ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2016-33

August 17, 2016

EDMONTON POLICE SERVICE

Case File Number F7890

Office URL: www.oipc.ab.ca

Summary: The Complainant complains that his personal information was disclosed by the Edmonton Police Service (the Public Body) in contravention of the *Freedom of Information and Protection of Privacy Act* (the Act) when the Public Body issued a media release about the Complainant following his release from prison.

The Adjudicator found that the Public Body was permitted to disclose the Complainant's personal information because the Public Body had reasonable grounds to believe that the public was in imminent danger or risk of harm. Disclosure in these circumstances is permitted under section 40(1) and 40(4) of the Act.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 32, 40, and 72.

I. BACKGROUND

[para 1] On October 11, 2013, the Edmonton Police Service (the Public Body or EPS) issued a media release wherein it revealed that the Complainant was recently released from a maximum security unit in a penitentiary after a lengthy sentence for specified violent offences (the media release). The media release went on to state that the Complainant was considered an "extremely violent and opportunistic offender who poses a significant risk of harm to the community especially with vulnerable persons". It stated

that the Complainant was residing in downtown Edmonton. The media release included a physical description and attached a picture of the Complainant.

[para 2] Five days after the media release, on October 16, 2013, the Complainant was served with a "Notice of Intention to Disclose Information" by the Public Body, which stated that pursuant to section 32(1) of the *Freedom of Information and Protection of Privacy Act* (the Act) it intended to publish personal information about the Complainant, including his criminal record, on the Solicitor General's High Risk Offender website.

[para 3] On October 22, 2013, the Complainant submitted a Breach Report form to the Office of the Information and Privacy Commissioner alleging that the Public Body breached section 32 of the Act when it issued the media release. Mediation was authorized but did not resolve the issue between the parties and so on March 16, 2015, the Complainant requested an inquiry. I received initial and rebuttal submissions from both parties.

II. INFORMATION AT ISSUE

[para 4] The information at issue in this inquiry is the Complainant's personal information that was disclosed in the media release by the Public Body.

III. ISSUES

[para 5] The Notice of Inquiry dated October 16, 2015 states the issue in this inquiry as follows:

> **Did the Public Body disclose the Complainant's personal information in contravention of, or in compliance with, the FOIP Act?**

IV. DISCUSSION OF ISSUES

> **Did the Public Body disclose the Complainant's personal information in contravention of, or in compliance with, the FOIP Act?**

[para 6] The Public Body admits that on October 11, 2013, it issued a media release that stated the Complainant's name and that he had been released from a maximum security unit in a prison after serving a lengthy sentence for specific violent crimes. The media release also stated the opinion of the Public Body that the Complainant was, "an extremely violent and opportunistic offender who poses a significant risk of harm to the community especially with vulnerable persons". The media release included a physical description of the Complainant and his picture. It also advised that he was living in downtown Edmonton.

[para 7] Personal information is defined 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 8] I find that the media release clearly contained the Complainant's personal information as that term is defined by section 1(n) of the Act.

[para 9] The Complainant argues that the Public Body did not meet the requirements under section 32 of the Act that would allow it to disclose the Complainant's personal information. In addition, the Complainant argues that in coming to the conclusion that he was at high risk to re-offend, the Public Body relied on information that was tainted by the relationship the Complainant had had with the correction officers at his former prison. He also argues that the Public Body failed to take into account the time that had elapsed since his last conviction, and his current physical state.

[para 10] Section 32 of the Act states:

32(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people, to any person or to an applicant

(a) information about a risk of significant harm to the environment or to the health or safety of the public, of the affected group of people, of the person or of the applicant, or

(b) information the disclosure of which is, for any other reason, clearly in the public interest.

(2) Subsection (1) applies despite any other provision of this Act.

(3) Before disclosing information under subsection (1), the head of a public body must, where practicable,

(a) notify any third party to whom the information relates,

(b) give the third party an opportunity to make representations relating to the disclosure, and

(c) notify the Commissioner.

(4) If it is not practicable to comply with subsection (3), the head of the public body must give written notice of the disclosure

(a) to the third party, and

(b) to the Commissioner.

[para 11] The Public Body responded to the complaint by asserting that section 40 permits the information disclosure.

[para 12] At the time of the disclosure, the potentially relevant portions of section 40 stated:

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

…

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

…

(e) for the purpose of complying with an enactment of Alberta or Canada or with a treaty, arrangement or agreement made under an enactment of Alberta or Canada,

…

(ee) if the head of the public body believes, on reasonable grounds, that the disclosure will avert or minimize an imminent danger to the health or safety of any person,[this provision was amended in 2013 to include a risk of harm to the health or safety of a minor]

…

(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 13] The Public Body argued that subsections 40(1)(c), (e), and (ee) all applied to authorize the disclosure.

[para 14] Because of the different positions taken by the parties as to what provision of the FOIP Act had been relied on in issuing the media release, I asked the Public Body what provision it had relied on at the time the media release was issued. The Public Body responded that the media release had been issued "in accordance with section 40 of the FOIPP Act as set out in the EPS's initial submissions" [this initial submission had asserted that the EPS "had the authority" to disclose the Complainant's personal information under the subsections listed at para 12 above], and that it has never relied on section 32 "as requiring the issuance of the media release". It further stated it believes that confusion as to which provision was applied arose because, after it had already issued the media release, it provided a notice to the Complainant of its intention to post similar information about him on its High Risk Offender Website, which is a process that does rely on section 32.

[para 15] The Complainant does not accept this. In support of his argument that the Public Body relied on section 32 and not 40 of the Act when disclosing the Complainant's personal information in the media release, the Complainant stated the following in his rebuttal submission:

> The [Public Body] submits that the information was disclosed under s. 40 of the *Act*. Up until now, the Respondent has never suggested that the information was disclosed under s. 40 of the *Act*. The Complainant submits that at all times, the [Public Body] relied on s. 32, not s. 40, and that the [Public Body] cannot now, after the fact, rely on s. 40. That the [Public Body] relied on s. 32 is supported by the following:
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> 1. On October 23, 2013, [an employee of the Public Body] served the Complainant with a "Notice of Intention to Disclose Information," (the "Notice") citing s. 32 as the authority. Specifically, the Notice says, "Take notice that pursuant to the provisions of section 32(1)…it is the intention of the Edmonton Police Service to disclose information and records which relate to you and which may affect your interests." The Notice goes on [to] use language found in s. 32, not s. 40. See specifically the second paragraph of the Notice;
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> 2. From October 17, 2013 – October 22, 2013, [an employee of the Public Body] and I communicated with each other via e-mail. In the e-mails, we discussed the Notice. I specifically referenced s. 32 of *FOIPPA*. At no point did [an employee of the Public Body] point out that s. 40 of *FOIPPA* applied, not s. 32; and
>
> 3. Until now, the [Public Body] has never disputed that s. 32 applied. This is despite that it was referenced in the Complainant's October 22, 2013 Breach Report Form, January 29, 2014 Complaint Form, and [the Senior Information Manager for this Office] January 21, 2015 Disposition letter.
>
> (Complainant's rebuttal submission at page 2)

[para 16] In response to the questions I posed, the Complainant repeated his point that the language used in the media release reflects that used in section 32 of the Act and not section 40(1)(ee) of the Act. He argues that the Public Body cannot now, after the fact, claim it was relying on section 40.

[para 17] As noted above, the Public Body says the media release was issued "in accordance with" section 40, but it does not actually state that it had section 40 in mind *at the time it made its decision* to issue the media release. In its inquiry submissions, it explains which of the provisions of section 40 apply to authorize the information disclosure. It also says it considered its 'Duty to Warn Protocol' in issuing the media release, and that the release was approved "in accordance with policy".

[para 18] I accept the Public Body's statement that it was relying on its Duty to Warn Protocol in issuing the media release. This Protocol does not make clear which provision of the FOIP Act is being relied upon for authority to disclose information that will be disclosed in the course of meeting the duty to warn. The language of the Protocol does more closely reflect section 32 than section 40; it also mentions that the FOIP Coordinator is to be given a copy of the release. However, it does not reference either FOIP provision in terms.

[para 19] Given the Public Body does not state positively that it was relying on section 40 at the time the media release was issued, it seems possible that it was not. It does not follow that it was relying on section 32; it may not have had either section 32 or section 40 in mind at the time, but rather was acting in accordance with its policy and protocol, and fulfilling its duty to warn. (I note, however, that the release itself states the information is being released under the authority of the Act.)

[para 20] I do not believe it matters in the present case which provision, if either of them, the Public Body was relying on at the time it made its decision. Section 40 contains a number of circumstances in which personal information can be disclosed, but the one which I believe is the best fit in the present circumstances, section 40(1)(ee), is quite similar in its terms to section 32 (the latter of which would fall under section 40(1)(a) in any event, since section 32 appears in Part 1 of the Act). Each of the provisions is met by the existence of a risk of harm to the health or safety of any person, and for the reasons given below, I believe that both provisions were met in the present circumstances.

[para 21] I note that section 32 requires advance notification to any person to whom the information relates, and it may be for this reason that the Complainant argues that this was the provision that should have been met, but was not met in the present case. (An email from the Complainant's counsel to the Public Body on October 22, 2013indicates the Complainant was objecting to the fact the notice was served "after the publication" [presumably of the media release], giving no opportunity to object.

[para 22] However, section 32(4) also allows notice to be given after the fact of the disclosure if it is not practicable to give it in advance. The Public Body was relying in its submissions on section 40 and not section 32, and did not make an argument about the notification question that arises under section 32. However, it appears the media release was issued in circumstances in which it would not have been practicable to notify the Complainant in advance and give him an opportunity to make representations, because the risk to public safety about which the Public Body was concerned had already arisen, in an immediate way. (The Complainant was either already residing in Edmonton, or travelling to Edmonton.) On October 17, 2013 (6 days after the release was issued),

when the Complainant's counsel and the Public Body became involved in an email discussion about the proposed posting on the High Risk Offender website, the Public Body provided a copy of the release to the Complainant's counsel by email.

[para 23] Regardless which provision, if either, was actually relied on by the Public Body, or what is motivating the parties to argue that it was one provision or the other, what is clear is that a Public Body must have authorization under the FOIP Act before it can disclose personal information. A Public Body such as the EPS is not free to disclose information in the course of meeting its duties under its own policies without taking into account the limitations on information disclosure contained in the FOIP Act; it must bring itself within one of the provisions that *permits* disclosure.

[para 24] Thus, regardless of which provision the Public Body was relying on, a complaint may be made that in the course of meeting its duty to warn, the Public Body contravened Part 2 of the Act, in that the disclosure did not fit within any of the provisions in section 40(1) that permit disclosure, or that the disclosure was excessive for meeting this purpose and thus contravened section 40(4).

[para 25] This is not to say that the Public Body must necessarily, at the time it is disclosing information, be able to point to the specific provision on which it is relying. However, it must have in mind a purpose which falls within one of the specified criteria under section 40. (As already noted, section 40(1) embraces both section 32 insofar as the latter provision falls under Part 1 of the Act and hence under section 40(1)(a), as well as the other provisions on which the Public Body relies in its submissions – sections 40(1)(c), (e) and (ee).) The Public Body must also consider whether the extent of information disclosure is necessary to meet this intended purpose.

[para 26] Similarly, I do not require that in making a complaint the Complainant have specified the provision on which the Public Body was relying – something he may have had no way of knowing at the time he made his complaint. It is enough for a complainant to question whether a public body's purposes met any of the provisions in section 40(1) that permit disclosure.

[para 27] Accordingly, I will consider in the following pages of this order whether in issuing the media release, the Public Body had a purpose that meets any one of the criteria under section 40(1), and whether it disclosed information only to an extent necessary for that purpose.

[para 28] Given that two provisions in the FOIP Act that contain some similar wording had been raised, I asked the parties to comment on the relationship between them.

[para 29] In response to my questions the Complainant stated that section 32 deals with harm to the general public or groups of the general public, whereas section 40(1)(ee) deals with imminent danger to "individual persons or at least identifiable person(s)". He also pointed to the need for an immediate disclosure such as would not permit notice to

be given. He suggested that for these reasons, section 40(1)(ee) does not apply in the present circumstances.

[para 30] In my view, either provision can be properly interpreted as applicable to an individual or to a group. Section 40(1)(ee) of the Act uses the term "any person". "Any person" can include a specific person or to people in a group, that may be in imminent danger. Nothing in the wording of section 40(1)(ee) of the Act limits the application of the section to include only identifiable person(s), and there does not have to be an imminent danger to a particular person to trigger section 40(1)(ee). Similarly, section 32 of the Act speaks about the risk of significant harm to "…the health or safety of the public, of the affected group of people, of the person or of the applicant". This list of who may be at risk includes large groups (the public), smaller groups (the affected group of people), individuals (any person), or an applicant. Application of section 32 is not restricted, as the Complainant argues, only to groups.

[para 31] I also note that section 40(1)(ee) of the Act deals with *imminent* danger to the health or safety of any person, and it permits disclosure rather than requiring it, whereas section 32 of the Act deals with a *risk of significant harm* to any person, and places a duty to warn on a public body in such cases. While the wording regarding imminent danger versus risk of significant harm is different, and there may be cases in which one provision applies but the other does not, the criteria in sections 32 and 40(1)(ee) of the Act are sufficiently similar that in some cases, the same considerations can be taken into account in applying either section.

[para 32] The Complainant also argues it is inappropriate for a public body to rely on section 40(1)(ee) in order to circumvent the requirements for advance notice under section 32. However, as I have already noted, section 32 allows for notice after the fact where, as was the case here, advance notice is not practicable in the circumstances.

[para 33] The Public Body's response to my questions about the relationship between the two provisions included the comment that there might be circumstances (though rare) in which a disclosure was required to meet the duty under section 32, but was not authorized under section 40. I have noted above, however, that section 40 permits disclosures where Part 1 is met, and Part 1 includes section 32. Therefore, if section 32 is met, a disclosure will be authorized under section 40.

[para 34] The circumstances of the present case were as follows: On October 10, 2013, the Public Body was advised by Corrections Canada that the Complainant would be moving to Edmonton after his release from a maximum security unit in a federal prison. (There is some lack of clarity about the timing, as the media release, issued the same day, stated the Complainant was already residing in Edmonton, but in one part of the Public Body's submissions it says it was advised he was travelling to Edmonton. In any event, his presence in Edmonton was either already a fact, or was imminent.) Corrections Canada also advised that the Complainant had a long, often violent, criminal history, that included offences relating to vulnerable people. In 2013, it was the opinion of employees of Corrections Canada that the Complainant was at a high risk to re-offend violently if

released into the community. There was additional information about the details of the Complainant's previous offences that possibly suggested an opportunity for him to commit similar offences in the circumstances in which the Complainant would be living in Edmonton.

[para 35] Given this information, it was the opinion of the Public Body that it ought to issue a warning to the public that the Complainant was currently residing in Edmonton. It decided that it needed to issue the media release so that the public was provided with necessary information to take appropriate safety precautions.

[para 36] The Complainant argues that the Public Body failed to take relevant circumstances into account, and that instead of scrutinizing the information provided to it by Corrections Canada, it accepted this information as fact. The Complainant points to his belief that the information was provided by employees of a prison that has physically and mentally abused him. He also states that there had been many years since his last conviction, and this does not appear to have been considered. In addition the Complainant notes that on leaving prison, he had physical impairments that reduced his risk of perpetrating a violent offence.

[para 37] The Public Body states that it relied on the information from Corrections Canada as factual information. It argues that it took into consideration the Complainant's history which included several violent offences, including the Complainant's continued violent behavior while incarcerated. The Public Body says it noted the information that the Complainant alleged that he was handicapped and confined to the wheelchair, but it says it was not clear what his condition was, as he had declined medical treatment. It also notes in its affidavit that he had been observed walking. While it seems that the length of time since the Complainant's last conviction and his physical state were not factors which the Public Body believed negated the risk to the public posed by the Complainant, it appears they were factors the Public Body did take into consideration.

[para 38] The Complainant also raised the possibility that he would himself suffer harm as a result of the media release. The Public Body replied that the Complainant's address was not made public, and that there was no evidence that his safety was put at risk by the release. In his rebuttal submission the Complainant provided an online 'Facebook' discussion about his release that followed the posting of the media release on Global Edmonton. I have reviewed the comments contained therein. Some of them are inappropriate in my view, but I do not believe this discussion can be taken to indicate there is a threat to the Complainant's safety from the individuals who posted these views.

[para 39] On its face, I do not see anything in the information provided by Corrections Canada that would indicate a reason to question its assessment of the risk posed by the Complainant. While observations of the Complainant's demeanor while in prison may have a subjective element, the Complainant's criminal record and details of his past convictions are objective facts that were proven in court. Therefore, I agree with the Public Body's assessment that it was reasonable to believe that there was an imminent danger to the safety of the public and that it was reasonable to believe that the media

release could avert or minimize that danger. I also agree with the Public Body that there was no evidence to suggest a risk of harm, or that any harm had occurred, to the Complainant himself.

[para 40] I have also noted that the Complainant stated in his request for inquiry (which he relied upon as part of his initial submission) that the Public Body took into account "irrelevant information from June 2014". It is not clear to me that this additional information is in fact irrelevant, even though it does not involve a conviction. Accepting that it is, however, in my view, the information from the period of time preceding the Complainant's release was sufficient to meet the tests under section 40(1), without having regard to this additional information.

[para 41] These circumstances, in my view, also meet the criteria of section 32 that it is information about a risk of significant harm to the health or safety of the public. The types of offences the Complainant had been convicted of committing, as set out in the Public Body's affidavit contained in its initial submission, had caused significant harm to individuals, and the potential danger was that he would commit similar offences.

[para 42] With regard to section 40(4), in my view, in order to properly warn the public, it was necessary to reveal what the risk was and what the Complainant looked like so the public could take necessary precautions. I accept that it was reasonable and necessary to disclose some information about the nature of the Complainant's convictions so as to convey the extent of the potential harm and seriousness of the risk, especially to vulnerable persons. The Public Body did not provide any overly-specific details of the Complainant's convictions, nor exactly where he would be living, neither of which was necessary to warn the public. Therefore, I believe that the Public Body disclosed only as much of the Complainant's personal information as was necessary to carry out its purpose of warning the public, within the terms of section 40(4).

[para 43] As a result, I find that the Public Body was permitted to disclose the Complainant's information as it did, pursuant to section 40(1) and 40(4) of the Act.

[para 44] Given my findings above, I do not need to undertake an analysis of the disclosure of the Complainant's personal information under the other provisions of the Act on which the Public Body is relying - sections 40(1)(c) and 40(1)(e).

V. ORDER

[para 45] I make this Order under section 72 of the Act.

[para 46] I find that the Public Body disclosed the Complainant's personal information in accordance with sections 40(1) and 40(4) of the Act.

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Keri H. Ridley
Adjudicator