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Vagueness in FOIPP:
Can Citizens Effectively Access Their Personal Information?

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Case Commented On: *Edmonton (City) v Alberta (Information and Privacy Commissioner)*, 2016 ABCA 110

The *Freedom of Information and Protection of Privacy Act*, RSA 2000, c. F-25 ("FOIPPA", or "the Act") outlines the obligations of a public body to provide access to records, including access to your own personal information. The overall purpose of the Act (s 2) is to balance our right to access records in the custody and control of public bodies, like the City, with protecting the privacy of individuals by controlling the manner in which public bodies collect, use and disclose personal information. Although there are exceptions to accessing records, these are limited, and interpretation of the Act should be made with the goal of maximum disclosure. As citizens, we have a right to know what information about ourselves is being held by a public body. For example, if someone is making a complaint about us we have a right to know the details so we can defend ourselves. Disclosure by the public body allows citizens to participate in decisions in a more informed and meaningful way.

Judicial History

The present case is an appeal from the Court of Queen's Bench decision in *Edmonton (City) v Alberta (Information and Privacy Commissioner)*, 2015 ABQB 246 ("*Edmonton v OIPC*, ABQB"). The Court of Queen's Bench case was an application for judicial review by the City of Edmonton ("City") of the decisions of an adjudicator, appointed by the Information and Privacy Commissioner ("Order F2013-53"). The adjudicator looked at a request by Ms. McCloskey, the applicant, under the FOIPPA, for access to certain records in the custody and control of the City. The adjudicator held that Ms. McCloskey only requested personal information and that the City did not fulfill its duty to assist. The adjudicator asked the City to go back and review all the relevant circumstances in their decision to reveal or withhold information requested by Ms. McCloskey. The City should also be more explicit on why they characterised some information as general as opposed to personal in nature. The City disagreed with the adjudicator's findings and requested a judicial review. The Court of Queen's Bench dismissed the City's application for judicial review. The standard of review was reasonableness, which gives wide latitude to the adjudicator's findings. On appeal, the Alberta Court of Appeal was asked to determine whether the City properly or adequately discharged its obligations as a public body to provide access to records under the FOIPPA.

Facts and Issue on Appeal

Ms. McCloskey made a request for access to certain records in the custody and control of the City under FOIPPA. Ms. McCloskey's initial request was for "… all records, regardless of format, relating to myself and to my property that may be held by the City of Edmonton"

(*Edmonton v OIPC,* ABCA, at para 2). A City official later phoned Ms. McCloskey to discuss her request. Ms. McCloskey advised the City she made a broad request because she did not know what types of records the City had in its custody and control. She made it known to the City official that she wanted to know of any complaints and any more records attached to the complaints (*Edmonton v OIPC*, ABCA, at para 2). The City characterised the request as related to property rather than to a person, and attached a fee to the request, while editing the records before they were released (*Edmonton v OIPC*, ABCA, at paras 6, 9). Ms. McCloskey was not satisfied with the records the City provided. As a result, Ms. McCloskey requested a review by the Information and Privacy Commissioner ("Commissioner"). The adjudicator appointed by the Commissioner considered whether the City met its obligations under s 10(1) of the Act, which requires a public body to make every reasonable effort to assist and to respond to each applicant openly, accurately and completely. The adjudicator found that the City did not respond to the applicant's request openly, accurately and completely (*Edmonton v OIPC*, ABCA, at para 58). Essential to this dispute is the meaning of personal information, as defined in s 1(n) of the Act. If the information is characterised as personal information then the records are released without a fee. If they are characterized as general information, the applicant must pay a fee and seek an alternate route to obtain the records. In the Act, personal information means recorded information about an identifiable individual. The adjudicator found the boundary between personal information and information about a business or property may be blurred (*Edmonton v OIPC,* ABCA, at para 8). The adjudicator concluded that although these records were related to a particular piece of property, the information in the records reflected on the conduct of the individual associated with the property and thus the request was for personal information (*Edmonton v OIPC,* ABQB, at para 9). As a result, the City had not responded appropriately to Ms. McCloskey's request.

A related issue is the removal of information from the records that may be harmful to third parties as determined by s 17 of the Act. The adjudicator found that the City was not sufficiently transparent in their reasons for severing certain information from the released documents, and referred the issue back to the City (*Edmonton v OIPC,* ABCA, at para 11). The adjudicator determined that the City did not properly assist Ms. McCloskey and ordered the City to process the request for documents "in accordance with the Act" and to "consider all relevant circumstances" (*Edmonton v OIPC,* ABCA, at para 12).

At issue in *Edmonton v OIPC,* ABQB was whether the adjudicator's approach to the term personal information was both reasonable and accurate. Justice Renke found the adjudicator's reasoning on the core issue was reasonable: information that was connected to property might well be about an individual if it had a personal dimension to it (*Edmonton v OIPC,* ABCA, at para 15). The ABQB found the City misinterpreted the legal meaning of personal information, and, as a result, there was a breach of s 10 of the Act. The duty to assist was a result of a misunderstanding of the meaning of personal information rather than a wilful disregard for providing the records. Justice Renke concluded the City owed a better explanation to Ms. McCloskey (*Edmonton v OIPC,* ABCA, at para 17). In this particular context, the essence of the request was for complaints and opinions expressed about Ms. McCloskey. The complaints and opinions were personal in nature. The City had argued that it was unreasonable for the adjudicator to direct the City to provide an explanation on how they came to their decision.

The Court of Appeal's Decision

In *Edmonton v OIPC,* ABCA, the Alberta Court of Appeal (Justices Slatter, McDonald, and Bielby) allowed the appeal in part. The adjudicator's finding that the City had breached s 10(1) of the Act was based on the assumption that the City did not make every reasonable effort to assist the applicant. The Court of Appeal found that the adjudicator's conclusion the City did not

fulfill its duty to assist and to respond openly, accurately, and completely was not rooted in the facts or the law (*Edmonton v OIPC*, ABCA para 58). A mistake does not mean necessarily a failure to assist. Although Court of Appeal found the City acted in good faith, they agreed with the adjudicator's findings on the scope of the term personal information, the resulting payment of fees, and the need for further particulars about the application of s 17 as reasonable (*Edmonton v OIPC*, ABCA, para 59).

The Court of Appeal concluded the Commission could not exercise its duty without knowing the basis on which the scope of production was made or refused (*Edmonton v OIPC*, ABCA, at para 53). The Court of Appeal specifically looked at the adjudicator's finding of a failure to assist Ms. McCloskey in an open, accurate, and complete manner (s 10(1) of the Act). They found that public bodies such as the City are required to do their best to comply with their obligations to disclose documents, and must act in good faith in interpreting the statute. However, it is unreasonable to think that they must be correct every time (*Edmonton v OIPC*, ABCA, at paras 39, 40). It was unreasonable for the adjudicator to find that the City failed to assist Ms. McCloskey on the basis of their interpretation of personal information (*Edmonton v OIPC*, ABCA, at para 44). The Court of Appeal came to the conclusion that the City did make all reasonable efforts to provide documents to the Commissioner's office. The City may have made a mistake, however the scope of the production did not arise from a failure to use all reasonable efforts (*Edmonton v OIPC*, ABCA, para 51). The Court of Appeal mentions that the "spirit of the Act suggests that unless third party interests are engaged, it is better to produce some documents that may not be of interest than to miss documents of important to the query" (*Edmonton v OIPC*, ABCA, at para 52). Once the scope of production was clarified by the reasons of the Court, the City would be required to disclose the appropriate documents. The quality of the produced documents could not be evaluated until after the City had produced documents with the benefit of the clarification of the Court (*Edmonton v OIPC*, ABCA, at para 53).

Commentary

The outcome of this case demonstrates how onerous it may be for citizens to obtain access to records from a public body. Ms. McCloskey had experience in privacy matters, while many people do not. The Court of Appeal's decision and reasons for reversal of the adjudicator's finding that the City made every reasonable effort to assist Ms. McCloskey is not persuasive. One of the objectives of the Act is to maximize access to records held by public bodies. In s 2 of the Act, the overall purpose is greater openness, while limiting access is the exception to the rule. Although the release of records depends on the context, the public body should always respond to an individual's request on the basis of transparency and accountability. In s 10(1) of the Act, there is a duty to assist applicants that requires the head of a public body to make every reasonable effort to respond to the request openly, accurately and completely. The applicant argued that the City only gave a partial response to her request for information (Order F2013-53 at para 18). The City should have informed Ms. McCloskey of all the records held in their custody and control, even those documents that may not be disclosed, and should have provided reasons why certain records were severed. The City should also provide the name of a contact person and provide notice of a right to review their decision (*The Annotated Freedom of information and Protection of Privacy Act*, Edmonton: Clark Dalton and Queen's Printer (2015), Commentary on s 10-Generally, at 5-10-1). This allows for greater openness and accountability on the part of a governing body. In the original Order F2013-53, it does not appear that the City gave sufficient reasons to the applicant as to why some of the information was severed. Thus, there is a positive duty placed on the public body to give reasons. In this instance, the Court of Appeal gave wide latitude to the City in their duty to assist. Public bodies, like the City, should be held to a high standard when servicing private citizens.

The adjudicator found that the City did not properly define Ms. McCloskey's request for information. Part of the problem lies in the lack of specificity in the definition of personal information in s 1(n) of the Act. Although the definition is meant to cover a variety of circumstances, it may lead to confusion and a lack of transparency and accountability in public bodies' access to information decision-making processes. In this instance, there was some disagreement as to what constitutes personal information as opposed to general information. The City argued that the applicant would have received more information about her property under a request for general information. Although this is an alternate route, the City is still obligated to give the applicant as much access to records as possible. The Act is considered a complete system and the City must fulfill its duty to provide access to records rather than point the applicant in another direction (*Edmonton v OIPC*, ABCA, at para 25).

The City withheld some information on the basis of s 17 of the Act (disclosure may be harmful to a third party). With respect to withheld information, (Order F2013-53, at para 57), how can the adjudicators review decisions made by a public body when even they are not clear on what decision the public body made? Was information severed from the disclosed record for fear of harming a third party, or was it withheld because it was non-responsive to the request?

A principled approach should guide a public body's duty to provide access to records to citizens. We have a right to know what public bodies know about us. Democracy means we can participate in how we are governed by a public body. The more information the governing body provides to citizens making inquiries, the less potential there is for lack of transparency and unaccountability.