

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2019-10

March 27, 2019

CHILDREN’S SERVICES

Case File Number 002399

Office URL: www.oipc.ab.ca

Summary: An employee of Children’s Services (the Public Body, formerly Human Services) says he was disciplined by his employer as a result of a complaint that had been made about his “involvement/comments while participating in a Human Services candid discussion and open forum” on a specified date. He made an access request to the Public Body under the FOIP Act for information from the Public Body regarding this complaint.

The Applicant requested an inquiry into the Public Body’s decision to withhold the name of the complainant under section 17(1).

The Adjudicator determined that the Public Body properly applied section 17(1).

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

Authorities Cited: AB: Orders F2008-012, F2008-028, F2008-031, F2018-14

I. BACKGROUND

[para 1] An employee of Children’s Services (the Public Body, formerly Human Services) says he was disciplined by his employer as a result of a complaint that had been made about his “involvement/comments while participating in a Human Services candid discussion and open forum” on a specified date. He made an access request to the Public

Body under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for information from the Public Body regarding this complaint.

[para 2] The Public Body responded to the request, providing records with information withheld under sections 17(1), 19 and 24.

[para 3] The Applicant requested a review and, subsequently, an inquiry. During the mediation phase, the Applicant narrowed his concern to his not having received the name of the person who had made the complaint against him, and the Public Body's reliance upon section 17 to withhold this information.

II. RECORDS AT ISSUE

[para 4] The records at issue consist of the two records (three pages) that reveal the identity of the complainant. Both records consist of email chains.

III. ISSUE

[para 5] The issue set out in the Notice of Inquiry, dated June 27, 2018, is as follows:

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

IV. DISCUSSION OF ISSUES

Is the information severed from the records personal information under the FOIP Act?

[para 6] Section 1(n) defines personal information under the Act:

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;*

[para 7] The information severed from the pages consists of the name of a Public Body employee (the complainant) who complained about the Applicant. A few comments made by the complainant were also withheld under section 17(1). Most of the email chains, including the content of the complaint made about the Applicant, were provided to him. The withheld comments could reasonably reveal the identity of the complainant. All of this information is personal information under the Act.

Does section 17(1) require the Public Body to withhold the personal information?

[para 8] Section 17 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

...

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

...

- (e) *the third party will be exposed unfairly to financial or other harm,*
- (f) *the personal information has been supplied in confidence,*

...

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

...

[para 9] Section 17 is a mandatory exception: if the information falls within the scope of the exception, it must be withheld.

[para 10] Under section 17, if a record contains personal information of a third party, section 71(2) states that it is then up to the applicant to prove that the disclosure would not be an unreasonable invasion of a third party's personal privacy.

[para 11] Previous orders from this Office have found that section 17 does not apply to personal information that reveals only that the individual was acting in a formal, representative, professional, official, public or employment capacity, unless that information also has a personal dimension (Order F2008-028, para. 54).

[para 12] In this case, the complaint arose in the context of a work event. However, I am satisfied that the complaint has a personal dimension such that section 17(1) can apply. Part of the reason for this finding is the context provided in the Public Body's *in camera* submission. I cannot reveal what the Public Body has said *in camera*, other than to say that the context of the complaint gives the information a personal dimension. I have written an addendum to this Order that explains to the Public Body why I made this finding.

[para 13] The Public Body has argued that sections 17(4)(g), and 17(5)(e), (f) and (h) weigh against disclosing the complainant's personal information. The Public Body said it also considered section 17(5)(c).

[para 14] Neither party has argued that any provisions in sections 17(2) or (3) apply in this case. Based on my review of the records and arguments before me, none appear to apply.

Section 17(4)

[para 15] Section 17(4)(g) creates a presumption against disclosure of personal information consisting of a third party's name when it appears with other personal information about that third party, or where the name alone would reveal personal information about the third party. This section applies to the complainant's personal information.

Section 17(5)

[para 16] Section 17(5)(c) weighs in favour of disclosure where the personal information is relevant to a fair determination of the Applicant's rights. Four criteria must be fulfilled for this section to apply:

- (a) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds;
- (b) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed;
- (c) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
- (d) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing. (Order F2008-012 at para. 55, Order F2008-031 at para. 112)

[para 17] In his request for inquiry, the Applicant states that he was disciplined as a result of the complaint. He argues that he is unable to defend himself without the name of the complainant. He states that the principles of natural justice should allow him to face his accuser.

[para 18] For section 17(5)(c) to apply, there must be an existing or contemplated proceeding. Neither party has informed me of any ongoing proceeding. The Applicant states that he is unable to defend himself against the complaint; possibly the Applicant intends to initiate a proceeding in relation to the disciplinary action taken by the Public Body. This possibility is speculative, both because the Applicant has not given any indication of this intention, and because the complaint was made and discussed within the Public Body several years ago, in fall 2015. It is not clear when disciplinary action was taken.

[para 19] Even if there is an ongoing or contemplated proceeding, it is not clear why the identity of the complainant is significant to the issue in any proceeding and/or why it is required for the Applicant to prepare or ensure an impartial hearing (factors (c) and (d) of the criteria listed above).

[para 20] The Applicant was provided with the content of the complaint, absent a few sentences that could identify the complainant. Of those sentences, only one related to the complaint; the remaining withheld sentences are of a more personal nature. These 'personal' sentences do not add context to the complaint beyond what the Applicant has already received. The withheld sentence that relates to the complaint is general in nature, and also does not add context or detail to the complaint beyond what the Applicant has already received. In other words, the Applicant has been provided with the content and details of the complaint. It is therefore not clear why the Applicant argues that he cannot defend himself against the complaint, without the name of the complainant.

[para 21] Section 17(5)(e) weighs against disclosure of personal information where disclosure would expose the third party unfairly to financial or other harm. Section 17(5)(h) weighs against disclosure of personal information where disclosure may unfairly damage the reputation of the third party.

[para 22] The Public Body's arguments on these points are primarily made in its *in camera* submission. All I can say about the application of section 17(5)(e) is that it may weigh against disclosure, but that there is insufficient support to find that it is a significant factor.

[para 23] Section 17(5)(h) requires the possible damage to reputation to be unfair. The Public Body has not addressed this point. While past Orders of this Office have found that identifying whistleblowers could lead to unfair damage to their reputation (see Order F2018-14, at para. 139), it is not clear to me whether any damage to the complainant's reputation would be unfair in these circumstances.

[para 24] Section 17(5)(f) weighs against disclosure of personal information where that information was provided in confidence. The Public Body has not provided me with information about how it generally handles complaints like the one made against the Applicant – whether it routinely receives such complaints in confidence or not. The Applicant argued that during the disciplinary process the Public Body referred to its policy regarding respect in the workplace. The Applicant states that this policy directs an 'accuser' to first discuss concerns with the individual who has committed the allegedly offending conduct.

[para 25] In this case, the Public Body's *in camera* submission indicates that the complainant expected to remain anonymous. A subjective expectation is not the strongest evidence; I do not have evidence regarding the reasonableness of the complainant's expectation, such as whether confidentiality was assumed by all parties. The Applicant's arguments indicate that employees may be expected to discuss concerns with the individual involved; however, this doesn't address the circumstances here, where the complainant did not address the Applicant directly. In other words, the policy as described by the Applicant does not address whether a complainant's identity is revealed to the 'accused' if the complainant chooses not to address the 'accused' directly.

[para 26] Given the sparse arguments on this point, in these circumstances I find that section 17(5)(f) does not weigh heavily against disclosure.

[para 27] No other relevant circumstances weighing in favour of or against disclosing the withheld information has been argued by the parties, and based on the submissions and records, I do not see any other circumstances that apply.

Weighing factors under section 17

[para 28] I found that section 17(4)(g) applies, such that disclosing the complainant's name is presumed to be an unreasonable invasion of privacy. I have found that if any provisions in section 17(5) weigh against disclosure, they do so only to a minor extent. However, the Applicant has not provided sufficient support to find that any factors weigh in favour of disclosure.

[para 29] I conclude that section 17(1) requires the Public Body to withhold the name of the complainant in the records at issue. The additional information withheld in the records at issue could reasonably be expected to identify the complainant if disclosed and so must also be withheld.

V. ORDER

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

[para 31] I find that the disclosure of the information withheld in the records at issue would be an unreasonable invasion of privacy. Under section 72(2)(b), I confirm the Public Body's decision to refuse access to that information.

Amanda Swanek
Adjudicator