

**ALBERTA**

**OFFICE OF THE INFORMATION AND PRIVACY  
COMMISSIONER**

**ORDER F2018-24**

June 4, 2018

**ALBERTA HUMAN RIGHTS COMMISSION**

Case File Number F8587

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

**Summary:** The Applicant made an access request to the Alberta Human Rights Commission (the Public Body) for records containing information about a human rights complaint she had made against the University of Calgary.

The Public Body provided responsive records, but severed information under sections 17 (disclosure harmful to personal privacy), 18 (disclosure harmful to individual or public safety), 20 (disclosure harmful to law enforcement), and 27 (privileged information) of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act).

On December 13, 2013, this office issued Order F2013-51. The Director of Adjudication directed the Public Body to disclose further information to the Applicant, as well as to reconsider its decision to withhold records in reliance on section 17, having regard to a list of specified factors. The Director of Adjudication held that she could not determine whether the information to which the Public Body had applied section 17 was personal information, as it was unclear whether the information was about an identifiable individual in some cases, or was about an individual acting in a personal capacity. She directed the Public Body to consider whether the information had a personal dimension before applying section 17(1).

The Public Body did not seek judicial review of Order F2013-51, but provided additional records to the Applicant. It continued to rely on section 17 to withhold some information

in the records from the Applicant. The Applicant requested review of the Public Body's decision on the basis that it had not complied with Order F2013-51.

At the inquiry, the Public Body did not provide any additional evidence as to whether the information in the records was personal information but pointed to the records as establishing that the information it had severed was personal information.

The Adjudicator held that she was bound by the conclusion of the Director of Adjudication that it was not possible to determine whether the information in the records had a personal dimension in the absence of evidence establishing context. The Adjudicator ordered the Public Body to disclose the records to the Applicant, with the exception of contact information which the Applicant had clarified she was not seeking.

**Statutes Cited: AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 17, 71, 72, 73

**Authorities Cited: AB:** Orders F2012-27, F2013-51

## **I. BACKGROUND**

[para 1] The Applicant made an access request to the Alberta Human Rights Commission (the Public Body) for records containing information about a human rights complaint she had made against the University of Calgary.

[para 2] The Public Body provided responsive records, but severed information under sections 17 (disclosure harmful to personal privacy), 18 (disclosure harmful to individual or public safety), 20 (disclosure harmful to law enforcement), and 27 (privileged information) of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act).

[para 3] On December 13, 2013, this office issued Order F2013-51. The Director of Adjudication directed the Public Body to disclose further information to the Applicant, as well as to reconsider its decision to withhold records in reliance on section 17, having regard to a list of specified factors.

[para 4] The Director of Adjudication found that sections 18, 20, and 27 had not been shown to apply to the information that had been withheld. She ordered the Public Body to disclose any information that had been withheld solely on the basis of these provisions.

[para 5] With respect to personal information that had been withheld under section 17 (as well as under sections 18, 20 and 27 in some cases) the Director of Adjudication found that the manner in which the Public Body had made its decisions in reliance on section 17 made it impossible for her to determine whether its decisions had been made correctly and whether section 17 could be said to apply. She ordered the Public Body to make new decisions that could involve giving notice to the individuals whose information was in the records so that they could provide their views, to make determinations as to

whether the entirety of the information was personal information, and whether it would identify the individuals whose personal information it was, and to consider only factors that have been established as relevant when making the new decisions.

[para 6] The Public Body did not seek judicial review of Order F2013-51. It disclosed further records, but continued to withhold some information from them in reliance on section 17.

[para 7] On October 27, 2014, the Applicant asked for a review of the Public Body's response, stating that she wished confirmation that the Public body had complied with Order F2013-51. Mediation was not successful in resolving this issue and on March 10, 2016, the Applicant requested an inquiry.

## II. INFORMATION AT ISSUE

[para 8] The information the Public Body severed from the records on the basis of section 17 is at issue.

## III. ISSUE

### **Issue A: Did the Public Body properly withhold information from the Applicant on the basis of section 17(1)?**

[para 9] 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*

*(a) the third party has, in the prescribed manner, consented to or requested the disclosure, [...]*

...

*(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 10] 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 11] 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 12] Section 17(1) requires a public body to withhold information only once all relevant interests in disclosing and withholding information have been weighed under section 17(5) and, having engaged in this exercise, 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 13] 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 14] 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.

[para 15] In Order F2013-51, the Director of Adjudication found herself unable to find that the information in the same records that are now before me was personal information, without more evidence. She said:

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.

I turn to the notes made by the Public Body's investigator of interviews with witnesses, which comprise a large part of the information that was withheld from the Applicant. With regard to the records in Volume 1, many pages of these notes record information which would possibly be identifiable only by reference to the names that are noted on the first of a series of pages recording a particular witness's statements and answers. It is possible that some of the statements would identify their maker from their content or their context quite apart from their names, but for much of this information, this is by no means clear. However, it appears that in making its decision as to what information to provide, rather than severing names and providing otherwise unidentifiable information, the Public Body provided only the names as written in the top margin of the notes, and, further, also provided these names and the associated page numbers of the notes in the index of records. The consequence is that though it might have been possible to disclose some of the information to the Applicant because the person being interviewed was not identifiable, the Public Body's disclosure of the names means that information cannot be disclosed on this basis.

However, this did not happen for some of the records that record witness interviews, for example, in Volume 3. For these notes, there remains a possibility that the people whose statements are being recorded in interviews are not identifiable, hence some of this information may not be "personal information" within the terms of the Act if the names are severed.

I note further that it may not have been possible for the person who performed the severing in this case to determine whether or not the interview notes would identify the person being interviewed if the name were severed. Indeed the only way it may have been possible to try to determine this would have been to ask the maker of the statements, and/or the person who made the notes. Conversely, some of the items of information, such as individuals' telephone numbers and an email address, are clearly their personal information. (Though the names might be severable, the Applicant could presumably try to discover whose phone numbers or email addresses they are by calling the numbers.)

Given this lack of clarity, I cannot determine whether much of the information that was withheld in part on the basis of section 17 was the personal information of an identifiable individual. I will deal below with how this problem can be addressed. [my emphasis]

[para 16] In Order F2013-51, the Director of Adjudication directed the Public Body to make new decisions under section 17(1) addressing the question of whether the information in the records was personal information. If the Public Body determined that the information was personal information, she required it to consider relevant factors under section 17(5) in deciding whether to withhold the information from the Applicant or not.

[para 17] As the Director of Adjudication was unable to determine whether the information to which the Public Body had applied section 17(1) was personal information, other than personal telephone numbers and email addresses, was personal information, and the same records and severing are before me, I must first consider whether the information at issue is personal information.

[para 18] Section 1(n) of the FOIP Act defines “personal information”. It states:

*1 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 19] The Public Body explains its new decision to find that the information in the records is personal information in the following terms:

In order to engage the provisions of section 17, a two-part threshold must be met:

- A determination of whether or not the records contain third party personal information; and
- If the records do contain third party personal information, a determination of whether or not disclosure of this information would constitute an unreasonable invasion of any third party's personal privacy.

**Do the records contain third party personal information?**

Paragraph 13 of Order F2012-27 states:

For information to constitute personal information for the purposes of the Act, it must be "about" an individual. The term "about" in the context of the definition is a highly significant restrictive modifier, in that "about" an individual is a much narrower idea than "related" to an individual' information that is generated or collected in consequence of some action on the part of, or associated with, an individual – and that is therefore connected to him or her in some way – is not necessarily "about" that individual (Order F2007-019 at para 20).

By definition, "personal information" means information about an identifiable individual and includes, but is not limited to, an individual's name, home or business address or home or business telephone number. [Section 1(n) of the FOIP Act].

The records contain names, personal email addresses, personal phone numbers as well as other personal information that is about someone other than the Applicant. For example information about third party work history and personal lives as well as statements relating to events that did not include the Applicant.

The Public Body submits it is evident from the face of the records that they contain "personal information" of a third party or third parties as defined in section 1(n).

[para 20] As noted above, the Director of Adjudication found in Order F2013-51 that it was not evident from the face of the records that the information the Public Body had severed under section 17(1) was personal information, with the exception email addresses and telephone numbers. She made this decision on the basis that there was insufficient evidence to make a determination whether the information about individuals appearing in the records was about the individuals acting in a representative capacity or in a personal capacity.

[para 21] The Director of Adjudication did not uphold the Public Body's decision as to whether the information it had withheld under section 17(1) met the terms of section 1(n), except for telephone numbers and email addresses. She directed the Public Body to determine whether the information to which it applied section 17(1) had a personal

dimension. If it had a personal dimension, then the Public Body was directed to make a new decision applying only relevant considerations under section 17.

[para 22] In its submissions, the Public Body does not indicate that it took the steps it was directed to take in Order F2013-51 to determine whether information in the records was personal information. Instead, it relies on a paragraph from Order F2012-27 and the evidence of the records to establish that the information it severed under section 17(1) is personal information.

[para 23] If I were empowered to overturn the decision of the Director of Adjudication in Order F2013-51, which I am not empowered to do, I would come to the same conclusion at which she arrived. She found she was unable to find that the information in the records was personal information without evidence as to the context in which information about individuals appears in the records. I am similarly unable to determine whether the information about individuals that appears in the records is about them acting in a personal capacity or a representative capacity. Indeed, in many places, the Public Body has disclosed some identifying information, which suggests that the individuals were acting in a representative capacity, but then withheld items of information from the same record without explanation. Record 3 contains a prime example of this type of severing. In other cases, as the Director of Adjudication noted in Order F2013-51, it is unclear who is being interviewed, and /or whether the person is being interviewed in the person's capacity as a representative of the University of Calgary or as an individual.

[para 24] In any event, I am not empowered to overturn Order F2013-51. Under section 73 of the FOIP Act, an order made by the Commissioner is final. In Order F2013-51, the Director of Adjudication was asked to find that the information severed from the records was personal information. She determined that this finding was not one that could be made based solely on the evidence of the records and directed the Public Body to make new decisions based on contextual evidence. In this present inquiry, the records have similarly been left to speak for themselves and the Public Body did not obtain any additional evidence as to context. It is therefore not open to me to arrive at a different conclusion than did the Director of Adjudication in Order F2013-51 as to the classification of the information in the records.

#### *Telephone Numbers and Email Addresses*

[para 25] In Order F2013-51 the Director of Adjudication concluded that telephone numbers and email addresses had a personal dimension and were personal information.

[para 26] In her rebuttal submissions, the Applicant states:

The Applicant submits she has no interest in receiving the severed email / contact information of interviewees.

As the Applicant has clarified that the contact information in the records is not responsive to her access request, I need not determine whether section 17 applies to this information and the Public Body may continue withholding this information.

### *The Burden of Proof*

[para 27] 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 28] Sections 71(2) and (3) do not apply in this case, as it is unknown whether the information the Public Body has severed is the personal information of a third party. 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 has a personal dimension. As a result, the Public Body has not met the burden of proving that it withheld information appropriately, (other than contact information), from the Applicant.

### *Section 72*

[para 29] Section 72 states, in part:

*72(1) On completing an inquiry under section 69, the Commissioner must dispose of the issues by making an order under this section.*

*(2) If the inquiry relates to a decision to give or to refuse to give access to all or part of a record, the Commissioner may, by order, do the following:*

*(a) require the head to give the applicant access to all or part of the record, if the Commissioner determines that the head is not authorized or required to refuse access;*

*(b) either confirm the decision of the head or require the head to reconsider it, if the Commissioner determines that the head is authorized to refuse access;*

*(c) require the head to refuse access to all or part of the record, if the Commissioner determines that the head is required to refuse access [...]*

[para 30] As the Public Body has not met its burden under section 71 of establishing that it was authorized or required to withhold information from the Applicant, I must now dispose of the issues under section 72(2)(a).

#### **IV. ORDER**

[para 31] I make this order under section 72 of the Act. I order the Public Body to disclose all information in the records other than telephone numbers and email addresses, to the Applicant.

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

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Teresa Cunningham  
Adjudicator