Much of the information that was severed consisted of names and educational history of third parties. The responsive records detail a complaint made about the Applicant to the Public Body. Along with names and educational history, other information about the details of the incident that led to the reprimand were severed. Given the nature of the incident, I find that it would be likely that the Applicant would be able to identify the third parties from the information about the incident that was severed by the Public Body. Therefore, I find that this information is information about identifiable individuals and that the information severed by the Public Body was all personal information of third parties.

(b) *Would the disclosure of the third parties' personal information be an unreasonable invasion of their personal privacy?*

[para 24] Section 17(4) of the Act sets out when the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy. The Public Body argues that section 17(4)(g) of the Act applies to the information at issue. Section 17(4)(g) of the Act states:

17(4)(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] From my review of the records at issue, third parties names were severed along with educational history and other information about identifiable individuals. Therefore, section 17(4)(g) (i) of the Act applies and creates a presumption that disclosure of the third parties' personal information would be an unreasonable invasion of their personal privacy.

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

[para 26] Although section 17(4)(g)(i) of the Act creates a presumption that disclosure of a third party's personal information would be an unreasonable invasion of his or her personal privacy, the Public Body must still weigh all the factors listed in section 17(5) of the Act and any other relevant factors to determine if it is appropriate to withhold the information at issue. 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.

[para 27] The Public Body submits that section 17(5)(e), (f), and (h) of the Act weigh in favour of not disclosing the information and only section 17(5)(i) of the Act weighs in favour of disclosing the information.

i. Section 17(5) factors weighing in favour of disclosure:

[para 28] The Public Body states that section 17(5)(i) (information originally provided by the Applicant) weighs in favour of disclosing the information at issue, but makes no argument in this regard. I do not believe that any of the information severed was provided by the Applicant and, therefore, find section 17(5)(i) of the Act is not applicable.

[para 29] The only other enumerated factor that may weigh in favour of disclosure is section 17(5)(c) of the Act (personal information is relevant to a fair determination of the applicant's rights). The Applicant did not specifically argue that this factor applied. Further, in order to establish it applies the following must be met:

1. The right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds;
2. The right is related to a proceeding which is either existing or contemplated, not one which has already been completed;
3. The personal information which the applicant is seeking access to has some bearing on or is significant to the determination of the right in question; and
4. The personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

[para 30] The Applicant provided me with no evidence that he has a legal right, or that the personal information would have some bearing on that right or is required to prepare

for the proceeding. Therefore, I find that this factor is not applicable to the information at issue.

ii. Section 17(5) factors weighing against disclosure:

[para 31] The Public Body argues that section 17(5)(e) of the Act (the third party will be exposed to financial or other harm) weighs in favour of severing the information at issue. The Public Body submits:

The Public Body has a reasonable belief that the Applicant *may* unfairly targeted (*sic*) third party individuals by making unfair accusations regarding their motives and integrity, which *possibly could* result in unfair damage to the personal reputation and employment of these third parties...[emphasis added]

[para 32] In support, the Public Body cites Order F2004-016 in which the Adjudicator found evidence that the Applicant would likely make unwanted contact with third parties whose information was severed from the records at issue.

[para 33] In order for section 17(5)(e) of the Act to apply, there needs to be more than a mere possibility of unfair damage. The Public Body provided no compelling evidence that would indicate that the Applicant would ‘target’ the third parties.

[para 34] I find that section 17(5)(e) of the Act does not apply to the information at issue.

[para 35] The Public Body also argued that section 17(5)(f) of the Act (information supplied in confidence) applies to the information at issue and is a factor that weighs against disclosure. The Public Body cited previous orders issued by this Office in support of its argument that confidentiality can be implied from the situation in which the information was supplied (Order F2003-016 at para 35). The Public Body further submitted:

These records are used as a tool to manage the personnel of the Public Body and are generally considered confidential. Third parties submitting information had a reasonable expectation that their information was being collected for a specific purpose and that it would be treated as confidential. Therefore, it is the position of the Public Body, taking under consideration the sensitive nature of the information, that the third parties implicitly considered their personal information to have been supplied in confidence.

[para 36] I do not think that the fact that the records are used by the Public Body to manage personnel has any bearing on whether the third parties had an expectation of confidentiality. However, I do note that the personal information that was severed and that would identify third parties was the information that raised issues about the Applicant that led to his being reprimanded. Given the context in which the information was supplied, I find that the third parties disclosed their personal information to the Public Body in confidence. Therefore, this factor weighs in favour of severing the information.

[para 37] Finally, the Public Body argued that section 17(5)(h) of the Act (disclosure may unfairly damage the reputation of any person referred to in the record) weighs in favour of severing the information. It advanced the same arguments that this section applies as it did for section 17(5)(e) of the Act.

[para 38] For the same reasons I rejected the Public Body's argument regarding section 17(5)(e) of the Act, I also find section 17(5)(h) of the Act is not applicable. The Public Body provided no sound basis for its belief that the Applicant could do anything with the information at issue that would unfairly damage the reputation of the third parties.

iii. Conclusion on section 17(5):

[para 39] I find that there are no section 17(5) factors that weigh in favour of disclosure. I also find that section 17(5)(f) of the Act weighs in favour of severing the third parties' personal information. As a result, I find that the Public Body properly severed the information at issue pursuant to section 17 of the Act.

V. ORDER

[para 40] I make this Order under section 72 of the Act.

[para 41] I find that the Public Body met its obligations under section 10 of the Act.

[para 42] I find that the Public Body properly applied section 17 of the Act to the information at issue.

Keri H. Ridley
Adjudicator