ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2015-41

December 18, 2015

CALGARY POLICE SERVICE

Case File Number F6681

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Summary: The Complainant complained that the Calgary Police Service ("CPS" or the "Public Body") collected his personal information in contravention of the *Freedom of Information and Protection of Privacy Act*. The Complainant's hockey association had required him to obtain a Police Information Check ("PIC") to enable him to volunteer as a coach. When the Complainant applied for the check to the CPS, the CPS required him to provide his fingerprints in order to complete a Vulnerable Sector Verification ("VSV").

The Public Body argued that this requirement was based on the requirements of the RCMP, who administer the VSV program. Because the Complainant was volunteering with minors and his gender and birthdate matched those of a pardoned sex offender, the RCMP's policy in providing checks was to require the Complainant's fingerprints, to ensure that he was not a pardoned sex offender, before it would issue a "clear" PIC. Therefore, the Public Body argued that the Complainant's fingerprints were necessary for one of its operating programs or activities.

The Information and Privacy Commissioner of Alberta found the Public Body relied heavily on the requirements of another organization as its basis for meeting the necessity test under section 33 of the Act. However, in this case, there was no other way for the Public Body to complete the PIC and the associated requirement in the circumstances for a VSV. The Commissioner found that this was a highly important program and one which required a high degree of certainty. Therefore, the Public Body was permitted to collect the Complainant's fingerprints pursuant to section 33 of the Act.

Statutes Cited: CANADA: *Canadian Charter of Rights and Freedoms*, s. 2, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11; *Criminal Records Act* R.S.C., 1985, c. C-47
AB: *Administrative Procedures and Jurisdiction Act*, R.S.A. 2000, c. A-3, s. 11; *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss.1, 33, and 72.
BC: *Criminal Records Review Act* R.S.B.C. 1996 c. 86.

Authorities Cited: AB: Order F2010-020 and F2010-027.

I. BACKGROUND

[para 1] In 2012, the Complainant sought to volunteer as a coach with a hockey team on which the players were minors. In accordance with the requirements of his hockey association, on October 25, 2012, the Complainant provided an application for a Police Information Check ("PIC") to the Calgary Police Service ("CPS" or the "Public Body"). According to the Public Body, the application stated that the Complainant was applying for a PIC because of his volunteer activity with Recreational Hockey Calgary. The Public Body also states that box 13 on the application form, which stated, "I will be working/volunteering with: children/youth", had been checked.

[para 2] The Public Body took the information from the application form and ran the Complainant's name and date of birth against the Canadian Police Information Centre database (CPIC), the Justice On-line Information Network database (JOIN), and the Public Body's Police Management System database (PIMS). These searches showed no record of criminal convictions, outstanding charges, or police incidents.

[para 3] Because the Complainant's application form had indicated that he would be volunteering with children or youth, in order to complete the PIC, the Public Body states that it had to perform a Vulnerable Sector Verification ("VSV"). The VSV required the Public Body to search the Complainant's name, gender and date of birth against the pardoned sex offender database, which is operated by the Royal Canadian Mounted Police – Canadian Criminal Real Time Identification Services (RCMP-CCRTIS). The Public Body's search of the database came back with an inconclusive result, wherein the Complainant's gender and date of birth matched that of a pardoned sex offender in that database. When two or more of the three criteria used to search the database produce a hit, the RCMP-CCRTIS procedures dictate that the only way to verify the applicant for the check is not the pardoned sex offender whose gender and birthdate match the applicant's is to collect the applicant's fingerprints and compare them to those of the pardoned sex offender.

[para 4] On October 25, 2012, the Public Body issued an "attend letter" to the Complainant requiring his attendance at the Public Body's Police Information Check Unit ("PIC Unit"). On receiving this letter, the Complainant contacted the Public Body

and, according to the Public Body, was told he was required to provide fingerprints in order to verify he was not a pardoned sex offender.

[para 5] On November 27, 2012, the Complainant attended the PIC Unit, his fingerprints were scanned, and they were then submitted to the RCMP-CCRTIS. Later that day, the Public Body was advised by the RCMP-CCRTIS that the Complainant's fingerprints did not match the fingerprints of a pardoned sex offender.

[para 6] On November 29, 2012, the Public Body sent the Complainant a "clear" letter indicating that his screening was done and the results were negative.

[para 7] On December 17, 2012, the Office of the Information and Privacy Commissioner received a complaint under the *Freedom of Information and Protection of Privacy Act* ("the Act" or "the FOIP Act") from the Complainant, stating he had been coerced into submitting fingerprints to the Public Body. I assigned a portfolio officer to mediate and attempt to resolve this complaint. That was not successful and on June 12, 2013, the Complainant requested an inquiry which I agreed to hold.

[para 8] I received submissions from both the Complainant and the Public Body. The RCMP was invited to participate in this inquiry as an intervener but did not respond to my invitation.

II. ISSUE

[para 9] The Notice of Inquiry dated January 22, 2015 sets out the issue in this inquiry as follows:

> **Did the Public Body collect the Complainant's personal information in contravention of Part 2 of the Act?**

[para 10] Throughout his submissions, the Complainant makes reference to the main issue in this inquiry being that the Public Body and the RCMP violated his rights guaranteed under the *Charter of Rights and Freedoms* when his fingerprints were collected.

[para 11] Section 11 of Alberta's *Administrative Procedures and Jurisdiction Act* states:

> *11 Notwithstanding any other enactment, a decision maker has no jurisdiction to determine a question of constitutional law unless a regulation made under section 16 has conferred jurisdiction on that decision maker to do so.*

[para 12] The regulation referred to in this provision does not confer jurisdiction to determine questions of constitutional law on the Information and Privacy Commissioner of Alberta. Therefore, I do not have jurisdiction to determine if the Complainant's Charter rights have been violated or any other Charter related questions which the Applicant raises. For this reason, I will not comment on the Complainant's arguments relating to the Charter.

[para 13] The Complainant also contends that he did not consent to a VSV and was coerced into providing his fingerprints. Collection of information under the FOIP Act does not depend on consent; rather, the issue is whether the Public Body has the authority to collect the information. In any event, after receiving the letter and speaking with the PIC Unit, the Complainant attended the Public Body's PIC Unit and provided his fingerprints. The Complainant had the option to not provide his fingerprints and not have the PIC search completed. While this likely would have meant that he could not volunteer as a coach, that is a requirement of the organization with which he was attempting to volunteer, not that of the Public Body.

[para 14] Finally, the Complainant made several comments in his later submissions alleging "The OIPC inquiry process is clearly tainted, biased and has been from the start". He appears to have formed this opinion as a result of a letter I sent to him and the Public Body on August 21, 2015. In that letter, among other things, I informed the parties that I would accept and consider portions of a new submission by the Complainant, and also that I would extend the time to complete the inquiry so as to give the Public Body an opportunity to respond to the Complainant's new submission.

[para 15] The Complainant subsequently wrote to me and the Minister of Justice and Solicitor General, Kathleen Ganley, alleging that the Minister has interfered with this inquiry so as to delay the process. The Complainant notes his "strong objection to the interference and obstruction of Alberta Justice Minister Ganley…" and states that "Minister Ganley and Commissioner Clayton met in person to discuss this file the week of August 21, 2015. The result of this meeting is documented in Commissioner Clayton's letter of August 21, 2015, resulting in yet another pointless delay in addressing the ongoing largest violation of Albertan's Constitutional Charter Rights since Charter inception."

[para 16] To be clear, Minister Ganley and Alberta Justice are not parties to this inquiry. I did not at any time discuss matters in this inquiry with Minister Ganley, nor did I receive or review any submissions from Alberta Justice. My August 21, 2015 letter to the Public Body and the Complainant makes no mention of any meeting with Minister Ganley "to discuss this file," and indeed no such meeting "to discuss this file" took place. Instead, the letter extends the deadline for completing the inquiry in order to accommodate the Complainant's submission and allow the Public Body an opportunity to respond. There is no foundation to the Complainant's claims that Minister Ganley interfered in this inquiry, or that such interference has compromised the inquiry process or resulted in any bias against the Complainant.

III. DISCUSSION OF ISSUE

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

[para 17] According to section 1(n)(v) of the Act, the Complainant's fingerprints are his personal information. Therefore, when the Public Body scanned the Complainant's fingerprints, it collected his personal information.

[para 18] Section 33 of the Act governs when a public body may collect an individual's personal information. Section 33 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 19] In British Columbia there is legislation that requires criminal records checks for individuals working with children or vulnerable adults (*Criminal Records Review Act*). I am not aware of any such legislation in Alberta, nor did the Public Body reference any. If such legislation existed, arguably section 33(a) of the Act would apply. However, that is not the case, and section 33(a) is not applicable in this inquiry.

[para 20] Section 33(b) of the Act does not apply either, because the collection was not for the purposes of law enforcement as that term is defined in section 1(h) of the Act.

[para 21] Therefore, in order to show that it properly collected the Complainant's personal information, the Public Body must prove that section 33(c) of the Act applies.

[para 22] The Public Body argues that it required the Complainant's fingerprints because they were necessary to complete a PIC where a VSV was required.

[para 23] As I explained in the background above, there was an indication on the PIC application that the Complainant would be working with minors. Therefore, in order to properly complete the PIC, further searches were required to ensure that the Complainant was not a pardoned sex offender.

[para 24] Regarding its own operating procedures for PIC searches, the Public Body states:

> The PIC Unit's Standard Operating Procedures are derived, in part, from the Ministerial Directive Concerning the Release of Criminal Record Information by the Royal Canadian Mounted Police, issued on August 4, 2010 by the federal Minister of Public Safety and the corresponding policies of the Royal Canadian Mounted Police – Canadian Criminal Real Time Identification Services (RCMP-CCRTIS) and CPIC. The PIC Unit is obliged to follow these policies due to its reliance, as a "local agency" or "CPIC Agency" on the

> criminal record information contained within the CPIC and CCRTIS databases in conducting thorough PICs, including Vulnerable Sector Verifications.
>
> (Public Body's initial submissions at page 12)

[para 25] Section 6.3 of the federal *Criminal Records Act* requires the RCMP to keep notations about individuals who have a conviction for certain offences and whose records have been "suspended". The portions of section 6.3 of the *Criminal Records Act* that are relevant to this inquiry state:

> *6.3 (1) In this section, "vulnerable person" means a person who, because of his or her age, a disability or other circumstances, whether temporary or permanent,*
>
> *(a) is in a position of dependency on others; or*
>
> *(b) is otherwise at a greater risk than the general population of being harmed by a person in a position of trust or authority towards them.*
>
> *(2) The Commissioner shall make, in the automated criminal conviction records retrieval system maintained by the Royal Canadian Mounted Police, a notation enabling a member of a police force or other authorized body to determine whether there is a record of an individual's conviction for an offence listed in Schedule 2 in respect of which a record suspension has been ordered.*
>
> *(3) At the request of any person or organization responsible for the well-being of a child or vulnerable person and to whom or to which an application is made for a paid or volunteer position, a member of a police force or other authorized body shall verify whether the applicant is the subject of a notation made in accordance with subsection (2) if*
>
> *(a) the position is one of trust or authority towards that child or vulnerable person; and*
>
> *(b) the applicant has consented in writing to the verification.*
>
> *(4) Except as authorized by subsection (3), no person shall verify whether a person is the subject of a notation made in accordance with subsection (2).*
>
> …

[para 26] According to the Public Body, there is one official database in Canada which serves as a repository for information about pardoned sex offenders. This is the database mentioned in section 6.3 of the *Criminal Records Act*. It is maintained by the RCMP-CCRTIS. Beyond the legislation cited, there does not appear to be any legislation governing what information is to be used when verifying if someone is a pardoned sex offender.

[para 27] Therefore, in order to access information in the database, the Public Body must abide by the policies and procedures put in place by the RCMP. At the time of the Complainant's PIC, this procedure entailed checking an applicant's name, birthdate, and gender against the information in the database. Under this procedure, if two or more of

those criteria matched a pardoned sex offender in the database, the results of the search were considered inconclusive. In those instances, the only way to issue a "clear" check was if the applicant's fingerprints did not match those of the pardoned sex offender.

[para 28] In this case, all of the Complainant's police checks came back clear, with the exception that his gender and birthdate matched that of a pardoned sex offender. This meant that in order to get a clear check, the Complainant had to have his fingerprints compared to those of the pardoned sex offender with whom he shared a birthdate and gender.

[para 29] The Complainant argues that, given that all of the Public Body's other searches showed he did not have a criminal record, the collection of his fingerprints was not necessary to prove that he was not a pardoned sex offender. While conceding that names could be changed, he suggested that he could have given the Public Body his birth certificate which would have established that his name had not been changed. This would have been a less intrusive way to ensure that he was not a pardoned sex offender.

[para 30] Whether the Complainant had a criminal record or not is a different question from whether he was on the pardoned sex offender database. Once pardoned, an individual's criminal record is kept apart from other criminal records. This, presumably, is why a separate database of pardoned sex offenders is kept, and access to it is tightly controlled by legislation (the *Criminal Records Act*).

[para 31] The Public Body contends that given the RCMP policies, there was no other way of performing the Complainant's PIC. As the Public Body stated:

> …As the Public Body has already stated, the RCMP CPIC database is the SOLE database for Canadian criminal convictions. There is NO Alberta database for same. In order to be permitted to use the CPIC database to do ANY criminal record checks as a local agency, the Public Body MUST follow the CPIC policy and process directives. A part of that process relates to VS Verifications against the RCMP-CCRTIS database of pardoned sex offenders. These processes are not a buffet from which a local agency may pick and choose which processes to follow. In order to use CPIC at all, a local agency must comply with the policy and process for accessing CCRTIS when it comes to VS Verifications, which includes fingerprinting when the VS results are deemed inconclusive…
>
> (Public Body's rebuttal submissions at page 3)

[para 32] What we are left with in this inquiry is a situation in which the Public Body requires access to a database it does not control. Its main (and seemingly only) argument is that because the Public Body needs to have access to the pardoned sex offender database to complete a VSV, it must follow the RCMP-CCRTIS rules, and those rules require fingerprint verification when there are two or more hits resulting from a name verification search. Therefore, the Public Body says it is necessary to collect the Complainant's fingerprints because another body requires them.

[para 33] There are two possible ways to interpret "necessity" as it appears in section 33(c).

[para 34] The first is to interpret it in such a way that this test is satisfied because there is no other way for the Public Body to conduct a VSV other than by way of the RCMP-CCRTIS database, a process for which fingerprints are a precondition. In other words, fingerprints are necessary because the RCMP policy says this is so, and because the Public Body has no available alternatives for conducting the checks.

[para 35] The second way to interpret the term is to hold that the test is not satisfied unless the collection of fingerprints is the only effective means by which to verify an applicant's identity in the circumstances of performing a VSV. Under this latter interpretation, the test is not satisfied by reference to the fact someone else (the RCMP rather the than the Public Body) has made a decision to require fingerprints; rather, it requires that fingerprints be objectively necessary in order to verify identity to the required degree of certainty.

[para 36] In this regard, I have already noted the Complainant's suggestions of other means for verifying identity which he believes provide the necessary level of certainty. He suggests that to ensure that a person (who at the time of the check has a name different from an identified pardoned offender) had not changed his or her name since being prosecuted for an offence, the Public Body could check name change data bases, or it could require a birth certificate to establish that there had not been a name change.

[para 37] As can be seen from the Public Body's submission set out above, the Public Body is relying primarily on the first interpretation of "necessity". It points *to the RCMP's non-optional requirements* to establish necessity for the purposes of its own practice of collecting the fingerprints, and makes no comment about whether there is an objective necessity for collecting fingerprints to provide a satisfactory method of verifying identity. Thus, in essence, the Public Body is making its decision to collect fingerprints on the basis of the requirements of another entity, rather than on the basis of its own objective assessment of whether this is necessary for achieving the required degree of accuracy.

[para 38] I am highly reluctant to approve an information-collection practice of a public body that is dependent on a decision made by some external entity, rather than by the public body itself. In my mind, this would be very close to allowing a public body to abdicate its obligations under the Act by virtue of entering into an agreement with some other entity or entities, which is not permitted (see Order F2010-027 and F2010-020 at para 61).

[para 39] At the same time, if I were to decide fingerprints were not "necessary" within the terms of section 33(c), this could have the result of precluding vulnerable sector checks in this province, and this would clearly be a highly undesirable result.

[para 40] I contemplated, therefore, asking the Public Body to make an independent decision about this matter, to be based on an objective assessment as to whether fingerprints (or some other biometric identifier) are or are not the only sufficiently reliable means in the circumstances to determine the identity of the person whose gender/name/birthdate combination has drawn a match (for at least two of these factors) in the pardoned offenders database.

[para 41] I have decided not to take this step, however, for the reasons below, and to find that the Public Body's practice of collecting fingerprints in circumstances such as the present is necessary for an operating program of the Public Body, and therefore compliant with section 33(c) of the Act.

[para 42] The Public Body in this case submitted that completing PICs is "an operating program of the Public Body as recognized in the Public Body's policy manual" and that the manual says the PIC Unit "conducts criminal record police information checks for individuals, agencies and businesses."

[para 43] Federal legislation (the *Criminal Records Act*) establishes the pardoned sex offender database, and section 6.3 says that "At the request of any person or organization responsible for the well-being of a child or vulnerable person and to whom or to which an application is made for a paid or volunteer position, a member of a police force or other authorized body shall verify whether the applicant" is in the database.

[para 44] The RCMP-CCRTIS has established procedures for verifying whether an applicant is in the database, which in certain circumstances requires collecting fingerprints. Information in the database is only released in specific, highly-controlled circumstances, and only to specific entities, including "Police agencies and authorized bodies, as determined by provincial and territorial governments, for the purposes of screening related to involvement in the vulnerable sector…".

[para 45] The Public Body describes the relationship as follows: "The PIC Unit is obliged to follow these policies due to its reliance, as a "local agency" or "CPIC Agency" on the criminal record information contained within the CPIC and CCRTIS databases in conducting thorough PICs, including Vulnerable Sector Verifications."

[para 46] In many respects, the relationship between the Public Body and the RCMP as described is more akin to an agency relationship whereby the Public Body acts as a conduit by which the information is collected for the service provided by the RCMP. That is, the Public Body facilitates access to a database established by federal legislation, which is maintained by a federal body and for which access is granted only in accordance with federal rules. Such a relationship would generally be more likely to be subject to federal privacy legislation and not Alberta's FOIP Act.

[para 47] The Public Body, however, does not make this argument, instead maintaining that completing PICs and VSVs is part of its own operating program.

[para 48] If I accept that completing PICs, and associated VSVs is an operating program of the Public Body, then I must accept that the Public Body's participation in the program is governed by federal legislation and that the Public Body does not control the rules respecting the collection of personal information.

[para 49] In such circumstances, there can be no useful result from my asking the Public Body to make an independent objective assessment as to whether fingerprints (or some other biometric identifier) are or are not the only sufficiently reliable means in the circumstances to determine the identity of the person whose gender/name/birthdate combination has drawn a match (for at least two of these factors) in the pardoned offenders database. Even if the Public Body were to make such an assessment and conclude that fingerprints are not necessary, it remains the case that the RCMP-CCRTIS controls access to the database and requires fingerprints in certain circumstances.

[para 50] To find that what the RCMP-CCRTIS is requiring is not necessary would mean making a finding on its policies. The RCMP did not participate in this inquiry; therefore, I have no knowledge of the rationale for its policies. Further, while I could make comments on the RCMP's policy, it is beyond my jurisdiction to require it to change that policy.

[para 51] I acknowledge the Applicant's suggestions about less invasive ways of ensuring that an individual is not a pardoned sex offender.

[para 52] However, there is always a possibility that documents can be forged, even birth certificates. As to the potential for eliminating name changes by reference to a name change database, legal name changes are a provincial area of responsibility for which there may be no central national repository or accessible database. Further, record keeping of this type can be faulty.

[para 53] It seems to me that it is both highly important that the identifier be as accurate as possible, and self-evident that a biometric identifier is more accurate than the kinds of documentation the Complainant suggests. In saying this, I recognize the possibility that a birth date can also be forged, with the result the individual would not be properly identified in the database in the first place. Despite this, any method by which the degree of uncertainty can be lessened is 'necessary' in my view, because it provides a correspondingly greater degree of assurance that volunteers for positions involving vulnerable populations will be screened out if warranted by their criminal history; in other words, it is "necessary" to ensure this outcome *to the greatest degree possible*.

[para 54] The program requires the Public Body to perform PIC searches. For individuals working with the vulnerable sector, this includes a search of the pardoned sex offender database. Only one repository of this information exists. There is, in fact, no other way for the Public Body to retrieve this information, and it requires this information to complete the VSV.

[para 55] Therefore, while it is clear that completing PICs, and associated VSVs, is not an "operating program" in the typical sense of having being established and controlled by the Public Body itself, I accept that these functions qualify as an operating program of the Public Body for purposes of section 33(c) of the Act, and that the collection of fingerprints is necessary.

[para 56] The RCMP is governed by federal privacy legislation. If the Complainant is concerned with the RCMP's policies regarding the requirement of collecting, using or retaining his personal information, he can (and I understand that he did) bring those concerns to the federal Privacy Commissioner. I do not know the outcome of the Complainant's complaint to the federal Privacy Commissioner (the Complainant having initially provided the decision to this office, but since it was with the proviso that he did not provide it as evidence in this inquiry, I did not review it). However, it is my understanding that his matter was dealt with by that Commissioner and a decision was issued.

IV. ORDER

[para 57] I make this Order pursuant to section 72 of the Act.

[para 58] I find that the Public Body did not contravene Part 2 of the Act when it collected the Complainant's fingerprints.

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Jill Clayton
Information and Privacy Commissioner of Alberta