

**ALBERTA**

**OFFICE OF THE INFORMATION AND PRIVACY  
COMMISSIONER**

**ORDER F2025-09**

March 4, 2025

**CITY OF CALGARY**

Case File Number 025720

**Office URL:** [www.oipc.ab.ca](http://www.oipc.ab.ca)

**Summary:** An individual made an access request to the City of Calgary (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for records relating to the hiring of an external investigator in relation to a former employee.

The Public Body responded, refusing to confirm or deny the existence of records responsive to the Applicant's request.

The Applicant requested a review of the Public Body's response, and subsequently an inquiry.

The Adjudicator determined that the Public Body properly refused to confirm or deny the existence of a record as authorized by section 12(2)(b) of the FOIP Act.

**Statutes Cited: AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 12, 17, 71, 72.

**Authorities Cited: AB:** Orders 97-002, 2001-013, F2003-002, F2004-015, F2006-012, F2008-009, F2008-020, F2008-028, F2009-029, F2011-010, F2012-18, F2014-16, F2016-24, F2022-31

## **I. BACKGROUND**

[para 1] On February 10, 2022, an individual (the Applicant) made an access request to the City of Calgary (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for records relating to the hiring of an external investigator in relation to a former employee. The wording of the clarified request is:

Provide findings and costs of hiring an external investigator related to the former Chief of Staff, [...]. Timeline: November 5, 2021 - February 10, 2022.

[para 2] On March 10, 2022, the Public Body informed the Applicant that it was refusing to confirm or deny the existence of responsive records, citing section 12(2) of the FOIP Act. In this response, the Public Body further stated that if responsive records exist, the information in the records would be withheld under sections 16(1), 17(1), 19(2) and 24(1) of the FOIP Act. On March 17, 2022, the Applicant requested this Office review the decision of the Public Body. The Commissioner assigned a senior information and privacy manager (SIPM) to investigate and attempt to settle the matter. At the conclusion of this process, the Applicant requested an inquiry.

## **II. RECORDS AT ISSUE**

[para 3] As the issue in this inquiry is whether the Public Body properly refused to confirm or deny the existence of a record, there are no records at issue, whether or not there were records responsive to the Applicant's access request.

## **III. ISSUES**

[para 4] The sole issue set out in the Notice of Inquiry, dated April 3, 2024, is as follows:

Did the Public Body properly refuse to confirm or deny the existence of a record under section 12(2) of the Act (contents of response)?

## **IV. DISCUSSION OF ISSUES**

[para 5] The Public Body relies on section 12(2)(b) to refuse to confirm or deny the existence of responsive records. This section states:

*12(2) Despite subsection (1)(c)(i), the head of a public body may, in a response, refuse to confirm or deny the existence of*

...

*(b) 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 6] The Public Body has the burden of proving that it properly relied on section 12(2), as stated in Order F2009-029 at para. 10-11:

Section 71(1) does not apply in this inquiry – and neither does section 71(2), as further explained below. A public body’s decision to refuse to confirm or deny the existence of a record is not a decision to refuse an applicant access to a record. Section 71 of the Act therefore does not set out the burden of proof under section 12(2).

Still, a public body has the burden of proving that it properly relied on section 12(2). Previous orders of this Office have said that where the Act is silent on the burden of proof, the burden should be allocated to the party that is in the best position to provide evidence on the particular issue (Order 2000-021 at para. 13). As public bodies are in the best position to explain why they have refused to confirm or deny the existence of a record requested by an applicant – and moreover, public bodies relying on section 12(2) often submit argument and evidence *in camera* to which an applicant is not able to respond – they have the burden of proof under section 12(2). Having said this, it is in an applicant’s best interest to also provide argument and evidence, even where the other party has the burden of proof (Order 99-014 at para. 11).

[para 7] In Order F2006-012, former Commissioner Work applied a purposive interpretation to section 12(2)(a) (at paras. 18 and 21):

Earlier orders of this Office have said that section 12(2) is to be used having regard to the objects of the Act, including access principles. In my view, in order to rely on section 12(2)(a) to refuse to say whether information exists that falls into a particular subsection of section 18 or 20, the Public Body should first consider what interest would be protected by withholding such information under the particular subsection of section 18 or 20, and then ask whether refusing to say if such information exists would, in the particular case, promote or protect the same interest...

... The sensible purpose for both provisions [sections 12(2)(a) and (b)] ... is to prevent requestors from obtaining information from a request indirectly that they cannot obtain directly. Requestors are denied access to information if access would cause harm to law enforcement, or unreasonable invasion of privacy. They should be denied information as to whether a record exists for the same reason, but not otherwise... This interpretation is also in accordance with the general principle in the Act of permitting access subject only to limited and specific exceptions.

[para 8] The test for properly applying section 12(2)(b) is set out in Order F2011-010, which states (at paras. 9-10):

In order for a public body to properly apply section 12(2)(b) of the Act, it must do each of the following: (a) search for the requested records, determine whether responsive records exist and provide any such records to this Office for review; (b) determine that responsive records, if they existed, would contain the personal information of a third party and that disclosure of the existence of the information would be an unreasonable invasion of the third party’s personal privacy; and (c) show that it properly exercised its discretion in refusing to

confirm or deny the existence of a record by considering the objects and purpose of the Act and providing evidence of what was considered (Order 98-009 at paras. 8 to 10; Order 2000-016 at paras. 35 and 38).

Part (b) of the foregoing test was recently re-worded as requiring the public body to show that confirming the existence of responsive records, if they existed, would reveal the personal information of a third party, and to show that revealing this personal information (that the records exist, if they exist) would be an unreasonable invasion of the third party's personal privacy (Order F2010-010 at para. 14).

[para 9] The question to be answered is therefore whether it would be an unreasonable invasion of the named employee's privacy to confirm whether responsive records exist.

[para 10] Many past Orders of this Office state that the disclosure of the names, contact information and other information about public body employees, that relates only to the employees acting in their professional capacities is not an unreasonable invasion of personal privacy under section 17(1) (see Orders 2001-013 at paras. 89-90, F2003-002 at para. 62, F2008-028 at para. 53) unless that information has a personal dimension in the circumstances. In other words, in the absence of a personal dimension, information cannot be withheld under section 17(1).

[para 11] Past Orders have also said that information relating to disciplinary actions does have a personal dimension.

[para 12] Past Orders have concluded that the factors outlined in section 17(2)-(5) are appropriate to use in determining whether confirming or denying the existence of responsive records is an unreasonable invasion of the named employee's privacy (see Order F2016-24).

[para 13] As stated in Order F2022-31 (at paras. 12-13):

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 (such as the Applicant in this case) 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.

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.

This same analysis applies where the section 17 analysis is conducted in relation to a public body's refusal to confirm or deny the existence of records under section 12(2)(b).

[para 14] The relevant portions of section 17 state:

*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*

...

*(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,*

...

*(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*

...

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

...

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

...

#### *Parties' arguments*

[para 15] In their request for inquiry, the Applicant states:

As outlined in Bylaw Number 26M2018 #29 - The Mayor must provide information on budgets and expenses to the Mayor's Chief of Staff in order to permit the Office of the Mayor to make this information publicly [available in] accordance with the policies and procedures governing that office. Since the mayor used public money to conduct an investigation on a city staff member, the public has the right to know what the findings of the investigation were as well as the cost of the investigation to the taxpayers. If the mayor wanted this to have been private then she should've used her own private money, not the public's. The mayor cannot use taxpayers money to fund a personal project, if she

does then it is our right to know how much of our money was used and what the results were, this is the mandate of an open and transparent government. If she does not wish to make the information public then I demand that she return the money used back to the public and she can keep her finding private.

[para 16] The Applicant relied on the arguments previously made in their request for review and request for inquiry, rather than providing a submission for the inquiry.

[para 17] The Public Body states confirming or denying the existence of records would confirm or deny whether records exist relating to a workplace investigation of the named employee. The Public Body states that information relating to possible disciplinary actions has a personal dimension, such that it is personal information of the relevant individual.

[para 18] The Public Body argues that none of the factors set out in section 17(2) or (3) apply in this case.

[para 19] The Public Body argues that disclosing whether records exist would disclose information about the named third party and their employment history; therefore, sections 17(4)(d) and (g) both apply, weighing against disclosing whether records exist.

[para 20] The Public Body also argues that sections 17(5)(e) and (h) weigh against disclosing the existence of responsive records. 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 21] Lastly, the Public Body argues that section 17(5)(a), which weighs in favour of disclosure where disclosure is desirable for the purpose of subjecting the activities of a public body to scrutiny, does not apply. The Public Body cites Order F2016-24, which states that in order for this provision to apply, there must be evidence that the activities of the Public Body have been called into question, which necessitates the disclosure of personal information. The Public Body argues that disclosing information of an employee's employment history does not subject the activities of the Public Body to scrutiny.

### *Analysis*

[para 22] Disclosing whether responsive records exist would disclose whether the employee named in the Applicant's access request had been investigated. I agree that this information has a personal dimension such that it would be the employee's personal information.

[para 23] I also agree that confirming or denying the existence of records would reveal information about the named employee's employment history, such that both sections 17(4)(d) and (g) apply, weighing against disclosing the existence of records.

[para 24] With respect to section 17(5)(e), the Public Body has not explained what financial or other harm the employee may be exposed to if the existence of records were confirmed or denied. However, I agree that section 17(5)(h) is applicable. If responsive records exist and the Public Body disclosed this fact, it would reveal the fact that the named employee was investigated. Past Orders have distinguished situations in which charges of misconduct were made from those in which charges were substantiated. In the latter case, disclosure of the relevant information may not be *unfair* within the terms of section 17(5)(h). In contrast, disclosure of unsubstantiated allegations may unfairly damage the individual's reputation (see Orders 97-002, F2008-009, F2008-020, F2012-18).

[para 25] In this case, revealing that the named individual was investigated could harm their reputation, as it could imply wrongdoing that has not been substantiated. Therefore, I find section 17(5)(h) weighs against disclosure, and that section 17(5)(e) is not relevant.

[para 26] The Applicant has not provided specific arguments regarding the application of section 17. The Applicant has pointed to Bylaw 26M2018, which requires the Mayor to provide budget information and expenses in order for the information to be made publicly available. The Applicant argues that because public money was spent on an investigation (assuming one occurred), the cost and results of that investigation must be made public.

[para 27] Section 17(2)(c) states that disclosure of personal information is not an unreasonable invasion of privacy if an Act of Alberta or Canada authorizes or requires the disclosure. However, a bylaw of the Public Body is not an Act of Alberta or Canada so this provision does not apply.

[para 28] Bylaw 26M2018, cited by the Applicant, establishes a code of conduct for elected officials of the Public Body. Section 29 of that Bylaw states:

29. The Mayor must provide information on budgets and expenses to the Mayor's Chief of Staff in order to permit the Office of the Mayor to make this information publicly available in accordance with the policies and procedures governing that Office.

[para 29] Nothing in this Bylaw requires the Mayor or the Public Body to publish the outcome of any investigation that may have occurred. Even if the Mayor is required to provide information about the expenditure of funds for an investigation, the Mayor is not required to provide sufficient detail of that expenditure so as to name the person investigated.

[para 30] It is possible the Applicant's argument is that the disclosure of the named employee's personal information is desirable to subject the Public Body to scrutiny, under section 17(5)(a).

[para 31] In order for the desirability of public scrutiny to be a relevant factor, there must be evidence that the activities of the public body have been called into question, which necessitates the disclosure of personal information in order to subject the activities

of the public body to public scrutiny. (See Order 97-002, at para. 94; Order F2004-015, at para. 88; Order F2014-16, at para. 34.)

[para 32] In Order F2014-16, the Director of Adjudication discussed appropriate factors to consider in determining whether public scrutiny is desirable. She said (at paras. 35-36):

In determining whether public scrutiny is desirable, I may consider factors such as:

1. whether more than one person has suggested public scrutiny is necessary;
2. whether the applicant's concerns are about the actions of more than one person within the public body; and
3. whether the public body has not previously disclosed sufficient information or investigated the matter in question.

(Order 97-002, paras 94 and 95; Order F2004-015, para 88).

It is not necessary to meet all three of the foregoing criteria in order to establish there is a need for public scrutiny. (See *University of Alberta v. Pylypiuk* (cited above) at para 49.) For example, in Order F2006-030, former Commissioner Work said (at para 23) that the first of these factor “is less significant where the activity that has been called into question, though arising from a specific event and known only to those immediately involved, is such that it would be of concern to a broader community had its attention been brought to the matter”, commenting that “[i]f an allegation of impropriety that has a credible basis were to be made in this case, this reasoning would apply”.

[para 33] The Applicant seems to indicate that it was inappropriate for the Mayor to use public funds to have an employee investigated (if she did). Aside from pointing to the Bylaw, the Applicant has not said why it would not be appropriate for the Mayor or Public Body to spend public money to conduct an employment investigation.

[para 34] I have already found that the Bylaw does not require the disclosure of personal information relating to an employment investigation. Even if the Mayor or Public Body contracted with an external investigator to conduct an investigation as the Applicant believes, I do not have any reason to expect that this is an activity worthy of public scrutiny. Therefore, I find that section 17(5)(a) does not apply.

*Conclusions regarding sections 17(1) and 12(2)(b)*

[para 35] I agree that sections 17(4)(d), (g) and 17(5)(h) weigh against disclosing any personal information that could be revealed by confirming or denying the existence of responsive records. The Applicant has not identified any factors that weigh in favour of disclosure, and none appear to apply.

[para 36] Therefore, I find that confirming or denying the existence of responsive records would be an unreasonable invasion of a third party's personal privacy under section 12(2)(b).

**V. ORDER**

[para 37] I make this Order under section 72 of the FOIP Act.

[para 38] I find that the Public Body properly refused to confirm or deny the existence of a record as authorized by section 12(2) of the Act.

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Amanda Swanek  
Adjudicator