

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2018-08

February 9, 2018

ALBERTA JUSTICE AND SOLICITOR GENERAL

Case File Number 000909

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request to Alberta Justice and Solicitor General (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) in order to obtain records containing information that would assist her to understand the circumstances of her sister's death. The Applicant requested:

Records for [sister's name] – April 2013 – March 2015

1. Guardian complaint – April 2013
2. Trustee complaint – Sept 2014
3. Details of death of [sister's name] – completed by OPG [Office of the Public Guardian] – Feb/March 2015
4. Details of death of [sister's name] – completed by SKILLS Society submitted to the OPG, Feb / March 2015

The Public Body provided records, but severed the name of its employees, the name of an apartment building, and the personal information of the Applicant's sister from the records. The Public Body subsequently reconsidered its decision and provided some of the names of its employees, and also provided information about the Applicant's sister. However, it continued to sever the name of the sister from the records.

The Adjudicator determined that the information about employees in the records was information about the employees acting in a representative capacity. She found that this information was not personal information as it lacked a personal dimension. The Adjudicator also determined that the name of an apartment building was not personal

information. The Adjudicator concluded that the name of the Applicant's sister was personal information and subject to a presumption that it would be an unreasonable invasion of personal privacy if the name were disclosed. The Adjudicator considered that the presumption was rebutted on the basis that disclosure would serve the compassionate purpose of enabling the Applicant to understand the circumstances of her sister's death. In addition, given that the Applicant's sister's name was inferable from the records, despite the severing, the Public Body's severing did not serve the purpose of section 17(1) and it would be inconsistent with the purpose of the FOIP Act to uphold severing of this kind.

The Adjudicator ordered disclosure of the records.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 17, 40, 72, 84

Authorities Cited: AB: Orders F2011-001, F2012-24, F2013-51, F2016-20

I. BACKGROUND

[para 1] The Applicant's sister, who received supports from the SKILLS society (the Society), died on February 14, 2015 while on a trip to the Valley Zoo with caregivers from the society. The Applicant, who was her sister's guardian and trustee, made an access request to Alberta Justice and Solicitor General (the Public Body) in order to obtain records containing information that will assist her to understand the circumstances of her sister's death. The Applicant requested:

Records for [sister's name] – April 2013 – March 2015

1. Guardian complaint – April 2013
2. Trustee complaint – Sept 14
3. Details of death of [sister's name] – completed by OPG [Office of the Public Guardian] – Feb/March 2015
4. Details of death of [sister's name] – completed by SKILLS Society submitted to the OPG, Feb / March 2015

[para 2] The Public Body responded to the Applicant on April 17, 2015. It provided some information, but severed information under section 17. It stated in its response:

You should note that under *the Act*, privacy rights do not end upon the death of the individual and, under section 17(2)(i), the personal information of a deceased person is protected for 25 years following death.

II. INFORMATION AT ISSUE

[para 3] The information the Public Body has withheld from the Applicant is at issue.

III. ISSUE

Issue A: Does section 17(1) of the Act (disclosure harmful to personal privacy) apply to the information severed from the records?

[para 4] The Public Body has severed information about employees of the Society, the Applicant's sister, and another member of the Applicant's family from the records under section 17(1). As section 17(1) applies only to personal information, I first turn to the question of whether the information severed by the Public Body is personal information under the FOIP Act.

[para 5] Section 1(n) defines personal information under the Act:

I 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;*

Personal information under the FOIP Act is information about an identifiable individual that is recorded in some form.

[para 6] Section 17 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.

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

[...]

(i) the personal information is about an individual who has been dead for 25 years or more...

[...]

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

(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation[...]

[...]

(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 7] 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 under section 17(1). Section 17(2) establishes that disclosing certain kinds of personal information is not an unreasonable invasion of personal privacy.

[para 8] When the specific types of personal information set out in section 17(4) are involved, disclosure is 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. It is important to note that section 17(5) is not an exhaustive list and any applicable relevant circumstances must be considered when making the decision as to whether it would be an unreasonable invasion of personal privacy to disclose the requested personal information. Section 17(1) requires the head of a public body to withhold personal information when the head concludes, after consideration of the factors under section 17(5), that disclosing the personal information would be harmful to the personal privacy of a third party.

[para 9] Section 17 is restricted in its application to "personal information". If information is not personal information, it may not be withheld under the authority of this provision. As noted above, the Public Body has severed information about the Applicant's deceased sister and the name of a family member. It has decided that it will not withhold the names of employees of the Society where they appear in the account of the events that took place on February 14, 2015 because "of the age of this file and the fact that all outstanding investigations are now complete". However, it continued to withhold the names of employees where they appeared in other records. I will therefore address the question of whether the information about employees appearing in the records

is personal information within the terms of section 17. The Public Body also withheld the name of an apartment building at which an employee of the society completed a shift. I will also address the question of whether this information is personal information.

Is information about a deceased individual personal information under the FOIP Act?

[para 10] Section 1(n) does not expressly include deceased individuals. However, section 84(1)(a) of the FOIP Act states:

84(1) Any right or power conferred on an individual by this Act may be exercised

(a) if the individual is deceased, by the individual's personal representative if the exercise of the right or power relates to the administration of the individual's estate [...]

Section 84 of the FOIP indicates that the term “individual”, when used in the FOIP Act, includes a deceased person. Moreover, the fact that a deceased individual's personal representative may exercise rights or powers under the FOIP Act relating to the administration of an estate, indicates that a deceased individual may have rights or powers under the FOIP Act. However, any such rights and powers cannot be exercised unless the exercise relates to the administration of an estate.

[para 11] In my view, section 84 establishes that deceased individuals are individuals under the FOIP Act and that information about a deceased individual is therefore personal information under section 1(n).

Is the information about the family member personal information?

[para 12] The information about the Applicant's family member includes her name and her place of residence. As a result, the information is personal information within the terms of section 1(n)(i) of the FOIP Act.

Is the information about employees of the Society severed from the records personal information?

[para 13] Not all information referring to an individual is necessarily personal information. Information associated with an individual in a professional, official or representative capacity may not be “about” the individual, but about the public body or organization employing the individual. Information about the actions of an employee performing work duties, may not be about the employee as an individual, unless the information has personal consequences for the employee, or there is something else about the information that gives the information a personal dimension. In Order F2013-51, the Director of Adjudication considered the question of whether information relating to an individual's work duties was personal information and said:

In Order F2011-014, the Adjudicator concluded that the name and signature of a

Commissioner for Oaths acting in that capacity was not personal information, as it was not information about the Commissioner for Oaths acting in her personal capacity. She said:

Personal information under the FOIP Act is information about an identifiable individual that is recorded in some form.

However, individuals do not always act on their own behalf. Sometimes individuals may act on behalf of others, as an employee does when carrying out work duties for an employer. In other cases, an individual may hold a statutory office, and the actions of the individual may fulfill the functions of that statutory office. In such circumstances, information generated in performance of these roles may not necessarily be about the individual who performs them, but about the public body for whom the individual acts, or about the fulfillment of a statutory function.

I find that the names and other information about employees of the Public Body and the University of Calgary acting in the course of their duties, as representatives of their employers, cannot be withheld as personal information, unless the information is at the same time that of an individual acting in the individual's personal capacity.

The question I must address is whether the information about employees, where such appears in the records, has a personal dimension, or whether it is solely about them acting in a representative capacity.

[para 14] I am unable to identify any information in the records that can be said to be about the employees of the society acting in anything other than a representative capacity. For example, on the record entitled "Complaint Respecting a Co-Decision Maker, Guardian or Trustee", the individual who made the complaint indicates that the complaint is being made in her role as an employee of the society, and that her complaint is made as a result of information gathered in the course of her employment.

[para 15] Although the Public Body has now released the employee information due to the age of the file and "the fact that all outstanding investigations are now complete", these are not considerations that are relevant to the question of whether the information in question is personal information. If it were the case that the information was gathered in the course of an employment or other investigation regarding an employee, and the information revealed the investigation and its nature, then the information would have a personal dimension and be the personal information of the employee, regardless of whether the file was old or the investigation had been concluded. However, there is no indication anywhere on the file that the employees referenced in it were the subject of an investigation, or were doing anything other than carrying out their duties to their employer, the Society. At the time the Public Body originally decided to withhold the information from the Applicant, it did not address the question of whether the employees were acting in a representative capacity or whether the information had a personal dimension. As a result, it needlessly withheld information from the Applicant to which she was entitled.

Is the name of the apartment building personal information?

[para 16] The Public Body has severed the name of an apartment building from the records. The records note that an employee of the Society had completed a shift at this apartment building. There is no indication as to the name of a client or clients for whom the employee was providing support, if any, or the unit number at which the employee provided support.

[para 17] Possibly, the Public Body is concerned that the Applicant, or someone else, could learn where the employee works. However, if that it is its concern, I am unable to say that releasing the apartment name could have this effect. There is no indication that the employee regularly attends the apartment building, or, as noted above, where in the building the employee attended. All that can be determined from the information in the records is that on one occasion, an employee provided services on behalf of the Society at a particular apartment building.

[para 18] This information is not personal information, as it conveys nothing about an identifiable individual.

Section 17(4)

[para 19] As noted above, section 17(4) creates a presumption that it would be an unreasonable invasion of personal privacy to disclose information falling within its terms. The information in the records about the Applicant's sister consists of her name in the context of other personal information about her within the terms of section 17(4)(g) (reproduced above). As a result, the information in the records about the Applicant's sister is subject to the presumption set out in section 17(4). I turn now to the question of whether this presumption is rebutted in relation to the name of the Applicant's sister and another family member mentioned in the records.

Section 17(5)

[para 20] Section 17(5) does not create an exhaustive list of circumstances to be considered. Rather, it contains examples of relevant circumstances. If a circumstance is relevant to the decision to be made under section 17(5), it must be considered, even if the circumstance is not enumerated in the statute.

[para 21] In F2012-24, the Director of Adjudication, citing order F2011-001, stated that section 17(2)(i) should not be interpreted as establishing that it is an unreasonable invasion of personal privacy to disclose the personal information of a deceased individual if the individual has not been dead for twenty-five years. She said:

In Order F2011-001 the Adjudicator said:

The Public Body notes that the Complainant's mother died in 1996. As she has not been dead for twenty-five years, the Public Body correctly points out that section 17(2)(i) does not apply to personal information about her. If section 17(2)(i) applied, it

would not be an unreasonable invasion of personal privacy to disclose the personal information and it would be unnecessary to weigh competing interests under section 17(5). However, the converse is not true: it does not follow from the fact that section 17(2)(i) does not apply that disclosure is an unreasonable invasion of personal privacy.

In other words, section 17(2)(i) does not operate ‘in reverse’, and the fact that an individual has not been dead for twenty-five years does not mean that it would necessarily be an unreasonable invasion of the individual’s personal privacy to disclose information about the individual.

[para 22] In the foregoing order, the Director of Adjudication also found that if disclosing the personal information of a deceased individual may assist a grieving family member to understand the circumstances of the individual’s death and to come to terms with it, that this is a relevant consideration and weighs strongly in favor of disclosure to the family member. She said:

I turn to the factors which I regard as important that the Public Body did not consider. The first of these relates to the particular circumstances of this access request – that it involves parents of a young adult daughter, with whom they were in regular contact, who died in circumstances such that they have not been able to be satisfied as to the cause of her death. It is entirely understandable, from the standpoint of compassion, that any information that could give them insight into her death would help them to deal with it. Again, the Applicants do not make this point expressly. However, the attachments to their submission make it clear that the information they already have has not provided them with a satisfactory explanation, and that they seek the entire police file in the hope that this will enlighten them about how and why she died beyond the information they have already been given.

I acknowledge the principle that an access requestor’s motives are not relevant in the sense that they do not generally have to explain or justify their reasons for seeking information. However, that is not to say that motives cannot be relied on to support a request. For example, section 17 permits the consideration of whether a requestor needs the information to determine their rights. In my view, the reasons why the Applicants are seeking information in this case – to try to understand what happened to their daughter when they have been unable to find any clear explanation – is a relevant circumstance in this case. In saying this, I am not saying that the records contain that explanation; nevertheless, whether they do or do not is information that would also be of significant use to them in these circumstances.

The Director of Adjudication considered that it is a relevant circumstance under section 17(5) if disclosing the requested information could assist a family member to understand what happened to a deceased family member. She also determined that this factor was not limited to the information the deceased individual might have chosen to disclose in the individual’s lifetime, but extended to all information that would assist family members to understand what had happened. She said:

I believe that the same compassionate element can be considered as a relevant factor under section 17(5) on an access request, despite the fact that it is not expressly enumerated therein. (The enumeration in section 40 can be understood as a reminder to public bodies that they have the ability to make such a disclosure regardless of an access request. I am reinforced in this view by the fact the provision is redundant in any event since public bodies may make such a disclosure regardless of familial relationships under section 40(1)(b) regardless of the familial status of the applicant.) Further, as a relevant factor under section 17(5), the consideration of compassion is not meant merely to serve in substitution for what the deceased person may themselves have disclosed; rather, it weighs in favour of giving as much information as possible to help meet the needs of families in the manner described in the Ontario decision. As well, it

can be a consideration not only relative to the information of a deceased person, but also relative to the personal information of other third parties that in some way relates to the deceased.

I note that the Public Body says it considered as a factor in its exercise of discretion under section 17(5) that the Applicants did not appear to have any “pressing need for any third party personal information”, but I do not know how it reached this conclusion. If the personal information of a third party can help inform the next of kin of the circumstances surrounding the death of a family member, and can help to make that death understandable, the family quite possibly does have a “pressing need” for it. Further, as discussed in Order MO-2404, a deceased’s family is likely in a better position to decide what information will be helpful to it than is a public body, even if the information is or includes that of a third party.

[para 23] The Applicant has asked for records regarding her sister to assist her to understand what happened to her, with the hope that this will bring closure. In my view, the rationale in Order F2012-24 is on point. I find that disclosing the personal information the Applicant has requested to her will assist her to understand the circumstances of her sister’s death. This finding applies equally to the complaint and to the account of the events taking place on February 14, 2015.

[para 24] In saying this, I note that the Public Body states in its submissions:

The Applicant is requesting information related to the death of her sister. The Public Body acknowledges that the Applicant is the Trustee, a family member and at one point in her sister’s life, the alternate guardian. The records contain personal information about the Applicant’s sister and the circumstance in which she died. The Public Body has released the non-identifying information without revealing the actual name of the deceased.

The Public weighed the personal privacy rights of the deceased and the rights of the family under compassionate grounds. The Public Body also considered 17(5)(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny.

All of the details surrounding the death of the Applicant’s sister have now been released. Any remaining personal information surrounding her death would reveal the individuals’ name in the records. If this information were to be found in the wrong hands, it would be an unreasonable invasion of their personal privacy.

Given the above, the Public Body submits that it established that the records contain personal information of a third party and maintains that the third party information was properly withheld from disclosure in accordance with section 17.

[para 25] The Public Body has severed the name of the Applicant’s sister from the records, although it has provided information where it can be inferred that the subject of the information is the Applicant’s sister. However, the Applicant could not state confidently that the information is about her sister, given that the Public Body has, in places, severed the information of its employees. In my view, the compassionate principle applies equally to the name of the Applicant’s sister, as it does to the other information about her.

[para 26] Another factor that may be considered under section 17(5) is whether severing personal information would result in absurdity. In Order F2016-20, I said:

In Order MO-3052, an adjudicator with the Ontario Office of the Information and Privacy Commissioner described the “absurd result principle” as a factor that may be relevant when determining whether it would be an unreasonable invasion of personal privacy to disclose personal information to an applicant. The adjudicator stated:

[...] According to the absurd result principle, whether or not the factors or circumstances in section 14(2) or the presumptions in section 14(3) apply, where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 14(1), because to find otherwise would be absurd and inconsistent with the purpose of the exemption.

One of the grounds upon which the absurd result principle has been applied in previous orders is where the information is clearly within the requester's knowledge.

In Ontario Order MO-3025-I, this principle was found to be relevant and to weigh in favour of disclosing personal information. In that case, the Adjudicator said:

In my view, however, the absurd result principle is relevant in the circumstances of this appeal. Although the appellant did not specifically address this point during my inquiry into the appeal, the circumstances raise the possible application of the "absurd result" principle. According to the absurd result principle, whether or not the factors or circumstances in section 14(2) or the presumptions in section 14(3) apply, where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 14(1), because to find otherwise would be absurd and inconsistent with the purpose of the exemption. One of the grounds upon which the absurd result principle has been applied in previous orders is where the information is clearly within the requester's knowledge.

PO-2489, para 41; PO-2751, para 52; MO-1329, para 36; PO-2380, para. 111 are also examples of orders applying this principle.

In the case before me, the newspaper article which the Applicant submitted with his access request contains the name of the EPS member, the substance of the complaint giving rise to the disciplinary hearing, the evidence heard by the presiding officer, and the EPS member's submissions for the hearing.

The Public Body has severed the name of an EPS member from information in the public realm to which the name of the EPS member is permanently linked. By responding to the Applicant's access request, the Public Body confirmed the identity of the EPS member. Moreover, the identity of the EPS member and the subject matter of the disciplinary hearing itself had already been made public in 2007. I take notice that the Edmonton Journal article in which the information heard in the hearing was disseminated continues to exist online. As a result, the Public Body's severing of the personally identifying information of the EPS member from the record serves no purpose. When severing serves no purpose, doing so undermines the principle purpose of access legislation, by which an applicant is entitled to access, unless the public interest is better served by withholding the information.

In the foregoing case, I found that when severing serves no purpose, it undermines the principle purpose of access to information. I also found that severing of this kind engages the absurd result principle, which weighs strongly in favor of disclosure when it applies.

[para 27] The Applicant knows her sister's name, and the name of the other family member that appears in the records, and can draw accurate inferences as to the identity of the third party whose name was severed from the records in most cases. In essence, the

severing that was done in this case serves no purpose and is primarily an inconvenience to the reader. I find that the absurd result principle applies to the Applicant's sister's name and that of the family member where it appears in the records.

[para 28] I note that the Public Body also argues that section 17(5)(h) applies and weighs against disclosure. Section 17(5)(h), cited above, applies when disclosure of information may unfairly damage the reputation of any person referred to in the record. The Public Body argues that disclosing the personal information in the records could harm the reputation of "the complainant" and the "assisted individual", although it does not explain the nature of the damage, or explain why it believes the reputation of these parties could be damaged unfairly.

[para 29] I have already found that the "complainant" in this case was an employee acting in a representative capacity. As a result, section 17(5)(h) cannot apply to that information. In addition, if I am wrong in my conclusion that the information about the employee is not personal information, I am unable to say that disclosure of the records could harm the reputation of the employee in any way. In addition, I am unable to say that disclosure of the records could damage the reputation of the Applicant's sister.

[para 30] Finally, I note that the Public Body argues that the information, if disclosed, could get into "the wrong hands". It is unclear to me from the Public Body's submissions how it envisions this would happen, or what it imagines could be done with the information if it did indeed end up in the wrong hands. The information at issue consists of the name of an employee, the name of the Applicant's sister, a family member, and the name of an apartment building. On the evidence before me, I am unable to say that disclosure of this information could result in any damage to these parties if the records at issue were subsequently disclosed by the Applicant.

[para 31] To conclude, I find that disclosing the information in the records would serve the compassionate purpose of assisting the Applicant to understand the circumstances surrounding her sister's death and that this factor weighs strongly in favor of disclosure. Moreover, I find that it would result in absurdity to withhold the Applicant's sister's name from the records, as the name is inferable in most instances, where it appears in the records. I find that this factor too weighs strongly in favor of disclosure. I conclude that the factors weighing in favor of disclosure outweigh the reasons against disclosing the personal information of the Applicant's sister. I find that the Public Body is not required by section 17(1) to sever the Applicant's sister's information or that of the family member from the records.

IV. ORDER

[para 32] I make this order under section 72 of the Act.

[para 33] I order the Public Body to give the Applicant access to the records she requested in their entirety.

[para 34] I order the Public Body to notify me in writing, within 50 days of being given a copy of this order that it has complied with it.

Teresa Cunningham
Adjudicator