ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2023-25

July 4, 2023

PUBLIC SAFETY AND EMERGENCY SERVICES

Case File Number 014840

Office URL: www.oipc.ab.ca

Summary: On July 12, 2018, the Applicant made an access request to Justice and Solicitor General (now Public Safety and Emergency Services) (the Public Body) for the following:

> [R]ecords of communications related to 2 appeals to the Alberta Law Enforcement Review Board (LERB) of the dispositions of 2 complaints I made to the Professional Standards Branch (PSB) of the Edmonton Police Service (EPS). The records will mostly be emails, but they could also consists of letters, notes, or other written documents. Excluding duplicate records.

The Public Body responded to the access request on May 9, 2019. It severed some information from the records it located under sections 4 and 17 of the FOIP Act.

The Applicant requested a review of the timing of the Public Body's response and the adequacy of its search. He also requested review of the Public Body's decisions to apply sections 4 and 17.

The Adjudicator found that the Public Body had conducted a reasonable search for responsive records. The Adjudicator confirmed the decision of the Public Body to sever the personally identifying information of third parties from the records; however, she noted that the records the Public Body had severed under section 17 had not been requested by the Applicant and were also "nonresponsive". The Adjudicator found that section 4(1)(a) applied to a decision made by a member of the Court of Appeal regarding leave to appeal. The Adjudicator determined that the Public Body's response to the

access request did not comply with section 11; however, as it had responded, there would be no purpose served by issuing an order regarding its noncompliance.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 4, 6. 10, 11, 14. 15, 17, 72

Authorities Cited: AB: Orders F2007-029, F2022-04

I. BACKGROUND

[para 1] On July 12, 2018, the Applicant made an access request to Justice and Solicitor General (now Public Safety and Emergency Services) (the Public Body) for the following:

> [R]ecords of communications related to 2 appeals to the Alberta Law Enforcement Review Board (LERB) of the dispositions of 2 complaints I made to the Professional Standards Branch (PSB) of the Edmonton Police Service (EPS). The records will mostly be emails, but they could also consists of letters, notes, or other written documents. Excluding duplicate records.

[para 2] The time period for the records was from January 11, 2016 to November 13, 2017.

[para 3] The Applicant also excluded the following kinds of records from his access request:

> In records returned from this FOIP request, I am requesting the exclusion of emails to, or from, or CC, my email address, [Applicant's email address] for simplification. I don't want to receive emails or letters I already have. However, if an email thread I was involved in was forwarded to another email address without me being a recipient of that email, I do want to receive that email.

[para 4] The Public Body responded to the access request on May 9, 2019. It severed some information from the records it located under sections 4 and 17 of the FOIP Act.

[para 5] The Applicant requested a review by the Commissioner of the Public Body's search for responsive records, its decision to sever information under sections 4 and 17, and the lateness of the response.

[para 6] The Commissioner authorized a senior information and privacy manager to investigate and attempt to settle the matter. At the conclusion of this process, the Applicant requested an inquiry. The Commissioner delegated her authority to conduct it to me.

II. ISSUES

ISSUE A: Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act (duty to assist applicants)?

ISSUE B: Does section 17(1) of the Act (disclosure an unreasonable invasion of personal privacy) apply to the information to which the Public Body applied this provision?

ISSUE C: Are records excluded from the application of the Act by section 4(1)(a)?

ISSUE D: Did the Public Body comply with section 11 (time limit for responding) of the Act?

III. DISCUSSION OF ISSUES

ISSUE A: Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act (duty to assist applicants)?

[para 7] Section 10(1) of the Act states:

> *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 8] In Order F2007-029, the Commissioner made the following statements about a public body's duty to assist under section 10(1):

> The Public Body has the onus to establish that it has made every reasonable effort to assist the Applicant, as it is in the best position to explain the steps it has taken to assist the applicant within the meaning of section 10(1).
>
> . . .
>
> Previous orders of my office have established that the duty to assist includes the duty to conduct an adequate search for records. In Order 2001-016, I said:
>
> > In Order 97-003, the Commissioner said that a public body must provide sufficient evidence that it has made a reasonable effort to identify and locate records responsive to the request to discharge its obligation under section 9(1) (now 10(1)) of the Act. In Order 97-006, the Commissioner said that the public body has the burden of proving that it has fulfilled its duty under section 9(1) (now 10(1)).
> >
> > Previous orders . . . say that the public body must show that it conducted an adequate search to fulfill its obligation under section 9(1) of the Act. An adequate search has two components: (1) every reasonable effort must be made to search for the actual record requested and (2) the applicant must be informed in a timely fashion what has been done.
>
> . . .
>
> In general, evidence as to the adequacy of search should cover the following points:
>
> • The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request

- The scope of the search conducted – for example: physical sites, program areas, specific databases, off-site storage areas, etc.

- The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.

- Who did the search

- Why the Public Body believes no more responsive records exist than what has been found or produced

[para 9] In his request for review, the Applicant questioned whether the Public Body had searched for all responsive records. He points to the fact that the Public Body stated that there were over 500 pages of records for it to process when it extended the time for responding, but that it only produced 125 pages.

[para 10] The Public Body states:

> The two entities referenced in the access request are separate public bodies and are apart from the Public Body at issue in this review (Public Safety and Emergency Services, formerly Justice and Solicitor General). The two oversight bodies (the LERB and the PSB) operate independently from Justice and Solicitor General (now Public Safety and Emergency Services). As such, there is very limited records in the custody of the Public Body.

[para 11] The Public Body also states:

> The Public Body requested records from the appropriate program areas using the scope and time period as requested by the Applicant. All follow up responsibilities including referrals to other areas and/or personnel as well as ensuring all missing attachments were […] obtained.
>
> • Further, all employees and/or program areas were asked if they were in possession of any relevant information.

[para 12] The Public Body explains that the two police oversight bodies in question operate independently of the Public Body. As a result, there are not likely to be many responsive records in the normal course of the Public Body's and the oversight bodies' operations. From my review of the records, I note that the majority of the records are responses prepared for the Minister to send to the Applicant regarding complaints he had made to the Public Body about the oversight bodies.

[para 13] Given the parameters of the Applicant's access request, it is clear why the Public Body located approximately 500 pages of records but included only 120 pages of records in its response. (It provided 90 pages of records after severing information under sections 4 and 17.) It was necessary to review the records meeting the terms of the Applicant's request – i.e. those records relating to his complaints before the review bodies – and then to remove any records that he had already received. As many of the records were prepared so that correspondence could be sent to the Applicant, it is clear that many of the records would then be excluded from the access request because the Applicant already had copies. It was necessary for the Public Body to review 500 pages of records in order to determine that 125 pages of them were responsive.

[para 14] The Applicant also states in his request for review:

> No records of contacts with (former) Minister Ganley, and no contacts with the Edmonton Police Commission ("EPC"), were referenced in the pages I received on May 21, 2019 (other than emails and letters I already have, which therefore are irrelevant to my Request).
>
> Unless such records can be returned, I'm requesting an explanation as to why those aspects (contacts with the EPC / Ganley / the Provincial Public Complaint Director) of my request weren't responded to or referenced in the 2018-P-0671 response to my request.

The Applicant notes that he did not receive any records of contacts with the former Justice Minister or the Edmonton Police Commission. He believes he should receive an explanation as to why such records were not provided.

[para 15] The Public Body has explained that the police review bodies are independent and that the Public Body does not contact the police review bodies to discuss cases before them. Most of the communications the Public Body located are responses to the Applicant's letters of complaint to the Minister. The Applicant's submissions do not explain why he believes there should be communications involving the Minister (other than the letters sent to him by the Minister in reply to his correspondence) or the Edmonton Police Commission among the records.

[para 16] The Applicant notes that in some of the records there are statements that refer to information having been received, but there is no corresponding email. An example is an email appearing on record 88, in which a Government of Alberta employee states: "FYI – I have been informed that the individual is not happy with the decision, or subsequent information from LERB, and is likely going to start calling people". The Applicant argues that there must be an email that "informed" the employee of the facts in the email. I am unable to find that statement "I have been informed" establishes that the source of employee's information was an email or other record. It appears entirely possible that the source of the information was a conversation, and not an email.

[para 17] In Order F2022-04 I reviewed the burden of proof when the adequacy of a public body's search is in issue. I said:

> A public body has the burden in the inquiry of establishing that it conducted a reasonable search for records; however, once it has provided detailed evidence to support finding that it conducted a reasonable search, the Applicant has the evidential burden of adducing, or pointing to evidence that suggests records, or categories of records, have not been searched for, or produced. The Applicant may do this by pointing to deficiencies in the Public Body's search, or providing evidence to support finding that additional records that have not been located or produced are likely to exist.
>
> In Order P2015-06 the Adjudicator explained how the evidential burden operates in inquiries where the adequacy of search is in issue:
>
> > As part of fulfilling its duties to the Applicant, the Organization must conduct an adequate search for records that respond to the Applicant's access requests. This means that the Organization must have made every reasonable effort to search for the records requested.

> The initial, or evidentiary, burden of proof lies with the Applicant to provide some evidence that the Organization failed to provide records in its custody or control. If the Applicant meets this initial burden, the onus then shifts to the Organization to prove, on a balance of probabilities, that it made every reasonable effort to conduct an adequate search for responsive records (Order P2006-012 at para 12).
>
> The burden described in Order P2015-06 also applies to inquiries in relation to searches conducted under the FOIP Act. Once the public body has completed a search for records and explained the search it conducted by addressing the points set out in Order F2007-029, the applicant then has the burden of pointing to some evidence to support the position that there may be records that exist that the public body has not searched for or produced. As examples of situations where the applicant's evidential burden is met, a public body's account of its search may reveal that likely repositories of responsive records were not searched, or the records the public body has located may refer to other responsive records that were not produced, or an applicant may have personal knowledge that a responsive record exists beyond what a public body has located because the applicant created it or was shown it at one time. When the evidential burden is met in relation to particular records, the public body must then provide additional evidence to establish that it conducted a reasonable search for such records, despite not having located them. If the public body does not satisfy the Commissioner that it conducted a reasonable search for records, the Commissioner may direct the public body to conduct a new search for responsive records.

[para 18] The Public Body has explained the steps it took to locate responsive records. It has explained how employees conducted the search, and also explained that there are limited communications between the Ministry and the review bodies because of the independent nature of the review bodies. As the Applicant has not provided an adequate basis for concluding that the Public Body excluded responsive records from its search, or failed to perform a reasonable search, I will confirm that the Public Body met the duty to assist.

ISSUE B: Does section 17(1) of the Act (disclosure an unreasonable invasion of personal privacy) apply to the information to which the Public Body applied this provision?

[para 19] 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 is personal information under the FOIP Act if it is recorded information about an identifiable individual.

[para 20] 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.

[para 21] 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 22] 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 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. If there are no factors weighing in favor

of disclosure, the presumption created by section 17(4) is not rebutted and the information cannot be disclosed.

[para 23] The Public Body provided the following explanation of its severing decision:

> Through consultation with Law Enforcement Oversight Branch (LEOB), it was recommended that the release of names and personal information which constitute pages 78 (in part), 80-81, 82-83 and 84-85 of the records at issue are letters addressed to other people who each wrote a complaint letter to the Public Body and/or were asking for information from the Public Body, be withheld under section 17(1) [Disclosure harmful to personal privacy] of the *FOIP Act*, as the release of the information would be an unreasonable invasion of the personal privacy of these individuals. The disclosure of the personal information within the records is presumed to be an unreasonable invasion

[para 24] The Public Body applied section 17(1) to the personally identifying information of individuals who wrote the Minister to express concerns about the police complaint system (but not about the Applicant's matters). The information appears on the records because the Public Body was preparing responses to these individuals at the same time it prepared its response for the Applicant. I am unable to identify any factors listed in section 17(5) that would support releasing these names to the Applicant. This is especially so, given that this information does not relate to the Applicant's access request.

[para 25] The Public Body severed letters written to the individuals in their entirety under section 17. It is unclear why it did so, as once the names and contact information of the individuals is removed, the remaining information would not identify them. Section 6(2) of the FOIP Act requires a public body to sever information subject to an exception from a record and to provide the remaining information to an applicant. From its explanation as to why it severed records 80 – 85, it does not appear that the Public Body considered section 6(2). If it were the case that records 80 – 85 were responsive to the Applicant's access request -- that is, if the records contained information the Applicant had asked for -- I would direct the Public Body to sever personally identifying information from the records and to provide the remainder to the Applicant. I will not do so in this case, as the Applicant did not request the information in these records.

[para 26] For the reasons above, I will confirm the Public Body's application of section 17(1).

ISSUE C: Are records excluded from the application of the Act by section 4(1)(a)?

[para 27] The Public Body applied section 4(1)(a) to a decision of a justice of the Court of Appeal to deny the Applicant leave to appeal a decision of the Law Enforcement Review Board. If records are subject to section 4(1)(a), the FOIP Act does not otherwise apply to them. Section 4(1)(a) states:

> *4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:*

> *(a) information in a court file, a record of a judge of the Court of Appeal of Alberta, the Court of King's Bench of Alberta or the Alberta Court of Justice, a record of an applications judge of the Court of King's Bench of Alberta, a record of a justice of the peace other than a non-presiding justice of the peace under the Justice of the Peace Act, a judicial administration record or a record relating to support services provided to the judges of any of the courts referred to in this clause[…]*
>
> *[…]*

The records to which the Public Body applied section 4(1)(a) are "records of a judge of the Court of Appeal" within the terms of section 4(1)(a). As a result, the FOIP Act does not apply to them and the Public Body is under no duty to provide them to the Applicant in a response under the FOIP Act. I will confirm the Public Body's decision that section 4(1)(a) applies.

ISSUE D: Did the Public Body comply with section 11 (time limit for responding) of the Act?

[para 28] The Public Body received the Applicant's access request on July 12, 2018 and responded on May 9, 2019.

[para 29] Section 11 of the FOIP Act sets out the time in which a public body must respond to an access request. It states:

> *11(1) The head of a public body must make every reasonable effort to respond to a request not later than 30 days after receiving it unless*
>
> *(a) that time limit is extended under section 14, or*
> *(b) the request has been transferred under section 15 to another public body.*
>
> *(2) The failure of the head to respond to a request within the 30-day period or any extended period is to be treated as a decision to refuse access to the record.*

[para 30] A Public Body has 30 days in which to respond to an access request unless section 14 or 15 is engaged.

[para 31] The Public Body acknowledges that it failed to meet the requirements of section 11 in its handling of the Applicant's access request.

[para 32] The Public Body did not comply with section 11; however, it did respond to the Applicant. The only thing I could order the Public Body to do in relation to section 11 at this point is to respond to the access request. Given that it has already done so there would be no benefit to issuing an order.

IV. ORDER

[para 33] I make this Order under section 72 of the Act. I confirm that the Public Body has met its duties to the Applicant under the FOIP Act.

[para 34] Records 80 – 85 are not responsive to the access request.

[para 35] I confirm that section 4(1)(a) applies to the decision of the Justice of the Court of Appeal.

[para 36] I confirm that the Public Body met its duty to assist by conducting an adequate search for responsive records.

_____

Teresa Cunningham
Adjudicator
/bah