ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2023-01

January 4, 2023

CITY OF EDMONTON

Case File Numbers 011667 and 011686

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Summary: The Applicant made two access requests to the City of Edmonton (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for notes and actions taken by bylaw enforcement officers regarding two addresses.

The Public Body refused to confirm or deny the existence of responsive records on the basis that doing so would be an unreasonable invasion of personal privacy under section 12(2)(b) of the FOIP Act.

The Adjudicator determined that confirming the existence of responsive records would not disclose personal information. She ordered the Public Body to respond to the Applicant without reliance on section 12(2)(b).

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

Authorities Cited: AB: Orders F2014-17, F2014-31

Case Cited: to *Edmonton (City) v Alberta (Information and Privacy Commissioner)*, 2016 ABCA 110 (CanLII).

1. BACKGROUND

[para 1] The Applicant made two access requests to the City of Edmonton (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for notes and actions taken by bylaw enforcement officers regarding two addresses.

[para 2] The Public Body refused to confirm or deny the existence of responsive records on the basis that doing so would be an unreasonable invasion of personal privacy under section 12(2)(b) of the FOIP Act. It stated:

> We are unable to confirm or deny the existence of the record(s) you have requested as per section 12(2)(b) of the FOIP Act. However, if such information did exist, it would be withheld from disclosure under section 17(1) (Disclosure harmful to personal privacy) of the Act.

[para 3] The Applicant requested review by the Commissioner of the Public Body's refusal to confirm or deny the existence of records responsive to the access request.

II. ISSUE

ISSUE A: Did the Public Body properly refuse to confirm or deny the existence of responsive records?

[para 4] Section 12 of the FOIP Act establishes the contents of a response under the FOIP Act. It states:

> *12(1) In a response under section 11, the applicant must be told*
>
> *(a) whether access to the record or part of it is granted or refused,*
>
> *(b) if access to the record or part of it is granted, where, when and how access will be given, and*
>
> *(c) if access to the record or to part of it is refused,*
>
> *(i) the reasons for the refusal and the provision of this Act on which the refusal is based,*
>
> *(ii) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and*
>
> *(iii) that the applicant may ask for a review of that decision by the Commissioner or an adjudicator, as the case may be.*
>
> *(2) Despite subsection (1)(c)(i), the head of a public body may, in a response, refuse to confirm or deny the existence of*

(d) a record containing information described in section 18 or 20, or

(e) a record containing personal information about a third party if disclosing the existence of the information would be an unreasonable invasion of the third party's personal privacy.

[para 5] Section 12 requires a public body to inform an applicant whether access will be granted or denied. If access is denied, then the public body must inform the applicant of the provision under which access is denied and its reasons; however, the public body may refuse to confirm or deny the existence of a record containing personal information if revealing the existence of the record would be an invasion of the privacy of the individual whose personal information it is.

[para 6] Section 1(n) of the FOIP Act defines "personal information" for the purposes of the FOIP Act. 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 […]

Information will be personal information under the FOIP Act if it is recorded information about an identifiable individual.

[para 7] Section 17 of the FOIP Act sets out the circumstances in which it would be an unreasonable invasion of personal privacy to disclose personal information. 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.

If the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy, a public body must refuse to disclose the information to an applicant under section 17(1). Section 17(2) (not reproduced) sets out the circumstances in which disclosing certain kinds of personal information is not an unreasonable invasion of personal privacy.

[para 8] When the specific types of personal information set out in section 17(4) are involved, disclosure is subject to a rebuttable presumption that it would be an unreasonable invasion of a third party's personal privacy to disclose the information. 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), and balance these against any presumptions arising under section 17(4). Section 17(5) is not an exhaustive list and any other relevant circumstances must be considered. If, on the balance, it would not be an unreasonable invasion of personal privacy to disclose an individual's personal information, a public body may give an individual's personal information to a requestor.

[para 9] If disclosing the existence of responsive records to a requestor would have the effect of disclosing personal information in circumstances that would amount to an invasion of the individual's personal privacy, then a public body may apply section 12(2)(b) and refuse to confirm or deny the existence of responsive records.

[para 10] In Order F2014-31, the Adjudicator said:

> In order to rely on section 12(2)(b), the Public Body must show that disclosing the existence of records responsive to the Applicant's access request, if they do exist, would be an unreasonable invasion of the third party's personal privacy. The provisions regarding an unreasonable invasion of personal privacy under section 17 of the Act may be used as guidance (Order 2000-016 at para. 35).

[para 11] In Order F2014-17, I said:

> In a case where section 12(2)(b) is applied, the question is whether, once all relevant interests weighing for or against disclosure are considered, disclosing the existence of the records would be an unreasonable invasion of personal privacy.

[para 12] The Public Body's position is that disclosing the existence of responsive records, assuming any such exist, would disclose information subject to section 17(4)(g) of the FOIP Act. It also argues that the presumption created by this provision is not rebutted. As cited above, section 17(4)(g) applies to the name of an individual, when it appears in the context of other personal information about the individual.

[para 13] The Public Body argues:

> The Public Body submits that the existence or non-existence of Bylaw Officer notes, compliance investigations and/or actions taken against an individual's home would be considered personal information under the Act as they go towards allegations of wrongdoings and/or complaints against an identifiable individual (i.e. the property owner). [My emphasis]
>
> The next step is to determine whether revealing such personal information (that the records exist, if they exist) would be an unreasonable invasion of the third party's personal privacy.
>
> Section 17(2) of the Act provides a list of certain circumstances that would give a presumption that the disclosure of personal information would not result in an unreasonable invasion of personal privacy. The Public Body submits that none of the circumstances listed in section 17(2) of the Act would apply in this situation. Act, s 17(2)
>
> Section 17(4) of the Act provides a list of certain circumstances that would give a presumption that the disclosure of such information would result in an unreasonable invasion of personal privacy. Act, s 17(4)
>
> The Public Body submits that revealing whether records exist would fall under the circumstance listed in section 17(4)(g) of the Act as the revealing or not revealing the existence of Bylaw Officer notes, compliance investigations and/or actions taken against an individual's home would disclose personal information about the individual that lives at this property (e.g. if they are law-abiding, if they are subject to complaints, how they use their property, etc…).[My emphasis]

[para 14] The Public Body's position is that if it were to confirm the existence of responsive records if such records existed, it would be disclosing the name of an individual in addition to the fact that the individual has been the subject of bylaw enforcement orders.

[para 15] The Applicant counters:

> The arguments and responses for the most part have already been made and responded to. They can be found in previous documents on the record. However, the public body reiterated its argument so I feel it would be remiss if I don't follow [suit].
>
> The public body main argument as I see it is that I am asking for personal information and therefore it is in its right to refuse the release of requested information. That statement is FALSE. I am not now nor have I ever asked for anything that can be remotely characterized as "personal" I have already [point for point] in previous documents of section 17(4) gone over on the record/submitted explaining how I have request ZERO information listed in that section deemed to be private.
>
> Exhibit (A) FURTHER REITERATES […] WITH DEFINITION OF "PRIVATE" and/or "personal" …none of which applies to what I am requesting!

> I have also gone on record with the fact that same public body that is arguing such information is illegal for them to make public has NO concern freely and openly disclosing same details in public/open to anyone full un censored details of my personal properties/ the fact I own several/how many infractions over the years and the fact my brother has the same issues before said appeal board hearing. The same information that this public body claims it is keeping secret in the interest of [FOIP] in this case!
>
> FURTHER more the public body repeatedly uses the argument that tidiness and maintenance of a property effects the neighboring properties in property value and effects the enjoyment of the neighbors and can be (an annoyance to neighbors) and therefore is a PUBLIC issue NOT "private" and therefore enforceable under the nuisance bylaws. NOW when it's convenient to hide behind that same public body argues that that same information/issue authorizing nuisance bylaw enforcement and public releasing of same information requested is now protected under foip!

[para 16] From the Applicant's submissions and his requests for review and inquiry, I understand that the Applicant owns rental properties and is seeking evidence to establish that bylaw officers have unfairly targeted those properties, while not enforcing bylaws in relation to other properties that may not be in compliance with bylaws. The Applicant does not want personal information, but information regarding the extent to which bylaw enforcement officers enforced bylaws in relation to the addresses in the access requests.

[para 17] I disagree with the Public Body that it would be disclosing personal information if it confirmed the existence of responsive records (if such exist) in relation to the properties that are the subject of the access requests. At most, from the existence of responsive records the requestor would learn that that there had been some sort of activity by bylaw enforcement personnel in relation to the subject properties, or not, but the confirmation would not reveal the nature of the activity.

[para 18] Disclosing whether records exist would not reveal the identity of the individuals or businesses responsible for the compliance of the property with bylaws. I acknowledge the names of the owners could be obtained from a land titles search, and if the owners are individuals, enforcement of bylaws against them could arguably in some circumstances constitute personal information. However, whether records exist or not would still not confirm that bylaw enforcement action had or had not been taken relative to any such individuals. Further, conceivably action could be taken against unidentifiable tenants rather than against the owners of the properties.

[para 19] The Public Body drew my attention to *Edmonton (City) v Alberta (Information and Privacy Commissioner)*, 2016 ABCA 110 (CanLII). In that case, Slatter J.A. speaking for the Court of Appeal, stated:

> 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 20] The Court also said:

> The City particularly disagrees with the finding of the adjudicator at para. 53:
>
> > Many pages of the records provided to me by the Public Body, which it believed were not responsive to a request for personal information, contain only information about the Applicant's property (for example, the state of the sidewalk on a particular day). However, these records appear to be records generated as a result of a complaint (and are therefore responsive to the applicant's request for her personal information). (emphasis added)
> >
> > The City argues that the adjudicator recognized that certain information related "only to property", yet required that it be produced. The adjudicator does not appear in this passage to resile from her conclusion that information about property has to have a "personal dimension" to be "personal information". Earlier on the adjudicator had held (a) the request for documents is to be categorized at face value, not based on what information the documents actually contain, and (b) if a document falls within the request, the whole document must be produced (para. 33). The challenged comment about "many pages" of the record, and being "responsive to the request" appear to relate to those issues, not the meaning of "personal information".
>
> As previously stated, the boundary between personal information and information about property will not always be clear. The core of the personal information here was "complaints", and particularly complaints about how Ms. McCloskey dealt with her property. Exactly where to draw the line between (a) documents that are about the "complaint", and (b) those dealing with the processing of that complaint that are merely about the "property" is complex. The way the adjudicator drew the line in this case is not unreasonable. The drawing of the line did not involve the disclosure of sensitive, confidential, or privileged information; the only implication was that the City was not entitled to a $25 fee for producing some of these collateral documents. In the context of this case, the adjudicator's decision was reasonably available on the facts and the law.
>
> It follows that the adjudicator's decision on this issue was reasonable: the complaints against Ms. McCloskey, and the related opinions of her neighbours about her reasonably fell within the definition of "personal information", even though some of the conduct underlying the complaints related to her property. [my emphasis]

In the present case, there is no personal dimension to the fact that the Public Body may have, or may not have, made notes, or whether it took action to enforce bylaws in relation to the two properties. Responding to the access requests without refusing to confirm or deny would not confirm that the owners (or occupants) were the subject of complaints, but only that bylaw officers took notes and considered bylaw enforcement activities regarding two properties.

[para 21] When the Public Body responds to the Applicant without relying on section 12(2)(b), then, in the event there are records responsive to the request it may determine whether there is personal information in them that should be severed under section 17 in order to ensure the personal privacy of any individuals.

[para 22] To conclude, I find that confirming the existence or otherwise of responsive records, in and of itself, would not reveal personal information. Confirming the existence of any responsive records in this case would confirm only that the Public Body took some steps in relation to two properties. I must therefore direct the Public Body to respond to the Applicant without reliance on section 12(2)(b).

III. ORDER

[para 23] I make this Order under section 72 of the FOIP Act.

[para 24] I order the Public Body to respond to the Applicant without reliance on section 12(2) of the FOIP Act.

[para 25] I order the Public Body to inform me within fifty days of receiving this order that it has complied with it.

_____
Teresa Cunningham
Adjudicator
/ah