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FOIPP Impacts on Municipalities and Other Public Boards: A Review of Some Recent Cases Relating to the Freedom of Information and Protection of Privacy Act, R.S.A. 2000, c. F-25 (FOIP Act)

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The *FOIP Act* applies to all Public Bodies, which includes municipalities. As the public becomes more aware of their rights under the *FOIP Act*, it becomes more important for municipalities to make sure that they understand the *FOIP Act* and what it requires from them.

These recent decisions provide some further guidance on the *FOIP Act* and how it applies to and can impact municipalities.

Edmonton (City) v. Alberta (Information and Privacy Commissioner), Alberta Court of Queen's Bench, 2011

The SDAB is a distinct and separate Public Body under the *FOIP Act* and a municipality need not search the SDAB's records as part of the municipality's document search.

The City of Edmonton provided the construction drawings and details of a development permit to the Complainant's next door neighbour who was concerned with the effect the construction would have on her enjoyment of her own property. The neighbour requested information from the City about the development, pursuant to *FOIP Act*, and the City responded. Shortly thereafter, the Complainant read about her proposed development in a local newsletter. The article included her name, her address, her builder's name, her building plans and other details about the development. The Complainant made a request, pursuant to the *FOIP Act*, in order to determine how information she believed was personal information became public. The Complainant was not satisfied with the response of the City and felt that the material provided by the City did not fully comply with her request. The Complainant requested the Office of the Information and Privacy Commissioner (the "Commissioner") to conduct a review on the City's response.

The Commissioner ruled that the City had not complied with the request. The Commissioner found: (1) the City had not been completely responsive and failed to do a thorough document search; (2) the City had disclosed the Complainant's personal information; and (3) the SDAB is a department of the City and therefore the City was obligated to search the SDAB records as part of its document search.

Upon judicial review, the Alberta Court of Queen's Bench disagreed. It found that the SDAB is a separate "Public Body" and the City was not required to include SDAB records as part of its documents search. It also held that the construction drawings were not personal information and even if they were, the City, as a Public Body, was entitled to disclose that personal information under Part 2 of *FOIP Act*.

Order F2011-016: Alberta Health Services (November 14, 2011)

A Public Body's duty to assist under the *FOIP Act* is expanded to include providing options to an applicant of submitting a new request for information instead of pursuing the review process if such an option can resolve the issue in dispute.

The Applicant requested information from Alberta Health Services (AHS), a Public Body, pursuant to the *FOIP Act* regarding the redevelopment of the Alberta Hospital Edmonton site. AHS asserted that its search failed to produce any records relating to the request. The Applicant, dissatisfied, requested a review by the Office of the Information and Privacy Commissioner (the "Commissioner").

The Adjudicator appointed by the Commissioner found that the Public Body failed to meet its duty to assist the Applicant pursuant to section 10(1) of *FOIP Act*, which provides that a Public Body must "make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely." The Adjudicator held that the Public Body's search was inadequate, overly restrictive, and ignored the clarification provided by the Applicant. A better search was ordered.

The Adjudicator held that the burden of proving that a search was adequately conducted lies with the Public Body. An adequate search has two components: (1) that every reasonable effort be made in searching for the actual records requested; and (2) that the Applicant must be informed in a timely manner about what has been done to search for the requested records. Where there is disagreement about the scope of a request, the Public Body, as part of its duty to assist, should advise an applicant of their option to submit an additional request that could more clearly outline the scope of the records being sought and avoid delay if the applicant wants to request a review of his initial request.

Order F2011-015: County of Thorhild No. 7 (November 14, 2011)

In calculating a fee estimate, a Public Body must determine the actual costs of processing the request as the basis of the fee estimate. It is not reasonable for the Public Body to rely upon FOIP Bulletins, the maximum amounts in the *Freedom of Information and Protection of Privacy Regulation* ("*FOIP Regulation*") or previous decisions of the Office of the Information and Privacy Commissioner.

The Applicant made a request to the County of Thorhild, the Public Body, for access to bank statements. The Public Body identified approximately 134 pages of responsive records and provided a fee estimate to retrieve and prepare the records for disclosure, including photocopying

costs. The Applicant disputed the fee estimate and requested a review by the Office of the Information and Privacy Commissioner (the “Commissioner”).

The Adjudicator appointed by the Commissioner found that the Public Body did not properly apply the fee schedule outlined in the *FOIP Regulation* and section 93 of *FOIP Act*. A fee estimate provided by a Public Body must be reasonable and must not exceed the actual cost of the processing the request.

In calculating its fee estimate, the Public Body had relied on “FOIP Bulletin Number 1”, a publication by Service Alberta that sets out costs for preparing records including an estimation of the time (two minutes per page) it would take to sever information from the page of a record. The Adjudicator found that reliance on the Bulletin was not reasonable in that the Public Body failed to establish that it would actually take two minutes per page to sever information from the records, as was suggested in the Bulletin. The Adjudicator held that severing, in this case, should only take five seconds per page. The Adjudicator held that the Public Body needed to determine the actual time it took to sever the records in order to determine the reasonable fee estimate to process the request. The Adjudicator similarly held that it was not reasonable for the Public Body to charge \$0.25 per page for photocopying without showing the actual cost of photocopying. It was not reasonable for the Public Body to rely upon the maximum amounts for photocopying and labour in processing a request as set out in the *FOIP Regulation* without providing evidence that these were the actual costs of the Public Body.

Order F2012-07: Calgary Police Service (April 20, 2012)

A Public Body may only collect, use and disclose personal information in accordance with the *FOIP Act*, and should be cautious of what authority it has when collecting, using and disclosing such personal information.

The Complainant was a civilian employee of the Calgary Police Service, a Public Body. The Public Body had received allegations that the Complainant was involved in inappropriate sexual conduct with an officer and began to monitor the Complainant’s activities on her work computer, including her e-mails. The Public Body found the Complainant’s personal login information for a personal email account and used this information to access the Complainant’s personal email account where several pictures of a sexual nature which appeared to have been taken on the Public Body’s premises. The Public Body used the pictures as grounds to terminate the Complainant’s employment. The Complainant requested a review by the Office of the Information and Privacy Commissioner citing a violation of Part 2 of the *FOIP Act*.

The Complainant did not object to the investigation of the Public Body or the monitoring of her work email. The main concern of the Complainant, and ultimately of the Adjudicator appointed by the Commissioner on this matter, was the Public Body’s use of personal information, specifically the login information to the Complainant’s personal email. The Public Body argued that the collection of the login information was authorized by the *FOIP Act* as it related to an employee investigation, and subsequent use and disclosure of that information were for the same purpose that they were collected.

The Adjudicator disagreed, stating that the use of the login information was not for the purpose of employee management, since the Public Body accessed the Complainant's personal email. The Adjudicator held that the Public Body could only use personal information to the extent necessary to fulfill its purpose in a reasonable manner, and that logging into the Complainant's personal email account was exceptionally invasive and patently unreasonable. Furthermore, the Adjudicator held that even if the photographs were relevant to the workplace investigation, their collection and subsequent use could not be justified as necessary for the Public Body's investigation.

Should you have any questions regarding the above or require any assistance with privacy matters, please contact Lorne I. Randa at 780-497-4832 or at lranda@brownleelaw.com.