

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2020-34

November 19, 2020

Thorhild County

Case File Number 003874

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Summary: The Applicant made an access to information request to Thorhild County (the Public Body) under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (the Act). In response, the Public Body released 24 pages of records, partially redacting some pages, and fully redacting others, under sections 17(1), 23(1), and 24(1) of the Act. The Applicant sought review of the application of these sections. The Applicant was aware of other e-mails that would have been responsive to the access request, that were not provided by the Public Body, and sought review of whether the Public Body fulfilled its duty to perform an adequate search under section 10(1) of the Act.

The Adjudicator found that the Public Body failed to establish that it performed an adequate search for records as required by section 10(1). The Adjudicator also found that the Public Body improperly redacted some information under section 17(1). During the inquiry, the Public Body decided it was prepared to release all information that was previously withheld under sections 23(1) and 24(1).

The Adjudicator ordered the Public Body to conduct a further search for responsive records and to release to the Applicant information withheld under sections 23(1) and 24(1), and information that was improperly withheld under section 17(1).

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(n), 4(m), 10(1), 17, 23(1), 24(1), 72

Authorities Cited: AB: Orders 97-002, 97-006, 98-007, 2000-030, 2001-008, 2001-013, F2004-008, F2007-029, F2009-026

I. BACKGROUND

[para 1] On June 28, 2016, the Applicant made an access to information request under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (the Act) to Thorhild County (the Public Body).

[para 2] In his submissions, the Applicant states that he was seeking e-mail exchanges between several of the Public Body's officials, concerning a specific issue. However, the Applicant's access request did not mention the issue in which he was interested. The Applicant's access request sought records described as,

E-mails from one Thorhild County councilor to another, with remaining councilors cc'd.

[para 3] The access request specified that the Applicant was seeking such e-mails from the period of July 14, 2015 to August 15, 2015.

[para 4] On July 25, 2016, the Public Body responded to the access request. It provided 19 pages of responsive records to the Applicant. The Public Body identified some responsive records as "personal or constituency records" and excluded them from its response, pursuant to section 4(1)(m) of the Act. The Public Body also redacted some information pursuant to sections 17(1), 23(1), and 24(1) of the Act.

[para 5] The Applicant believed that the Public Body had excessively redacted information, and failed to properly conduct a search for responsive records as required by section 10(1) of the Act. In order to address his concerns, on August 10, 2016, he sought a review of the response to his access request. Mediation and investigation were authorized to resolve these issues. As a result, the Public Body ceased relying on section 4(1)(m) to exclude records, and provided five further pages of records, with redactions, to the Applicant. The Applicant remained unsatisfied, and this matter proceeded to inquiry.

II. RECORDS AT ISSUE

[para 6] The following pages of the responsive records were redacted entirely:

Pages: 11, 21, 22, and 24

[para 7] The following pages of the responsive records were partially redacted:

Pages: 5, 7, 10, 18, 20, and 23

III. ISSUES

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

ISSUE B: Does section 17(1) of the Act (disclosure harmful to personal privacy) apply to the information severed from the record?

ISSUE C: Did the Public Body properly apply section 23(1) of the Act (local public body confidences) to the information in the records?

ISSUE D: 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

Preliminary Matter – Affected Third Party

[para 8] An affected third party under section 67(1)(a)(ii) of the Act was provided notice of this Inquiry. The affected third party did not make a submission.

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

[para 9] 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 10] The two parts of the duty to assist in section 10(1) were set out in Order F2004-008 at para 32:

- Did the Public Body make every reasonable effort to assist the Applicant and to respond to the Applicant openly, accurately and completely, as required by section 10(1) of FOIP?
- Did the Public Body conduct an adequate search for responsive records, and thereby meet its duty to the Applicant, as required by section 10(1) of FOIP?

[para 11] The Applicant believes that the Public Body failed to meet its duty since the records provided to him appear to include e-mails from only two councilors, while the Applicant states that there are five. The Applicant also states that several e-mails that would be responsive to his access request were circulating among members of the public, but were not provided by the Public Body.

[para 12] The burden of proof falls on the Public Body to demonstrate that it met its duty under section 10(1). (See Order 97-006). A public body must provide the Commissioner with sufficient evidence to show that it made a reasonable effort to identify and locate records responsive to the request. (See Order 2000-030). Former Commissioner Work, Q.C. described the points that a public body's evidence should generally cover in Order F2007-029 at para. 66:

In general, evidence as to the adequacy of a 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 13] Despite that the above description of what points evidence in respect of the adequacy of a search should generally cover was included in the Notice of Inquiry sent to both parties, the Public Body did not address them in its submissions. After noting that it had released further records to the Applicant through the review process, the Public Body summarized its position on whether it had met its duty under section 10(1) as follows:

While the staff responsible for conducting the search are no longer with the County, the Applicant provided very specific parameters with respect to the records he was seeking, and all emails during the applicable time period from one County councilor to another in which the other councilors were copied have been identified and disclosed to the Applicant. We assume this is no longer an issue, and there is no basis for concluding the County has failed to meet its duty to assist under section 10(1) of the *Act*.

[para 14] I note that the Public Body tailored its search for records to the "very specific parameters" of the access request, which did not mention the issue about which the Applicant was seeking information. In light of the Applicant's statements that there are e-mails that are responsive to the access request that were not provided by the Public Body, it seems to me that there is a possibility that the parameters of the access request were narrower than the Applicant might have intended. However, the parameters of the request are clear, and as such, the Public Body had no duty under section 10(1) to consult with the Applicant to determine if he was seeking a broader category of records. This point was addressed in Order 2001-013 at para. 21:

Section 9(1) [now section 10(1)] does not require a public body to request clarification of a request when the request is, on its face, very clear. The Applicant's request was very specific. While I encourage public bodies to assist applicants by clarifying requests, I find that in processing the Applicant's request in this manner, the LERB did not contravene section 9(1) of the Act.

[para 15] However, without any evidence of how the Public Body actually conducted its search, I must find that the Public Body has failed to meet the burden of demonstrating that it met its duty under section 10(1). Accordingly, I find that it failed to meet its duty.

ISSUE B: Does section 17(1) of the Act (disclosure harmful to personal privacy) apply to the information severed from the record?

[para 16] 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 17] Section 17(2) defines circumstances where disclosure is not an unreasonable invasion of third party personal privacy under section 17(1). If section 17(2) does not apply, determining whether disclosure is an unreasonable invasion of third party personal privacy involves consideration of presumptions that disclosure is unreasonable under section 17(4), and further relevant circumstances under section 17(5).

[para 18] I also note that section 17(1) only applies to personal information. Information that is not personal information cannot be withheld under it.

[para 19] "Personal Information" is defined in section 1(n) of the 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 20] My findings regarding whether any information redacted under section 17(1) is not personal information are below. Where redacted information is personal information, I discuss applicable considerations under sections 17(2), (4) and (5).

[para 21] The Public Body redacted some information under section 17(1) from pages 10, 20, and 23. It redacted pages 11, 21, 22, 24 in their entirety under section 17(1). Since pages 10 and 11 are related to each other my findings for them appear together, as do my findings for pages 20 through 24, which are also related to each other.

Pages 10 and 11

[para 22] The redaction to these pages begins on the bottom of page 10 and carries over to page 11, which is redacted entirely. The redaction contains two separate parts: 1) the body of an e-mail, beginning on page 10 and carrying over to page 11; and, 2) the header of another e-mail, which appears at the bottom of page 11. The header at the bottom of page 11 contains the name of the author of another e-mail, the date and time it was sent, and the names of the recipients. The body of the e-mail related to the header on the bottom of page 11 appears on page 12, and was disclosed to the Applicant.

[para 23] Under section 1(n) of the Act, personal information is information that is about an identifiable individual. Some of the redacted information on pages 10 and 11 lacks the quality of being about an individual. Included in this category is a boiler-plate disclaimer appearing at the end of the body of the e-mail that begins on page 10 and ends on page 11, as well as the date and time that another e-mail was sent, which appears in the header redacted at the bottom of page 11. Since this information is not personal information, it should not have been redacted under section 17(1).

[para 24] Information identifying a person who carried out an action in a business capacity is not considered personal information, unless it has a personal dimension. See, for example, Order F2009-026 at para. 11. After reviewing the body of the e-mail beginning on page 10 and carrying over to page 11, it is evident that the act of sending the e-mail was done in the author's business capacity with the Public Body. Thus, identifying the author does not disclose any information that has a personal dimension to it. Accordingly, the identity of the author as the one who sent the e-mail is not personal information, and should not have been redacted. Specifically, the name of the author that appears at the end of the e-mail should have been disclosed to the Applicant.

[para 25] The same considerations apply to the header of another e-mail redacted at the bottom of page 11. The body of that e-mail, which appears on page 12, indicates that it

too was sent in a business capacity by the author, and received in a business capacity by the recipients, and that it has no personal dimension; accordingly the author's and recipients' identities are not personal information, and should have been disclosed as well.

[para 26] I discuss personal information redacted from pages 10 and 11, below.

[para 27] While the e-mail beginning on page 10 and carrying over to page 11 was sent in a business capacity, the information redacted from the body of the e-mail contains third party personal information. The redacted body of the e-mail contains the personal views and opinions of the author about several matters, which are the author's personal information under section 1(n)(ix) of the Act. The redacted information further contains the author's personal opinion about whether other individuals are properly performing their duties. Under section 1(n)(viii) of the Act, this information is the personal information of the individuals that are the subject of the author's opinions. Lastly, there is personal information of a named third party that describes a sensitive matter arising in the workplace, which has a personal dimension to it, affecting the named third party.

[para 28] The Public Body applied section 17(4)(f) in respect of the information redacted from pages 10 and 11. That section states,

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

(f) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations,

[para 29] I find that section 17(4)(f) does not apply. While some of the information consists of the author's opinion about third parties, it is not the sort of opinion that constitutes a personal recommendation, evaluation, character reference, or personnel evaluation as those terms have been defined in other decisions. In Order 97-002 at para. 31, the former Commissioner considered that such evaluations involve an assessment made against a particular standard or professional judgement, by someone with the authority to carry out the particular evaluation. Those criteria are not met in this case. Rather, the information is simply one individual's opinion of another.

[para 30] While not referenced by the Respondent, since the name of one third party appears with other personal information about the third party, section 17(4)(g)(i) applies in respect of their personal information. Section 17(4)(g)(i) states,

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

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

[para 31] The Public Body considered section 17(5)(h) as a relevant factor in determining whether personal information must be redacted from pages 10 and 11 in responding to the access request. Section 17(5)(h) states:

(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

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

[para 32] I find that section 17(5)(h) applies. Much of the redacted personal information contains the author's opinion on whether the third parties' actions were proper or improper, or amount to misconduct. There is no evidence before me that the author's conclusions were fairly arrived at, or whether the subject of the opinions have had the chance to address them. Disclosure may unfairly damage the reputations of these third parties.

[para 33] The author's opinions on matters other than other individuals also stands to unfairly damage the reputation of a person referred to in the redacted information. While this information is not an opinion directly about another individual, the opinions reflect back upon those who were involved with the matters at hand. There is no evidence before me that the author's opinions were fairly arrived at, nor whether the individuals involved in the matter have had the chance to address them.

[para 34] I find that there are no other relevant considerations under section 17(5).

[para 35] Accordingly, I find that the presumption against disclosure under section 17(4)(g)(i) has not been rebutted. The Public Body was required to withhold the personal information of the third party named in the e-mail for this reason.

[para 36] For the personal information related to unnamed third parties consisting of the author's opinions about them, and the author's opinion on matters that reflect back upon people involved in them, I find that the consideration in section 17(5)(h) weighs in favour of withholding this information. As there are no other considerations that weigh in favour of disclosing it, I find that the Public Body was required to withhold this information as well.

Pages 20, 21, 22, 23, and 24

[para 37] These pages contain a chain of e-mails. The Public Body takes no position on the application of section 17 to these pages, and states that it will follow any direction provided in this Inquiry with respect to them. In its response to the access request, it did not indicate that it applied any provisions of sections 17(4) or 17(5) to the information.

[para 38] Since section 17(1) provides a mandatory exception to disclosure, I consider the Public Body's application of it despite that it does not take a position on it in this Inquiry. As stated by the former Commissioner in Order 2001-008 at para. 13,

In Order 96-008, I considered the late raising of exceptions that were claimed by the public body in its written submission for the first time. I said that I would consider mandatory

exceptions that were not raised until during the course of the inquiry. As I am responsible for the administration of the Act, I would consider a mandatory exception whether or not the parties raised the exception...

[para 39] The Applicant argues that the information on these pages consists of serious allegations against a third party, concerning conduct toward another third party, and that therefore section 17(2)(b) applies. Section 17(2)(b) states,

(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

(b) there are compelling circumstances affecting anyone's health or safety and written notice of the disclosure is given to the third party,

[para 40] I surmise that the Applicant concluded that these pages contain allegations since the disclosed subject of an e-mail on page 20 is, "Re: Allegations." The Applicant goes further, however, and also describes what he understands the allegations to be. I have not been provided an explanation of how the Applicant reached his conclusions about what the content of these pages is. Since confirming whether what the Applicant apparently believes is contained in these pages may reveal information that the Public Body is required to withhold, I do not comment directly on the Applicant's statements related to the matter.

[para 41] The test for determining whether section 17(2)(b) applies consists of two parts:

- a) There are compelling circumstances affecting anyone's health and safety; and,
- b) There is a causal connection between disclosing the personal information and the compelling circumstances affecting anyone's health and safety. (Order 98-007 at para. 47)

[para 42] After reviewing the information on these pages, I find that section 17(2)(b) does not apply. The Applicant offers no evidence, and the information itself does not indicate, that there is any causal connection between disclosing any personal information and circumstances affecting anyone's health and safety.

[para 43] I now consider whether information was properly redacted from these pages under section 17(1).

[para 44] With the exception of the e-mail addresses and the subject line in the e-mail starting on page 20, and information on page 23 indicating that a message was forwarded, the entirety of these pages was withheld under section 17(1).

[para 45] Some of the information that was withheld is not personal information. It lacks the qualities of being about an identifiable individual. This information consists of the following:

- The boiler-plate disclaimer at the end of the e-mails ending on pages 20 and 22
- The dates and times on which the e-mails were sent

[para 46] I discuss personal information contained in these pages below.

[para 47] While the Public Body has these e-mails, the subject matter of the e-mails is not related to the Public Body's business of carrying out its duties to administer Thorhild County. The matter discussed is a personal one, which any individual could face, regardless of whether or not they are associated with any particular entity. Unlike the e-mail appearing on pages 10 and 11, these e-mails do not appear to have been sent in a business capacity.

[para 48] The bodies of all of the e-mails consist of details about personal situations of their respective authors and recipients; their opinions, thoughts, and feelings about the situation, and how it is being handled; their opinions of other third parties; and some details of the personal lives and actions of other third parties. Since the authors', recipients' and other third parties' names are present, a presumption against disclosure under section 17(4)(g)(i) applies to this information.

[para 49] Page 23 contains names and e-mails addresses of several individuals copied on an e-mail. Since the names are present along with personal information in the form of e-mail addresses, which themselves contain the names of the recipients copied on the e-mail, a presumption against disclosure under section 17(4)(g)(i) applies to this information as well. As noted, these are not business e-mails.

[para 50] Several of the e-mails contain a post-script message that could be used to identify the author. Even if it is not the personal information of the author in its own right, in combination with the subject of the e-mail, "Confidential: Retraction & Appology Request" [sic] (which has already been disclosed), disclosing the post-script message would permit the author to be identified and disclose information about the author. The post-script message is personal information in this regard as well.

[para 51] Neither of the parties argue that any of the enumerated factors in section 17(5) apply. I note that several of the e-mails indicate that they were sent to the Public Body confidentially. As such, section 17(5)(f) applies to them, and weighs in favour of withholding the information. Section 17(5)(f) states,

(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

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

[para 52] I also find that section 17(5)(h) applies. The information suggests actions and motives on the part of several third parties, which, by their nature, may bring these third parties into disrepute, without the opportunity to address them.

[para 53] I find that none of the other enumerated factors in section 17(5) apply.

[para 54] As well under the heading of section 17(5), I consider the Applicant's argument that disclosing the redacted information is in the public interest. The Applicant's contention is that disclosing the information that he believes is in the e-mails will reveal information about how the Public Body handled reports of a particular, serious allegation. I consider that, in some situations, information such as this could be a relevant circumstance under section 17(5). However, upon reviewing the redacted information, I do not agree with the Applicant that disclosing the information is a matter of public interest.

[para 55] It is clear from a review of these pages that significant amounts of the redacted personal information were provided to the Public Body from private individuals. This information is thus already circulating among some members of the public. The remaining information relates to how those involved in the personal matter raised in the e-mails are reacting to it. While I consider that, under some circumstances, it is conceivable that what begins as a personal matter could effect a public body's operations, or the public's trust in the public body to such a degree that the public interest is engaged, there is no evidence that such is the case here.

[para 56] I find that there are no other relevant circumstances under section 17(5) that would weigh in favour of disclosure. Accordingly, I find that the presumption against disclosure under section 17(4)(g)(i) remains operative, and that the Public Body was required to withhold the redacted personal information on pages 20 through 24.

Conclusion on the Application of section 17(1)

[para 57] With the exception of the application of section 17(1) to information that is not personal information, I find that the Public Body correctly withheld information under it.

ISSUE C: Did the Public Body properly apply section 23(1) of the Act (local public body confidences) to the information in the records?

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

[para 58] The Public Body redacted information under sections 23(1) and 24(1) of the Act from pages 5, 7, and 18.

[para 59] In the course of this Inquiry, the Public Body's position on the application of sections 23(1) and 24(1) shifted. It is now prepared to disclose the information previously withheld under them. Accordingly, I do not consider Issues C and D.

V. ORDER

[para 60] I make this Order under section 72 of the Act.

[para 61] I order the Public Body to search for further records that are responsive to the Applicant's access request, as required by section 10(1) of the Act. The Public Body shall provide to the Applicant any further responsive records found, subject to its authority to withhold information under the Act, and to provide the Applicant with a detailed description of its search. The description shall address the points that evidence of an adequate search should generally cover, as set out at para. 12 of this Order.¹

[para 62] I order the Public Body to release the following information to the Applicant:

- The name of the author of the e-mail redacted under section 17(1) from the e-mail that appears on pages 10 and 11. Specifically, the name of the author as it appears in the sign off following the body of the e-mail.
- The boiler-plate disclaimers on pages 11, 20, and 22.
- Information redacted from the header of an e-mail that appears at the bottom of page 11, consisting of the names of the author and recipients, and the date and time that the e-mail was sent.
- The dates and times that e-mails were sent on pages 20 through 24.
- All information redacted under sections 23(1) and 24(1).

[para 63] I order the Public Body to continue to withhold redacted personal information that I have not ordered it to disclose.

[para 64] I order the Public Body to comply with this order within 50 days of receiving it.

[para 65] I order the Public Body to provide written confirmation to me and to the Applicant that it has complied with this order within 50 days of receiving it.

John Gabriele
Adjudicator
/bah

¹ I considered whether ordering the Public Body to provide the Applicant an explanation, describing how it initially determined that it provided all responsive records, would suffice to remedy its failure to establish that it met its duty under section 10(1). Since those responsible for conducting the search are no longer at the Public Body, I considered that it might be quite difficult for the Public Body to provide a satisfactory explanation. In light of that difficulty, a new search for responsive records appears to be the most practical way to see that the Applicant's access rights under the Act are fully realized.