

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2010-014

July 19, 2011

CALGARY POLICE SERVICE

Case File Number F5199

Office URL: www.oipc.ab.ca

Summary: The Complainant made a complaint to the Commissioner under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) that his employer, the Calgary Police Service, (the Public Body), had taken his journal, which he had been required to keep as part of his training as a police recruit, and provided it to a psychologist for assessment. The Complainant complained that the Public Body had collected his journal and disclosed the journal to a psychologist, who then used it to make an assessment, all in contravention of Part 2 of the FOIP Act.

The Adjudicator found that the Public Body had collected the Complainant's personal information from his journal in order to obtain insights into his behavior and to assess safety concerns that had arisen. She found that this purpose was consistent with section 33(c) of the FOIP Act, given that training recruits was a function of the Public Body and that this function would include assessing suitability and ensuring safety.

The Adjudicator found that the Public Body had used the Complainant's personal information for the purpose for which it had been collected and used no more information that was necessary for meeting this purpose. She therefore found that the Public Body had used the Complainant's personal information in compliance with Part 2 of the FOIP Act.

The Adjudicator found that the Public Body's disclosure of the Complainant's personal information to the psychologist was made in compliance with both sections 40(1)(h) and 40(4) of the FOIP Act.

The Adjudicator confirmed that the Public Body had complied with part 2 of the FOIP Act in its treatment of the personal information in the Complainant's journal.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 33, 34, 39, 40, 41, 68, 72; *Personal Information Protection Act*, S.A. 2003, c P-6.5

Authorities Cited: AB: Orders F2006-019, F2011-007, P2006-008

Sopinka, John, et al. *The Law of Evidence in Canada* 2nd ed. Markham: Butterworths, 1999

Cases Cited: *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 112;

I. BACKGROUND

[para 1] The Complainant made a complaint to the Commissioner that the Calgary Police Service (the Public Body) had collected his personal information in contravention of Part 2 of the FOIP Act when it collected the Development Action Plan journal (DAP journal) he was required to keep as part of his training as a police officer. He also complained that the Public Body had improperly used the journal to prepare a psychological assessment, which it had relied on at a termination hearing, and had improperly disclosed the DAP journal when it provided it to a psychologist.

[para 2] The Commissioner authorized a mediator to investigate and try to settle the complaint under section 68 of the FOIP Act. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

[para 3] The Complainant provided both initial and rebuttal submissions, while the Public Body provided initial submissions.

II. ISSUES

Issue A: Did the Public Body collect the Complainant's personal information in contravention of Part 2 of the FOIP Act?

Issue B: Did the Public Body use the Complainant's personal information in contravention of Part 2 of the FOIP Act?

Issue C: Did the Public Body disclose the Complainant's personal information in contravention of Part 2 of the FOIP Act?

III. DISCUSSION OF ISSUES

Issue A: Did the Public Body collect the Complainant's personal information in contravention of Part 2 of the FOIP Act?

[para 4] In Order P2006-008, the Commissioner explained the burden of proof in relation to complaints made under the *Personal Information Protection Act* in the following way:

Relying on these criteria in Order P2005-001, I stated that a complainant has to have some knowledge of the basis of the complaint and it made sense to me that the initial burden of proof can, in most instances, be said to rest with the complainant. An organization then has the burden to show that it has authority under the Act to collect, use and disclose the personal information. This initial burden is what has been termed the "evidential burden". As I have said, it will be up to a complainant to adduce some evidence that personal information has been collected, used or disclosed. A complainant must also adduce some evidence about the manner in which the collection, use or disclosure has been or is occurring, in order to raise the issue of whether the collection, use or disclosure is in compliance with the Act.

[para 5] In *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 112, Yamauchi J. approved this approach to the burden of proof in complaints made under the FOIP Act. He said:

FOIPPA s. 71 deals with the burden of proof when a person seeks access to records. In some cases, the burden rests on the applicant. In others, the burden rests on the head of the public body. However, FOIPPA does not contain any provision that tells us on whom the burden of proof rests when a person lodges a complaint with the OIPC alleging that they believe a public body has used or disclosed their personal information in contravention of FOIPPA Part 2. Thus, the usual principle of "he who alleges must prove" applies. The OIPC takes this approach on these types of matters, see *e.g.* Order F2002-020: *Lethbridge Police Service* (August 7, 2002) at para. 20, which said:

... in this inquiry, the Complainant has the burden of proving that his personal information was disclosed by the Public Body. The Complainant has not met this burden of proof. Before I am able to find that a breach of Part 2 of the Act has occurred, there must be a satisfactory level of evidence presented in support of the allegation. If this were not the case, a public body could be put into the untenable position of proving a negative (*e.g.* that a breach did not occur) based on any allegation raised by a complainant.

But see, Order P2006-008: *Lindsay Park Sports Society* (March 14, 2007) at paras. 9-21, where the OIPC said that complainants under FOIPPA do not have a legal burden, but an evidential burden. Once the complainant satisfies the evidential burden, the burden shifts to the public body to show "that it has the authority ... to collect, use or disclose personal information," at para. 20. Because of FOIPPA's structure, this Court agrees with the *Lindsay Park* analysis of the burden of proof and evidentiary burden.

[para 6] The authors of *The Law of Evidence* 2nd Edition describe the evidential burden in the following way:

A party... may satisfy an evidential burden without doing anything; for example, a witness called by the Crown testifies to facts, which raise the issue of self-defence. Thus, a party may discharge

an evidential burden by pointing to some evidence already on the record. In these circumstances, the defendant does not adduce evidence but rather, the issue is raised by the evidence...

The term “evidential burden” means that a party has the responsibility to insure that there is sufficient evidence of the existence or non-existence of a fact or of an issue on the record to pass the threshold test for that particular fact or issue.

[para 7] A complainant bears the initial burden of adducing or pointing to evidence that establishes his or her information was collected, used or disclosed, depending on the nature of the complaint.

[para 8] Personal information is defined by section 1(n) of the FOIP Act. This provision states:

1 In this Act,

- (n) *“personal information” means recorded information about an identifiable individual, including*
 - (i) *the individual’s name, home or business address or home or business telephone number,*
 - (ii) *the individual’s race, national or ethnic origin, colour or religious or political beliefs or associations,*
 - (iii) *the individual’s age, sex, marital status or family status,*
 - (iv) *an identifying number, symbol or other particular assigned to the individual,*
 - (v) *the individual’s fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,*
 - (vi) *information about the individual’s health and health care history, including information about a physical or mental disability,*
 - (vii) *information about the individual’s educational, financial, employment or criminal history, including criminal records where a pardon has been given,*
 - (viii) *anyone else’s opinions about the individual, and*
 - (ix) *the individual’s personal views or opinions, except if they are about someone else;*

Personal information under the FOIP Act is information about an identifiable individual.

[para 9] In the present case, the Complainant argues that the Public Body collected his personal information in contravention of Part 2 of the FOIP Act. Consequently, the Complainant bears an initial evidential burden of establishing that the Public Body collected his personal information. If the Complainant satisfies this burden, then the burden shifts to the Public Body to establish that the collection, use, and disclosure of the Complainant’s personal information was done in compliance with Part 2 of the FOIP Act.

[para 10] The Public Body concedes that it collected, used, and disclosed the Complainant's journal. It states:

On August 21st, [an acting sergeant] was reviewing the Problem-Based Learning (PBL) journals (also known as Developmental Action Plans or DAP's) of Class 187. Upon reading the Complainant's journal, he became concerned about the content, and therefore showed the journal to [a sergeant] who also found some of the entries problematic. In light of the incidents from two days previous, and knowing that the Complainant had been sent for a Psychological Assessment, the two officers believed the journal might assist in the psychological assessment, so they brought the journal to the Public Body's Staff Psychologist.

[para 11] The Public Body provided the notes of the acting sergeant and the sergeant, referred to in its submissions, for the inquiry. These notes establish that they collected the Complainant's journal and provided it to a psychologist for her use in conducting a psychological assessment.

[para 12] The Public Body also provided a copy of the journal in question as an exhibit in its submissions. I note that the journal recorded the personal opinions and thoughts of the Complainant and is therefore information about him. I therefore find that the journal contains his personal information as defined by section 1(n) of the FOIP Act.

[para 13] I find that the Complainant's evidential burden has been met regarding the collection, use, and disclosure of his personal information. The burden of proof now shifts to the Public Body to establish that its collection, use and disclosure of the journal was made in compliance with Part 2 of the FOIP Act.

Did the Public Body collect the Complainant's journal in compliance with section 33 of the FOIP Act?

[para 14] The Complainant argues:

When [the acting sergeant] and [the sergeant], who are members of Calgary Police Service, took my journal to the psychologist without my consent, my knowledge or prior discussion with me, they violated my rights guaranteed by Part 2 of the FOIP Act...

The same instructors showed us strict techniques to be followed in writing our entries in order to make the journal NON-FOIPable. NON-FOIPable is a term they used to describe information that can not be required by law to be shared. And yet, the contents of my journals were shared without my knowledge.

I would like to mention that they obtained my journal after they collected them for the very first review. The purpose of this review was to give us feedback on how to write our entries more appropriately, in particular making sure we followed the NON-FOIPability techniques.

The Complainant primarily objects to the Public Body's collection of his journal because the Public Body showed his journal to a psychologist without first obtaining his consent or informing him that it intended to do so.

[para 15] Section 33 establishes that a public body may not collect personal information except in three specific circumstances. It states:

33 No personal information may be collected by or for a public body unless

- (a) the collection of that information is expressly authorized by an enactment of Alberta or Canada,*
- (b) that information is collected for the purposes of law enforcement,*
or
- (c) that information relates directly to and is necessary for an operating program or activity of the public body*

[para 16] Although the Complainant argues that the consent of an individual is necessary when a public body collects personal information, section 33 does not require consent. Rather, section 33 restricts the purposes for which a public body may collect personal information.

[para 17] The Public Body argues that its collection of the Complainant's personal information meets the requirements of section 33(c). In its submissions, it states:

The Public Body relies on section 33(c) of the Act, and states that ...any collection of the Complainant's personal information occurred during the course of administering the Complainant's training.

[para 18] In the Public Body's summary of its arguments, it argues:

The Public Body collected the Complainant's personal information by:

- i) requiring recruits to keep a journal of their learning plans; and
- ii) in periodically reviewing the journals to assist the recruits in achieving their learning objectives by providing feedback on their learning plans;

The Public Body's collection of the Complainant's personal information was authorized by section 33(c) of the Act, in that it was information relating directly to and necessary for an activity of the Public Body, namely, recruit training and management.

[para 19] The Public Body provided the affidavit of an in-service instructor who taught the recruit training module regarding keeping journals. She states:

I do verily believe that [the Complainant's class] was advised that the purpose of the journal, also known as a "Development Action Planner" (or DAP) was for the recruits to personalize their learning experience. They were instructed to discuss their thoughts about a particular situation or learning issue, personalize the experience, and then develop an action plan on how to better their learning, the latter of which was intended to be the key component of the journal as a tool for learning.

I do verily believe the potential for disclosure of the DAP and periodic review of the DAP was explained several times to the recruits, and reinforced in subsequent lessons. Recruits were instructed that the DAP remains the property of the CPS, is a record of the CPS, and is therefore producible in court and disclosable on a FOIP request or in the event an internal matter is investigated by the Professional Standards Section of the CPS. Recruits were told that their DAP would be reviewed by their instructors, their recruit advocate and their police training officers, and that they would be relevant and reviewed if there was a behavioral issue.

...

The purpose of reviewing the journals periodically was to assist the instructors in identifying any potential learning issues and assist the recruits in achieving their learning objectives by providing feedback on the plans or potentially furthering their learning objectives with additional assistance. (My emphasis)

I make this Affidavit truthfully, in answer to the Complainant's claims that this personal information was collected and disclosed in contravention of the FOIP Act and for no other purpose

[para 20] The in-service instructor explained to recruits that the journals would be relevant and reviewed if there was a behavioral issue. While the in-service instructor's statements speak to the use to which the Public Body put DAP journals, specifically, it could be inferred that she considered the purpose for collecting DAP journals to be similar – that is, DAP journals are collected and reviewed, among other reasons, because they may be relevant to behavioral issues.

[para 21] The Public Body provided a course syllabus, which contains references to the journals. The syllabus contains the following talking points:

Questions about Development Action Planning retention – explain who gets to read them
Lost Development Action Planning concerns – no names
Handing Development Action Planning to next PTO – or copy of your notes
Do not disclose personal details of calls, names, etc.
If DPA Development Action Planning is not acceptable for coach – bare minimum of journal entry would be the action plan for recruit.
Recruit advocate will check on the recruit Development Action Planner
PSS wanting access for behavior issues of recruits (My emphasis)
Discussion on when the Development Action Planning and content of Development Action Plans

Individual Exercise

1. Development Action Plan this session in the Development Action Planner using DPA and how will you use this in recruit training.
2. Reinforce that Development Action Planning is a tool for personal improvement

[para 22] While the Public Body, in its arguments, appears to restrict its purpose in collecting journals to “providing feedback in relation to learning plans”, I accept the evidence of the in-service instructor and the syllabus, that journals are also collected and reviewed because they are relevant when there are behavioral issues.

[para 23] The Public Body argues that its collection of the Complainant's personal information relates directly to an operating program or activity of the Public Body, in particular, its recruit training program and was necessary for it.

The Public Body submits that recruit training is one of its operating programs, and that instruction in proper note-taking and journal writing is an integral part of that program. Given the subject matter, effective instruction includes the period review of recruits' journals, in order to provide feedback and assistance.

Section 33(c) refers to personal information that relates directly to an operating program that is also necessary for the program itself. The question becomes, what kind of information is necessary for an operating program or activity? In my view, information necessary for an operating program or activity is information necessary for the public body to operate or offer the program or activity.

[para 24] In the present case, the Public Body must establish that the collection of the Complainant's personal information collected from his journal was for a purpose relating directly to the recruit training program, and was necessary for the recruit training program.

[para 25] I accept that providing feedback to recruits regarding their learning plans and reviewing their journals when there is a behavioral issue directly relates to and is necessary for recruit training for the purposes of section 33(c) of the FOIP Act. The affidavit evidence of the in-service instructor establishes that the DAP journals, and the personal information they contain, are an important and necessary tool for the Public Body's recruit training program, both for providing feedback and reviewing behavioral issues.

[para 26] The acting sergeant who decided to take the Complainant's journal to a psychologist states:

On Friday August 21, 2009, during the morning I was reviewing some of the [DAP] journals from [the Complainant's class]. When I read the Complainant's journal I was shocked at some of the content. In light of the SCI incidents I thought the content was very relevant and perhaps shed some light on [the Complainant's] state of mind.

The "SCI incidents" to which the acting sergeant refers include two incidents in which individuals participating in role playing activities involving the Complainant were injured, and an incident involving the Complainant's firearm. The acting sergeant notes that he considered the contents of the Complainant's journal to be relevant to the incidents that had taken place that week. I also note that the Public Body's evidence establishes that an acting staff sergeant and a sergeant met with the Complainant on August 20 to discuss behavioral issues that had been observed in training and had resulted in injuries or the potential for injuries, to other recruits. At that time, the Complainant was notified by an inspector that he was required to attend a fitness for duty assessment from the psychological services section. The evidence establishes that the Public Body had identified a behavioral issue in relation to the Complainant.

[para 27] The acting sergeant does not expressly state his purpose for collecting the journals of the recruits, only that he happened to be reviewing journals on August 21, 2009. The acting sergeant may have been reading the recruits' journals as a matter of course and came across the information relevant to the behavioral issues while doing so, or he may have been reading the Complainant's journal with the specific intention of determining whether it contained information relevant to the behavioral issues observed in training. In either case, collecting the Complainant's personal information in the DAP

Journal, then, because of its relevance to the behavioral issue that had been identified, is consistent with the in-service instructor's stated reasons for reviewing, or collecting, DAP journals. Moreover, collecting personal information to assess a recruit's suitability and to assess behavioral concerns, in light of documented incidents and evidence of a potential safety risk, is a purpose consistent with the requirements of section 33(c) of the FOIP Act. I make this finding because ensuring suitability and safety of recruits are activities relating directly to, and necessary for, providing recruit training, and collecting the Complainant's personal information in his DAP journal is consistent with furthering these purposes.

Did the Public Body's collection of the Complainant's journal comply with the requirements of section 34 of the FOIP Act?

[para 28] Section 34 of the FOIP Act imposes requirements on the manner in which a Public Body may collect personal information in certain circumstances. As with section 33, the consent of an individual is not relevant to the application of section 34. Section 34 states, in part:

34(1) A public body must collect personal information directly from the individual the information is about unless...

(n) the information is collected for the purpose of managing or administering personnel of the Government of Alberta or the public body...

...

(2) A public body that collects personal information that is required by subsection (1) to be collected directly from the individual the information is about must inform the individual of

- (a) the purpose for which the information is collected,*
- (b) the specific legal authority for the collection, and*
- (c) the title, business address and business telephone number of an officer or employee of the public body who can answer the individual's questions about the collection...*

[para 29] I interpret section 34(2) as applying in situations where a public body is *required* to collect personal information directly from an individual under section 34(1), but not in situations where it collects information from the individual the information about but is not required to do so by section 34(1). Section 34(2) establishes the steps a public body must take in order to collect personal information directly from a person whom the personal information is about.

[para 30] Some of the exceptions in section 34(1) may be viewed as acknowledgment by the legislature that there are situations in which collecting personal information in a direct manner or collecting it from the individual whom the information is about, could interfere with or defeat a public body's legitimate purposes in collecting the information and undermine its ability to collect the information. Other exceptions

enumerated in section 34(1) may be viewed as acknowledging that information may only be collected indirectly or from someone other than the individual who is the subject of the information as a practical matter.

[para 31] The Public Body does not argue that its collection of the Complainant's personal information falls under any of the exceptions to the requirement to collect information directly from the individual whom the information is about under section 34(1). Rather, it argues that it met the requirements of section 34(2) when it collected the Complainant's personal information from his journal.

[para 32] The Public Body argues that because the in-service instructor explained the purpose of journaling and how it was necessary for the recruit's learning, that it complied with both sections 34(2)(a) and (b) when it collected the Complainant's journal. In addition, it argues that the requirements of section 34(2)(c) were met through the instructional process. I make no findings in relation to the Public Body's arguments or evidence in relation to its compliance with sections 34(2) as I find that section 34(2) of the FOIP Act does not impose a requirement with which the Public Body was to comply when it collected the Complainant's DAP journal.

[para 33] I have already found that the Public Body collected the Complainant's journal in order to assess the Complainant's suitability for the recruit training program and because the journal was relevant to behavioral issues that had been identified. In my view, these purposes are consistent with "managing or administering personnel of the public body" for the purposes of section 34(1)(n) of the FOIP Act.

[para 34] As noted above, the duty in section 34(2) applies only in situations in which a public body is required to collect personal information directly from the individual whom the information is about. Section 34(1)(n) expressly excludes personal information collected for the purposes of managing personnel from the requirement to collect personal information directly. I therefore find that it was unnecessary for the Public Body to comply with section 34(2) when it collected the Complainant's journal, as this provision sets out the process for collecting personal information directly only in the circumstances when direct collection is required.

[para 35] I acknowledge that my interpretation of the relationship between subsections (1) and (2) of section 34 differs from that of the Adjudicator in Order F2006-019. In that order, the Adjudicator decided that public bodies are required to comply with section 34(2) if they collect personal information from the individual whom the information is about, even in situations when an exception to section 34(1) applies to the collection. However, in Order F2011-007, a recent order of this office, the Adjudicator rejected this approach and determined that if an exception to the application of section 34(1) applies, a public body need not comply with the requirements of section 34(2) in relation to that collection, even if it is collecting the information from the individual whom the information is about. I agree with the reasoning of the Adjudicator in Order F2011-007.

[para 36] As the Public Body was not required to comply with section 34(2) when it collected the Complainant's DAP journal, I need not decide whether it did.

Issue B: Did the Public Body use the Complainant's personal information in contravention of Part 2 of the FOIP Act?

[para 37] The Complainant argues that he understood his journal would be used to provide him with feedback regarding his training, rather than used by a psychologist in conducting a psychological assessment.

[para 38] Section 39 of the FOIP Act limits the circumstances in which public bodies may use personal information. It states, in part:

39(1) A public body may use personal information only

(a) for the purpose for which the information was collected or compiled or for a use consistent with that purpose...

(4) A public body may use personal information only to the extent necessary to enable the public body to carry out its purpose in a reasonable manner.

[para 39] Section 41 establishes what consistent purposes are for the purposes of section 39(1)(a). It states:

41 For the purposes of sections 39(1)(a) and 40(1)(c), a use or disclosure of personal information is consistent with the purpose for which the information was collected or compiled if the use or disclosure

(a) has a reasonable and direct connection to that purpose, and

(b) 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.

[para 40] The Public Body argues that its use of the Complainant's personal information meets the requirements of section 39(1)(a) on the basis that it was used for the same purpose that it was collected:

The Public Body states that it used the Complainant's personal information when its Instructors gathered in the recruits' journals for review and the provision of feedback to their Action plans.

The Public Body submits that this use of the Complainant's personal information was for the same purpose for which it was collected, that is, for the purposes of recruit training and instruction.

Did the Public Body's use of the Complainant's journal comply with section 39(1)?

[para 41] I find that the Public Body's characterization of its use of the Complainant's personal information from his journal is contradicted to a certain extent by its evidence. The Public Body's evidence does not establish that it provided the Complainant with feedback regarding his Action plan. However, despite its arguments, I am satisfied by its evidence that it used the personal information in the Complainant's journal for purposes reasonably and directly connected with its purpose in collecting the journal, and that its use of the information for that purpose was necessary for operating its recruit training program.

[para 42] The acting sergeant who reviewed the Complainant's journal states that on August 21, 2009, the day after the Complainant had been served with a memorandum to attend a psychological assessment, he determined that the Complainant's entries in his journal were relevant and shed some light as to the Complainant's frame of mind in relation to incidents that were already under investigation. He therefore decided that the entries should be provided to the psychologist conducting the assessment and that he brought the journal to the psychologist for that reason. He states:

When I read [the Complainant's journal] I was shocked at some of the content... I thought the content was very relevant and ... shed some light on [the Complainant's] frame of mind. I therefore showed the journal to [a staff sergeant] and together we took it over to [a psychologist] at the psychological services division. We went through the contents together and she made some notes...

This account is corroborated by the notes of a staff sergeant. The acting sergeant does not indicate in his notes that he used the personal information in the Complainant's journal in order to provide feedback to him regarding his learning plan, as the Public Body argues. Rather, the only purpose the acting sergeant documents for his use of the Complainant's personal information in the journal is that he considered the information in the journal relevant to the Complainant's state of mind in relation to incidents that had occurred, and would be useful for the psychologist who was providing a psychological assessment of the Complainant. I find that this use of the Complainant's journal is consistent with the Public Body's purpose in collecting the journal because it would be relevant to a behavioral issue it had identified.

[para 43] The sergeant who reviewed the journal with the acting sergeant states:

[The acting sergeant] approached me in regard to [the Complainant's development action planner. I reviewed it with him finding some of [the Complainant's entries problematic. We decided to take the Complainant's D.A.P. to [a psychologist] for her information. .. Went over [the Complainant's]D.A.P. and pointed out the concerning entries. [The psychologist] agreed with us in regards to the entries.

[para 44] I note that on August 20, 2009, the day before the journal was reviewed by the acting sergeant, the acting sergeant had spoken with the Complainant regarding the incidents in which the Complainant had been involved and it was determined that the Complainant should report for a psychological assessment.

[para 45] I have found that the Complainant's personal information in the DAP journal was collected because the Public Body had identified a behavioral issue and DAP journals are relevant to assessing behavioral issues. I find that the Public Body used the personal information in the DAP journal for the purpose of assessing the Complainant's psychological fitness. In my view, this is consistent with the Public Body's purpose in collecting the journal and was necessary for it to fulfill its function in relation to training recruits and assessing their suitability.

Did the Public Body use the journal only to the extent necessary to enable the public body to carry out its purpose in a reasonable manner under section 39(4)?

[para 46] The journal was used by the Public Body in order to assist it in conducting a psychological assessment of the Complainant's mental state at the time of incidents it was investigating. Having reviewed the contents of the journal, I am satisfied that all the personal information in the Complainant's DAP Journal would have assisted the Public Body in conducting an assessment of the Complainant's psychological suitability and to assess risk in a reasonable manner, as the information in the journal consists of the Complainant's thoughts and views at the time of incidents that led to the identification of a behavioral issue.

[para 47] For the reasons above, I find that the Public Body used the Complainant's journal in compliance with section 39(4) of the FOIP Act.

Issue C: Did the Public Body disclose the Complainant's personal information in contravention of Part 2 of the FOIP Act?

[para 48] The Complainant argues the following:

Before disclosing those entries to anyone, the sergeants should have asked for my consent. Before disclosing those entries to the psychologist, they should have discussed with me if they have any concern with them. They didn't take into consideration that those entries were personal and that English is my third language.

In their notes, the sergeants expressed concerns with my entries and that is the reason they took my journal to the psychologist. They obviously misinterpreted what I meant in those entries and the least they could have done is to ask me what I meant...

The Complainant argues that his consent was necessary before the personal information contained in his journal could be disclosed to the psychologist.

[para 49] Section 40 of the FOIP Act establishes the circumstances in which a public body may disclose personal information. It states, in part:

40(1) A public body may disclose personal information only...

...

(b) if the disclosure would not be an unreasonable invasion of a third party's personal privacy under section 17,

- (c) *for the purpose for which the information was collected or compiled or for a use consistent with that purpose,*
- (d) *if the individual the information is about has identified the information and consented, in the prescribed manner, to the disclosure...*
- ...
- (h) *to an officer or employee of the public body or to a member of the Executive Council, if the information is necessary for the performance of the duties of the officer, employee or member...*

(4) A public body may disclose personal information only to the extent necessary to enable the public body to carry out the purposes described in subsections (1), (2) and (3) in a reasonable manner.

[para 50] Section 40 establishes many circumstances in which a public body may disclose personal information; the consent of an individual under section 40(1)(d) is only one circumstance. Therefore, while it is clear that the Complainant did not consent to the disclosure of the personal information in his journal to the psychologist, if the Public Body's disclosure falls under another subsection of section 40, the disclosure will be authorized by section 40.

[para 51] The Public Body relies on section 40(1)(h) as providing authority for its disclosure of the Complainant's journal to the psychologist. I will therefore consider whether providing the journal to the psychologist was authorized by this, or another provision of section 40(1), and whether only the personal information necessary for carrying out the Public Body's purposes in a reasonable manner was disclosed.

Did the Public Body disclose the Complainant's personal information in compliance with, or contravention of, section 40(1)?

[para 52] The Public Body argues the following in relation to section 40(1)(h):

Section 40(1)(h) of the Act permits disclosure of personal information to officers or employees of the public body that has custody or control of the personal information if the information is necessary for the performance of the duties of the employee.

The Public Body's Staff Psychologist is an employee of the Public Body. Her opinion and determination of the Complainant's psychological fitness played a crucial role in the determination that the Complainant was not suitable to be [a] police officer.

The instructors reviewing the Complainant's journal deemed it to be of significance in the overall psychological assessment, and therefore disclosed it to the Staff Psychologist, who deemed it to be relevant to the assessment.

[para 53] The evidence of the Public Body is that a psychological assessment of the Complainant had been scheduled before it provided the journal to the psychologist.

Moreover, the evidence of the acting sergeant and the staff sergeant, discussed above, is that the personal information in the journal was relevant to the Complainant's state of mind regarding the incidents under investigation, and that some of the statements made in the journal required review by a psychologist. Consequently, it was necessary for the psychologist to review the journal in order to conduct the assessment the Public Body required her to perform as part of her job duties. I therefore find that the Public Body disclosed the journal to the psychologist because it was necessary for the performance of her duties. I therefore find that the disclosure to the psychologist was made in compliance with section 40(1)(h) of the FOIP Act.

[para 54] While I accept that the Public Body was authorized by section 40(1)(h) to disclose the Complainant's personal information to the psychologist, I also find that section 40(1)(c) authorizes the disclosure, given that the personal information in the journal was collected because it was relevant to a behavioral issue, and disclosing the information to the psychologist was intended to assist the Public Body to assess the behavioral issue. Moreover, for the purposes of section 41 of the FOIP Act, assessing the behavioral issue was necessary for the operation of the Public Body's recruit training program.

If the Public Body disclosed the Complainant's personal information in compliance with section 40(1), did it also comply with section 40(4)?

[para 55] Section 40(4) authorizes a public body to disclose information under subsections (1), (2), and (3), only to the extent necessary to meet its purposes under those subsections in a reasonable way. By implication, it would be a contravention of this provision if a public body disclosed more information than is necessary for meeting the purpose contemplated by section 40(1)(c).

[para 56] I find that disclosing the entire journal was reasonable for the Public Body's purpose in assisting the psychologist to conduct a psychological assessment. The journal consists of the Complainant's thoughts and opinions regarding circumstances that led to the Public Body's decision to investigate his psychological fitness. It was therefore necessary to disclose the entire journal to the psychologist to serve the Public Body's purpose of assisting the psychologist to assess the Complainant's psychological fitness.

[para 57] For these reasons, I find that the Public Body complied with section 40(4) when it disclosed the Complainant's personal information from his journal to the psychologist.

IV. ORDER

[para 58] I make this Order under section 72 of the Act.

[para 59] I confirm that the Public Body collected the Complainant's personal information in compliance with Part 2 of the FOIP Act.

[para 60] I confirm that the Public Body used the Complainant's personal information in compliance with Part 2 of the FOIP Act.

[para 61] I confirm that the Public Body disclosed the Complainant's personal information in compliance with Part 2 of the FOIP Act.

Teresa Cunningham
Adjudicator