

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ADJUDICATION ORDER #12

January 5, 2021

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

Note: The Office of the Information and Privacy Commissioner has removed the Adjudicator's signature from this unofficial version of the Order.

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

IN THE MATTER OF AN INQUIRY PURSUANT TO THE
Freedom of Information and Protection of Privacy Act, RSA 2000, c F-25
Respecting Order in Council OC 245/2020 – *Re* OIPC File Reference 2019/20-G-002

Between:

PC

Applicant

- and -

THE OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

Respondent

Corrected decision: A corrigendum was issued on January 7, 2021; the corrections have been made to the text and the corrigendum is appended to this Decision.

REASONS FOR DECISION
HONOURABLE MADAM JUSTICE JUNE M ROSS, ADJUDICATOR

Introduction

[1] Mr. C [or Applicant] submitted a formal request for access to information to the Office of the Information and Privacy Commissioner [OIPC or Respondent]. Based on s 29(1) of the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 [FOIPPA], the OIPC refused to disclose the information to Mr. C because the Information and Privacy Commissioner [IPC or Commissioner], as the head of a public body (i.e. the OIPC), determined that the information is already readily available to the public.

[2] Mr. C submitted a written request to review the OIPC's decision by an adjudicator to the Minister of Service Alberta, pursuant to s 77(2) of FOIPPA.

[3] Consequently, I was appointed as Adjudicator in this matter – referenced as: “Adjudication Request OIPC File Reference 2019/20-G-002 – by Order in Council O.C. 245/2020, dated July 29, 2020 for the purposes of section 75(1)(a) and (e) of *FOIPPA*.

[4] I was formally notified of this appointment by email correspondence dated September 18, 2020, and in the circumstances, I extended the period for the completion of the review. Thus, the 90-day period calculation started running from September 18, 2020 to expire on December 17, 2020.

[5] On December 3, 2020, I advised parties that I would be further extending the period for completion of review and delivery of written decision on this matter to January 17, 2021, pursuant to *FOIPPA*, s 69(6).

Background

[6] On August 21, 2019, Mr. C submitted an access request to the OIPC for:

“Electronic copy of the complete OIPC staff directory (including contractors and consultants). Please include names, job titles, phone numbers, email addresses, office location and organizational structure.”

[7] On August 26, 2019, the OIPC informed Mr. C that the public body does not have a staff directory that includes all the information that he requested. The public body stated that it did not believe it would be necessary to create such a record as the information was already in the public record.

[8] The OIPC indicated in its response that the staff directory is within the Government of Alberta website. The address, phone number, email address and web page of the OIPC are provided. The people employed within the OIPC are identified, and for each there is a title, name, phone and fax number, as well as email addresses.

[9] The OIPC advised Mr. C that the publicly available directory is in the form of an organizational structure, which appeared in its annual report provided to Mr. C.

[10] The OIPC explained the status of “independent contractors,” provided their names and functions, as well as the OIPC unit to which they provided service.

[11] Mr. C was not satisfied with the OIPC’s disclosure, which he found incomplete. Consequently, On September 17, 2019, he submitted his request that seeks a review of the OIPC’s decision by an Adjudicator.

[12] At a preliminary meeting held on October 7, 2020, the procedure for this Adjudication was established as follows:

1. Mr. C opted to rely on his letter to the Minister dated September 10, 2019 as his submission on the merits.
2. The IPC will provide a written submission by October 28, 2020 responding to Mr. C’s merits submission.
3. Mr. C will provide a written submission by November 12, 2020 in reply.
4. The IPC will then submit a written rebuttal submission by November 23, 2020.

5. By November 30, 2020, any request for an oral hearing by any parties or the Adjudicator shall be made.

Issues

[13] The issues to be addressed are as follows:

- 1) Is the record or information sought by Mr. C exempt under s 4(1)(d) of *FOIPPA*?
- 2) If not, is the record or information exempt under s 29 of *FOIPPA*?
- 3) If s 29 of *FOIPPA* is not applicable, what is the scope of the Commissioner's duty to assist under s 10 of *FOIPPA* in this case? and
- 4) Should Third Party Notices issue?

Adjudication

Issue 1 – Is the record or information sought by Mr. C exempt under s 4(1)(d) of *FOIPPA*?

[14] Section 4(1)(d) of *FOIPPA* provides:

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:

(d) a record that is created by or for or is in the custody or under the control of an officer of the Legislature *and relates to the exercise of that officer's functions* under an Act of Alberta ... (*emphasis added*).

Applicant

[15] Mr. C says it is unclear how s 4(1)(d) provision is invoked by a request for the OIPC's staff and contractor/consultant directory and associated business contact information. He argues that the information he has requested does not relate to the exercise of the Information and Privacy Commissioner's (IPC's) functions under s 4(1)(d).

[16] The Applicant refers to the decision in *University of Calgary (Re)*, IPC Order F2010-036 at para 38, where the adjudicator found that "the names, titles, and business contact information of employees, consultants, or contractors of third-party businesses is not commercial information or information to which section 16(1)(a) applies."¹ Also, he notes, in *Alberta Insurance Council*

¹ 16(1) The head of a public body must refuse to disclose to an applicant information

(a) that would reveal

(i) trade secrets of a third party, or

(ii) commercial, financial, labour relations, scientific or technical information of a third party,

(b) that is supplied, explicitly or implicitly, in confidence, and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,

(iii) result in undue financial loss or gain to any person or organization, or

(*Re*), Order F2008-031 at para 129, it was held that “the fact that a third party’s personal information is merely business contact information, or of a type normally found on a business card, is a relevant circumstance weighing in favour of disclosure.”

[17] Mr. C submits that the information in scope of his original access request falls under the category of business contact information. Contractors and consultants may not have job titles or offices at the OIPC and, in fact, they do not need to have office locations or job titles at the OIPC. Nevertheless, the Applicant contends that his request “aims to understand who these contractors and consultants are, their business contact information and the type of work they are engaged in for the OIPC by virtue of their roles or positions.”

[18] The Applicant states that the OIPC’s response to his original request was incomplete because it did not include business emails, business phone numbers, and business office locations for the public body’s independent contractors. Mr. C indicates that the information he is requesting should include the following:

Consultant A

- Name of Company
- Business Address
- Business Phone Number
- Business Email Address

[19] In sum, Mr. C submits that although the issue regarding email addresses of OIPC employees is now settled, the issue of business email addresses of contractors and consultants is still outstanding.

Respondent

[20] The OIPC takes the position that Mr. C’s request is subject to the exemption at s 4(1)(d) or, alternatively, the exception at s 29 of *FOIPPA*.

[21] In *Alberta (Information and Privacy Commissioner) v Alberta (Freedom of Information and Protection of Privacy Act Adjudicator)*, 2011 ABCA 36 at paras 39,47, the Court of Appeal held that: (i) s 4(1)(d) should be determined first, as all other issues are moot if that provision applies; and (ii) the purpose of s 4 of *FOIPPA* was to exclude the information referenced therein from the reach of *FOIPPA*. Further, at para 74, the appellate Court indicated that it is important to note that: “not all records created by or for an officer of the legislature are exempt. Records must relate to the exercise of that officer’s function under an act of Alberta to be exempt.”

[22] Pursuant to ss 1(m) and 45(2) of *FOIPPA*, the Commissioner is an Officer of the Legislature. Certain functions of Officers of the Legislature fall within parliamentary privilege,

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- (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.
 - (2) The head of a public body must refuse to disclose to an applicant information about a third party that was collected on a tax return or collected for the purpose of determining tax liability or collecting a tax.
 - (3) Subsections (1) and (2) do not apply if
 - (a) the third party consents to the disclosure,
 - (b) an enactment of Alberta or Canada authorizes or requires the information to be disclosed,
 - (c) the information relates to a non-arm’s length transaction between a public body and another party, or
 - (d) the information is in a record that is in the custody or under the control of the Provincial Archives of Alberta or the archives of a public body and has been in existence for 50 years or more.

which serves to ensure constitutional separation of powers between the Legislature, the executive and the judiciary.

[23] The IPC may engage the services of any persons necessary to assist in carrying out her duties and functions: *FOIPPA*, ss 51(1), 51(2).

[24] Section 51 of *FOIPPA* states:

51(1) There may be a part of the public service of Alberta called the Office of the Information and Privacy Commissioner consisting of the Commissioner and those persons employed pursuant to the Public Service Act *that are necessary to assist the Commissioner in carrying out the Commissioner's duties and functions under this or any other enactment.*

(2) The Commissioner may engage the services of any persons necessary to assist the Commissioner *in carrying out the Commissioner's duties and functions.* (*emphasis added*).

[25] The OIPC submits that people in the category of s 51(2) independent contractors and consultants do not have job titles, or offices at the OIPC, and would not typically appear in an organizational structure, and therefore there is not a record to give of the kind that Mr. C seeks. He has been told that there is no available "OIPC staff directory" that would have that information for contractors and consultants, beyond the information which has been provided to him. Many of the OIPC staff who do not have their direct lines listed are decision-makers.

[26] The OIPC contends that it cannot disclose a record that does not exist. If it existed, what Mr. C asks for (a complete OIPC staff directory including names, job titles, phone numbers, email addresses, office location and organizational structure) would be a record under the control of an Officer of the Legislature that relates to her functions under three different Acts of Alberta and would be captured by the exemption at s 4(1)(d).

Analysis

[27] A statutory provision dealing with hiring of staff is only adjectival in the sense of authorizing the setting up of operational apparatus to facilitate the functioning (i.e. the eventual exercise of powers and performance of duties) of the Commissioner. That legislative provision essentially creates an administrative structure to *assist* the Commissioner. The hiring of staff is a necessary, preliminary step to enable the substantive exercise of the powers and duties specified in s 53 of *FOIPPA*.

[28] Neither the statutory authorization of the OIPC to recruit staff nor the actual recruitment of staff constitutes the exercise of the substantive powers, duties and functions of the Commissioner as an Officer of the Legislature. For instance, it would be fanciful to expect the Commissioner claim or assert parliamentary privilege over her administrative action that engages the recruitment of a staff member. Typically, it will be the role of human resource officers or unit of the public body to facilitate such recruitment.

[29] Section 4 relates to exception of records that are *directly* engaged or involved with the exercise of *substantive* powers conferred on the Commissioner, for instance, as specified under s 53 of *FOIPPA*.

[30] Section 53 of *FOIPPA* lists the *substantive* powers and duties of the Commissioner inclusively:

(1) In addition to the Commissioner's powers and duties under Part 5 with respect to reviews, the Commissioner is generally responsible for monitoring how this Act is administered to ensure that its purposes are achieved, and may

(a) conduct investigations to ensure compliance with any provision of this Act or compliance with rules relating to the destruction of records

[....]

(h) authorize the collection of personal information from sources other than the individual the information is about,

(i) bring to the attention of the head of a public body any failure by the public body to assist applicants under section 10, and

(j) give advice and recommendations of general application to the head of a public body on matters respecting the rights or obligations of a head under this Act.

(2) Without limiting subsection (1), the Commissioner may investigate and attempt to resolve complaints that

(a) a duty imposed by section 10 has not been performed,

(b) an extension of time for responding to a request is not in accordance with section 14,

(c) a fee required under this Act is inappropriate,

(d) a correction of personal information requested under section 36(1) has been refused without justification, and

(e) personal information has been collected, used or disclosed by a public body in contravention of Part 2.

[31] There is presently no evidence in these proceedings to demonstrate that the persons recruited by the Commissioner as independent contractors and consultants – whose information or record is being sought in this matter – belong to the category of staff that are decision-makers performing s 53 type of duties or functions.

[32] It is not in dispute that the type of record that Mr. C seeks is publicly available for s 51(1) category of OIPC staff who are a part of the public service of Alberta. Clearly, given the public availability of that record, it will be unrealistic to say that the Commissioner may seek to assert parliamentary privilege over what is readily available to the public. Similarly, it is most unlikely that the Commissioner would potentially assert parliamentary privilege over identical record of s 51(2) independent contractors and consultants who are recruited to provide services that are necessary to assist the Commissioner perform her duties in the same manner and purpose for which s 51(1) public service staff of the OIPC are employed to assist her.

[33] Further, the OIPC argues that there is no record to produce in response to Mr. C's access request – i.e. the information for contractors and consultants. I do not accept this argument.

[34] By its own admission, the OIPC acknowledges that it has provided some information to Mr. C regarding the names and functions of independent contractors and consultants whose services are engaged by the Privacy Commissioner to assist in carrying out her duties and functions, pursuant to s 51(2): see OIPC Written Submissions, dated November 23, 2020, at pp 3-4.

[35] While the information might not currently exist in the format preferred by the Applicant or in the form that the OIPC's employees covered by s 51(1) is presented on the Government of

Alberta's public website, I strongly believe that fundamentally similar information exists within the Department for independent contractors and consultants.

[36] Consequently, I find that the information or record of the business names, emails, phone numbers, and office locations of the OIPC's independent contractors and consultants exist and are in the custody of the OIPC.

[37] I also conclude that the record sought by the Applicant regarding OIPC's independent contractors and consultants is *not* exempted under s 4(1)(d) of *FOIPPA* because the information as requested is neither directly engaged nor involved with the exercise of the *substantive* powers and functions conferred on the Commissioner as an Officer of the Legislature under the *FOIPPA*.

Issue 2 – Is the record or information exempt under s 29 of *FOIPPA*?

[38] Section 29 of *FOIPPA* states in part:

29(1) The head of a public body may refuse to disclose to an applicant information

(a) that is readily available to the public...

(b) that is to be published or released to the public within 60 days after the applicant's request is received.

Applicant

[39] Mr. C argues that while section 29 may apply to some of the published information, the information regarding the independent contractors and consultants is not readily available to the public.

[40] He says that the OIPC's refusal to provide the requested information on contractors and consultants, based on section 29 of *FOIPPA*, is not valid.

Respondent

[41] The OIPC contends that Mr. C was provided with the names, job titles, office locations, and places in the organizational structure of each of the OIPC staff, a phone number and a general email address for those persons in electronic form. The Public Body notes that it appears his remaining issues relate to the fact that he did not receive individual email addresses, and that the organizational structure provided is not in a form that satisfies him. The OIPC reiterates, if s 4(1)(d) does not apply, Mr. C's access request is subject to the exception under s 29 of *FOIPPA*.

[42] OIPC argues that the information sought by Mr. C is readily available to the public; and as such is governed by s 29 of *FOIPPA*. However, it acknowledges that information on independent contractors and consultants are *not* on the Government of Alberta website at all as the website deals with people who are engaged under the *Public Service Act*, RSA 2000, c P-42. The website is not published by the IPC, it is published by the Government of Alberta.

[43] To the extent that the directory requested by Mr. C does not exist, it does not exist publicly or at all. The IPC cannot provide a document that does not exist.

Analysis

[44] Obviously, both parties fundamentally agree that the information or record requested by Mr. C specifically on contractors and consultants does *not* appear readily available to the public.

[45] Since the information regarding the independent contractors, which Mr. C seeks is *not* “readily available to the public,” it is simply logical to conclude that the information is *not* covered by s 29 of *FOIPPA*.

[46] Section 29 of *FOIPPA* empowers the Commissioner to refuse disclosure *only* in cases where the information sought is readily available to the public.

[47] The relevant question arising from the above finding is whether or not the OIPC has a duty to create the record sought by Mr. C under the provision of s 10 of *FOIPPA*.

[48] The inquiry regarding the OIPC’s duty to create record under s 10 in this case follows.

Issue 3 – What is the scope of the Commissioner’s duty to assist under s 10 of *FOIPPA* in this case?

[49] Section 10 of *FOIPPA* 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.

(2) The head of a public body must create a record for an applicant if

(a) the record can be created from a record that is in electronic form and in the custody or under the control of the public body, using its normal computer hardware and software and technical expertise, and

(b) creating the record would not unreasonably interfere with the operations of the public body.

Applicant

[50] Mr. C submits that the OIPC failed to meet its duty to assist, by failing to name in its initial response, all the provisions it relied on to withhold records (e.g. section 4(1)(d)); nor did the OIPC seek further clarity about the information that Mr. C was looking for in his access request.

[51] He notes that in *Alberta Labour Relations Board (Re)*, 2006 CanLII 80886 at para 124 (AB OIPC) – IPC Order F2004-026, the adjudicator found and concluded that:

[The] Public Body failed in a minor way to meet its duty to assist the Applicant under section 10, by failing to name in its initial response all the provisions it ultimately relied on to withhold records. It also failed in its duty to assist by providing some of the records only long after a point at which their disclosure would have been highly significant to the Applicant. As well, it failed to properly clarify the scope of the Applicant’s request.

Respondent

[52] The OIPC argues that s 10 of *FOIPPA* does not impose any absolute obligations, and only requires “every reasonable effort”: *Edmonton (City) v Alberta (Information and Privacy*

Commissioner), 2016 ABCA 110 at para 37. It notes that the adjudicator in *University of Alberta and University of Calgary (Re)*, 2008 CanLII 88761 at para 90 (AB OIPC) [*U of A & U of C*] said that: “Reasonable” means “fair, proper, just, moderate, suitable under the circumstances; fit and appropriate to the end in view; not immoderate or excessive.”

[53] The Respondent submits that where the amount of time and resources that would be required to create the record requested would unreasonably interfere with the operations of the OIPC, the public body will not be required to create a requested record. In support of this argument, the Respondent cites *U of A & U of C* at paras 90-92:

[para 90] The amount of time and resources that would be required to create the record in question is not as great as in other inquiries where it was found that creating a record would unreasonably interfere with the operations of the public body. However, I must consider what is reasonable in the circumstances of this inquiry....

[para 91] The Applicant may indirectly obtain the actual number of students enrolled in a particular class from the U of A’s website by subtracting the spaces remaining in each class from the maximum enrolment indicated. I believe that the creation of a record that provides the information directly would unreasonably interfere with the U of A’s operations, as the amount of time and effort involved would not be fit and appropriate to the end in view and would be immoderate or excessive under the circumstances.

[para 92] To require registrar staff to spend approximately two days preparing the record is not reasonable when the Applicant can obtain the specific information that she requires in respect of a particular class much more quickly online by making a calculation herself...

[*Emphasis added*]

[54] The Respondent submits that apart from the fact that there is no “missing information,” in the public body’s response to Mr. C, s 10 of *FOIPPA* does not require the OIPC to create a record in the form, format or manner requested by the Applicant.

Analysis

[55] Unlike the case in *U of A & U of C*, Mr. C in the present case cannot indirectly create the requested record from the information that is publicly available on the Government of Alberta website.

[56] In the *Alberta Energy Regulator (Re)*, Order F2019-09 [*AER*], the Adjudicator held:

[para 68] Section 10(2) requires a public body to create a record if that record can be created from another record that is in electronic form using the public body’s normal computer hardware and software, and its expertise. This requirement is subject to the limit in section 10(2)(b) (unreasonable interference with public body operations). The duties imposed by section 10(2) have been described as “electronically manipulating existing data to create a record consisting of only the data the applicant wants or that is organized in a manner the applicant wants” (see Order F2011-R-001, reconsideration of Order F2009-005, at para. 19).

....

[para 73] In this access request, the Applicant requested the records in “electronic searchable format (similar to that which the Alberta Government provides on their public website).” ...

....

[para 77] Given the Public Body’s statement that it processes records in pdf format, it seems quite likely that the Public Body can create the record as requested by the Applicant. Indeed, if the Public Body usually provides records in pdf format in response to an access request, then the Public Body’s usual practice seems to satisfy the Applicant’s request.

....

[para 79] As I have found that the Public Body cannot withhold the responsive records in their entirety, I will order the Public Body to provide responsive records to the Applicant. *I find that section 10(2) requires the Public Body to provide the Applicant with the records in searchable, machine readable format, as requested by the Applicant.*

[*Emphasis added*]

[57] I endorse the Adjudicator’s approach in *AER*.

[58] There is a strong case for the inference that the OIPC would not have engaged the services of independent contractors or consultants whose personal information are unknown to it as a public body. That presumption, as I stated earlier, leads to a reasonable conclusion that the information regarding these independent contractors and consultants engaged by the OIPC exists somewhere in the public body’s computer hardware and/or software and can be easily created from that source.

[59] It is also significant that the OIPC neither argued nor provided any evidence that creation of the record requested by Mr. C would take unreasonable amount of time and resources of the OIPC’s operations.

[60] Given that a section of the OIPC workforce includes independent contractors and the information of OIPC staff that is publicly available does not include this category of staff, I conclude that s 10 of the *FOIPPA* imposes a duty on the Commissioner to make the information on the independent contractors and consultants available to Mr. C.

Issue 4 – Should Third Party Notices issue?

Applicant

[61] The Applicant takes no specific position on the issue of third party notices.

Respondent

[62] The OIPC submits that it is only if ss 4(1)(d) and 29 are found not to apply that third party notices under s 17 of *FOIPPA* must be addressed.

[63] Third parties have a statutory right to “third party notices,” and provide input when any of their personal information may be released.

[64] The information that Mr. C seeks relating to business address and telephone numbers is *prima facie* “personal information.” Every individual whose information is sought would be due third party notices regarding the release of their personal information. That ensures that the protections within *FOIPPA* are properly afforded.

[65] The OIPC posits that if there is a *prima facie* case for the disclosure of third party information, then third party notices will have to be issued. Once third parties provide input, they may become part of a further review and adjudication. Section 1(n)(i) of *FOIPPA* provides that personal information includes an identifiable individual’s business address and business telephone number.

[66] Section 80(b)(i) and (c)(iii) of *FOIPPA* states that on receiving a request for a review, the Minister must as soon as practicable give a copy of the request “to any other person who in the opinion of the Minister is affected by the request” and provide a summary of the review procedures to that person.

Analysis

[67] On the basis that the information requested by Mr. C is personal information, as defined by s 1(n)(i) of *FOIPPA*, it is necessary to hear from the people whose information may be disclosed, because it is inappropriate to make a decision regarding their personal information without doing so (s 17 of *FOIPPA*). That section deals with “disclosure harmful to personal privacy,” and is premised on the direction that 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”: s 17(1).

[68] There is a *prima facie* case for the disclosure of third party information in this matter.

[69] I agree with the Respondent that the determination of the question regarding the nature of involvement of these third parties and the associated process to follow in order to realize this objective is properly conducted at first instance by the OIPC.

[70] Accordingly, the OIPC is directed as a public body to inform the affected third parties of the request for their information, in order for them to be heard.

Disposition

[71] Pursuant to ss 81(2) of *FOIPPA*, I remit the issue of third party notices and related process to the OIPC for determination in accordance with my findings and conclusion in this Adjudication.

Heard on the 7th day of October, 2020.

Written Submissions provided on October 28, 2020, November 12, 2020, and November 23, 2020.

Dated at Alberta this 5th day of January, 2021.

Honourable Madam Justice June M Ross
Adjudicator

Appearances:

PC

Self-Represented Applicant

Glenn Solomon, QC

Jensen Shawa Solomon Duguid Hawkes LLP
for the Respondent

**Corrigendum of the Reasons for Decision
of
The Honourable Madam. Justice J M Ross**

Corrections were made to paras 42, 43 and 64 to the name of the Applicant.