

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2018-07

February 9, 2018

CITY OF EDMONTON

Case File Number 000908

Office URL: www.oipc.ab.ca

Summary: The Applicant's sister died suddenly while on a day trip with her caregivers. Representatives of the fire department came to the scene to supply emergency medical services. The Applicant sought information regarding the circumstances of her sister's death from the City of Edmonton (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act). In particular, on March 16, 2015, the Applicant made an access request to the Public Body. She requested a copy of a fire captain's report regarding the incident:

The Public Body provided a copy of the requested report, but severed the cell phone number of a person who had called 911 under section 17(1) (disclosure harmful to personal privacy).

The Adjudicator found that she had insufficient information before her to determine that the cell phone number was personal information. She noted that section 17(1) can only be applied to information that is or is likely to be personal information. The Adjudicator ordered the Public Body to reconsider its decision to withhold the cell phone number under section 17(1), by taking into account evidence that would enable it to determine whether the cell phone number was personal information or not.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 6, 17, 71, 72

I. BACKGROUND

[para 1] The Applicant's sister died suddenly while on a trip to the Valley Zoo with her caregivers. Representatives of the fire department came to the scene to supply emergency medical services. The Applicant sought information regarding the circumstances of her sister's death. In particular, on March 16, 2015, the Applicant made an access request to the Public Body. She requested:

[Fire Station's Captain's] Report [...]
Any DATS documentation showing a pickup of any kind or, service for a scheduled pickup from the zoo.

[para 2] She specified that the relevant date for the requested records was Saturday, February 14, 2015.

[para 3] The Public Body responded to the access request on March 26, 2015. The Public Body provided the report the Applicant had requested, but severed from the report the cell phone number of a person who had contacted 911 regarding the Applicant's sister. The reason provided for severing the information was section 17 (disclosure harmful to personal privacy). The Public Body stated that it was unable to locate any records containing the requested information regarding DATS. The Public Body referred the Applicant to Alberta Health Services to obtain a copy of the 911 call as Alberta Health Services had custody and control of that information.

[para 4] The Applicant requested review by the Commissioner of the Public Body's decision to sever the cell phone number from the report.

II. INFORMATION AT ISSUE

[para 5] The cell phone number with which a caller contacted 911 is at issue.

III. ISSUE

Issue A: Does section 17 (disclosure harmful to personal privacy) of the FOIP Act require the Public Body to withhold the telephone number in the records from the Applicant?

[para 6] Section 17 sets out the circumstances in which a public body may or must not disclose the personal information of a third party in response to an access request. It states, in part:

17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

[...]

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

[...]

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

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

(ii) the disclosure of the name itself would reveal personal information about the third party[...]

(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,

(b) the disclosure is likely to promote public health and safety or the protection of the environment,

(c) the personal information is relevant to a fair determination of the applicant's rights,

(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,

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

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

(g) the personal information is likely to be inaccurate or unreliable,

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

(i) the personal information was originally provided by the applicant.

[para 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) (not reproduced) 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). Section 17(5) is not an exhaustive list and any other relevant circumstances must be considered.

[para 9] Section 17(1) requires a public body to withhold information once all relevant interests in disclosing and withholding information have been weighed under section 17(5) and, having engaged in this process, the head of the public body concludes that it would be an unreasonable invasion of the personal privacy of a third party to disclose his or her personal information.

[para 10] Once the decision is made that a presumption set out in section 17(4) applies to information, it is necessary to consider all relevant factors under section 17(5) to determine whether it would, or would not, be an unreasonable invasion of a third party's personal privacy to disclose the information.

[para 11] However, it is important to note that section 17(1) is restricted in its application to personal information. Before a public body may apply section 17(1), it must first determine whether the information in question is personal information or that it is likely to be so. In this case, I must consider whether the cell phone number severed from the records is likely to be personal information.

[para 12] Section 1(n) of the FOIP Act defines "personal information". It states:

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;

[para 13] The Applicant argues in her reply submissions:

Releasing the cell telephone number is NOT an unreasonable invasion of privacy as this person was the fill-in caregiver who was to care for [the Applicant's sister], the individual who willingly made the 911 call and is the only living link to first hand details of what transpired in the hours prior to and up to the actual tragedy.

[para 14] The Public Body argues:

The issue in this inquiry is whether or not the Act requires the Public Body to refuse to release the telephone number of the caller. This requirement arises from section 17 of the Act, which imposes a mandatory obligation on the head of the public body to "refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy" (Act, s 17(1)). To determine if this section was correctly applied by the Public Body, it is necessary to determine:

- a) is the caller's telephone number personal information; and
- b) would the disclosure of the telephone number be an unreasonable invasion of the third party's personal privacy [...]

"Personal information" is defined in the Act as follows [excerpt]:

1(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, [...]

The redacted information requested by the Applicant throughout this inquiry is the telephone number, presumably a cellular number, of the individual that called 911 on the date of the incident. The Public Body submits that this type of information fits squarely within the statutory definition of personal information for the purposes of the Act, and that the Public Body has therefore discharged its onus to establish that section 17 applies.

[para 15] The Applicant would like to obtain the cell phone number of the person who contacted 911. Although she does not expressly state that her purpose in obtaining the cell phone number is to contact the caller, it would appear necessary that she contact the caller using the number in order to obtain the information she is seeking.

[para 16] The Public Body states that the first question to answer in this inquiry is whether the cell phone number is personal information. I agree with this approach. However, it is unclear, on the evidence, whether the cell phone number belongs to, or is associated with an identifiable individual. This is because the identity of the caller is not documented in the records. While the records indicate that particular cell phone number was used to contact 911, it is unknown whether the cell phone number belonged to an identifiable individual or to an organization or public agency. If the cell phone number belonged to an identifiable individual, it is also unknown whether the cell phone number is in service. If the cell phone number belonged to an organization or public entity, it is unknown whether the individual who called 911 also used the phone for personal purposes, with the result that the cell phone number might have a personal dimension and be personal information, or whether the cell phone was used by an employee or employees only as representatives of an organization or public entity, in which case the cell phone number would not be the personal information of an identifiable individual.

[para 17] In her reply submissions, the Applicant argues that the 911 call was made by her sister's "fill-in caregiver". While she did not submit evidence for the inquiry to support this assertion, I am aware, in my capacity as the adjudicator assigned to conduct related inquiries 000909 (Alberta Justice and Solicitor General) and 001188 (Alberta Health Services) and having reviewed the records in those cases, that a caregiver from the Skills Society, acting in her official capacity, was the 911 caller. Further, I am aware from the information in file 000909 that a caregiver who was present when the 911 call was made asked that her cell phone number be provided to the Applicant so that she could speak to the Applicant regarding what had happened. The Applicant contacted her. However, I do not know whether the cell phone number that appears in the records at issue in this inquiry is the same cell phone number that the records in file 0000909 indicate was provided to the Applicant.

[para 18] There is no presumption or rule that a cell phone number is personal information. A cell phone number will be personal information if it is associated with an identifiable individual acting in a private capacity. For example, I note that in Order PO-3016, a decision of the office of the Information and Privacy Commissioner of Ontario, the Adjudicator held:

In my view, portions of the emails sent by police and the investigation notes (Records 1c, 1f and 3) do not constitute the "personal information" of any identifiable individual. I note that the police emails contain one of the officer's work cell phone number and describe the actions the police took upon arrival on the scene. I also note that portions of the investigation notes capture the investigator's efforts to schedule meetings and obtain evidence from individuals acting in their professional capacities. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225].

The ministry takes the position that the incident report and audio statement (Records 7 and 8) contain the personal information of the appellant's partner. I note that the information contained in these records were gathered in the course of the appellant's partner's professional duties and do not include information about her which is personal in nature. In my view, the information contained in the records which relate to the appellant and the patient which were provided by the appellant's partner, police, ministry EMS staff or dispatch constitutes the personal information of the appellant and the patient only. These individuals did not provide the information at issue in their personal capacities.

I will order the ministry to disclose certain portions of Records 1c, 1f and 3 because they do not contain the "personal information" of any identifiable individual and thus personal privacy provisions in the *Act* cannot apply to this information [...]

[para 19] This office has adopted a similar position. In Order F2013-51, the Director of Adjudication reviewed cases of this office addressing when referring to an individual is personal information and when it is not. She said:

From the severing conducted by the Public Body, it appears that it may have relied on section 17 to withhold information about its employees or those of University of Calgary employees acting in the course of their duties. For example, the Public Body withheld records such as the University of Calgary's representative's first name and the business phone and fax number at which she could be contacted, contained in records 3-1, 3-2, and 3-3.

As well, the Public Body has severed information, partly in reliance on section 17, that may be properly characterized as 'work product'. For example, it has severed the questions asked by an investigator, in addition to the answers of those interviewed. It has also withheld what is possibly a line of inquiry which the investigator means to follow (the note severed from record 1-151). While some of the questions and notes may reveal the personal information of witnesses, it does not appear that it is always the case that they do, and it appears possible that the Public Body withheld information on the basis that it may reveal something about the investigator performing duties on its behalf, rather than personal information about third parties.

The Public Body has also withheld notes of an interview by the Public Body's investigator of the University of Calgary's legal counsel, in part in reliance on section 17. Information about the legal counsel's participation in the events surrounding the Applicant's complaint to the University is not her personal information unless it has a personal aspect, which was not shown.

As well, it may be that some of the information of persons interviewed in the third volume relating to the Applicant's 'retaliation' complaint, which was withheld in reliance on section 17, may be information about events in which these persons participated in a representative rather than a personal capacity. Again, to be personal in such a context, information must be shown to have a personal dimension.

In Order F2009-026, the Adjudicator said:

If information is about employees of a public body acting in a representative capacity the information is not personal information, as the employee is acting as an agent of a public body. As noted above, the definition of "third party" under the *Act* excludes a public body. In Order 99-032, the former Commissioner noted:

The *Act* applies to public bodies. However, public bodies are comprised of members, employees or officers, who act on behalf of public bodies. A public body can act only through those persons.

In other words, the actions of employees acting as employees are the actions of a public body. Consequently, information about an employee acting on behalf of a public body is not information to which section 17 applies, as it is not the personal information of a third party. If, however, there is information of a personal character about an employee of a public body, then the provisions of section 17 may apply to the information. I must therefore consider whether the information about employees in the records at issue is about them acting on behalf of the Public Body, or is information conveying something personal about the employees.

In that case, the Adjudicator found that information solely about an employee acting as a representative of a public body was information about the public body, and not information about the employee as an identifiable individual. In *Mount Royal University v. Carter*, 2011 ABQB 28 Wilson J. denied judicial review of Order F2009-026.

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.

[para 20] From the foregoing, I conclude that information about individuals acting in a representative capacity is not personal information within the terms of the FOIP Act, unless the information also has a personal dimension.

[para 21] I acknowledge that section 1(n) specifically includes "information about an identifiable individual, including, the individual's name, home or business address or home or business telephone number"; however, it is unknown whether the cell phone number in this case is that of an identifiable individual, or could convey information about an identifiable individual. As a result, section 1(n) does not enable me to find that the cell phone number is personal information.

[para 22] In this case, a cell phone number appears in the records without any information as to the identity of the caller or the owner of the cell phone. While the 911 call was made in the caregiver's role as a caregiver, it is unknown whether the cell phone she used to make the call was her personal phone, or whether it belonged to her employer and was only to be used in a representative capacity, or whether it belonged to someone else. Without knowing this information, it is impossible to say that the cell phone number is personal information.

[para 23] Even drawing on my knowledge of the information available to me in other files does not assist me to find that the cell phone used to make the 911 call belongs to the caregiver with whom the Applicant spoke. In addition, I am unable to find that the cell phone number is likely to be the personal information of the 911 caller, or, alternatively, that it is likely to be information about an agency, organization or public body. I can only say that the cell phone number was used by a caregiver with the Skills Society. That is insufficient to determine whether the cell phone number is personal information or not.

[para 24] Section 71 of the FOIP Act sets out the burden of proof in an inquiry. It states:

71(1) If the inquiry relates to a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part of the record.

(2) Despite subsection (1), if the record or part of the record that the applicant is refused access to contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.

(3) If the inquiry relates to a decision to give an applicant access to all or part of a record containing information about a third party,

(a) in the case of personal information, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy, and

(b) in any other case, it is up to the third party to prove that the applicant has no right of access to the record or part of the record.

[para 25] Sections 71(2) and (3) do not apply in this case, as it is unknown whether the cell phone number is the personal information of a third party, or is information about a third party, but not personal information. Section 71(1) applies, as the Public Body has made a decision to refuse access under section 17, but there is nothing before me to support finding that the information it has withheld is personal information. As a result, the Public Body has not met the burden of proving that it appropriately withheld the cell phone number from the Applicant.

[para 26] I acknowledge that there may be other ways available to the Applicant to obtain the information she seeks, such as contacting the Skills Society. Regardless, section 6 of the FOIP Act creates a right of access to recorded information, subject only to the application of exceptions. As a consequence, a public body may not withhold information from the Applicant under the FOIP Act unless an exception to disclosure applies to information, regardless of whether the requested information will be of any use

to an applicant. At present, there is insufficient evidence to ground the application of an exception to disclosure to the cell phone number.

[para 27] I will not order the Public Body to give the Applicant access to the cell phone number at this time, as it remains possible that the cell phone number is personal information and that it would be an unreasonable invasion of personal privacy to disclose it. However, I must ask the Public Body to reconsider its decision to apply section 17(1) to the cell phone number. In making the new decision, the Public Body should either consider any evidence it may have in its custody or control to determine whether the cell phone number is likely to be personal information, or obtain evidence to assist it to make the decision. Once it has done so, it may apply section 17(1) if it considers the cell phone number likely to be personal information, or it may disclose the cell phone number if it concludes the cell phone number is not personal information. It will be open to the Applicant to request review of the new decision if she disagrees with it.

[para 28] I do not anticipate that the Public Body will need to follow the process above whenever it makes an access decision about a cell phone number. In most cases, there will be sufficient context in the record or records in which the cell phone number appears to make the decision as to whether the cell phone number is personal information or not. However, in this case, there is insufficient context in the evidence before me, even drawing on my knowledge of related files, to decide whether the cell phone number is personal information. I must therefore ask the Public Body to review evidence in making this determination.

IV. ORDER

[para 29] I make this Order under section 72 of the FOIP Act.

[para 30] I require the Public Body to fulfill its duty under the FOIP Act of determining whether a mandatory exception to disclosure applies to the cell phone number, or alternatively, to perform its mandatory duty of providing information not subject to an exception to an applicant, whichever the Public Body determines applies. I require the Public Body to do so by either reviewing or obtaining evidence that will assist it to determine whether the cell phone number is likely to be personal information or is not personal information.

[para 31] Once the Public Body has met this duty, I require the Public Body to provide the new decision regarding the cell phone number to the Applicant.

[para 32] I order the Public Body to notify me in writing, within 50 days of receiving this order that it has complied with it.

Teresa Cunningham
Adjudicator