Office of the Information and Privacy Commissioner of Alberta

Report on a tribunal's decision to disclose a Decision on the internet

Law Enforcement Review Board

July 19th, 2013
Privacy Complaint F6566

I. What was investigated?

[1] The Complainant is a police officer. His professional conduct was questioned during a work incident. This led to a disciplinary hearing and a determination of misconduct. The Complainant appealed that determination to the Law Enforcement Review Board (the Board, the LERB or the Public Body). The Board heard the appeal in public and issued a Decision.

[2] The Board's Decision was posted on its website. The Complainant believes the posting of a decision that is retrievable using his name in a web search engine is a breach of his privacy. He filed a privacy complaint with the Information and Privacy Commissioner.

[3] The Commissioner authorized me to investigate this matter. The issue investigated was:

> Did the Public Body disclose the Complainant's personal information contrary to Part 2 of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act or the Act)?

[4] The investigation included examining whether the Public Body had:

- authority to disclose the Complainant's personal information in the Decision; and,
- authority to disclose the Complainant's personal information on the Public Body's website.

The FOIP Act

[5] Personal information is defined in section 1(n) of the Act as, among other things, "*recorded information about an identifiable individual, including…the individual's name…information about the individual's….employment history…[and] anyone else's opinions about the individual...*".

[6] I confirm the Decision contains the Complainant's personal information. It has:

- The Complainant's name;
- The Complainant's profession and rank (employment history);
- References to an on-the-job incident the Complainant was involved in (employment history and opinions); and,
- A professional conduct decision made under the *Police Act* (employment history).

[7] Section 40 of the Act deals with the disclosure of personal information. Subsection (1) states that a "*public body may disclose personal information only*" for the reasons listed in the provision.

[8] Even if a disclosure is authorized by a provision in subsection 40(1), a public body must still consider subsection 40(4). Subsection 40(4) restricts an authorized disclosure to "*only… the extent necessary to enable the public body to carry out the purposes described in subsections (1)…in a reasonable manner*".

II. The Complainant's concerns

[9] The Complainant made the following complaint.

> LERB [Decision number] is a document issued by the LERB. The LERB has published this document with my personal details (NAME) online. If my name is googled the first item that is showed is a PDF document of the decision into a[n] appeal I was involved in. This HAS affected me in that strangers that know my name can google me and find out I am a police officer etc.

[10] The Complainant also included these comments (from an email he sent to Alberta Justice and Solicitor General) with the complaint form.

> I understand fully that the LERB decisions are open for the public to obtain. I have no issues with that as the majority of people who would be interested in such a document will already know I am a police officer. My issues are that people who google me find out I am a police officer, that is something I do not want happening in the area I live in and people I meet. I do not want my children to be at risk and think it is terrible that there is no responsibility on

anyones (sic) part as to the google searches and the publication of such [a] document. I do not want my name in the document and feel it is my personal privacy that is at risk. Is there no protection for me? I can google many people I know who have been through LERB issues and they do not show up on google.

All I can say is that I feel I am at risk by firstly having my profession slapped all over the internet, and secondly I feel this is putting my family at risk.

III. The Public Body's position

[11] The Public Body provided this Office with information regarding its authority to disclose the Complainant's personal information.

Disclosure authority relied upon by the Public Body

[12] The Public Body relied upon subsections 40(1)(e) and (f) of the Act as its authority to disclose the Complainant's information.

> *40(1) A public body may disclose personal information only…*
>
> > *(e) for the purpose of complying with an enactment of Alberta or Canada or with a treaty, arrangement or agreement made under an enactment of Alberta or Canada,*
> >
> > *(f) for any purpose in accordance with an enactment of Alberta or Canada that authorizes or requires the disclosure…*

[13] Therefore, if a law, or a regulation under a law, allows or requires a disclosure, the FOIP Act will allow, or will not prevent, the disclosure.

The Police Act and LERB policies

[14] Part 2 of the *Police Act* provides the Public Body with direction on how to run its appeal process. Subsections 20(1)(l) and (m) require appeals to be held in public unless, in the opinion of the Board, it is in the public interest to hear the matter in private.

> *20(1) For the purpose of conducting an appeal or an inquiry before the Board, the following applies:…*
>
> > *(l) an appeal or an inquiry shall be held in public;*
> >
> > *(m) notwithstanding clause (l), an appeal or an inquiry, or any portion of it, may be held in private if, in the opinion of the Board, it is in the public interest to do so…*

[15] Section 20 also contains the following.

- Section 20(1)(c) – The Public Body has the same power as is vested in the Court of Queen's Bench for the trial of civil actions to summon and enforce the attendance of witnesses, compel witnesses to give evidence on oath, and compel witnesses to produce documents.

- Section 20(2.1) – A decision of the Board must be made in writing.

- Section 20(3) – Where the Public Body concludes an appeal, the parties to the appeal, the commission, and the Minister must be informed in writing of the findings.

[16] As a quasi-judicial tribunal, the Public Body advised that it "adopts the open court principal (sic). This principle promotes public and media access to the Public Body's proceedings and ensures the effectiveness of the evidentiary process, encourages fair and transparent decision-making, promotes the integrity of the justice system and informs the public about the Public Body's operation".

[17] The Public Body has a policy that guides its appeal process and it has resource material for participants.

- Policy D-01, Decisions of the Board, states that "Decisions of the Board are considered public documents and will be posted on the Board website shortly after the decision is issued".

- The Board's resource document entitled "Preparing for a Hearing" advises readers that "hearings are open to [the] public unless the Board determines otherwise. Local media may be present to report on the proceedings".

[18] As notification of the public nature of the appeal process, the 'Preparing for a Hearing' and the 'Decisions of the Board' documents were given to the Complainant in a letter to his counsel in 2010. I was told that at "no time was the LERB advised of any potential concerns or issues respecting the online disclosure of the Complainant's decision".

Investigation analysis

Authorized disclosure under the FOIP Act – Section 40(1)(f)

[19] Section 40(1)(f) allows for a disclosure "*for any purpose in accordance with an enactment of Alberta…that authorizes…the disclosure*". (While the Public Body referred to

two subsections, 40(1)(e) and (f), to authorize its disclosure, I did not find it necessary to consider both.)

[20] In my opinion, the Public Body's authority to conduct its appeals in the presence of the public further to section 20(1)(l) of the *Police Act* is clear. Therefore, section 40(1)(f) of the Act is met for that process. However, are records that stem from a public appeal also to be made public?

[21] In Order 2013-014, the Adjudicator decided the public body, a regulator and tribunal, had the authority to disclose a decision to affected parties and beyond. In Order 2013-014, the public body had comprehensive authority in its home legislation, broader than in this case, that it could rely upon to allow a wider disclosure.

[22] That is not the case here. The Public Body has the authority under the *Police Act* only to hold the appeal in public; there is no specific authority in the *Police Act* that allows a disclosure of the information from the appeal to the general public.

Authorized disclosure under the FOIP Act – Section 40(1)(c)

[23] While section 40(1)(f) may not provide the precise authority to disclose the personal information in a decision to the general public, I believe section 40(1)(c) may provide such authority. Section 40(1)(c) reads:

> *40(1) A public body may disclose personal information only…*
>
> > *(c) for the purpose for which the information was collected or compiled or for a use consistent with that purpose.*

[24] The Public Body is an independent quasi-judicial body established under the *Police Act*. Under that statute, its primary activities (relative to this case) are:

1. To hear appeals, in public, brought forward by citizens and by police officers (which is consistent with the open court principle) [section 20(1)(l)];

2. To dispose of the matter by writing the decision in those appeals [section 20(2.1)]; and,

3. To advise the parties and the Minister of the decision [section 20(3)].

[25] Those are the purposes for which the personal information was collected or compiled so the Public Body would also be authorized under subsection 40(1)(c) of the FOIP Act to disclose information for those same purposes.

[26] Subsection 40(1)(c) also allows a public body to disclose the information if the disclosure is for a use *consistent* with the original purpose of collection.

[27] Under section 41 of the FOIP Act, a disclosure is consistent with the original purpose for collection if the disclosure "*has a reasonable and direct connection to that purpose, and…is necessary for performing the statutory duties of, or for operating a legally authorized program of, the public body that uses or discloses the information*".

[28] One of the main components of the open court principle is transparency because, among other things, it advances public confidence in the courts and tribunals. Disclosure to the public has a reasonable and direct connection to the original reasons for collecting and compiling the information, and it is necessary for the operating activity of the Public Body: i.e., conducting appeals in public. Additionally, the public disclosure of a decision is consistent with the authority to allow a member of the public or the press to be present at a hearing.

[29] Section 40(1)(c), in my opinion, allows the Public Body to disclose the personal information to the public.

IV. Limiting disclosure to extent necessary

[30] When a disclosure is authorized under section 40(1) of the *Act*, a public body must still consider subsection (4) and ensure the personal information disclosed is "*limited to the extent necessary to carry out the purposes described in subsections (1), (2) and (3) in a reasonable manner*".

[31] Based on the Complainant's concerns and the details in this case, there are two components to consider when deciding whether the disclosure was limited to the extent necessary relative to the purpose and whether it was also done in a reasonable manner.

1. The amount and detail of the information that was disclosed.

   This component deals with the personal information itself: names, details of events, opinions, etc. ~ each data element disclosed ~ and its relevance to the purpose for disclosure.

2. How far afield was the information disseminated? That is, who are all the recipients of the information?

   This component deals with the degree or penetration of disclosure and refers to all the probable or potential viewers of the Decision. Is the disclosure limited to a person or group of people; is the disclosure unlimited; or is it at some point in between? Finally, which degree satisfies the purpose for disclosure?

Disclosure of details in the Decision

[32] The Public Body was authorized, under section 40(1)(f), to disclose personal information in the Decision to a limited audience ~ the parties to the appeal ~ for a purpose in accordance with an enactment that authorizes or requires the disclosure (but it was not authorized under that provision to disclose the Decision to the general public).

[33] The applicable enactment is the *Police Act*, sections 20(1)(l), 20(2.1), and 20(3) which allows an appeal to be held in public; a decision to be made in writing following the appeal; and, a disclosure to the parties and the Minister. Therefore, the disclosure must be limited to fulfilling those purposes: holding a public appeal, writing a decision, and informing the limited audience.

[34] I also found the Public Body was authorized under section 40(1)(c) to disclose the information in the Decision to the general public because to do so was consistent with the original purposes for collection.

[35] Because the Public Body limited the data elements in its Decision to only those that were germane to the public appeal and to the Decision, the restrictive condition in subsection 40(4) of releasing only relevant data elements has, in my opinion, been met. The Decision disclosed only the Complainant's name; his profession and rank; references to the on-the-job incident he was involved in; and, the decision itself.

Disclosure on the website

[36] Because the Complainant has questioned the need to disclose the information on the LERB's website, this investigation also analyzed whether the *degree or penetration* of disclosure was limited to the extent necessary in accordance with section 40(4) of the Act.

[37] In February 2010, the Privacy Commissioner of Canada issued a guidance document called *Electronic Disclosure of Personal Information in the Decisions of Administrative Tribunals.* In July 2011, the British Columbia Information and Privacy Commissioner's Office issued a similar document and the same guidelines have been referred to by the Office of the Information and Privacy Commissioner of Saskatchewan.

[38] All provide the same guidance on the considerations of posting decisions on the internet. I used the guidelines to help analyze whether the internet disclosure was limited to only "*the extent necessary to enable the public body to carry out the purposes described in subsections (1)…in a reasonable manner*" further to section 40(4).

The guidelines and the comments relative to this investigation

i. Assessing whether a tribunal's enabling legislation allows for a public disclosure.

The enabling legislation of the LERB not only allowed but required a public process during the appeal.

ii. The sensitivity, accuracy, and level of detail of the personal information.

The information is not particularly sensitive and I can only assume it was accurate, particularly since the Complainant did not raise an issue about accuracy. The detail was limited to a specific job-related incident not about, for instance, more intimate details of the Complainant's life.

Notably, the Complainant was not concerned about the primary content of the Decision. Rather his concern was about the fact that his name is associated with his profession (when that information is on the web).

iii. The context in which the personal information was collected.

The information was originally collected to assess and make a decision about the conduct of the Complainant while he was doing his job as a public official.

iv. The specific public policy objectives and mandate of the tribunal, the public interest in the proceeding and its outcome.

According to the General Information sheet on the Public Body's website the "principal activity of the Board is to hear appeals from citizens who have complained about a police officer's actions and are not satisfied with the disposition of their complaint. Police officers who have been the subject of discipline arising out of a complaint and who themselves feel aggrieved with the decision of their chief of police may also appeal to the Board. The Board provides a forum for both citizens and police officers separate and apart from the police service involved."

The appeal was driven by the Complainant regarding a disciplinary matter; it was not citizen driven. However when the conduct of a police officer is being questioned, even in a case such as this where a member of the public does not directly raise the issue, there is a public interest and public disclosure component. How a police officer handles his/her duties ultimately affects the public.

v. The expectations of affected individuals.

Given that he complained, it would seem the Complainant did not expect that the information would be so publicly posted. However, the Public Body did provide the Complainant with information on the public nature of the process and of any decision resulting from the process.

The Complainant could have raised the issue with the Board at the time of the appeal and asked for a less public process. The request may not have been granted; however it would at least have raised the Complainant's concerns.

The Board has the authority to make the public/non-public determination.

vi. The possibility that an individual may be unfairly exposed to monetary, reputational or other harm as a result of disclosure and the gravity of that harm.

The harms noted, if they resulted at all, would stem from the incident itself or possibly from the public appeal process, not from the disclosure of the incident on the Public Body's website. This Office cannot ask to have the appeal process changed from public to non-public.

The Complainant alluded to harm in his complaint but no specifics were provided. I attempted to obtain more information from the Complainant but was not successful.

vii. The finality of the tribunal's decision and the availability of a right of appeal or review.

A decision of the Board may be appealed to the Alberta Court of Appeal on a question of law.

viii. A tribunal should limit the amount of information in the decision unless truly relevant to the decision of the tribunal.

There does not appear to be any extraneous information in the Decision.

[39] This case raises another important consideration. The point was not mentioned in the federal or BC guidance documents but may have been had the facts of this case been before them.

ix. Whose personal information is at issue and what is its relevance to the larger public policy goal of the tribunal?

> Personal information such as a name in a decision about a public official acting in the public official role, would warrant greater scrutiny through disclosure ~ and ease of access to that disclosure ~ than, for instance, the name of the individual challenging a benefit level or appealing a property tax.
>
> While that precise question was not posed to the Public Body, in its response to me it did state that its process "encourages fair and transparent decision-making, promotes the integrity of the justice system and informs the public about the Public Body's operation".

[40] With that said, is there a need to have the Decision so public that it can be easily retrieved from the internet using a web search engine such as Google? Could the Public Body's policy objective be arrived at "in a reasonable manner" if:

- The appeal was heard in public;
- Anyone could attend, including the press;
- The Decision could be found entering an officer's name on the LERB website; and,
- The Decision could *not* be found entering an officer's name using a web search engine?

[41] One further, and important, consideration helps to answer that question.

Interfering with quasi-judicial bodies - Order F2013-14

[42] I referred to Order F2013-14 earlier. It deals with this issue and refers to the role of this office in the context of adjudicative bodies collecting and disclosing personal information.

[43] At paragraph 38 the Adjudicator said:

> "…it is important to ensure that the restrictions on dealings with personal information under the FOIP Act are not applied so as to interfere inappropriately with the statutory functions of the tribunal, in relation to … whom and to what degree (in terms of personally identifying information) the personal information it has relied on needs to be disseminated (though the last of these is arguably more than the others also within the province of the Commissioner)."

[44] She goes on to say, at paragraph 42:

> "It is only when a quasi-judicial body can be said to be handling personal information in a manner clearly outside the scope of what is reasonable, for example by gathering or requiring, or disclosing, personal information that is entirely extraneous to its proceedings – where, in other words, it ranges outside its own territory and brings itself into the territory covered by the FOIP Act, that a response from the Commissioner is required. To put this another way, any application of the standard of reasonableness for dealings with personal information imposed [by] the FOIP Act to a quasi-judicial body's dealings with personal information in the course of exercising its quasi-judicial functions should be done only in situations in which the possibility of impropriety in those dealings has clearly been raised. Even then it should be done with great care and deference to the expertise of the quasi-judicial body."

[45] In summary, unless the privacy-related conduct of the tribunal is clearly unreasonable, the questioning of the amount or method of disclosure must be handled cautiously and with deference.

[46] When the guidelines and Order F2013-14 are considered, in my opinion, the Public Body fulfilled the condition in section 40(4) when it posted the Decision on its website.

VII. The investigation conclusion…

- The FOIP Act does not specifically prevent disclosures on the internet.

- The *Police Act* requires appeals to be heard in public. It does not provide specific authority to disclose the information, which stems from an appeal, to the public.

- The Public Body has adopted the open court principal which encourages fair and transparent decision-making. When a decision reflects the professional behavior of an official of the justice system, the name or identity of the individual becomes more meaningful to the process.

- Section 40(1)(f) of the FOIP Act allows the personal information in the Decision to be disclosed to the parties of the appeal and to the Minister because another act allows that disclosure.

- Section 40(1)(c) of the FOIP Act allows a disclosure on the website because the reason it is being disclosed is for a use consistent with an original purpose for collection.

- The Public Body appears to have thought through the rationale for posting LERB decisions on its website, and this office must not interfere inappropriately with the functions of the tribunal.

- In my opinion, due to the factors above, the Public Body did not disclose the Complainant's personal information contrary to section 40(1) of the FOIP Act.

- In my opinion, due to the factors above, the Public Body did not disclose the Complainant's personal information, including disclosing it on the internet, contrary to section 40(4) of the *Act*.

V. …and a recommendation

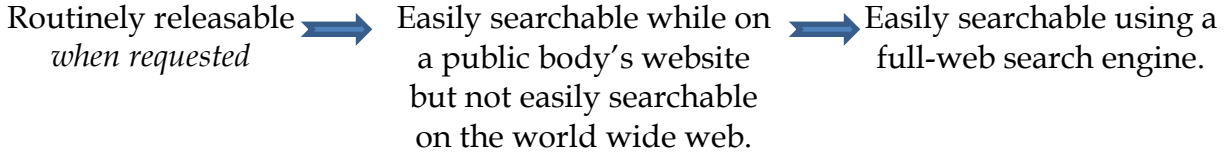
[47] There are many decisions on the LERB's website. The cases relate to minor and major police disciplinary issues. The question that flows from this complaint is: though a disclosure on the internet is authorized, can an adjustment be made for certain decisions so that name-searchability is limited to only the LERB's site?

[48] There are ways to minimize personal information disclosure on the internet. For instance, and again taken from the BC Commissioner's documents, public bodies could "employ technological means of protecting privacy on the Internet by using robot exclusion protocols… and eliminating the option of public search queries by name. This makes it more difficult for search engines such as Google to locate and display search results of a tribunal's decision pertaining to a specific individual".

[49] "A robot exclusion protocol is a convention used to prevent web robots from accessing all or part of a website that is otherwise publicly viewable."

[50] Using proper criteria, distinguishing between the decisions that result from more serious conduct issues and those in a minor category ~ with the more serious public interest ones being easily searchable compared to those at the other end of the spectrum ~ may still fulfill the important and sometimes conflicting principles of the accountability of public officials through access to information, and the protection of those same officials' privacy.

[51] If this or similar methods were employed an ease-of-access continuum would result.



[52] I think it is up to the Public Body to determine the merit of making decisions fully publicly searchable or limiting the searchability, and therefore disclosure, in some fashion. It is also up to the Public Body to determine the merit of differentiated treatment based on each case and developing the proper criteria to determine that treatment.

[53] In its November 2002 report, the Select Special FOIP Act Review Committee reflected upon the disclosure of personal information in decisions of administrative tribunals. While it did not precisely refer to the disclosure of such decisions on the internet it did state this (on page 29):

> "The Committee considered a range of options and agreed that each tribunal was in the best position to advise on the appropriateness of disclosure of personal information in its decisions. It was agreed, therefore, that any authorization or requirement to disclose personal information in decisions should be in the legislative instrument that governs the administrative tribunals."

[54] Controlled privacy is a critically important element of privacy schemes (and a desired one for the Complainant). That said, I do think it's important to point out one possible and very significant outcome that could arise if differentiated treatment were employed: if nothing were located using a search engine that scanned the whole internet, individuals searching on the web might not go any further, and could assume there are no matches, because the search parameters led to no results being found.

[55] The Public Body ~ since it deals with information of law enforcement officials ~ must consider whether is it transparent enough, with the ease-of-search so relied upon now, to limit the locating of a decision to only its site. It must also recognize that if the information is not easily accessible it can be seen to be inaccessible.

[56] I recommend the Board consider reviewing its current policies to determine whether differentiated disclosures would satisfy both its openness-through-access objective and its privacy objective.

Prepared by Catherine Taylor, Portfolio Officer