

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2014-10

February 12, 2014

TOWN OF TABER

Case File Number F6374

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request to the Town of Taber (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act). He requested correspondence written between April 19, 2011 and May 9, 2011 referring either to himself or his wife. He also requested a list of all non-personal utility accounts which have been temporarily suspended or discontinued, and copies of all correspondence, E Mail or other inter office communication relating to the authorization or approval of funding support of the Arts Council to assist it in paying all or a portion of its utility bills.

The Public Body conducted a search for responsive records. The Public Body located the records responsive to the first part of the access request and created a record responsive to the second part of the access request. It was unable to locate any records responsive to the third part of the access request. The Public Body severed some information from the records it did locate on the basis that it was non-responsive or the personal information of a third party.

The Adjudicator noted that it had not provided adequate explanation to the Applicant regarding the search it had conducted, and that this was necessary given that the records contained the image of a responsive attachment, but the attachment had not been produced. The attachment had been destroyed, and only an image of it remained; however, the Public Body had not explained this in its response.

The Adjudicator confirmed that the Public Body had conducted a reasonable search for responsive records. The Adjudicator noted that the Public Body had explained the steps it had taken to locate responsive records and explained why it had concluded no further records could be produced in its submissions. Although it had not done so when it responded originally, and had arguably not met the duty to assist for that reason, there was therefore no benefit to ordering it to explain its search when it had already done so at the inquiry.

The Adjudicator found that the information severed as non-responsive was non-responsive. She confirmed the decision of the Public Body to sever the name and telephone number of an individual from the records, but ordered the Public Body to disclose the remaining information from the record to which it had severed information under section 17.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 6, 7, 10, 12, 17, 35, 72;

Authorities Cited: **AB:** Orders 97-020, 2001-016, F2009-001, F2009-005,

Cases Cited: *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2010 ABQB 89; *University of Alberta v. Pylypiuk*, 2002 ABQB 22

I. BACKGROUND

[para 1] On May 14, 2012, the Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to the Town of Taber (the Public Body). The Applicant requested:

... copies of all correspondence relating to [himself or his wife] or issues brought forward by them for the period April 19, 2011 to May 9, 2011, inclusive. This should include, but not necessarily be limited to, all communication be it written correspondence, E Mail including attachments to E Mails which relate to [the Applicant or his wife], fax or other such communication between or among town employees, the Mayor, Council Members and all outside agencies, organizations, town advisors or contractors.

For the period May 2011 to April 2012: a list of all non-personal utility accounts which have been temporarily suspended or discontinued such that the account holder does not have to pay for all or a portion of utility charges. This list to include all community organizations and other public bodies.

For the period June 1, 2011 to the date of this request: copies of all correspondence, E Mail or other inter office communication relating to the authorization or approval of funding support for the Arts Council to assist it in paying all or a portion of its utility bills.

[para 2] The Public Body responded to the Applicant's access request on June 13, 2012. The Public Body provided records responsive to the Applicant's request for personal information and for information regarding the utility accounts. However, the Public Body stated that it was unable to locate any responsive records relating to authorization or approval of funding support for the Arts Council or its utility bills.

[para 3] On August 9, 2012, the Applicant requested review by the Commissioner of the Public Body's response. The Commissioner authorized mediation to resolve the dispute between the parties.

[para 4] On January 10, 2013, the Public Body provided the Applicant with a more detailed response, in which it explained that it had severed some information from the records under section 17(1) (disclosure harmful to personal privacy).

[para 5] As mediation was unsuccessful in resolving the issues, the matter was scheduled for a written inquiry.

II. INFORMATION AT ISSUE

[para 6] Information severed from the records under section 17 and information withheld from the Applicant as "nonresponsive" is at issue.

III. ISSUES

Issue A: Did the Public Body meet its duty to assist the Applicant as provided by section 10(1) of the Act (duty to assist applicants)?

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

Issue C: Did the Public Body properly withhold information as non-responsive to the Applicant's request?

IV. DISCUSSION OF ISSUES

Issue A: Did the Public Body meet its duty to assist the Applicant as provided by section 10(1) of the Act (duty to assist applicants)?

[para 7] Section 10 of the FOIP Act states, in part:

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 8] Prior orders of this office have determined that the duty to make every reasonable effort to assist applicants includes the duty to conduct a reasonable search for responsive records. In Order 2001-016, the Commissioner said:

In Order 97-003, the Commissioner said that a public body must provide sufficient evidence that it has made a reasonable effort to identify and locate records responsive to the request to discharge its obligation under section 9(1) [now 10(1)] of the Act. In Order 97-006, the Commissioner said that the public body has the burden of proving that it has fulfilled its duty under section 9(1) [now 10(1)].

Previous orders ... say that the public body must show that it conducted an adequate search to fulfill its obligation under section 9(1) [now 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.

[para 9] As discussed in the foregoing excerpt, a public body bears the burden of proving that it conducted a reasonable search for responsive records.

Did the Public Body complete a reasonable search for responsive records?

[para 10] The Public Body submitted the affidavit of its Human Resources Manager and FOIP Coordinator in support of its arguments that it conducted a reasonable search for responsive records. This affidavit states:

Regarding Section 1 of the 2012 Request, given that the Public Body has already conducted a search for records responsive to the 2011 Request [an access request the Applicant had made July 29, 2011 that is not the subject of this inquiry] as a starting point for my search and repeated [the] same steps as I had taken in 2011. Therefore the search for documents responsive to Section 1 of the 2012 Request involved repeating those steps outlined in paragraphs 8 to 10 of this Affidavit and included asking the Public Body's staff and council to search their records again in response to the 2012 Request. An email to the Public Body's staff and council in this regard was sent on May 24, 2012. The email provided instructions for conducting a search of "All folders", including messages from the "Deleted items folder", of the [recipients'] email records. Attached hereto and marked as Exhibit "J" to this my Affidavit is a copy of the email sent to Public Body staff and council members dated May 24, 2012 as well as the instructions for conducting the search that were attached to that email.

Similar searches were conducted in response to Section 2 and Section 3. Regarding Section 2, the search revealed no records containing a list of utility accounts that were temporarily suspended or discontinued. However, the search revealed one utility account where utility service had been temporarily suspended. That account belonged to a seasonal campground that received only garbage service. The Public Body created a new record containing this information in order to respond to Section 2.

Regarding Section 3, Public Body staff and council members were asked to search their entire email file system using the words "Arts Council" and all their hard copy files. Additionally, I searched the Public Body's central filing system and council minutes for responsive records. The searches by Public Body staff, council members and myself revealed no records that were responsive to Section 3.

[para 11] Paragraphs 8 – 10 of the affidavit, to which the foregoing excerpt refers, states:

In response to the Applicant's 2011 Request, I had a discussion with all members of the Public Body's staff and council who were verbally instructed to search their own personal computers and hard copy files and produce anything related to [the Applicant and the Applicant's wife]. Additionally on August 2, 2011, I sent an email message to all members of the Public Body's staff and council instructions which outlined how to search their email. Attached hereto and marked as Exhibit "E" to this my Affidavit is a copy of the email sent to Public Body staff and council members dated August 2, 2011 as well as the instructions for conducting the search that were attached to that email.

The Public Body maintains a central filing system in which all historical documents are kept. I conducted a search of these files for responsive documents. Through discussions with senior management of the Public Body, I determined that the FOIP and planning areas of the central filing system were [the] most likely areas to contain responsive records as the Applicant has been most active in these areas. Accordingly, my search of the central filing system concentrated on these areas. I also conducted a search of all the offices at the Public Body's administration building and conducted an electronic historical search of all the Public Body's council minutes.

I conducted the search of the Public Body's central filing system. All other searches were conducted by the Public Body's staff or council members pursuant to oral and electronic instructions. Any records located by staff or council members were provided to me. I received responses from all Public Body staff and council member[s] either following my initial email request or after subsequent follow-up correspondences that were sent to individuals from whom I did not receive a response initially.

[para 12] Exhibits "J" and "E" referred to in the excerpts cited above contain instructions as to how to conduct electronic searches of Outlook for responsive emails. Exhibit "J", which instructs the Public Body's staff and council members to search for documents responsive to the Applicant's access request for this inquiry states:

Recently, the Town has received a FOIP request that has asked that a search of our email be completed for any documents pertaining to the Arts Council of Taber...

Exhibit "E", which instructs the Public Body's staff and council members to search for documents responsive to the Applicant's previous access request, states:

Recently, the Town has received a FOIP request that has asked that a search of our email be completed for any documents pertaining to [the Applicant and his wife].

[para 13] In his submissions of January 3, 2013, the Applicant states:

Despite the Town's sworn statement that it "identified and disclosed" the subject documents in its 2012 Response (I'm not sure what the Town means by "identified" as certainly the subject documents were not identified in the 2012 Response), I continue to hold to the view that the Town has failed to adequately explain why the specific information requested, and identified in detail in my October 31st submission, and in earlier correspondence to the Commissioner and her Office, was not provided to me. This is unreasonable and does not meet the Town's obligation regarding its Duty to Assist.

The crux of my complaint rests on whether or not I received all emails and attachments that referred to me, specifically pertaining to the following emails:

- 1) An email sent April 19, 2011 with an attachment labelled [name of Applicant].docx. (I will refer to this attachment as "Letter 1");
- 2) An email sent April 20, 2011 at 9:55 am with an attachment of the same name (I will refer to this attachment as "Letter 2"), in which it is described as an "updated letter"; and
- 3) An email sent April 20, 2011 at 3:08 pm with an attachment of the same name (I will refer to this attachment as "Letter 3") in which it is described as "Revised 2."

Letter 1 is attached to an email sent from [the first employee] to [a second employee] and copied to [the third employee] and [the fourth employee]. We were provided with a print-out from the

email accounts of all parties except for [the second employee] – no relevant emails were included from the [second employee's] account.

Both Letter 2 and 3 are attached to emails sent from [the third employee] to [the first employee].

A thorough review of the documents I was provided in the 2012 FOIP Response yields one letter which appears to be a draft word document (as it is not on letterhead or signed). I did not consider this to be one of the attachments, as it was not labelled as such. Further I have great difficulty accepting this letter as being the letter referred to as being too harsh in [the employee's] email to [the second employee].

How am I to know whether this letter is a fabrication or whether it is Letter 1, 2 or 3? If the Town had honored my request to provide ALL emails and ALL attachments, I should have received four copies of Letter 1, and two copies each of Letter 2 and 3. The Town included print-outs of the email accounts of all parties (except for that of [the second employee], which is equally concerning). Why did they withhold two of the three letters, and where are the additional copies of the letters? A review of the entire package shows that the Town included multiple copies of documents & emails, regardless of whether they were the exact same thing, simply because they originated from different email accounts. Why, when it pertained to these emails of April 19 and 20, did they withhold two of the three letters? And if they are arguing that they did in fact provide me with the letters (their submission claims they provided two letters, not three), why did they make an exception to the rule here, and only supply one copy? Again, accepting the position of the FOIP Portfolio Officer that a proper search was undertaken leaves one with no other option but to conclude that documents were deliberately withheld. Again, this is not consistent with the Town's claim it met its Duty to Assist.

I believe that any reasonable person knowledgeable of all the facts would conclude that this particular letter offered up by the Town is suspect, especially when relevant email attachments are withheld.

[para 14] The Applicant's position is that there are drafts of records referred to in the records that have not been produced. Because these drafts have not been produced, he reasons that these drafts were deliberately withheld from him.

[para 15] The Public Body submitted an affidavit by the human resources manager and FOIP Coordinator to respond to this point. This affidavit states:

The 2012 Response contained several responsive emails dated April 19, 2011 and April 20, 2011 that had documents attached to them. Chronologically, the first email was sent by [the first employee] to [the second employee] on April 19, 2011 at 4:32 p.m. (the "First Email"). A copy of the First Email was disclosed as part of the 2012 Response (Index of Records – Docs A3). [The third employee] and [the fourth employee] both employees of the Public Body were also sent "carbon copies" of the First Email.

[...]

The copies of the First Email received by [the third employee] and [the fourth employee] were identified by the Public Body in their respective email inboxes. Copies of these emails were also disclosed in the 2012 Response (Index of Records – Docs A7 and A8). A copy of the First Email was not identified in the inbox of [the second employee who is no longer an employee of the Public Body], presumably because it had been deleted prior to the Public Body's receipt of the 2012 Request and the previous, similar request that was made by the Applicant in 2011 (the "2011 Request").

Although the emails received by [the third and fourth employees] on April 19, 2011 from [the first employee] had the Original Letter attached to them, only one copy of the Original Letter was included in the 2011 Response.

The second email with an attachment was sent by [the third employee] to [the first employee] on April 20, 2011 at 9:55 a.m. (the "Second Email"). A copy of the Second Email was included in the 2012 Response (Index of Records – Doc A9). The document attached to the Second Email was again titled "[the Applicant's name].docx" and was referred to as an "updated" letter (the "Updated Letter"). The Second Email was originally identified and disclosed in the Public Body's response to the 2011 Request (the "2011 Response"); however, the Updated Letter was not included in the 2011 Response. The Public Body's search in response to the 2012 Request did not identify the actual Second Email in its digital form but only identified a "PDF" copy of the email in the Public Body's records of the documents provided in the 2011 Response. As such, the Updated letter that was attached to the Second Email was not available for the Public Body to disclose in the 2012 Response.

Following receipt of the Rebuttal Submission of the Applicant, the Public Body conducted an additional search of its records for the Updated Letter. This included searches of [the first employee's and the third employee's] email inboxes as well as their respective hard drives. The Updated Letter was not located during this additional search.

The electronic copy of the Second Email received by [the first employee] was not identified by the Public Body in any of the searches conducted by the Public Body. It is likely that the Second Email was deleted from [the first employee's] inbox prior to the search done by the Public Body in response to the 2012 Request.

A third email with an attachment was sent from [the third employee] to [the first employee] on April 20, 2011 at 3:08 p.m. (the "Third Email"). The Third Email also had a document attached to it titled "[the Applicant's name].docx" and referred to this document as "Revised 2" (the "Final Letter"). A copy of the Third Email was identified in both [the third employee's] email outbox and [the first employee's] email inbox. Both of these copies of the Third Email were included in the 2012 Response (Index of Records – Docs. A10 and A11). A copy of the Final Letter was also included in the 2012 Response (Index of Records Doc A1). Although copies of the Final Letter were attached to the emails identified in [the third employee's] email outbox and [the first employee's] email inbox, the Public Body included only one copy of the Final Letter in the 2011 Response.

The Original Letter and the Final Letter were both included twice in the 2012 Response (Index of Records – Docs A1, A2, C1 and C2) The Original Letter and the Final Letter were originally disclosed in response to the 2011 Request. Following the 2011 Response and before the 2012 Request, the Applicant requested to be provided with copies of the attachments to the said emails (i.e. the Original Letter and the Final Letter[]). Under the mistaken assumption that these documents were not already part of the 2011 Response, the Public Body included duplicate copies of the Original Letter and Final Letter in the 2012 Response.

[para 16] In its rebuttal submissions, the Public Body states:

Following receipt of the Applicant's Rebuttal Submission, the Public Body attempted to retrieve the Updated Letter by conducting an additional search of [the first employee's] and [the third employee's] email inboxes as well as their respective hard [drives]. The Public Body was unable to locate the Second Email or the Updated Letter during this additional search.

[para 17] The Public Body's evidence establishes that it conducted searches of employees' and council members' email accounts, the hard drives of two employees, and its central filing system in order to locate responsive records. Once it reviewed the

Applicant's rebuttal submissions it also searched the hard drives of the employee and the third employee; however, this additional search failed to locate any additional responsive records.

[para 18] As noted in the Background above, the Applicant requested "correspondence relating to [himself or his wife] or issues brought forward by them for the period April 19, 2011 to May 9, 2011". Any information about the Applicant and his wife and the issues they raised that was either sent or received in correspondence by representatives of the Public Body would be responsive to the access request. The Public Body had its employees and council members search their email accounts for responsive records. It also checked its central filing system for any hard copies of responsive records. The Public Body produced the records it located as a result of this search in its response to the Applicant's access request, and provided them for the inquiry and also expanded its search to include the hard drives of two employees on reviewing the Applicant's rebuttal submissions.

[para 19] A draft of a letter written by the first employee and sent to the third employee for comment as an attachment is the primary point of disagreement in this inquiry. Although the email indicates the presence of an attachment, the attachment referred to as the "updated letter" in the Public Body's submissions, has not been produced.

[para 20] The Applicant argues that the updated letter was deliberately withheld from him. The position of the Public Body is that its failure to produce the updated letter in response to the Applicant's 2011 request (which is not the subject of this inquiry) was inadvertent; the reason it did not produce the updated letter in response to the Applicant's 2012 request (which is the subject of this inquiry) was because the record no longer exists.

[para 21] The Public Body states:

The Public Body submits that this email was likely deleted as a transitory document prior to the Public Body's receipt of the 2012 Response, and, in the case of [the first employee's] email inbox, the previous similar 2011 Response as well.

[para 22] The term "transitory document" refers to information in draft form that is not the final version of a document. *FOIP Guidelines and Practices 2009*¹ defines a "transitory record" as:

... a record that has only immediate or short-term usefulness or value and will not be needed again in the future. Transitory records contain information that is not required to meet legal or financial obligations or to sustain administrative or operational functions, and has no archival value.

¹ Access and Privacy Service Alberta, *FOIP Guidelines and Practices 2009* (Edmonton; Government of Alberta, 2009) p. 312

[para 23] Transitory records are those that may be destroyed after their usefulness to a public body has ended. In this case, the attachment that was deleted was a draft document that the Public Body's employee decided not to send to the Applicant. The purpose of the record was to enable an employee to review its contents and to make any necessary changes to the document that would be necessary.

[para 24] In general, the FOIP Act does not require Public Bodies to maintain or archive records. The only provision in the FOIP Act that requires a public body to maintain records is section 35. This provision states:

35 If an individual's personal information will be used by a public body to make a decision that directly affects the individual, the public body must

(a) make every reasonable effort to ensure that the information is accurate and complete, and

(b) retain the personal information for at least one year after using it so that the individual has a reasonable opportunity to obtain access to it, or for any shorter period of time as agreed to in writing by

(i) the individual,

(ii) the public body, and

(iii) if the body that approves the records and retention and disposition schedule for the public body is different from the public body, that body.

[para 25] Section 35 requires a public body to maintain the personal information of an individual for at least one year, if the personal information will be used to make a decision directly affecting the individual. While the missing record would likely contain the personal information of the Applicant, given that the other drafts are addressed to him, the personal information in the missing record (the Applicant's name and address) was not going to be used to make a decision affecting his rights. In any event, that information was retained in other records, such as the final version of the letter that the Applicant received.

[para 26] The FOIP Act did not impose a general obligation on the Public Body to keep the updated draft. That being said, I take the Applicant's point that when an access request is made, and a record is responsive to the access request, the Public Body has a duty to produce that record to the applicant if the record is in its custody or control, even though it is a transitory record.

[para 27] The copy of record A9 shows an attachment entitled "[the Applicant's name].docx". At the time the paper copy of this record was made, it would have been possible to click on the attachment in the electronic version of the record to open it and to

make a copy of it. It appears that the .pdf copy of record A9 was produced from the original electronic record in order to respond to the Applicant's access request in 2011. As the Public Body acknowledges, the file attachment that appears in the document was not produced to the Applicant in 2011.

[para 28] When the Public Body conducted its search for responsive records in 2012, only a .pdf file of A9 remained. The Public Body was unable to produce the updated draft, which had originally been attached to the email of which record A9 is a copy.

[para 29] The evidence supports that the attachment existed at some time during the processing of the Applicant's 2011 request, as there is an image of the attachment appearing in a document located as a result of processing the Applicant's access request. However, in my view, the original failure to produce this attachment can be attributed to inadvertence. In any event, the Applicant's 2011 access request and the Public Body's response to it is not the subject of this inquiry. However, even if the 2011 matter were before me, there would be no remedy that I could order. The evidence establishes that the record no longer exists; there is no point in ordering a public body to produce a record that does not exist.

[para 30] With regard to the 2012 access request and response, I am satisfied that the Public Body completed a reasonable search for responsive records. By conducting a final search of employee hard drives, the Public Body ensured that the missing attachment was not in its possession. The repositories of records through which the Public Body conducted the search documented in its submissions and affidavit evidence are those that were likely to contain responsive records. I am satisfied that the Public Body has produced all records in its custody or control that are responsive to the access request.

[para 31] In making this finding I acknowledge the Applicant's concern that none of the records produced seem particularly harsh in tone, which makes him question whether he has received the draft of the letter which the first employee had described as "aggressive". While I agree with the Applicant that none of the drafts that were produced appear harsh or aggressive, the tone of a letter is subjective. What may appear to be harsh to one person may not appear harsh to another.

[para 32] The first letter dated April 6, 2011 contains underlining of certain bylaw provisions and is focused on the Public Body's authority to charge the Applicant for services. The second, redrafted letter dated April 6, 2011 deals with the Applicant's expressed concerns more directly and explains the reasons for the bylaws rather than underlining them. The first letter essentially dismisses the Applicant's issues on the basis of the bylaws; the second provides greater explanation as to why the Public Body will not make a decision in his favor. On that basis, the first letter can be construed as being harsher than the second. In my view, the fact that neither letter is particularly harsh, does not mean that another, harsher version of the first letter exists and has not been produced.

Did the Public Body respond openly, accurately, and completely?

[para 33] Previous orders of this office (See Orders F2009-001, F2009-005) have held that the duty to respond openly, accurately, and completely includes explaining the steps taken to locate responsive records and to explain to why a public body believes no further records exist. In *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2010 ABQB 89 the Alberta Court of Queen's Bench confirmed the reasonableness of this interpretation of section 10, stating:

The University argues that it provided a full, complete and accurate response, and that it was unreasonable to find that it failed in the information component of the duty to assist. In particular, the University says that the Adjudicator unreasonably required it to explain why it believes no further responsive records exist and failed to describe the steps it took to identify the location of responsive records.

The University's submissions set out the information it provided, and argues that it is not necessary in every case to give extensive and detailed information, citing, Lethbridge Regional Police Commission, F2009-001 at para. 26. This is not an entirely accurate interpretation as to what the case holds. While the Adjudicator indicated that it was not necessary in every case to give such detailed information to meet the informational component of the duty to assist, it concluded that it was necessary in this case. In particular, the Adjudicator said (at para. 25):

In the circumstances of this case, I also find that this means specifically advising the Applicant of who conducted the search, the scope of the search, the steps taken to identify and locate all records and possible repositories of them, and why the Public Body believes that no more responsive records exist than what has been found or produced.

Similarly here the Adjudicator reasonably concluded that the informational component of the duty to assist included providing the University's rationale, if any, for not including all members of the Department in the search, for not using additional and reasonable keywords, and, if it determined that searching the records of other Department members or expanding the keywords would not lead to responsive records, its reasons for concluding that no more responsive records existed.

The University argues that the Adjudicator's reasoning is circular because she unreasonably expanded the search by ignoring the proper scope of the Request and the University's reasonable steps to ascertain the likely location of records, and then asks the University to explain why it did not search further. That argument is itself circular, presupposing that the University's search parameters were reasonable.

In my view, the Adjudicator's conclusion that the University either expand its search or explain why such a search would not produce responsive records was reasonable in the circumstances and based on the evidence.

If a public body's search for responsive records omits areas where it would seem reasonable to assume records would be located, or the records point to potentially responsive records that have not been produced, then a public body should explain why it has searched only the areas it did or explain why it has not, or cannot produce the records referred to in the records it is producing. In this case, the records refer to a record (the .pdf file) that it has not produced.

[para 34] In neither its June 13, 2012 response nor its January 10, 2013 response did the Public Body address the steps it had taken to search for responsive records, or explain why it believed it was unable to produce any more responsive records, such as the .pdf attachment. In his access request, the Applicant stated that he was specifically looking for attachments.

[para 35] In this case, the fact that one of the records contains the image of an attachment that would be responsive, but was not produced, required some explanation as to why the attachment could not be produced in order for the Public Body to meet the duty to respond openly, accurately and completely. The Applicant's request for an inquiry was in part driven by this missing record and the lack of explanation for its absence. It should not have been necessary to undergo the inquiry process for the Applicant to learn the details of the Public Body's search and the reasons why it believes that it has produced all the responsive records it can produce.

[para 36] As the Public Body has now provided a detailed explanation as to why it cannot produce the missing attachment, and as it has documented the fact that it conducted a reasonable search, were I to order it to respond openly, accurately, and completely, I would only be ordering to do what it has now done in its submissions. I will therefore make no order in regard to its duty to respond openly, accurately, and completely. However, I suggest to the Public Body that it provide more detail regarding the searches it conducts when it makes its responses to applicants in the future.

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

[para 37] Section 17 requires a public body to withhold the personal information of an identifiable individual when it would be an unreasonable invasion of the individual's personal privacy to disclose his or her personal information.

[para 38] Section 1(n) of the FOIP Act defines personal information. It states:

I In this 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;*

[para 39] Information is personal information within the terms of the FOIP Act if it is recorded and is about an identifiable individual.

[para 40] The Public Body severed from emails in record 49 the opinions of its employees about an individual who is not the Applicant or his wife. The Public Body also severed references in the emails to the individual's opinions. The Public Body also severed the individual's name and telephone number.

[para 41] As set out in sections 1(n)(viii) and (ix) of the FOIP Act, opinions about an individual and the individual's own opinions are the individual's personal information. The name and telephone number of an individual are personal information under section 1(n)(i). As the information severed from the records is personal information, I turn now to the question of whether the Public Body properly withheld this information under section 17(1).

[para 42] Section 17 sets out the circumstances in which a public body may or must not disclose the personal information of a third party in response to an access request. It 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

(g) the personal information consists of the third party's name when

(i) it appears with other personal information about the third party, or

(ii) the disclosure of the name itself would reveal personal information about the third party[...]

(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,

(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 43] 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 (such as the Applicant in this case) 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 44] 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). Section 17(5) is not an exhaustive list and any other relevant circumstances must be considered.

[para 45] 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). [my emphasis]

[para 46] Section 17(1) requires a public body to withhold information only once all relevant interests in disclosing and withholding information have been weighed under section 17(5) and, having engaged in this process, the head concludes that it would be an unreasonable invasion of the personal privacy of a third party to disclose his or her personal information.

[para 47] Once the decision is made that a presumption set out in section 17(4) applies to information, then it is necessary to consider all relevant factors under section 17(5) to determine whether it would, or would not, be an unreasonable invasion of a third party's personal privacy to disclose the information. If the decision is made that it would be an unreasonable invasion of personal privacy to disclose the personal information of a third party, the Public Body must then consider whether it is possible to sever the personally identifying information from the record and to provide the remainder to the Applicant, as required by section 6(2) of the FOIP Act.

[para 48] As noted in the discussion of personal information above, the Public Body severed the name of an individual, his opinion, opinions about him, and his telephone number from the records. I find that this information is subject to the presumption created by section 17(4)(g), as the information includes the name of the individual in the context of other information about him.

[para 49] I am unable to identify any factors under section 17(5) weighing in favor of disclosure of the individual's name and telephone number. As a result, I find that the presumption created by section 17(4)(g) is not outweighed.

[para 50] With regard to the opinions severed from the emails, I note that the Public Body did not turn its mind to the question of whether the individual's name and telephone number could be severed from the records and the remaining information about the opinions provided to the Applicant. If the Public Body were to remove the individual's name and telephone number, then, in my view, it would not be possible for the individual to be identified on the basis of the other information in the records, including the opinions expressed. There appears to be nothing unique or personally identifying in the opinions attributed to the individual, particularly as the opinions are not directly quoted, but only paraphrased.

[para 51] While I agree with the Public Body that the information about the opinions is subject to section 17(4)(g) when it is associated with the name and telephone number of the individual, once this personally identifying information is removed, the opinions are no longer personal information and are no longer subject to a presumption under section 17(4).

[para 52] I intend to confirm the Public Body's decision to withhold the name and telephone number of the individual from record 49, but to order it to disclose the remaining information to the Applicant.

Issue C: Did the Public Body properly withhold information as non-responsive to the Applicant's request?

[para 53] The Public Body has redacted information from the records that it argues is non-responsive to the Applicant's access request.

[para 54] In Order 97-020, former Commissioner Clark found that determining whether records are responsive is an important component of responding to an access request. He said:

In Ontario Order P-880, the Office of the Information and Privacy Commissioner of Ontario had the following to say about "responsiveness":

In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to the request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request.

"Responsiveness" must mean anything that is reasonably related to an applicant's request for access. In determining "responsiveness", a public body is determining what information or records are relevant to the request. It follows that any information or records that do not reasonably relate to an applicant's request for access will be "non-responsive" to the applicant's request.

[para 55] The former Commissioner determined that sections 7 and 12 of the FOIP Act provide the legislative authority for determining that records or portions of records are non-responsive. He said:

How do I reconcile section 6(1) [now 7(1)] of the Act, which speaks only of access to a record, and section 11(1) [now 12(1)] of the Act, which speaks of access to a record or part of a record?

Section 6(1) and section 11(1) are both contained in that part of the Act dealing with the process of obtaining access. Those sections should be read in such a manner that they do not conflict. Consequently, I intend to read section 6(1) and section 11(1) together as supporting an

interpretation that a public body may grant access to part of the record that contains the responsive information, and may remove the non-responsive information from that record.

[para 56] Section 6 of the FOIP Act gives applicants a right of access to any record in the custody or control of a public body. This right is subject only to the exceptions established in Division 2 of Part I of the FOIP Act. Section 6 states, in part:

6(1) An applicant has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.

(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record.

[para 57] However, the right of access is not engaged until an Applicant requests information. A Public Body is not required to provide a response to an Applicant in relation to all information in its custody or under its control; only the information that reasonably relates to the access request. Essentially, a Public Body's duties to an applicant in relation to responding to an access request are not engaged until an applicant asks for the information.

[para 58] The issue before me is to determine whether the Public Body has duties to the Applicant under the FOIP Act in relation to the information it has withheld from the records as "non-responsive". In order to make this determination, I must consider whether the Applicant requested this information.

[para 59] As detailed above, the Applicant requested "copies of all correspondence relating to [himself or his wife] or issues brought forward by them for the period April 19, 2011 to May 9, 2011, inclusive".

[para 60] If information is, or appears in, correspondence relating to the Applicant or his wife, or relates to issues brought forward by the Applicant or his wife, then information is responsive to the Applicant's access request.

[para 61] The Public Body redacted information from two records on the basis that it was not information the Applicant had requested: records 46 and 51. The information redacted from records 46 and 51 consists of agenda items unrelated to the Applicant and his wife, the issues he raised, arts council funding, or "non-personal utility accounts which have been temporarily suspended or discontinued". The information is therefore not the information the Applicant requested. The information severed from records 46 and 51 is therefore non-responsive to his access request.

V. ORDER

[para 62] I make this Order under section 72 of the Act.

[para 63] I confirm that the Public Body complied with its duties under section 10 of the FOIP Act.

[para 64] I confirm that the information severed from the records by the Public Body as non-responsive is non-responsive.

[para 65] I order the Public Body to sever the name and phone number of the individual who is referred to in record 49, from record 49, and to provide the remaining information to the Applicant.

[para 66] 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