

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2018-09

February 9, 2018

ALBERTA HEALTH SERVICES

Case File Number 001188

Office URL: www.oipc.ab.ca

Summary: The Applicant's sister died suddenly while on a day trip with support workers. The Applicant made an access request to Alberta Health Services for a copy of the 911 call that was made by a support worker during the trip.

The Public Body provided a copy of the requested 911 call, but severed the cell phone number of a person who had called 911 under section 17(1) (disclosure harmful to personal privacy).

The Adjudicator found that she had insufficient information before her to determine that the cell phone number was personal information. She noted that section 17(1) can only be applied to information that is or is likely to be personal information. The Adjudicator ordered the Public Body to reconsider its decision to withhold the cell phone number under section 17(1), by taking into account evidence that would enable it to determine whether the cell phone number was likely to be personal information or not.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 6, 17, 71, 72

Authorities Cited: **AB:** Orders F2009-019, F2013-13, F2013-53 **ON:** PO-3016

Cases Cited: *Edmonton (City) v. Alberta (Information and Privacy Commissioner)* 2011 ABQB 226; *Edmonton (City) v Alberta (Information and Privacy Commissioner)*, 2016 ABCA 110

I. BACKGROUND

[para 1] The Applicant's sister, who received supports from a society, died on February 14, 2015 while on a day trip to the zoo with her support workers from the society. The Applicant made a request to Alberta Health Services (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act). She requested:

1. 911 Call of Saturday, February 14, 2015 [...]

[para 2] The Public Body responded to the access request. It provided the 911 recording, but severed the cell phone number of the 911 caller from the records under section 17 of the FOIP Act (disclosure harmful to personal privacy).

[para 3] The Applicant requested review of the Public Body's decision to sever the cell phone number from the record. The Commissioner authorized mediation to resolve the dispute. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

II. INFORMATION AT ISSUE

[para 4] The cell phone number the Public Body has withheld from the Applicant is at issue.

III. ISSUE

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

[para 5] 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 6] 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 7] 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 8] Section 17(1) requires a public body to withhold information once all relevant interests in disclosing and withholding information have been weighed under section 17(5) and, having engaged in this process, the head of the public body concludes that it would be an unreasonable invasion of the personal privacy of a third party to disclose his or her personal information.

[para 9] Once the decision is made that a presumption set out in section 17(4) applies to information, 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.

[para 10] However, it is important to note that section 17(1) is restricted in its application to personal information. Before a public body may apply section 17(1), it must first determine whether the information in question is personal information or that it is likely to be so. In this case, I must consider whether the cell phone number severed from the records is likely to be personal information.

[para 11] Section 1(n) of the FOIP Act defines "personal information". It states:

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 12] The Applicant argues in her reply submissions:

Releasing the cell telephone number is NOT an unreasonable invasion of privacy as this person was the fill-in caregiver who was to care for [the Applicant's sister], the individual who willingly made the 911 call and is the only living link to first hand details of what transpired in the hours prior to and up to the actual tragedy.

[para 13] The Public Body argues:

1. Section 1 (n) of the FOIP Act defines "personal information" as "recorded information about an identifiable individual, including
 - (i) the individual's name, home or business address or home or business telephone number"

In *Edmonton (City) v. Alberta (Information and Privacy Commissioner)*, 2011 ABQB 2661 [sic] on judicial review of F2009-019 & F2009-20, [Madam] Justice Moen indicated with respect to the definition of "personal information":

Here, the general words ("personal information") are followed by the specific words particularized in the list (s. 1(n)(i) to (ix)). This suggests that the definition of personal information in FOIPP should be limited by the list that follows. While the enumeration is not exhaustive because the list is prefaced with the term "including", other enumerated examples falling within the definition must be in the same type or nature as the enumerated list. (TAB #1)

Given the definition found at section 1(1)(n) [sic] it is submitted that a cell phone number would be "personal information" as it is the same type of information as enumerated in that subsection.

Likewise, an individual does not have to be identifiable by every person reviewing a particular record in order for there to be personal information about that individual; the individual needs only to be identifiable by someone. In Order F2008-020 the Adjudicator said that even if neither the public body nor he could conclusively identify a particular individual (in this case an individual in a video recording), the individual was identifiable to other persons. (Orders F2008-020 [30], F2008-025[9]). (TAB# 2) It is submitted the same principle applies to a cell phone number of an individual whom is unknown to the public body.

[para 14] The Public Body argues that the cell phone number is personal information. It relies on *Edmonton (City) v. Alberta (Information and Privacy*

Commissioner) 2011 ABQB 226, in which Moen J. rejected this office’s interpretation of section 1(n). While previous cases of this office, and the case before her, had held that information will be personal information if it “about an identifiable individual” (F2009-019 at paragraph 41), Moen J. rejected this interpretation. She held that information will only be personal information if it is similar to the information specifically enumerated in section 1(n) of the FOIP Act. Applying this reasoning, the Public Body takes the position that the cell phone number is personal information, because such information is similar to a home or business telephone number listed in section 1(n)(i).

[para 15] Following Moen J.’s decision in *Edmonton (City)*, Adjudicator Swanek reviewed case law regarding personal information and held in Order F2013-53:

In many cases the determination as to whether information is “personal information” is dependent on the context in which it appears. A statement that a property owner does not remove snow from the sidewalk adjacent his or her property seems to be a statement about the actions (or lack of action) of the property owner, rather than a statement about the property. Similarly, a statement about an owner’s landscaping or gardening practices seems to be a statement about that owner’s use of her property. In comparison, a statement about the lot grading of a property or a statement about the amount of snow on a sidewalk, appear to be statements about property (although it may relate to the property owner).

Another distinction that has been made in past orders between information related to an individual and personal information about the individual is whether there is a “personal dimension” to the information. The adjudicator in Order F2010-011 commented that information about an individual’s business may be personal information about that individual in circumstances that give a “personal dimension” to that information, such as allegations of wrongdoing. Similarly, information about employees acting in the course of their job duties is normally not considered information *about* those individuals; however, there may be circumstances that give that information a “personal dimension”, such as disciplinary issues or performance evaluations (see Orders F2004-026 and P2012-09).

The Applicant is seeking complaints made about her or her property because she is concerned about what neighbours may be saying *about her*. Because the Applicant resides at the property at issue, complaints about the property could be characterized as complaints about her behavior. Following the above line of reasoning, these circumstances of the Applicant’s request indicate that records containing complaints about her property have a “personal dimension” such that they contain information that is not merely related to the Applicant but is *about her*.

The records that are responsive to the Applicant’s request (complaints about her and her property, and records resulting from those complaints) contain both statements about the Applicant’s use of her property (her personal information) as well as statements about the property only (not the Applicant’s personal information).

I have concluded that the Applicant’s request was aimed at complaints made about her, whether directly or via complaints about her property, and was a request for her personal information [...]

[para 16] In *Edmonton (City) v Alberta (Information and Privacy Commissioner)*, 2016 ABCA 110 the Alberta Court of Appeal confirmed Adjudicator Swanek’s decision regarding personal information in Order F2013-53 and accepted that section 1(n) is broader in scope than accepted by Moen J. in the case cited by the Public Body, above. The Court of Appeal stated:

In addition to both statutes relating to the same subject of “privacy”, both the definitions in the *FOIPP Act* and the *Personal Information Protection Act* contain the same root: “information about an identifiable individual”. The *FOIPP Act* goes on to say that, while “personal information” means “information about an identifiable individual”, it specifically “includes” some described categories of information. Describing a term as “meaning” something general, but then “including” some specific items is a well-known device used in statutory drafting. The core meaning is intended to be general. The specific items that are “included” are there to remove doubt about whether those items are covered by the general definition, and they can also provide some insight into what the Legislature intended by the general definition: *Dagg v Canada (Minister of Finance)*, [1997] 2 SCR 403 at para. 68.

In general terms, there is some universality to the conclusion in *Leon’s Furniture* that personal information has to be essentially “about a person”, and not “about an object”, even though most objects or properties have some relationship with persons. As the adjudicator recognized, this concept underlies the definitions in both the *FOIPP Act* and the *Personal Information Protection Act*. It was, however, reasonable for the adjudicator to observe that the line between the two is imprecise. Where the information related to property, but also had a “personal dimension”, it might sometimes properly be characterized as “personal information”. In this case, the essence of the request was for complaints and opinions expressed about Ms. McCloskey. The adjudicator’s conclusion (at paras. 49-51) that this type of request was “personal”, relating directly as it did to the conduct of the citizen, was one that was available on the facts and the law.

[para 17] In the foregoing excerpt, the Court of Appeal acknowledged that to be personal information, information must be “about a person”. It also recognized that determining whether information is personal information requires consideration of the context in which information appears. As a consequence of the Court of Appeal decision in *Edmonton (City) v Alberta (Information and Privacy Commissioner)*, 2016 ABCA 110, Moen J.’s interpretation of section 1(n) no longer represents the law, while the Adjudicator’s analysis in Order F2013-53 does state the law. I will therefore apply the principles set out in that order, and in the Court of Appeal decision.

[para 18] The Applicant would like to obtain the cellular telephone (cell phone) number of the person who contacted 911. Although she does not expressly state that her purpose in obtaining the cell phone number is to contact the caller, it would appear necessary that she contact the caller using the number in order to obtain the information she is seeking.

[para 19] It is unclear, on the evidence, and the context in which the cell phone number appears, whether the cell phone number the Applicant requests belongs to, or is associated with, an *identifiable individual*, as required by section 1(n). This is because the owner of the cell phone and the function of the cell phone (whether for business or personal use) is not to be found in the evidence before me. The 911 caller identifies herself as a support worker providing support services on behalf of an agency; however, it is unclear whether the cell phone number she used is associated with her as a representative of the agency for which she provides support services, or is her own personal cell phone, or alternatively, was borrowed from someone else. It is also unknown whether the cell phone number continues to be in service. If it is out of service, it may not be associated with an identifiable individual.

[para 20] While the records indicate that particular cell phone number was used to contact 911, it is unknown whether the cell phone number belonged to an identifiable individual or to an organization or public agency. If the cell phone number belonged to an identifiable individual, it is also unknown whether the cell phone number is in service. If the cell phone number belonged to an organization or public entity, it is unknown whether the individual who called 911 also used the phone for personal purposes, with the result that the cell phone number might have a personal dimension and be personal information, or whether the support worker used the cell phone only as a representative of an organization or public entity, in which case the cell phone number would not have a personal dimension.

[para 21] There is no presumption or rule that a cell number is personal information. A cell phone number will be personal information if it can be associated with an identifiable individual acting in a personal capacity. For example, I note that in Order PO-3016, a decision of the office of the Information and Privacy Commissioner of Ontario, the Adjudicator held:

In my view, portions of the emails sent by police and the investigation notes (Records 1c, 1f and 3) do not constitute the “personal information” of any identifiable individual. I note that the police emails contain one of the officer’s work cell phone number and describe the actions the police took upon arrival on the scene. I also note that portions of the investigation notes capture the investigator’s efforts to schedule meetings and obtain evidence from individuals acting in their professional capacities. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be “about” the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225].

The ministry takes the position that the incident report and audio statement (Records 7 and 8) contain the personal information of the appellant’s partner. I note that the information contained in these records were gathered in the course of the appellant’s partner’s professional duties and do not include information about her which is personal in nature. In my view, the information contained in the records which relate to the appellant and the patient which were provided by the appellant’s partner, police, ministry EMS staff or dispatch constitutes the personal information of the appellant and the patient only. These individuals did not provide the information at issue in their personal capacities.

I will order the ministry to disclose certain portions of Records 1c, 1f and 3 because they do not contain the “personal information” of any identifiable individual and thus personal privacy provisions in the *Act* cannot apply to this information [...]

[para 22] In Order F2013-13, I determined that the cell phone numbers of police members were the personal information of the members for the following reasons:

However, given that the officers likely carry and use their cell phone outside work, and for purposes other than work purposes, I am prepared to accept that the cell phone numbers have a personal dimension and that section 17 may apply to the cell phone numbers.

[para 23] In the present case, a cell phone number appears in the records without any information as to the identity of the caller or the owner of the cell phone. While the 911 call was made in the support worker’s role as a support worker, it is unknown

whether the cell phone she used to make the call was her personal phone, or whether it belonged to her employer and was only to be used in a representative capacity, or whether it belonged to someone else. Without knowing this information, it is impossible to say that the cell phone number is personal information.

[para 24] I acknowledge that section 1(n) specifically includes “information about an identifiable individual, including, the individual’s name, home or business address or home or business telephone number”; however, it is unknown whether the cell phone number in this case is that of an identifiable individual, or could convey information about an identifiable individual. As a result, section 1(n) does not enable me to find that the cell phone number is personal information.

[para 25] Section 71 of the FOIP Act sets out the burden of proof in an inquiry. It states:

71(1) If the inquiry relates to a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part of the record.

(2) Despite subsection (1), if the record or part of the record that the applicant is refused access to contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party’s personal privacy.

(3) If the inquiry relates to a decision to give an applicant access to all or part of a record containing information about a third party,

(a) in the case of personal information, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party’s personal privacy, and

(b) in any other case, it is up to the third party to prove that the applicant has no right of access to the record or part of the record.

[para 26] Sections 71(2) and (3) do not apply in this case, as it is unknown whether the cell phone number is the personal information of a third party, or is information about a third party, but not personal information. Section 71(1) applies, as the Public Body has made a decision to refuse access under section 17; however, there is nothing before me to support finding that the information it has withheld is subject to an exception to disclosure. As a result, the Public Body has not met the burden of proving that it appropriately withheld the cell phone number from the Applicant.

[para 27] The Public Body argues that the Applicant may contact the Skills Society and speak with her sister’s support worker or someone else with knowledge of the events of February 14, 2015 to obtain the closure she seeks, regardless of whether she obtains the cell phone number. I note too that if the Applicant obtains the cell phone number it

would not follow that the person who owns it will answer, or speak to her even if the owner does, or have the answers the Applicant would like to obtain. Regardless, section 6 of the FOIP Act creates a right of access to recorded information, subject only to the application of exceptions. As a consequence, a public body is under a duty to give access to requested information that is not the subject of an exception under the FOIP Act, even when the requested information will be of limited or no use to an applicant and when there are other means for the applicant to obtain the information. At present, there is insufficient evidence to ground the application of an exception to disclosure to the cell phone number.

[para 28] I have decided that I will not order the Public Body to give the Applicant access to the cell phone number at this time, as it remains possible that the cell phone number is personal information and that it would be an unreasonable invasion of personal privacy for the Public Body to disclose it. However, I must require the Public Body to reconsider its decision to apply section 17(1) to the cell phone number. In making the new decision, the Public Body should either consider any evidence it may have in its custody or control to determine whether the cell phone number is likely to be personal information, or obtain evidence to assist it to make the decision. Once it has done so, it may apply section 17(1) if it considers the cell phone number likely to be personal information, or it may disclose the cell phone number if it concludes the cell number is not personal information. It will be open to the Applicant to request review of the new decision if she disagrees with it.

[para 29] I do not anticipate that the Public Body will need to follow the process above whenever it makes an access decision about a cell phone number. In most cases, there will be sufficient context in the record or records in which the cell number appears to make the decision as to whether the cell phone number is personal information or not. However, in this case, there is insufficient context in the evidence before me to decide whether the cell phone number is personal information. I must therefore ask the Public Body to review evidence in making this determination.

IV. ORDER

[para 30] I make this Order under section 72 of the FOIP Act.

[para 31] I require the Public Body to fulfill its duty under the FOIP Act of determining whether a mandatory exception to disclosure applies to the cell phone number, or alternatively, to perform its mandatory duty of providing information not subject to an exception to an applicant, whichever the Public Body determines applies. I require the Public Body to do so by either reviewing or obtaining evidence that will assist it to determine whether the cell phone number is likely to be personal information or is not personal information.

[para 32] Once the Public Body has met this duty, I require the Public Body to provide the new decision regarding the cell phone number to the Applicant.

[para 33] I order the Public Body to notify me in writing, within 50 days of receiving this order that it has complied with it.

Teresa Cunningham
Adjudicator