

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2017-04

January 19, 2017

ALBERTA ENVIRONMENT AND PARKS

Case File Number 001593

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Summary: The Applicant made a request for records to Alberta Environment and Parks (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) regarding the 2013 flooding in High River; in particular he requested information regarding flooding in the Hamptons neighbourhood.

The Public Body searched for responsive records and produced what it located to the Applicant. It severed names, phone numbers, and images of individuals from the records where it was unable to determine that the individuals were acting in a representative capacity.

The Adjudicator confirmed that the Public Body had met its duty to assist the Applicant by conducting an adequate search for responsive records, clarifying the kinds of records he was requesting, and answering questions as to the sources of other potentially responsive records. The Adjudicator also confirmed the decision to apply section 17(1) to the information to which the Public Body had applied this provision.

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

Authorities Cited: AB: Orders 2001-033, F2014-12

I. BACKGROUND

[para 1] On April 20, 2015, the Applicant made a request for access under the *Freedom of Information and Protection of Privacy Act* to Alberta Environment and Parks (the Public Body). He requested:

Please accept this note to clarify my FOIP request. In the wake of the floods of 2013 and more specifically in the context of [a contractor's] infamous comments regarding the "sacrificing" [of] your area, I am respectfully requesting ANY and ALL information with regard to the berm, subsequent water movement / changes in levels, sewer back up with associated dates / timelines, capacities, etc. Additionally, any information pertaining to exacerbated sewage concentration (E.coli, etc) in Sunrise / Hamptons and any back flow into other communities as a result of this berm and subsequent changes in water levels (head) or other actions / inactions ie. missing sewer caps in Hamptons. Additionally, this FOIP request also includes any other actions / inactions that could be reasonably deemed pre-emptive or co-emptive. Also, pumping equipment utilized dates / timelines / place rates of flow. (ie. When was water pumped into the Sunrise / Hamptons area and when as it consequently pumped out) This request includes but is not limited to satellite information, LiDAR, aerial photos, notes, emails, diagrams, maps, investigations, EOC documents / notes, notes from contractors or other government or NGO's pertaining to this. Also notes and documents from the Arbitration held last fall, and other judgements / settlements / compensation that may have been paid to other similar affected residences and their owners. Also, please advise of any GOA / AEMA/ or other pertinent agency / entity / person (s) that have or is likely to have any other information that would pertain to this request but not be provided / available with this specific FOIP request. I trust this request was broad enough to be all inclusive however I only require the salient information that will accurately reflect what happened to the water levels (height / duration / etc.) in the days after the 2nd Avenue and 498 Ave berms were built and water was pumped into / out of these areas.

The Public Body searched for records and responded to the access request on July 24, 2015. The Public Body located 332 pages of records and provided these to the Applicant. It severed information under section 17 (information harmful to personal privacy) from portions of some records.

[para 2] The Applicant sought review by the Commissioner of the Public Body's response to his access request. He complained that the records he had received contained extraneous information and did not contain the information he had requested.

[para 3] The matter proceeded directly to inquiry.

II. INFORMATION AT ISSUE

[para 4] Information severed by the Public Body under section 17 of the FOIP Act 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 FOIP Act (duty to assist applicants)?

Issue B: Does section 17(1) of the FOIP Act (disclosure harmful to personal privacy) apply to the information severed from the records?

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 FOIP Act (duty to assist applicants)?

[para 5] 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 6] In this case, the Applicant takes issue with the records the Public Body produced in response to his access request. He states:

The 300+ pages of information that Alberta Environment and Parks previously sent me was absolutely useless. We still don't know what happened to the water levels and sewage issues in our community. One has to ask – why is that?

I believe that I can reasonably speak on behalf of most in High River who have been adversely affected by the actions of these emergency officials that the secrets and lies have gone on long enough. I believe the real reason that the government is reluctant to provide this information is because they are liable. And withholding pertinent information in this regard is blatantly unacceptable. When people are forced from their homes for ~ month and the government refuses to tell you what happened – something is very amiss.

And I believe that the various Public Bodies are collectively misapplying these exemptions to unfairly and inappropriately protect their interests at the expense of those whom they have harmed.

The Applicant is primarily concerned that the records he received are of no use to him and do not explain the water levels and sewage issues in his community. He is also concerned that government entities are withholding information from him for reasons relating to liability.

[para 7] The records the Public Body provided in its response to the Applicant contain minimal severing. Where personally identifying information appears in the records, and it is not clear that the individual is acting in a personal or representative capacity, the Public Body has severed the personally identifying information from the records. This severing does not serve to minimize liability (if any), as the Applicant contends, but, as will be discussed below in relation to the Public Body's application of section 17, to meet its duties under this provision.

[para 8] The purpose of the FOIP Act is to create a right of access to records in the custody or control of government entities subject to limited and specific exceptions. The duty to assist imposed by section 10 furthers this purpose by imposing a duty on public bodies to take all reasonable measures to assist an applicant seeking records.

[para 9] In Order 2001-033, former Commissioner Work considered whether section 10(1) incorporates a duty to answer questions. He concluded:

Section 10(1) also requires a public body to respond to each applicant openly, accurately and completely. One of a public body's duties in this regard is to tell an applicant whether there are records that respond to the applicant's access request.

[...]

The Applicant has a right of access to records (section 6(1) of the Act). The Applicant does not have a right to have the Public Body answer questions. Similarly, the Public Body does not have a duty to answer the Applicant's questions (it may do so if it wishes), but the Public Body does have a duty to respond to the Applicant about whether it has records that will answer the Applicant's questions.

In brief, the Public Body should have responded to the Applicant in the following manner: "You asked for (a)..., (b)..., and (c)... We searched.... Here's what we have... We don't have anything else."

Therefore, because the Public Body did not tell the Applicant whether it had records that would answer the Applicant's questions, I find that the Public Body did not respond openly, accurately and completely to the following parts of the Applicant's access request: (a)10 ((a)1, 3-9 are not at issue); (b)1, 2, 3, 5, 6, 7; (c)7.

A public body has a duty to answer questions as to whether it has responsive records in its custody or control. It does not have a duty to answer questions regarding its processes, unless that is the only way to answer the question of whether it has responsive records in its custody or control.

[para 10] Under section 10, a public body does not have a duty to answer any question posed by an applicant, but it has a duty to answer questions regarding the kinds of records it has in its custody or control.

[para 11] The Public Body provided detailed notes for the inquiry regarding the search it conducted for responsive records and the discussions it had with the Applicant.

[para 12] From the Public Body's evidence, I am able to conclude that it took steps to find out what kinds of information the Applicant was looking for and made sure that all sources of potentially responsive records were identified and searched. On April 24, 2015, an employee of the Public Body contacted the Applicant and learned that he was very interested in obtaining satellite imagery of the High River area during the floods and that what he required was "scientific and technical information pertaining to the water levels in these berms during this time."

[para 13] The Public Body produced copies of the satellite imagery of the area that it had in its custody. It provided copies of technical and scientific reporting it had in its custody and control regarding the water levels in the High River area. The notes it provided for the inquiry established that it checked and double checked with employees to ensure that it did not fail to produce responsive records.

[para 14] In my view, the records the Public Body included in its response to the Applicant are responsive to the Applicant's access request as he originally framed it, and to the subsequent clarification. The records also serve to answer questions regarding the water levels in the High River area during the flood.

[para 15] The Public Body also answered questions as to the other public bodies that might be likely to have records in their custody or control that would serve to answer the Applicant's specific questions regarding governmental response to the flooding and the construction of the berms. For example, on June 3, 2015, the Public Body also discussed with the Applicant that Alberta Municipal Affairs was likely to have responsive records in its custody or control. This is because it has control and custody over records created by the Alberta Emergency Management Agency, which made decisions during the state of emergency in 2013 High River.

[para 16] The Public Body has met its duties under section 10(1) as they relate to the Applicant. It conducted a thorough search for responsive records and clarified with the Applicant the kinds of records he considered responsive. It also answered his questions regarding other public bodies that could have custody over the records he was seeking. That it has not produced records containing details of any investigations into all the potential causes of or contributing factors to the extent of the flooding in the Applicant's neighbourhood is not attributable to bad faith on the part of the Public Body, but to the fact that it does not have any such records in its custody or control. A report (records 220 – 245), dated January 2015, which appears among the records the Applicant was provided and was intended to compile environmental data regarding the 2013 flooding in Southern Alberta, concludes with two recommendations: first, that analysis be conducted "of the causes and mechanism of flooding in the Town of High River and area"; and second, that potential flood control and flood management measures be identified and assessed. These recommendations suggest that conducting a study of the kind the Applicant would like to receive may be within the Public Body's purview; however, they also indicate that at the time it was submitted, the Public Body has not yet undertaken such a study or even decided to undertake one. The records the Public Body has produced contain the data it has collected regarding the flooding; however, the records suggest that at the time of the access request, it had not yet conducted an analysis of that data to determine the causes or flood management measures. As discussed above, any records of decisions made in relation to emergency measures are likely to be in the custody of Alberta Municipal Affairs, as the Alberta Emergency Management Agency was responsible for these decisions.

[para 17] In any event, the notes of the steps it took to locate responsive records, which the Public Body provided for the inquiry, establish that it took all reasonable measures to locate responsive records and to ensure that no responsive records were missed.

[para 18] The Applicant's issue with the Public Body's response is that the records do not serve the purpose for which he requested them; however, this does not mean that they are not the kinds of records he requested. I find that they are.

[para 19] For the reasons above, I find that the Public Body met its duty to assist the Applicant as required by section 10 of the FOIP Act.

Issue B: Does section 17(1) of the FOIP Act (disclosure harmful to personal privacy) apply to the information severed from the records?

[para 20] 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.

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

- (a) the third party has, in the prescribed manner, consented to or requested the disclosure,*
- (b) there are compelling circumstances affecting anyone's health or safety and written notice of the disclosure is given to the third party,*
- (c) an Act of Alberta or Canada authorizes or requires the disclosure,*
- (d) repealed 2003 c21 s5,*
- (e) the information is about the third party's classification, salary range, discretionary benefits or employment responsibilities as an officer, employee or member of a public body or as a member of the staff of a member of the Executive Council,*
- (f) the disclosure reveals financial and other details of a contract to supply goods or services to a public body,*
- (g) the information is about a licence, permit or other similar discretionary benefit relating to*
 - (i) a commercial or professional activity, that has been granted to the third party by a public body, or*
 - (ii) real property, including a development permit or building permit, that has been granted to the third party by a public body,*

and the disclosure is limited to the name of the third party and the nature of the licence, permit or other similar discretionary benefit,

- (h) *the disclosure reveals details of a discretionary benefit of a financial nature granted to the third party by a public body,*
- (i) *the personal information is about an individual who has been dead for 25 years or more, or*
- (j) *subject to subsection (3), the disclosure is not contrary to the public interest and reveals only the following personal information about a third party:*
 - (i) *enrolment in a school of an educational body or in a program offered by a post-secondary educational body,*
 - (ii) *repealed 2003 c21 s5,*
 - (iii) *attendance at or participation in a public event or activity related to a public body, including a graduation ceremony, sporting event, cultural program or club, or field trip, or*
 - (iv) *receipt of an honour or award granted by or through a public body.*

[...]

(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 21] Section 17 does not say that a public body is never allowed to disclose third party personal information. It is only when the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy that a public body must refuse to disclose the information to an applicant under section 17(1). Section 17(2) (not reproduced) establishes that disclosing certain kinds of personal information is not an unreasonable invasion of personal privacy.

[para 22] 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 23] The Public Body explains its application of section 17(1) as follows:

The Public Body submits that under section 17 of the Act the Public [Body] correctly withheld personal information as defined under Section 1(n) "personal information" means recorded information about an identifiable individual, including (i) the individual's name, home, or business telephone number. As identified in Appendix 3, they were only 9 [records] where personal information was redacted by the FOIP Advisor as a consequence of the fact that this personal information could not be accurately associated with a company. The other names in the documents that were redacted were members of the public, whose names were not responsive to

the request, and for whom disclosure of their names would constitute an unreasonable invasion of their personal privacy.

The Public Body severed the names, phone numbers, and images of individuals that appear in the records in cases where it was unable to determine whether the names, phone numbers, and images constitute information about an individual acting in a representative capacity. In other words, if it could not tell that the individual was representing a business or government entity, it severed personally identifying information about the individual.

[para 24] The first question is whether the severed information is personal information. Section 1(n) of the FOIP Act defines “personal information”. It states:

1 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;*

Section 1(n) does not define “personal information” exhaustively, but inclusively. As a result, information that is “about an identifiable individual” is personal information, even if it does not fall within the terms of subclauses i – ix.

[para 25] I find that telephone numbers, images and the names of individuals constitute recorded information about an identifiable individual within the terms of section 1(n).

[para 26] The next question to consider is whether it would be an unreasonable invasion of personal privacy to disclose the information to which the Public Body has applied section 17(1).

[para 27] None of the provisions of section 17(2) appears to authorize disclosure of the personal information in the records. I turn now to the question of whether the information falls within section 17(4).

[para 28] I find that the names and phone numbers, fall within the terms of section 17(4)(g) as these consist of the name of an individual in the context of other information about the individual.

[para 29] I also find that the images of individuals are their personal information within the terms of section 17(4)(g), even though their names do not appear in the records. In Order F2014-12, I commented on the application of section 17(4)(g) in situations where an individual appears in video or photographs, but the individual's name is not contained in the video or photograph. I said:

Section 17(4)(g) makes specific reference to the name of a third party. Neither the photograph nor the video at issue contains the names of the inmates who appear in it. However, in some cases, where the inmates look straight at the camera, their faces are clear enough to be recognizable to someone who knows them. To anyone who knows the inmates and could identify them on viewing the video or the photograph, the name would be available. Essentially, the name of an individual is associated with the individual when the individual is identifiable, as an individual's name is part of the individual's identity.

As discussed above, anyone who views the video or the photograph and knows an inmate who appears in the video or photograph would also know the name of the individual and would be able to learn that the individual was an inmate at the Edmonton Remand Centre on June 28, 2011. The name of the individual is therefore associated with the images in the video and the photograph, in association with the fact that the individual was incarcerated in the Edmonton Remand Centre on a given day. I therefore find that section 17(4)(g) applies, as the information in the photograph and the video would effectively reveal to some persons the name of the individual in addition to other personal information about the individual.

This reasoning would apply to the pictures of people that appear in the records at issue. The information that could be determined from the photographs by someone who knows the individuals would be the location and activities of the individual at the time the photographs were taken. As a result, section 17(4)(g) applies.

[para 30] As section 17(4)(g) applies, the personal information is subject to a presumption that it would be an unreasonable invasion of personal privacy to disclose it. In this case, there do not appear to be any factors weighing in favor of disclosure.

[para 31] As I am unable to identify any factors weighing in favor of disclosure of the personally identifying information, I intend to confirm the Public Body's decision to withhold the information.

V. ORDER

[para 32] I make this Order under section 72 of the Act.

[para 33] I confirm that the Public Body met its duty to assist the Applicant as required by section 10 of the FOIP Act.

[para 34] I confirm that the Public Body is required to withhold the information to which it applied section 17(1).

Teresa Cunningham
Adjudicator