

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2018-16

April 12, 2018

CITY OF CALGARY

Case File Number 000658

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request pursuant to the *Freedom of Information and Protection of Privacy Act* (the Act) to the City of Calgary (the Public Body) for information about him in the possession of the Public Body's Prosecution Branch. The Public Body responded but ultimately withheld some information citing sections 17 and 24 of the Act.

The Adjudicator found that the Public Body properly applied section 17 to the information on page 29 of the records at issue with the exception of the first part of the first sentence severed. The Adjudicator also found that the Public Body properly applied section 24(1)(b) of the Act to the information on page 30 of the records at issue but not to the first half of the first sentence severed by the Public Body on page 29 of the records at issue.

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

Authorities Cited: AB: Orders 96-006, 2007-021, F2008-31, F2009-026, F2010-031, F2013-23, and F2013-40.

Cases Cited: *Covenant Health v. Alberta (Information and Privacy Commissioner)*, 2014 ABQB 562.

I. BACKGROUND

[para 1] On March 21, 2015, the Applicant made an access request to the City of Calgary (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the Act) for copies of all emails sent or received by, or otherwise in the possession of, the City of Calgary Law Department / Prosecutions branch, containing information about the Applicant. The Applicant named specific Public Body employees whose email accounts might contain responsive records.

[para 2] The Public Body responded to the Applicant on March 31, 2015, providing some responsive records and severing others in part or withholding them in their entirety relying on sections 20(1)(g) and 24(1)(b) of the Act.

[para 3] On April 10, 2015, the Applicant requested a review of the Public Body's response; specifically, he requested a review of the Public Body's application of the exceptions to withhold information.

[para 4] On March 4, 2016, as the review by this Office was progressing, the Public Body reviewed the records at issue once again and determined that section 20 of the Act did not apply. It provided further records to the Applicant but continued to withhold some information on two pages of responsive records citing sections 17 and 24 of the Act.

[para 5] Mediation was not successful in resolving the issues between the parties and on March 14, 2016, the Applicant requested an inquiry into the Public Body's response. The Commissioner agreed to hold an inquiry.

II. INFORMATION AT ISSUE

[para 6] The information at issue in this inquiry is the severed portions of pages 29 and 30 of the responsive records.

III. ISSUES

[para 7] The Notice of Inquiry dated September 28, 2017 lists the issues in this inquiry as follows:

- 1. Does section 17 of the Act (disclosure harmful to personal privacy) apply to the information in the records?**
- 2. Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information in the records?**

IV. DISCUSSION OF ISSUES

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

[para 8] Section 17 of the Act states that a public body must refuse to disclose a third party's personal information where the disclosure of that information would be an unreasonable invasion of the third party's personal privacy. In order for section 17 to apply, the information must be a third party's personal information.

a. Is the severed information personal information?

[para 9] Personal information is defined by section 1(n) of the Act as follows:

1(n) "personal information" means recorded information about an identifiable individual, including

(i) the individual's name, home or business address or home or business telephone number,

(ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,

(iii) the individual's age, sex, marital status or family status,

(iv) an identifying number, symbol or other particular assigned to the individual,

(v) the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,

(vi) information about the individual's health and health care history, including information about a physical or mental disability,

(vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,

(viii) anyone else's opinions about the individual, and

(ix) the individual's personal views or opinions, except if they are about someone else;

[para 10] The Public Body argues that the information severed on page 29 of the records at issue is the personal information of employees of the Public Body because it is information about an identifiable individual that has a personal dimension.

[para 11] The third parties whose information has been severed are employees of the Public Body. The information about them is being conveyed to other employees of the

Public Body because it has some relevance to all of the work activities and responsibilities of the third parties and the employees to whom the information is being conveyed. Generally speaking, records of the performance of work responsibilities by a third party are not an employee's personal information unless there is a personal dimension to the information (see Order F2008-31 at para 128). Given that the information exists as a consequence of the employee's function within the Public Body, the question that must be answered is if there is a personal dimension to the information.

[para 12] The first half of the first sentence severed by the Public Body contains information conveyed by an employee about the behavior of another individual. While this could be said to be an opinion of the employee about the behavior of the other individual, I believe it is more properly described as a summation of the interactions the employee had with the other individual (as seen from the employee's perspective).

[para 13] In Order F2009-026, the Adjudicator stated:

...the actions of employees acting as employees are the actions of a public body. Consequently, information about an employee acting on behalf of a public body is not information to which section 17 applies, as it is not the personal information of a third party. If, however, there is information of a personal character about an employee of a public body, then the provisions of section 17 may apply to the information. I must therefore consider whether the information about employees in the records at issue is about them acting on behalf of the Public Body, or is information conveying something personal about the employees.

(Order F2009-026 at para 11)

[para 14] In Order F2009-026, a public body was withholding information from an applicant which included a statement made by a public body employee to the public body's security office about an incident involving the applicant. The Adjudicator found that because the incident (and the reporting of the incident) occurred while the employee was acting in her representative capacity with the public body, section 17 could not apply. She stated:

In this case, the opinion formed about the Applicant is based on the employee's experience providing services to the Applicant on behalf of the Public Body, and on a conversation that took place between the Applicant and the employee regarding the Public Body's guidelines. Further, review of the records at issue indicates that this opinion was given to the security office so that the security office could assess the situation and take any steps that office considered necessary. I find that the opinion was also provided by the employee in a representative capacity, as part of her employment duties.

(Order F2009-026 at para 16)

[para 15] I believe that the analysis in Order F2009-026 is persuasive in this case. In this inquiry, the Public Body's employee was advising other employees of the Public

Body about interactions that she had been having with a third party. The information before me indicates that these interactions occurred while the employee was acting in her representative capacity and that the information was conveyed to other employees in that same capacity. Therefore, I do not believe that there is a personal dimension such that this information is the employee's personal information.

[para 16] The second half of the first sentence that was severed on page 29 of the records at issue mentions allegations being made against the employee. Past orders issued by this Office have found that when there is a complaint or accusation of wrongdoing against an employee, this can be seen to bring a personal dimension to information. In Order F2010-031 the Adjudicator stated:

Information about an individual's performance of work duties may be personal information in a context where it is suggested or alleged that the individual has acted improperly or wrongfully (Order F2008-020, para. 28).

(Order F2010-031 at para 53)

[para 17] I find that the second half of the first sentence severed on page 29 of the records at issue contains allegations an employee acted improperly and, therefore, this information has a personal dimension such that it is personal information of a third party.

[para 18] The second line severed contains information about an employee's health which fits under section 1(n)(vi) of the Act and in my opinion is not about the performance of the employee's work responsibilities. Therefore, this is a third party's personal information.

b. Did the Public Body properly withhold the third party's personal information relying on section 17 of the Act?

[para 19] Section 17(1) of the Act states:

17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

[para 20] Sections 17(2) and 17(3) of the Act list circumstances in which the disclosure of personal information is not an unreasonable invasion of a third party's personal privacy. None of the circumstances listed are applicable in this inquiry.

[para 21] Section 17(4) of the Act lists circumstances in which the disclosure of a third party's personal information is presumed to be an unreasonable invasion of the third party's personal privacy. The Public Body submits that section 17(4)(d) and (g) of the Act apply to the third party personal information in the records and creates a presumption that disclosing the information would be an unreasonable invasion of the third parties' personal privacy. Section 17(4)(d) and (g) of the Act state:

17(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

...

(d) the personal information relates to employment or educational history,

...

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

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

(ii) the disclosure of the name itself would reveal personal information about the third party,

[para 22] Page 29 of the records at issue contains the names of two third parties. In addition, there is information about the conduct of one of the third parties (which I have found is her personal information) and the health of the other third party (which I have also found is her personal information). Therefore, I agree with the Public Body that section 17(4)(g)(i) of the Act applies to the information that was severed from the records at issue. Because I have found that section 17(4)(g)(i) of the Act applies to the personal information on page 29 of the records at issue, I will not make a finding regarding the application of section 17(4)(d) of the Act to the personal information on page 29 of the responsive records.

[para 23] Although section 17(4)(g) of the Act creates a presumption that the disclosure of the information would be an unreasonable invasion of a third party's personal privacy, the Public Body must still examine relevant circumstances including the factors listed in section 17(5) of the Act to determine if the disclosure of the information would be an unreasonable invasion of the third party's personal privacy. Section 17(5) of the Act states:

17(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

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

(b) the disclosure is likely to promote public health and safety or the protection of the environment,

(c) the personal information is relevant to a fair determination of the applicant's rights,

(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,

(e) the third party will be exposed unfairly to financial or other harm,

(f) the personal information has been supplied in confidence,

(g) the personal information is likely to be inaccurate or unreliable,

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and

(i) the personal information was originally provided by the applicant.

[para 24] The Public Body submits that none of the factors listed in section 17(5) of the Act weigh in favour of disclosure of the third parties' personal information. The Public Body further argues that sections 17(5)(e) (the third party will be exposed unfairly to harm) and section 17(5)(f) (the personal information has been supplied in confidence) weigh against disclosure of the personal information on page 29 of the records at issue. Specifically, the Public Body states:

The nature of the information severed on page 29 of the Records for both third parties is such that it could cause harm to the third parties. Employment history is sensitive and could potentially result in additional stress for that individual. Also, the events described in the severed information near the bottom of page 29 of the Records describes sensitive events involving that individual and could potentially result in additional stress of harassment.

(Public Body's initial submissions at para 28)

[para 25] Section 17(5)(e) of the Act applies when a third party *will* be exposed to unfairly to harm. In order for section 17(5)(e) of the Act to apply, there needs to be something more than a mere possibility of harm (see Order F2013-40 at para 33). The Public Body has not provided compelling evidence or compelling argument that there is anything more than a mere possibility of some sort of harm; therefore, I find section 17(5)(e) of the Act is not a circumstance weighing against disclosure.

[para 26] Regarding the applicability of section 17(5)(f), the Public Body states that the information was supplied in confidence because:

The information severed on page 29 of the Records is not available from public sources. It was prepared for a purpose which would not entail disclosure. This sort of information is treated confidentially within the Public Body and is not intended to be disclosed outside of the Public Body. The third parties provided this information to the Public Body with an implicit understanding that it would be kept as confidential and not further disclosed.

(Public Body's initial submission at para 30)

[para 27] Given the nature of the information and circumstances in which it was provided to the Public Body, I agree with the Public Body that this information was supplied in confidence and that this is a factor weighing against disclosure of the personal information found on page 29 of the records at issue. However, if I am incorrect and the information was not supplied in confidence, there are still not factors that would override the presumption created by section 17(4) of the Act. As a result, I find that the Public Body properly applied section 17 to the personal information found on page 29 of the records at issue, with the exception of the first half of the first sentence which I previously found was not personal information and therefore could not have section 17 of the Act applied to it.

2. Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information in the records?

[para 28] The Public Body applied sections 24(1)(a) and (b) to information on page 30 and section 24(1)(b) of the Act to the first sentence severed on page 29 of the records at issue. Sections 24(1)(a) and (b) of the Act state:

24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal

(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,

(b) consultations or deliberations involving

(i) officers or employees of a public body,

(ii) a member of the Executive Council, or

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

[para 29] I intend to first consider section 24(1)(b) of the Act.

[para 30] The test for the application of section 24(1)(b) of the Act is that the information must be:

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

(Order 2007-021 at para 67)

[para 31] The third part of this test has been restated by the Court of Queen's Bench in *Covenant Health v. Alberta (Information and Privacy Commissioner)*, 2014 ABQB 562. The Court stated:

The Commissioner prefers a much narrower approach. Her preferred approach limits the scope of the undefined terms by these limitations: "To fall within section 24(1)(b) the consultations or deliberations must be (i) sought or expected to be part of the responsibility of a person, by virtue of that person's position, (ii) directed toward taking an action, and (iii) made to someone who can take or implement the action". *Alberta Justice and Attorney General*, Order F 2007-021, para 67. This definition is too restrictive. It is not consistent with the rest of the paragraphs in s. 24(1) which are drawn in broad language. There is no basis to insist that one of the persons in the group has the authority to "take or implement an action".

(Court of Queen's Bench in *Covenant Health v. Alberta (Information and Privacy Commissioner)*, 2014 ABQB 562 at para 143, footnote 87)

[para 32] Therefore, it is not a requirement that someone in the consultation group has the authority to take or implement an action. However, given the information before me, I believe that using either test, the information on page 30 would have met the test.

[para 33] The information on page 30 consists of an email between lawyers of the Public Body's prosecution branch where one lawyer is consulting another in coming up with a strategy on how to deal with a particular situation. This was information that was sought or expected by virtue of these lawyers' positions with the Public Body and directed at how to deal with a particular situation. It is my understanding that the lawyers involved would have also had the ability to implement an action.

[para 34] With regard to the information on page 29 of the records at issue the test for section 24(1)(b) has also been met, except for the first half of the first sentence severed on page 29 (discussed below).

[para 35] On page 29, I have already found that much of the information was severed properly under section 17 of the Act, except for the first half of the first sentence severed. The remaining information (that was not personal information) is the mere recitation of background facts, including the first half of the first sentence severed. Neither section 24(1)(b) nor section 24(1)(a) applies to background facts unless the information is so interwoven that it is not distinct from the consultations or deliberations (see Order F2013-23 at para 30). The background facts in the first half of the first sentence severed on page 29 are not interwoven in any consultations, or deliberations (section 24(1)(b)) or advice, etc. (section 24(1)(a)) and, therefore, cannot be withheld pursuant to section 24(1) of the Act.

[para 36] Section 24 of the Act is a discretionary exception and so the Public Body must prove that it exercised its discretion appropriately. The Public Body submits that it considered the following factors:

- a. the general purpose of the Act which is to provide information subject to limited and specific exceptions;
- b. that releasing personal information about third parties would be an unreasonable invasion of their personal privacy;
- c. the purpose of Section 24(1)(a) and (b) of the Act which is to allow full and frank deliberations and discussions to occur by employees of the Public Body, as well as the public's interest in having its public servants conduct these discussions.

[para 37] I find that the Public Body properly exercised its discretion and that, the Public Body properly applied section 24(1)(b) of the Act to page 30 of the records at issue.

V. ORDER

[para 38] I make this Order under section 72 of the Act.

[para 39] I find that the Public Body properly applied section 17 of the Act to the information on page 29 of the records at issue, with the exception of the first half of the first sentence severed.

[para 40] I find that the Public Body properly applied section 24(1)(b) of the Act to the information on page 30 of the records at issue, but not to the information in the first half of the first sentence severed by the Public Body on page 29 of the records at issue. As neither section 24(1)(b) nor section 24(1)(a) applies to that information, I order that information to be disclosed to the Applicant.

[para 41] I order the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that it has complied with the Order.

Keri H. Ridley
Adjudicator