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There's no right to absolute privacy when you want to build something in a city

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Cases Considered:

Edmonton (City) v. Alberta (Information and Privacy Commissioner), 2011 ABQB 226

There is no absolute right to privacy in the context of planning and development within a municipality. In a contest between the right to privacy and the right to enjoy one's own property without interference from a neighbour, a balance must be struck. Otherwise, we'd be constantly in each other's faces over actions such as one neighbour arbitrarily chopping down trees straddling the line between two homes or mowing down a line of bushes running between two houses. One person's pleasure is another person's annoyance – the source of such annoyance could be something as seemingly innocuous as an outdoor hot tub on a second floor balcony.
When an Edmonton property owner named Kim Mah read details about her application for a development permit in a community newsletter, she complained to the *Office of the Information and Privacy Commissioner* that her privacy was breached. Rather oddly, in light of the fact that neighbouring property owners do have the right to know about such matters, a Commission adjudicator agreed. Even stranger, the Commissioner found that an appeal board with the independent power to review development proposals was instead a City of Edmonton department. Rather appropriately, the City's legal department applied for a judicial review. Quite rightly, a Queen's Bench judge read the relevant legislation against the facts, found that the Commissioner had erred, and sent Mah's complaint back to the Privacy Commissioner to reconsider.

The facts in *Edmonton (City) v. Alberta (Information and Privacy Commissioner)* are straightforward. Mah and her husband wanted to build a house so their builder applied for a development permit with variations; the property owners weren't named in the application, just the builder. A City of Edmonton Development Officer subsequently approved the permit. A neighbouring property owner learned about the proposed construction after returning from a trip abroad and met with officials in the development office to find out more. The neighbour was concerned about several variations that she felt would impact the enjoyment of her property; i.e. the proximity of Mah's proposed house to her property line, the removal of trees and shrubs running down the line, and an external hot tub on the second floor. The construction drawings didn't include information about the interior of Mah's house but did show details about the exterior, including that second floor hot tub. After this meeting, the neighbor made two requests under the *Freedom of Information and Protection of Privacy Act*, RSA 2000, F-25 (*FOIPP*) to the City's development department for further information about Mah's proposal, with which the City duly complied.

After information was provided pursuant to these *FOIPP* requests, Mah read a notice about her development application in a community newsletter. The notice included Mah's address (but not her name), the builder's name, the builder's plans and the history of the variance approval process relating to these plans. Upset by this, Mah made her own *FOIPP* application to the City to find out how the newsletter had obtained this information. The City duly complied. However, Mah wasn't satisfied with the response. She thought the Subdivision Development Appeal Board (SDAB) might have relevant documents in its possession too. Moreover, she evidently thought the City should be able to simply demand that the SDAB hand over any relevant documents in its possession. So she complained to the Privacy Commissioner, asking him to review whether the City had fully complied with her *FOIPP* request. She also complained that her personal information was disclosed when the neighbour was allowed to see the construction drawings. The Commissioner's adjudicator investigated and found that:

- the City had failed to do a thorough search for documents;
- the City had disclosed Mah's personal information;
- the SDAB is a department of the City; and
- thus the City was obligated to search SDAB records as part of its search for relevant documents (at para. 8).

In her subsequent judicial review of these findings, Justice A.B. Moen of Alberta's Court of Queen's Bench had three issues to consider:

- Is the SDAB a city department or a public body?
- Did the City disclose Mah's personal information by showing the neighbour the construction drawings?
- If personal information was disclosed in the construction drawings, was this disclosure contrary to Part 2 of the *FOIPP* Act (at para. 13)?

Before addressing these issues, Justice Moen had to decide first of all whether this was a matter that properly fell within her ambit of authority to review. Ordinarily, judges will defer to decisions of specialized agencies or tribunals acting within their fields of expertise; for example, privacy matters in the case of the Privacy Commissioner. However in this instance, at issue was how to interpret relevant sections not only of *FOIPP* legislation but also the *Municipal Government Act*, RSA 2000, c. M-26 (*MGA*). Because the *MGA* is not legislation that falls within the particular expertise of the Privacy Commissioner, interpretation of it and its application to the facts is a matter that properly falls within a judge's authority to review in any event. Furthermore, on a review of how a tribunal or specialized agency like the Privacy Commissioner has interpreted *FOIPP* legislation that is directly applicable to its role, a superior court judge will assess the correctness of the interpretation.

The status of the SDAB – whether it was a public body or a City department – could be resolved only by looking to the relevant sections of these two pieces of legislation. According to *FOIPP* section 1(p)(vii), a "public body" is defined as including "a local public body." A "local public body" is defined under section 1(j)(iii) as including "a local government body." A "local government body" is defined under section 1(i)(xii) as including "any board, committee, commission, panel, agency or corporation that is created or owned by a [municipality] and all the members or officers of which are appointed or chosen by that body." By way of comparison, in accordance with section 627(1) (a) of the *MGA*, the SDAB is a board created by the City. Nothing in the *MGA* identifies this board as being a department of the City. Thus, a plain reading

of the applicable sections clearly shows that the SDAB is a public body, which makes the Commissioner's determination that the board is a City department and thus by implication subject to the control of the City administration dead wrong (at para. 44).

On the question of whether the City disclosed Mah's personal information when a neighbour saw the construction drawings, Justice Moen had two claims of privacy breaches before her: i) the disclosure of the drawings by City planners pursuant to the neighbour's first, informal request to see them; and ii) when the City's file in the matter was disclosed pursuant to the neighbour's own *FOIPP* applications. The issue of whether release of those drawings constituted a breach of Mah's privacy rights turned on the status of the drawings. Could drawings of the exterior of a proposed house be construed as personal information? If yes, then was this release of personal information permissible in accordance with Part 2 of *FOIPP*? The Privacy Commissioner's rationale was that the drawings were examples of personal information because they contained information about Mah's *personal intentions*. In arriving at this conclusion, the Commissioner was apparently relying on previous consideration of the meaning of "personal information" within the context of the *Personal Information and Privacy Act*, RSA 2000, c. P-6.5 (*PIPA*). According to section 1(k) of *PIPA*: "personal information means information about an identifiable individual;..." In *Re Douglas Homes*, Order P2007-0004, the Privacy Commissioner looked to this definition of "personal information" in *PIPA* and found that (at para. 15):

> …information as to the nature or state of property owned or occupied by someone is their personal information if it reflects something of a personal nature about them such as their taste, personal style, personal intentions, or compliance with legal requirements. (emphasis added, cited in *Edmonton (City) v. Alberta (Information and Privacy Commissioner)* at para. 56)

What constitutes personal information is an exercise in statutory interpretation – a question of law that Justice Moen determined was clearly within the "core function" of the Commissioner's role (at para. 51). In deciding whether information is personal, law must be applied to facts. Since there was a question of mixed fact and law, Justice Moen ruled the Commissioner's interpretation had to be reasonable. In this case, she found it was not, even going so far as to say the Commissioner had made "a serious error" (at para. 52). The serious error was the Commissioner's use of the definition of personal information from *PIPA* in his determination as to what would be personal information within a *FOIPP* context. However, *PIPA* does not apply to privacy matters in a public body context; rather, it applies to privacy matters in the private sector; i.e. businesses, non-profit organizations and professional regulatory bodies such as the *Alberta Law Society*. Justice Moen's blunt assessment at para. 58 on this point speaks for itself:

> It was incumbent on the Privacy Commissioner to analyse the definition of personal information in *FOIPP* and, if he considered the definition in *PIPA* as guidance, to determine if there was a difference in the definitions between the two. He did neither.

Justice Moen referred to the need to contextualize the definition of "personal information," then pointed to the balancing that must occur between private interests and the public scrutiny of decisions by municipal officials that impact the interests of others (at paras. 63-67). *FOIPP*, particularly the sections that set out the statute's purposes, must be read in the context of planning legislation, with the latter's goal of ensuring the orderly development of property within our municipalities. The purposes of *FOIPP* are set out in section 2; the relevant sections for analysis are 2(a) and 2(e) which say:

2 The purposes of this Act are

(a) to allow any person a right of access to the records in the custody or under the control of a public body subject to limited and specific exceptions as set out in this Act…

(e) to provide for independent reviews of decisions made by public bodies under this Act and the resolution of complaints under this Act.

In conclusion, neighbours living in high density areas have a right to know what their neighbours are planning to build because their rights to enjoy their own properties could be affected by the intentions and plans of others. In such a context, the address of a site where there are plans for development, as well as details about the proposed development itself is information that must be made public. Furthermore, the SDAB is a public body with a role of intrinsic importance to the good governance of a municipality.

If the SDAB were in fact just another City department, that would effectively scuttle the board's "arm's length" relationship with the City's administration, officers and staff, thus reducing the board's role to that of mere "rubber stamper." This "arm's length" relationship carries an independent power to review any approved development or subdivision proposal that is the subject of an appeal by a neighbouring property owner, then amend it or even reject it altogether. Conversely, the SDAB can reject an appeal if it finds that an approved development does not interfere with a neighbour's right to enjoy his/her own property.

The SDAB is just one of several "arm's length" municipal review boards with the mandate of hearing residents' challenges to decisions of City officials that impact their rights and interests. Indeed, for property owners, the SDAB, along with property tax assessment appeal boards, constitute powerful tools available to, respectively: i) protect the right to enjoy their own property without interference from neighbours and ii) reduce their annual property assessments (hence the amount of municipal taxes they will have to pay) if they think the City's assessment does not reflect a property's fair market value. That property owners have such sources of independent review is important not only for the sake of their rights as property owners and taxpayers. These sources are also fundamentally important for maintaining citizens' confidence in the integrity of municipal government.