

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2014-42

October 23, 2014

CALGARY POLICE SERVICE

Case File Number F7094

Office URL: www.oipc.ab.ca

Summary: The Complainant made a complaint to the Commissioner that the Calgary Police Service (the Public Body) had disclosed his personal information in contravention of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act), when a police officer revealed information about the terms of a Recognizance, a Certificate of Analyst, and a Notice of Intention to his parents.

The Adjudicator determined that the Recognizance was a record of a justice of the peace within the terms of section 4(1)(a) of the FOIP Act and that information disclosed from this record is exempt from the application of the FOIP Act.

The Adjudicator determined that the Certificate of Analyst and the Notice of Intention were records relating to a prosecution that had not yet been completed within the terms of section 4(1)(k) of the FOIP Act at the time of the disclosure. She determined that disclosure of the contents of these records was therefore a matter exempt from the application of the FOIP Act.

The Adjudicator confirmed that the Public Body had not contravened the FOIP Act.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 4, 72;

Authorities Cited: **AB:** Orders F2007-021, F2009-013, F2009-044, F2013-13

Cases Cited: *Alberta (Information and Privacy Commissioner) v. Alberta (Freedom of Information and Protection of Privacy Act Adjudicator)*, 2011 ABCA 36; *Alberta (Attorney General) v. Krushell*, 2003 ABQB 252

I. BACKGROUND

[para 1] On May 6, 2013, the Complainant made a complaint to the Commissioner that an officer of the Calgary Police Service (the Public Body) had disclosed his personal information to his parents. In particular, he complained that the officer had disclosed details of a criminal charge and the terms of a recognizance to which he was subject.

[para 2] The Commissioner authorized mediation to resolve the dispute. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

[para 3] On May 23, 2014, I wrote the parties to advise that I had added the issue of the application of section 4(1)(a). I also asked the Complainant questions regarding the substance of his complaint.

[para 4] The Complainant answered my questions and both parties made submissions regarding the application of section 4(1)(a), in addition to the question that had originally been posed for the inquiry.

[para 5] Once I reviewed the Complainant's answers to my questions and the Public Body's submissions, I decided that it was necessary to add the issue of whether section 4(1)(k) applies to the information from the Certificate of Analyst that the Complainant complains was disclosed. I invited both parties to make submissions regarding this issue.

II. ISSUES

Issue A: Is the information that is the subject of the complaint excluded from the application of the FOIP Act by the application of sections 4(1)(a) or 4(1)(k) of the Act?

Issue B: If the answer to Issue A is no, 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: Is the information that is the subject of the complaint excluded from the application of the FOIP Act by section 4(1)(a) of the Act?

[para 6] Section 4(1)(a) of the FOIP Act states:

4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

(a) information in a court file, a record of a judge of the Court of Appeal of Alberta, the Court of Queen's Bench of Alberta or The Provincial Court of Alberta, a record of a master of the Court of Queen's Bench of Alberta, a record of a justice of the peace other than a non-presiding justice of the peace under the Justice of the Peace Act, a judicial administration record or a record relating to support services provided to the judges of any of the courts referred to in this clause[...]

[para 7] Section 4(1)(a) applies to recorded information in the custody or control of a public body, but excludes from the application of the FOIP Act any information in a court file.

[para 8] In Order F2009-044, the Adjudicator stated:

Information in a court file includes copies of documents which originated in a court file (Order F2007-021 at para 25-26).

[para 9] In Order F2013-13, I discussed the kinds of information and records to which section 4(1)(a) applies. I said:

Section 4(1)(a) encompasses several different types of records that are exempt from the operation of the FOIP Act. These include: a record filed with the Court, and therefore "in a court file", records of the judges of the Court of Queen's Bench, the Court of Appeal or the Provincial Court of Alberta, records of a justice of the peace, judicial administration records, or records relating to support services provided to the judges. Information need not be filed with the Court to meet the requirements of section 4(1)(a) if it falls under one of the other categories of information listed in this provision.

It is not clear from the Public Body's arguments or the evidence before me that the records it argues are exempt under section 4(1)(a) constitute information that was filed with the Court, as discussed in previous orders of this office. However, I find that the records are "records of a justice of the peace" within the terms of this provision, given that they are records of a decision made by a justice of the peace under Part XVI of the *Criminal Code* to confirm the Information and promise to appear. I make this finding on the basis that the records consist of an Information and promise to appear and because the Information is signed by a justice of the peace.

[para 10] The Public Body relies on Orders F2007-021 and F2009-044 and argues that the information disclosed by the police officer originated from a record in a court file. The Public Body states:

The Public Body submits that the Recognizance upon which the Complainant was released on May 10, 2012 was issued by a Justice of the Peace of the Provincial Court of Alberta. It was therefore "information in a court file" and was therefore not subject to the Act, nor was the information therein.

The Recognizance upon which the Complainant was released contained, inter alia, the charge against the Complainant and the conditions of his release from custody pending trial. By the

terms of the Recognizance, the Complainant was obliged to abide by a curfew and remain in his stated residence between the hours of 10:00 PM and 07:00 AM, seven days per week. He was also obliged to present himself at the door of his residence to any peace officer in order to verify compliance with the curfew.

The Public Body submits that any disclosure by [the officer] of the information within the Recognizance is not subject to review by the Information and Privacy Commissioner.

[para 11] Section 4 of the FOIP Act establishes the Act's scope. Section 4 states that the FOIP Act applies to recorded information in the custody or control of a public body, subject to exceptions, which it enumerates. The FOIP Act may be viewed as applying to verbal disclosures of personal information, provided that the information that is disclosed has as its source recorded information in the custody or control of a public body in a situation where the recorded information is not subject to an exemption under section 4.

[para 12] The Applicant argues:

Part 1 of the FOIP Act regulates what information shall be accessed by Applicants to public bodies. There was never any Applicant to a public body for information to be accessed. This is a case of a police officer disseminating information without having been asked to do so.

[para 13] The Applicant takes the position that section 4 is included in Part 1 of the FOIP Act and therefore applies to access requests, and not complaints. As he has made a complaint and not an access request, he reasons that section 4 does not apply. I am unable to read section 4(1) as the Applicant proposes. Section 4 is explicit that it applies to the entire FOIP Act, as opposed to being restricted in its application to Part 1. Section 4 is not contained in Part 1 of the FOIP Act, as the Complainant argues, but is an "application provision" preceding Part I. Application provisions, such as section 4, apply to the entire statute in which they are found.

[para 14] I draw support for this interpretation from *Alberta (Information and Privacy Commissioner) v. Alberta (Freedom of Information and Protection of Privacy Act Adjudicator)*, 2011 ABCA 36 in which the Alberta Court of Appeal considered the scope of section 4 of the FOIP Act. The Court stated:

In my view, the analysis in *Krushell* would also insulate the Attorney General from review by the Commissioner of its practice of posting daily docket lists. If a person named in a docket sought review by the Commissioner of the posting of their personal information (i.e. name) without consent, the conclusion in *Krushell* that FOIPPA's reach does not extend to information contained in court records would mean that the Commissioner could not entertain a complaint about the docket. [my emphasis]

[para 15] In the foregoing case, the Court of Appeal held that when information is subject to section 4, it is excluded from the application of both the access to information and the protection of privacy provisions in the FOIP Act.

[para 16] In *Alberta (Attorney General) v. Krushell*, 2003 ABQB 252, which was cited in the Court of Appeal decision referred to above, the Court stated:

[...] one might consider the possible reasons for excluding court records from disclosure as an aid to determining which purpose s. 4(1)(a) was created to address. One such reason may indeed be that an ongoing alternate system for access to information is available. However, another may be the desire to protect the privacy of persons who are charged but have not yet and may never be convicted of a criminal offence. While such interests might be protected through the subsequent operation of s. 17 it is also likely that the privacy concerns surrounding the unconvicted accused are without exception, and so should be excluded in the first instance from the operation of the Act rather than triggering the expense of having Alberta Justice having to subsequently locate and edit such documents under the s. 17 provisions.

The mischief which could be created by allowing ready public access to the names of unconvicted accused is not difficult to imagine. Statutorily prescribed punishments for the convicted would pale in many cases in comparison to the *de facto* punishment created by posting information on the criminally charged for the benefit of the gossip and the busybody. Similarity of names might create defamatory impressions. Same-day internet postings would create concern about courthouse security and judge-shopping which could affect the administration of justice and thus judicial independence in ways the Legislature clearly attempted to avoid by so carefully exempting all matters relating to the judiciary in other subsections of s. 4.

[para 17] The Court in *Krushell* commented on the purpose of section 4(1)(a) and opined that it was possibly intended to protect the privacy of persons charged with offences as well as to protect the administration of justice from interference. Another view would be that section 4(1)(a) is intended to recognize that Courts have inherent jurisdiction to control their own processes, including the manner in which information is collected, used, disclosed, and accessed in proceedings before them. If it were not for section 4(1)(a), the manner in which information is collected, used, disclosed or accessed by parties in a Court proceeding, such as a trial, would be reviewable by the Commissioner in circumstances where a public body, such as the Crown, is a party to a proceeding or otherwise has possession of information entered in such proceedings. Such a result would undermine the jurisdiction and independence of the courts.

[para 18] On the facts of the present case, the police officer disclosed information from the Recognizance, which was signed by a justice of the peace. Although the police officer disclosed this information verbally, the source of the information remains the Recognizance. I find that the Recognizance is a record of the justice of the peace within the terms of section 4(1)(a). I therefore find that the information that the officer disclosed was not subject to the FOIP Act. It follows that the disclosure itself is not subject to the FOIP Act.

[para 19] The evidence of the parties establishes that the police officer told the Applicant's parents the details of the Certificate of Analyst when she visited their home with the intention of serving the Applicant. The records indicate that a Crown prosecutor directed the Public Body to serve the Applicant with the Certificate of Analyst and a Notice of Intention. It is also clear from the evidence that serving the Applicant with these records was a step taken to further an ongoing prosecution and that the records relate to the prosecution.

[para 20] Section 4(1)(k) of the FOIP Act states:

4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

(k) a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed;

[para 21] As discussed in Order F2009-013, section 4(1)(k) is intended to ensure that prosecutions may proceed without interference.

[para 22] At the time information regarding the existence of the Certificate of Analyst and the Notice of Intention was disclosed to the Applicant's parents, a prosecution was ongoing. These records relate to this prosecution. Any information disclosed by the police officer regarding these records was also information relating to a prosecution that had not yet been completed. I find that the information regarding the Certificate of Analyst and the Notice of Intention that was disclosed falls within the scope of section 4(1)(k), and any disclosure of details regarding these documents falls outside the scope of the FOIP Act for that reason.

Issue B: If the answer to Issue A is no, did the Public Body disclose the Complainant's personal information in contravention of Part 2 of the FOIP Act?

[para 23] As I have answered the question of whether section 4 applies to the information that was disclosed by the police officer in the affirmative, I need not answer this question.

IV. ORDER

[para 24] I make this Order under section 72 of the Act.

[para 25] I confirm that the Public Body did not breach any duties under the FOIP Act when it disclosed information about the Complainant to his parents on February 12, 2013.

Teresa Cunningham
Adjudicator