ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2016-24

June 30, 2016

CALGARY POLICE SERVICE

Case File Number F7689

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Summary: Pursuant to the *Freedom of Information and Protection of Privacy Act* (the Act), the Applicant made an access request to the Calgary Police Service (the Public Body) for records relating to himself and his interaction with two named CPS officers. The Applicant also requested records relating to prior complaints and disciplinary actions taken against the two officers.

The Public Body provided the Applicant with some responsive records but, relying on section 12(2) of the Act, refused to confirm or deny the existence of any disciplinary records. The Applicant believed that the Public Body ought to fully answer his access request; he also provided reasons why he believed there may be more responsive records than had been located.

The Adjudicator found that the Public Body could rely on section 12(2) of the Act in responding to the Applicant's access request for disciplinary records, except with regard to any disciplinary records relating to decisions that were publicly available. The Adjudicator also found that the Public Body had performed an adequate search for responsive records.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 3, 10, 12, 17, 59, and 72, and *Police Service Regulation* Alberta Regulation 356/1990, s. 16.

Authorities Cited: AB: Orders 98-009, F2006-007, F2007-029, F2008-009, F2008-017, F2008-020, F2009-015, F2011-010, F2013-17, F2014-16, and F2014-31.

Human Rights Tribunal Decisions Cited: ON: *Washington v. Toronto Police Services Board*, 2009 HRTO 217; *Steele v. Ontario (Minister of Community Safety and Correctional Services)*, 2010 HRTO 1019.

Court Cases Cited: *Aroda v. Ontario Human Rights Commission*, 2010 ONSC 419 (unreported); *Howard Johnson Inn v. Saskatchewan Human Rights Tribunal* [2010] S.J. No. 557.

I. BACKGROUND

[para 1] Pursuant to the *Freedom of Information and Protection of Privacy Act*, on September 23, 2013, the Applicant made an access request to the Calgary Police Service (the Public Body), for the following:

1. Any notes, reports, records, files or correspondence, including but not limited to email, between [two named CPS officers], conveying information, opinions, reactions, or advice about me, the traffic charge against me…and/or complaints filed with the Calgary Police Commission and Alberta Human Rights Commission regarding the officers in question for the period of June 3, 2012 to present.

2. Any correspondence, including but not limited to email, between [two named CPS officers] and the Crown Prosecutor's office regarding the foregoing.

3. Any email correspondence between [two named CPS officers] in any way connected to this incident or me (whether by name or otherwise) or referencing racial profiling, racial remarks, or accusations of racism for the period of June 3, 2012 to present.

4. A record of any prior complaints, decisions and/or hearings, or disciplinary action, made against [two named CPS officers] through Calgary Police Service Professional Standards or other body (i.e. Alberta Human Rights Commission).

[para 2] On October 23, 2013, the Public Body responded to the Applicant's access request. It provided the Applicant with some responsive records, portions of which were severed in reliance on section 17 of the Act. In addition, the Public Body stated:

> I wish to advise you that we are unable to neither [sic] confirm nor deny the existence of any record in regards to any prior complaints, decisions and/or hearings, or disciplinary actions made against [two named CPS officers]. If such information did exist, it would be withheld from disclosure under section 17(1) of the *Act*.

[para 3] On November 18, 2013, the Applicant requested that the Office of the Information and Privacy Commissioner review the Public Body's response to his access request. Mediation was authorized to attempt to resolve the matter, but was not

successful, and the Applicant requested an inquiry on March 9, 2015. Submissions were received from both parties, including *in camera* submissions from the Public Body.

III. ISSUES

[para 4] The Notice of Inquiry dated September 29, 2015 stated the issues in this inquiry as follows:

1. Did the Public Body properly refuse to confirm or deny the existence of a record as authorized by section 12(2) of the Act (contents of response)?

2. Did the Public Body meet its obligations required by section 10(1) of the Act (duty to assist applicants)? In this case, the Commissioner will consider whether the Public Body conducted an adequate search for responsive records.

IV. DISCUSSION OF ISSUES

1. Did the Public Body properly refuse to confirm or deny the existence of a record as authorized by section 12(2) of the Act (contents of response)?

[para 5] In its response to the Applicant, the Public Body relied on section 12(2) of the Act, and neither confirmed nor denied the existence of records relating to complaints, decisions and/or hearings, or disciplinary actions, relating to the two CPS officers named by the Applicant in his access request.

[para 6] Section 12(2) of the Act states:

> *12(2) Despite subsection (1)(c)(i), the head of a public body may, in a response, refuse to confirm or deny the existence of*
>
> > *(a) a record containing information described in section 18 or 20, or*
> >
> > *(b) a record containing personal information about a third party if disclosing the existence of the information would be an unreasonable invasion of the third party's personal privacy.*

[para 7] Order F2011-010 sets out the steps a public body must follow in order to apply section 12(2)(b) properly. It must:

(a) search for the requested records, determine whether responsive records exist and provide any such records to this Office for review;

(b) show that confirming the existence of responsive records, if they existed, would reveal the personal information of a third party, and show that revealing this personal information (that the records exist, if they exist) would be an unreasonable invasion of the third party's personal privacy;

(c) show that it properly exercised its discretion in refusing to confirm or deny the existence of a record by considering the objects and purpose of the Act and providing evidence of what was considered.

(Order F2011-010 at paras 9-10)

[para 8] The questions for this inquiry are: whether revealing the existence of the records would reveal personal information about a third party, and, if it would; whether this would be an unreasonable invasion of the third party's personal privacy.

[para 9] The Act defines personal information in section 1(n) of the Act as follows:

> *1(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;*

[para 10] The Public Body argues that revealing the existence of any records responsive to the fourth item of the request would necessarily indicate that a complaint had been made or a disciplinary proceeding had been taken against the police officer, because records would not exist otherwise. I agree that this would be the effect of revealing the existence of any disciplinary records, even if any such records were not themselves disclosed.

[para 11] That a named officer has been subject to complaints or disciplinary proceedings is his or her personal information.

[para 12] According to earlier orders of this office (for example, Order 98-009 at para 15), section 17 of the Act should be used as a guide in deciding whether confirming the existence of responsive records would be an unreasonable invasion of a third party's personal privacy.

[para 13] Section 17(1) of the Act states:

> *17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.*

[para 14] Section 17(4) of the Act lists personal information, which if disclosed, is presumed to be an unreasonable invasion of a third party's personal privacy. The potentially relevant parts of section 17(4) of the Act state:

> *17(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if…*
>
> > *(b) the personal information is an identifiable part of a law enforcement record, except to the extent that the disclosure is necessary to dispose of the law enforcement matter or to continue an investigation,*
> > …
> > *(d) the personal information relates to employment or educational history,*
> > …
> > *(g) the personal information consists of the third party's name when*
> >
> > > *(i) it appears with other personal information about the third party, or*
> > >
> > > *(ii) the disclosure of the name itself would reveal personal information about the third party, … .*

[para 15] In their submissions, the parties in this inquiry discuss various provisions of section 17, and how they would apply to records, if any, regarding which the Public Body has applied section 12(2). Because where a public body has relied on section 12(2), section 59(3)(b) prohibits me from revealing whether records exist or not, I will discuss these various factors in the abstract. This discussion merely addresses various points made by the parties that I reviewed, and should not be taken as implying disciplinary records do or do not exist.

[para 16] Records relating to disciplinary proceedings would be an identifiable part of a law enforcement record (section 17(4)(b)). As well, that a named officer has been subject to disciplinary proceedings is his or her employment history (section 17(4)(d); thus, revealing the existence of records (if any existed) would reveal the CPS officers' employment history. Sections 17(4)(b) and (d) of the Act would therefore both operate to create a presumption that revealing this information would be an unreasonable invasion

of third parties' personal privacy. Section 17(4)(g)(i) (name plus personal information) would also apply, and give rise to the same presumption.

[para 17] Although a presumption would arise, such presumptions can be overridden by factors set out in section 17(5) of the Act. The potentially relevant parts of section 17(5) state:

> *17(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether*
>
> > *(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,*
> > …
> > *(c) the personal information is relevant to a fair determination of the applicant's rights,*
> >
> > …
> > *(e) the third party will be exposed unfairly to financial or other harm,*
> > …
> > *(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, … .*

[para 18] The Public Body argues that there are no factors listed in section 17(5) that weigh in favour of disclosure, and that section 17(5)(h) weighs against disclosing information. The Applicant argues that section 17(5)(a) and 17(5)(c) of the Act weigh in favour of disclosure. I will deal with each of these factors separately.

i. Section 17(5)(a)

[para 19] The Public Body states that in order for section 17(5)(a) of the Act to apply, the Applicant must provide some evidence (beyond mere accusations and speculation) calling the activities of the Public Body into question (Order F2014-16 at para 40). In Order F2006-007, the Adjudicator stated:

> In *Pylypiuk* (*supra*) Gallant J. stated that the reference to public scrutiny of government or public body activities under what is now section 17(5)(a) requires some public component, such as public accountability, public interest and public fairness.
>
> (Order F2006-007 at para 27)

[para 20] In Order F2008-009, the Adjudicator held as follows:

> A factor weighing in favour of disclosure of the personal information of third parties is that disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny, under section 17(5)(a) of the Act. For the section to apply, there must be evidence that the activities of the public body have been called into question, which necessitates the disclosure of personal information to subject

> the activities of the public body to public scrutiny (Order 97-002 at para 94; Order F2004-015 at para 88).
>
> (Order F2008-009 at para 64)

[para 21] Order F2008-009 raised a number of additional factors that may be considered to determine if public scrutiny is desirable:

> …the following may be considered: (1) whether more than one person has suggested that public scrutiny is necessary; (2) whether the applicant's concerns are about the actions of more than one person within the public body; and (3) whether the public body has previously disclosed a substantial amount of information or has investigated the matter in issue (Order 97-002 at paras 94 and 95; Order F2004-015 at para 88). However, it is not necessary to meet all three of the foregoing criteria in order to establish that there is a need for public scrutiny (*University of Alberta v. Pylypiuk* at para 49). What is most important to bear in mind is that the reference to public scrutiny of government or public body activities under section 17(5)(a) requires some public component, such as public accountability, public interest or public fairness (*University of Alberta v. Pylypiuk* at para. 48; Order F2005-016 at para 104).
>
> (Order F2008-009 at para 65)

[para 22] In this case, the Applicant argues that disclosure of the information he requested would be in the public interest because it would show the "…accountability of the public body regarding the conduct of its officers." The Applicant's submissions suggest that he believes that he had been the target of racism and/or racial profiling when he was stopped by the two named CPS officers in the incident referred to in the 'Background' portion of this decision.

[para 23] However, there is nothing in the Applicant's submissions to suggest that these officers may have been involved in similar situations in the past, and that the CPS failed to deal with them appropriately, such as would warrant public scrutiny of the Public Body's actions, whether with regard to the actions of individual officers acting as the Public Body's representatives, or the actions of the Public Body in dealing with the officers. (See, by way of contrast, Order F2008-020, at paras 50 to 55, which refers to circumstances that raise a possible concern that allegations against police officers were not properly dealt with in terms of the criminal charges and disciplinary charges that were laid.)

ii. Section 17(5)(c):

[para 24] The Applicant also argues that, "[t]his disclosure is essential to provide context for the current complaints before the Alberta Human Rights Commission and the Calgary Police Commission against the Calgary Police Service". The Applicant seems to be arguing that he needs the police disciplinary records because they are relevant to a fair determination of his rights (section 17(5)(c)).

[para 25] In order for section 17(5)(c) of the Act to apply, the following criteria must be met:

> 1. The right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds;
>
> 2. The right is related to a proceeding which is either existing or contemplated, not one which has already been completed;
>
> 3. The personal information which the applicant is seeking access to has some bearing on or is significant to the determination of the right in question; and
>
> 4. The personal information is required in order to prepare for the proceeding or to ensure an impartial hearing. (Order F2008-012 at para. 55, Order F2008-031 at para. 112)
>
> (Order F2014-31 at para 24)

[para 26] Because the Applicant has an existing complaint against the two named CPS officers before the Alberta Human Rights Commission, the Public Body concedes that the first two criteria are met. However, the Public Body argues that the last two criteria are not met because the past actions of the two named CPS officers are not the subject of the complaint. It suggests that evidence relating to any past matters with respect to the particular incident before the Commission would be more prejudicial than probative.

[para 27] I note in this regard that similar fact evidence of discriminatory practices is commonly accepted by human rights tribunals. See, for example, *Washington v. Toronto Police Services Board*, 2009 HRTO 217; *Steele v. Ontario (Minister of Community Safety and Correctional Services)*, 2010 HRTO 1019. As stated in the latter of these cases (at para 37) this procedure, which involves an initial review of the evidence by the adjudicator to first balance probative versus prejudicial effects, was approved by the Ontario Divisional Court in *Aroda v. Ontario Human Rights Commission*, 2010 ONSC 419 (unreported). See also *Howard Johnson Inn v. Saskatchewan Human Rights Tribunal* [2010] S.J. No. 557.

[para 28] Thus, while it is true that information *as to the existence of* such records may be of little utility to the Commission in making its decision, actual evidence of earlier instances of racial profiling might be (and indeed, courts have held that even mere allegations of earlier discrimination could sometimes properly be admitted in such proceedings). Thus, if records showing earlier instances of racial profiling existed, they would possibly be disclosable under section 17(5)(c) because they would possibly help the Applicant vindicate his rights. However, if the Public Body were permitted to refuse to confirm the existence of the records because the *mere fact of their existence* could not help the Applicant in a human rights proceeding, this would mean the Applicant could not obtain the records themselves, even though the records themselves could help him in such a proceeding. Therefore, in such circumstances, I do not believe the insignificance for the human rights proceeding of the *mere existence of* such records could be treated as a factor weighing in favour of the public body's reliance on section 12(2). To put this

another way, the fact that reliance on section 12(2) would preclude the Applicant's obtaining records that he needed for the human rights proceeding if such records existed, would be a relevant factor for the Public Body to consider in deciding whether disclosure of the existence of such records would unreasonably invade the third parties' privacy within the terms of section 12(2).

[para 29] I have also noted the Public Body's argument that the Human Rights Commission can itself order whatever evidence it regards as necessary for its processes. In this regard, I refer to section 3(a) of the FOIP Act, which says:

> *3 This Act*
>
> > *(a) is in addition to and does not replace existing procedures for access to information or records.…*

This means not only that FOIP does not displace other procedures, but also that other procedures do not vitiate access rights under the Act. See as well Order F2013-17, at para 206. (I acknowledge that Order F2009-015 (at para 68) stated that the fact evidence is clearly available through discovery might make the need for the same evidence less pressing under section 17(5)(c). However, as noted in that order (at para 70), the availability of records through some other channel can also weigh against the idea that their disclosure would unreasonably invade privacy. Moreover, here, it is unclear what evidence would be obtainable, and at what stage, through the human rights proceeding.)

iii. Section 17(5)(h):

[para 30] The Public Body argues that section 17(5)(h) of the Act (unfair damage to reputation) would weigh in favour of withholding the information because "[t]he records in question relate to disciplinary matters that may or may not have been adjudicated upon and found to be valid." I agree that in cases relating to complaints that were not taken up by the Public Body or some other body, or disciplinary matters that did not proceed to a hearing, disclosing that there was a complaint, or that there is a record of a disciplinary matter that did not proceed to a hearing, could unfairly damage the reputation of the CPS officers. This view is supported by previous decisions of this office. (See, for example, Order F2008-017 at para 147.) Since the Applicant has asked for information concerning particular officers, disclosure of any such records would disclose this kind of information. Therefore, section 17(5)(h) of the Act would weigh against disclosing the existence of any complaints or disciplinary matters that did not result in a hearing or testing of evidence in some way.

iv. Effect of the amendment to section 16 of the Police Service Regulation

[para 31] Section 16 of the *Police Service Regulation* was amended in 2011. It now states:

> *16(1) Where a hearing or a portion of a hearing is to be conducted under Part 5 of the Act,*

> *(a) in the case of a complaint referred to in section 45 of the Act, the chief of police shall direct that the hearing or a portion of it be conducted in public or private whichever he determines to be in the public interest, and*
>
> …
>
> *(5) Where a hearing or a portion of a hearing is held in public, the written decision or the portion of it arising from the public hearing shall be made publicly available.*

[para 32] For any disciplinary decisions arising from public hearings, confirming if such records exist would only reveal information already in the public realm, which would weigh heavily against reliance on section 12(2). (This would not apply to disciplinary decisions arising from closed hearings.)

v. Conclusion

[para 33] I have reviewed the Public Body's open and *in camera* submissions, as well as the submissions of the Applicant. Since discussing the particular factors I regard as relevant to my decision could reveal whether or not the records exist, I may not do so, beyond saying that some of the points I made above have guided my decision.

[para 34] Based on the foregoing I find that the Public Body is permitted to rely on section 12(2) of the Act in responding to the Applicant's access request for disciplinary records, with the exception of disciplinary records, if any, that resulted in a publicly-available written decision. With regard to that exception, I will order the Public Body to respond to the Applicant without relying on section 12(2) of the Act.

2. Did the Public Body meet its obligations required by section 10(1) of the Act (duty to assist applicants)? In this case, the Commissioner will consider whether the Public Body conducted an adequate search for responsive records.

[para 35] The Applicant believes that there are emails between the CPS Officers, or other records in their possession about the interaction he had with them, and that those records have not been produced.

[para 36] Section 10(1) of the Act states:

> *10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.*

[para 37] The Public Body must establish that it made every reasonable effort to assist an applicant and this includes conducting an adequate search for responsive records. In Order F2007-029 the former Commissioner stated that the Public Body in that case should provide the following evidence as proof of an adequate search:

> • The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
>
> • The scope of the search conducted – for example: physical sites, program areas, specific databases, off-site storage areas, etc.
>
> • The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
>
> • Who did the search
>
> • Why the Public Body believes no more responsive records exist than what has been found or produced
> (Order F2007-029 at para 66)

[para 38] By way of affidavit evidence, the Public Body advised that a Disclosure Analyst undertook a search for records responsive to the Applicant's request. The Analyst stated that in doing so he used the information provided by the Applicant (including his name and offence date) to search the Police Information Management System, and found nothing. He searched two other databases (INET and CAD) and found one responsive record (INET report) that had been released to the Applicant previously. He then contacted the named CPS officers and had them search their files, police notes, and email, and provide him with any responsive records (notes and records were located by one of the officers). He also searched the "Livelink" system (which did not turn up any additional notes). In addition, the IT department was contacted to search for any emails of the two named CPS officers containing the Applicant's name. The IT search would have captured any responsive emails between the officers, and any responsive emails to or from either of them and any other person. It would have captured deleted email as well.

[para 39] The Analyst also stated his belief, based on his review of the file, that the Professional Standards Section had been contacted by the Disclosure Analyst's manager "to make inquiries in relation to the Applicant's request" [this presumably related to the fourth item of the Applicant's request relating to prior complaints or discipline against the two officers, regarding which the Public Body has applied section 12(2) of the Act].

[para 40] Based on the searches conducted, the Analyst stated his belief that no responsive records exist, other than those that had been located through the searches that had been conducted.

[para 41] I have noted that the Applicant stated the following in the "Summary of Concerns" attached to his request for inquiry:

> … given the fact that the Public Body provided incorrect information regarding the existence of my complaint made to the Calgary Police Commission and Calgary Police Service, as mentioned above [this refers to a statement made

> earlier on the page that the Public Body had "incorrectly advised the Senior Information and Privacy Manager regarding the existence of my complaint against the members before the Calgary Police Commission (CPC) and Calgary Police Service (CPS). My complaint … filed May 21, 2013 is currently under review with the Professional Standards Section"], I question whether the Public Body conducted a thorough and adequate search for the requested records.

[para 42] It is not clear to me what significance the Applicant thinks this purportedly incorrect advice regarding the Applicant's complaint, or his reasons, as stated in his "Summary of Concerns" for wanting the requested records (to provide insight into the officers' motives for stopping him), might have had on the nature and extent of the search. The search, as described by the Disclosure Analyst, was for the records the Applicant had requested, including for email correspondence of the two officers using the Applicant's name. As stated in his summary of what he wanted reviewed in his request for review dated November 14, 2013, what the Applicant thought might be missing was email correspondence between the two officers concerning the incident involving him. The search as described would have located any such information, including deleted emails.

[para 43] Based on the Public Body's affidavit evidence, I find that the Public Body performed an adequate search for responsive records.

V. ORDER

[para 44] I make this Order under section 72 of the Act.

[para 45] I order the Public Body to respond to the Applicant's access request for disciplinary records, if any, that are publicly available under section 16 of the *Police Service Regulation*, without relying on section 12(2) of the Act.

[para 46] Para 45 aside, I confirm the Public Body's ability to rely on section 12(2) with respect to the fourth item of the Applicant's access request.

[para 47] I find that the Public Body performed an adequate search for responsive records, and met its obligations under section 10 of the Act.

[para 48] I order the Public Body to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with it.

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Christina Gauk, Ph.D.
Adjudicator and Director of Adjudication