ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2009-032

March 31, 2010

CALGARY POLICE SERVICE

Case File Number F4517

Office URL: www.oipc.ab.ca

Summary: The Applicant complained that the Calgary Police Service (CPS) had failed to meet its duty to assist him. It provided information to him at a late stage in the inquiry, but had not provided the information at the point at which, by reference to an order of this office in an unrelated case, it became apparent that he was entitled to it under the Act.

The Adjudicator held that the duty to assist was referable to the point at which the public body responds to an access request, and that the CPS had not failed in its duty to assist the Applicant by failing to provide the information at an earlier point.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss.10(1), 27(1), 27(1)(a), 72.

Orders Cited: AB: F2004-017**;** F2007-014.

I. BACKGROUND

[para 1] In a March 28, 2008 request to the Calgary Police Service (CPS) for access to information under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act or the Act), the Applicant asked for invoices and/or bills associated with a civil lawsuit launched by a former police chief against particular individuals, in relation to

particular websites, as well as for invoices from and or payments to a private investigator for services rendered in pursuit of the claim. The CPS located 58 pages of responsive records, but refused to provide them on the basis that they were protected by solicitor-client privilege, and thus fell within the exception in section 27(1) of the Act.

[para 2] In his request for review to this office of June 10, 2008, the Applicant stated that he is not seeking information as to the specific parties involved, but asks for sufficient disclosure of the records to enable him to know how much money was billed and paid in legal costs/ lawyers' fees and private investigator(s)' fees in furtherance of the law suit.

[para 3] Mediation was authorized but did not succeed, and the matter was set for inquiry.

[para 4] The CPS did not submit records for my review in this inquiry, but chose instead to rely on the Solicitor-Client Protocol of the office (which has been posted on the office website) in connection with documents for which a claim of solicitor-client privilege has been made. Accordingly, CPS made a series of arguments about the basis on which it was claiming solicitor client privilege.

[para 5] As I was unable to reach a conclusion as to whether solicitor-client privilege applied on the basis of these arguments, I asked the CPS to provide further explanations. I also pointed out that according to an earlier order of this office, billing amounts for legal services do not meet the test for privilege unless they would enable the person seeking the information to deduce or otherwise acquire communications protected by the privilege, rather than being neutral information. I therefore asked the CPS to explain how revealing records that show only the amounts of legal fees relating to the law suit in question would reveal communications protected by privilege.

[para 6] On January 25, 2010, in its response to my questions, the CPS stated:

> I note, however, that your letter advises that the Applicant is no longer seeking full disclosure of the 58 pages of records at issue, but is only interested in "how much money was spent" in defending the lawsuit at issue.
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> The Calgary Police Service does not oppose providing this information to the Applicant and advises that the following amounts were invoiced and paid for legal bills "associated with the civil lawsuit launched by [the former police chief] against [named individuals] in relation to the now-defunct "Standfirm" and "Code 200" websites": … .

The CPS then went on to set out the total billed amounts.

[para 7] In view of this response, I asked the Applicant to comment as to whether this information satisfied his request. On February 5, 2010, he replied, stating that he wished the inquiry to continue, both because he did not wish to abandon the possibility that the

adjudicator would order further disclosure beyond just the billed amounts, and also because he wished me to address why, in light of the appropriate characterization of his request, it "took the public body until January 2010 to disclose this information when it was abundantly clear from the outset that it would have substantially satisfied [his] request".

[para 8] In view of this reply, the Commissioner decided to continue with this inquiry, and directed that the following issue be added:

> Did the Public Body make every reasonable effort to assist the Applicant, and to respond to him openly, accurately and completely?

II. RECORDS AT ISSUE

[para 9] The information at issue was provided by way of a newly-created record, rather than by providing redacted records. Therefore, the redacted version of the records (consisting of 58 pages) remains at issue in the sense that the Applicant may, as explained further below, choose to have the information provided in this manner.

III. ISSUES

[para 10] The original issue in this matter stated in the Notice of Inquiry was whether section 27(1) of the Act had been properly relied on in refusing access to the records. However, the Applicant has made very clear, both in his request for review, and in his correspondence to me, that he was not asking for a review of the CPS's response to him insofar as it withheld the totality of records relating to the billings for the lawsuit, but only insofar as it withheld the billed amounts. Therefore, I will not now ask the CPS to explain why it applied section 27(1)(a) to the remaining parts of the records. I may review only matters relative to which a request for review has been made. Therefore, as the CPS has disclosed the billed amounts, the application of section 27(1) is no longer an issue relative to any of the information in this matter.

[para 11] Thus the issue is, as stated above:

> Did the Public Body make every reasonable effort to assist the Applicant, and to respond to him openly, accurately and completely?

This duty arises under section 10(1) of the Act.

[para 12] I will also comment as to whether the CPS met its duty by providing information (in the form of a newly-created record) rather than by providing severed records.

IV. DISCUSSION OF ISSUES

[para 13] In his letter of February 5, 2010, asking that the inquiry be continued, the Applicant stated that the CPS's characterization of his access request as one that had changed from being for all the records relating to the billings in the lawsuit to one for the billed amounts misrepresented his position. He stated:

> … in her Jan 25 letter to your office [the Privacy Counsel for the CPS] said the service decided to disclose the information because my position had somehow changed and "the applicant is no longer seeking full disclosure of the 58 pages of records at issue, but is only interested in 'how much money was spent' in defending the lawsuits at issue."
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> This is simply inaccurate, and a gross misrepresentation of my position. From the beginning, I argued that the Calgary Police Service could simply tell me how much they spent on the lawsuits without contravening Sec. 17 ("disclosure harmful to personal privacy") or Sec. 27 ("privileged information").
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> In my request for review sent to your office on June 10, 2008, I wrote: "I acknowledge there may be information in those records that, if released, would constitute an unreasonable invasion of privacy and be subject to privilege. However, it is my contention that none of those provisions prevent the Calgary Police Service from providing disclosure that will answer one basic question: How much did these legal manoeuvers cost? In case the request for review wasn't shared with the public body, there was also this line from my initial brief submitted at inquiry in May 2009:"[K]nowing which lawyer(s) or private investigator(s) billed for services is not central to the applicant's request and this information could be severed. Put simply, the applicant wants to know how much the pursuit of [the former police chief's] lawsuit cost the ratepayers of Calgary, and how these monies were spent. This information can be disclosed without contravening Sec. 27(2).

[para 14] As well, in his submission, the Applicant again stated that he is not asking for information as to which lawyers billed for services (which could be severed), but only how much money was spent.

[para 15] I agree that the characterization of the Applicant's request in the January 25 letter of the CPS Privacy Counsel may be described as inaccurate to some degree. The original access request to the CPS was for "invoices and/or bills *associated with*" [my emphasis] the civil lawsuit, so it was for all the records that the CPS identified as responsive. However, from the time of the request for inquiry to this office, the Applicant's position has been that he would be satisfied with the billing information only. Information as to what took place during the mediation phase is not available to me, so I do not know whether the CPS was told at that time that the Applicant wanted only the billing information. However, it is clear that the Applicant expressed this position in his submission of May, 2009. Thus if the January 25 letter is to be taken as describing his position as having changed from that time, it is inaccurate.

[para 16] However, in its response to me of March 12, 2010, the CPS explained why it had not provided the information earlier that it disclosed in its letter of January 25. It stated that at the time of the access request, Order F2007-014 (dated October 10, 2008) which clarified the position of this office as to the application of solicitor-client privilege to lawyers' bills of account, had not yet been issued. (I note that prior to that time, the position of this office had been that legal bills of account are subject to solicitor client privilege. See Order F2004-017.) The CPS stated the following:

> The Public Body submits that it a not in breach of its duty to assist in refusing disclosure of its legal invoices in April of 2008 since it had acted in good faith based on its interpretation of the Act and case law as it relates to the claim of solicitor-client privilege. The Public Body submits that while the release of Order #F2007-014 on October 28, 2008 clarified the position of the Privacy Commissioner with regard to the disclosability of legal bills of account, the present matter was already under review at that time. The Public Body cannot find any authority to suggest that its duties under section 10 extend to it reconsidering a denial of records that is already under review.
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> … The Public Body submits that it was not obliged to address its claimed exemption under section 27 until called on by the Privacy Commissioner's office to do so. The Public Body further submits that the Privacy Commissioner did not solicit further information in respect of the section 27 exemption until January 5, 2010, and that upon receipt of the correspondence of that date from the Privacy Commissioner's office, the Public Body responded quickly (on January 25) in providing the information that it anticipated it would be compelled to provide, under the interpretation advanced under Order #F2007-014, i.e. the final dollar amounts the Public Body spent in relation to the legal matter in question. The Public Body submits that there was no earlier point in the process at which it was obliged to reconsider its position, that it was entitled to reconsider its position due to the clarification provided by Order #F2007-014, and that it in fact reconsidered its position, and provided the information that it anticipated it would be ordered to produce, based on Order #F2007-014.

[para 17] The CPS did not explain why it did not offer to disclose the records to the Applicant at the time it made its submissions in this inquiry (in May, 2009). I do note that neither party mentioned Order F2007-014 in their submissions, even though it had issued six months earlier.

[para 18] Be that as it may, I do not believe that that the duty of a public body to assist an applicant embraces the duty to reconsider its position in light of developments in the law that occur at some point during the inquiry process. The duty under section 10(1) of the Act is referable to a public body's response to an applicant at the time the request is made. While in some cases a public body who has failed to meet its duty may still do so at a later time, the request for review is for a review of the original response. The Act imposes a time limit for responding, and it does not speak to what is to happen if developments subsequent to the response that point to an outcome different from the decision that the public body made initially.

[para 19] Furthermore, the CPS did not wait for me to make a ruling on this issue; rather it provided the information at the first point at which it was formally called upon to focus

on the question in light of Order F2007-014. It did not argue, as potentially it might have done depending on the content of the records, that F2007-014 is distinguishable on the facts.

[para 20] I conclude that the fact the CPS did not provide the billing amounts earlier does not constitutes a breach of section 10(1) of the Act.

[para 21] I turn to the fact that the CPS created a record in order to provide the total of the billed amounts, rather than providing the redacted records. I note that CPS has now offered to provide the redacted records on payment of the $25 fee (which it had formerly returned when deciding to refuse disclosure). This is in accordance with the requirements of the Act, which provides access to records rather than the right to information in newly-created records. Thus if the Applicant prefers to instead receive redacted records on payment of the fee, he may indicate this preference to the CPS.

V. ORDER

[para 22] I make this Order under section 72 of the Act.

[para 23] I find that the CPS has not breached its duty to the Applicant under section 10(1) of the Act.

Christina Gauk, Ph.D.
Director of Adjudication