

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2019-35

October 8, 2019

ALBERTA JUSTICE AND SOLICITOR GENERAL

Case File Number 001394

Office URL: www.oipc.ab.ca

Summary: The Complainant made a complaint to the Commissioner that Alberta Justice had collected, used, and disclosed his personal information in contravention of Part 2 of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) by conducting searches of databases to which it has access.

The Adjudicator found there was insufficient evidence to support finding that the Complainant's personal information had been collected, used, or disclosed in the circumstances the Complainant alleged.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 4, 33, 34, 39, 40, 72

Authorities Cited: AB: Orders F2004-010, F2013-51, F2014-42

I. BACKGROUND

[para 1] On July 29, 2015, the Complainant made a complaint to the Commissioner that Alberta Justice and Solicitor General (the Public Body) had collected, used, and disclosed his personal information in contravention of Part 2 of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act). The particulars of the complaint are the following:

The Complainant and victim, [name of Complainant] is an individual presently residing in or around Calgary, Alberta, who occasionally acts as legal representative for clients, including in the Provincial Court of Alberta.

The Respondent and accused, Alberta Justice and Solicitor General also known as the Crown also known as Her Majesty the Queen in Right of Alberta also known as Her Majesty the Queen ("HMQ" or the "Crown") is an Alberta Public body.

The Respondent and accused, [name of Crown prosecutor] is an assistant chief [Crown] prosecutor presently employed for the Crown.

The Facts

On or around June of 2015, [the Complainant] was advised by a provincial prosecutor named [...] that on or around May 2015, the Crown and/or [...] commenced an investigation into [the Complainant's] background (the "Unauthorized Access and Collection of Information") without [the Complainant's] knowledge, permission and consent, or caused the same to be done so by others. [The Complainant] was also advised of a particular memo.

Shortly thereafter, the Crown and/or [...] disclosed or/and caused to be disclosed, such unlawfully obtained Information (the "Unauthorized Disclosure of Information") including by way of the above relayed memo to third parties, including HMQ employees.

Furthermore, on or around June of 2015, [the Complainant] was approached and advised by a member of the Alberta Bar who is a practicing lawyer, that a crown prosecutor employed for HMQ and subordinate to [...] named [...] also known as [...] communicated and disseminated to her, among other things, certain information which falls under, inter alia, provincial privacy legislation and relates to [...] while at all times material such disseminated information pertained to [the Complainant].

[The Complainant] was also advised that criminal record searches were commenced about him by the Crown, [...] and/or [...], and although [the Complainant] does not have a criminal record, consent was to be obtained by HMQ from [the Complainant] prior to such unauthorized inquiries and searches. Other concerns exist & [the Complainant] reserves his rights.

In addition, [the Complainant] was also advised that HMQ commenced or caused to be commenced, inappropriate searches with respect to [the Complainant's] personal matters on administrative, judicial, court and the Crown's record keeping systems and HMQ and/or [...] have thereafter disseminated or caused to be disseminated such obtained information, if any, to other parties, including other traffic court agents who have approached [the Complainant] and have notified him of such.

[para 2] The Complainant indicated that he was seeking the following remedies:

An Order or declaration that HMQ and/or Mr. [...] contravened provincial privacy legislation;

An Order that HMQ and/or Mr. [...] and any other involved HMQ parties receive the appropriate fine(s) and penalties including as within section 92(1)(5);

An Order that HMQ implement safety precautions so as to prevent further improprieties and breaches of provincial privacy legislation; and

An Order for costs, including on a solicitor to client and full indemnity basis; and

Such further and other relief that [the Complainant] and/or counsel for [the Complainant] may advise and/or that the OIPC may allow.

[para 3] The Commissioner authorized a senior information and privacy manager to investigate and attempt to settle the matter. At the conclusion of this process, the Complainant requested an inquiry. The Applicant requested an inquiry on the basis that “the senior privacy manager erred in fact, law and / or fact and law, did not use a proper line of reasoning and other concerns”.

[para 4] The Commissioner agreed to conduct an inquiry and delegated her authority to conduct it to me.

II. ISSUES

Issue A: Did the Public Body collect the Complainant’s personal information? If yes, did it do so in compliance with or in contravention of section 33 of the Act?

Issue B: If yes, did the Public Body collect the Complainant’s personal information directly or indirectly? If indirectly, did it do so in compliance with, or contravention of, section 34 of the FOIP Act?

Issue C: Did the Public Body use the Complainant’s personal information? If yes, did it do so in compliance with or in contravention of section 39 of the Act?

Issue D: Did the Public Body disclose the Complainant’s personal information? If yes, did it do so in compliance with or in contravention of section 40(1) and 40(4) of the Act?

III. DISCUSSION OF ISSUES

Issue A: Did the Public Body collect the Complainant’s personal information? If yes, did it do so in compliance with or in contravention of section 33 of the Act?

[para 5] As noted above, the Complainant alleges that the Public Body conducted searches of record systems to which it has access and collected his personal information. The particulars are set out in the background above.

[para 6] The Public Body’s position is that the Complainant has not provided sufficient evidence to establish that it collected his personal information as he alleges it did. The Public Body states:

The Complainant alleges, in summary, the following:

The Public Body conducted a background investigation and “inappropriate searches” on him without his consent, which [were] then disclosed to unnamed sources;

[...]

The Public Body respectfully maintains that the Complainant did not meet the burden of proof in alleging that a privacy breach occurred or was reasonably likely to occur, therefore the Public Body does not need to show that it had authority to collect, use or disclose the Complainant's personal information.

[para 7] Section 33 of the FOIP Act establishes the circumstances in which a public body may collect personal information. It states:

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

(a) the collection of that information is expressly authorized by an enactment of Alberta or Canada,

(b) that information is collected for the purposes of law enforcement, or

(c) that information relates directly to and is necessary for an operating program or activity of the public body.

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

1 In this Act,

(n) "personal information" means recorded information about an identifiable individual, including

(i) the individual's name, home or business address or home or business telephone number,

(ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,

(iii) the individual's age, sex, marital status or family status,

(iv) an identifying number, symbol or other particular assigned to the individual,

(v) the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,

(vi) information about the individual's health and health care history, including information about a physical or mental disability,

(vii) *information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,*

(viii) *anyone else's opinions about the individual, and*

(ix) *the individual's personal views or opinions, except if they are about someone else[...]*

[para 9] From the foregoing, I conclude that personal information under the FOIP Act is information about an identifiable individual.

[para 10] The Complainant has the initial or "evidential" burden of proof, in that he must adduce some evidence as to why he believes his personal information was collected by the Public Body in the circumstances he alleges. If the Complainant discharges this burden, then the Public Body has the burden of demonstrating that its disclosure of the Complainant's personal information was in accordance with Part 2 of the FOIP Act (Order F2004-010 at paragraph 5).

[para 11] The Complainant alleges that the Public Body decided to conduct an investigation into his background and gathered information from various databases in order to do so. In support of his complaint, he provided three emails.

[para 12] The first email is dated May 27, 2015 at 2:20 PM. It is from a supervisor and addressed to a Crown prosecutor. The email states: "Hi [name of prosecutor] [The Complainant] he is not a lawyer correct?"

[para 13] The second email is dated May 27, 2015 2:22 PM. In this email, the prosecutor replies: "Yep. Not a lawyer. Though he told me he is 2nd year law school. Dunno if that is correct. Third hand says he has told others UBC law. I doubt he has a [criminal record], he got hired as a Sheriff so they would have vetted him out."

[para 14] The third email is from a provincial prosecutor to two employees of the Public Body. The email is dated July 22, 2015 at 1:32 PM and asks: "Can either of you advise as to whether or not you are aware of an agent by the name of [the Complainant's name]?"

[para 15] The Complainant's complaint is that the Public Body conducted inappropriate searches with respect to his personal matters and used administrative, judicial, Court, and the Crown's record keeping systems in order to do so.

[para 16] The Complainant has provided no evidence to support the allegations in relation to which the Commissioner accepted his complaint. The emails he submitted do not support finding that the Public Body conducted searches of the record keeping systems to which it has access in order to collect or use personal information of the Complainant. The emails reveal only that employees of the Crown asked each other

whether they were familiar with an agent, and what his credentials to act as an agent were.

[para 17] Possibly, the language the Complainant used in his complaint is intended to describe the prosecutors' actions of asking other prosecutors about the Complainant. If the Complainant's complaint is based on the emails he submitted for the inquiry, then it is a complaint that prosecutors collected information about him acting as an agent. An "agent" in the context of the emails, is someone who represents someone else in legal proceedings.

[para 18] Past orders of this office have held that information about a third party acting in a representative capacity, rather than a personal capacity, is not personal information within the terms of the FOIP Act. In Order F2013-51, the Director of Adjudication distinguished personal information from information about a third party acting as a representative. She said:

As well, the Public Body has severed information, partly in reliance on section 17, that may be properly characterized as 'work product'. For example, it has severed the questions asked by an investigator, in addition to the answers of those interviewed. It has also withheld what is possibly a line of inquiry which the investigator means to follow (the note severed from record 1-151). While some of the questions and notes may reveal the personal information of witnesses, it does not appear that it is always the case that they do, and it appears possible that the Public Body withheld information on the basis that it may reveal something about the investigator performing duties on its behalf, rather than personal information about third parties.

The Public Body has also withheld notes of an interview by the Public Body's investigator of the University of Calgary's legal counsel, in part in reliance on section 17. Information about the legal counsel's participation in the events surrounding the Applicant's complaint to the University is not her personal information unless it has a personal aspect, which was not shown.

As well, it may be that some of the information of persons interviewed in the third volume relating to the Applicant's 'retaliation' complaint, which was withheld in reliance on section 17, may be information about events in which these persons participated in a representative rather than a personal capacity. Again, to be personal in such a context, information must be shown to have a personal dimension.

In Order F2009-026, the Adjudicator said:

If information is about employees of a public body acting in a representative capacity the information is not personal information, as the employee is acting as an agent of a public body. As noted above, the definition of "third party" under the Act excludes a public body. In Order 99-032, the former Commissioner noted:

The Act applies to public bodies. However, public bodies are comprised of members, employees or officers, who act on behalf of public bodies. A public body can act only through those persons.

In other words, the actions of employees acting as employees are the actions of a public body. Consequently, information about an employee acting on behalf of a public body is not information to which section 17 applies, as it is not the personal information of a third party. If, however, there is information of a personal character about an employee of a public body, then the provisions of section 17 may apply to the information. I must therefore consider whether the information about employees in the records at issue is

about them acting on behalf of the Public Body, or is information conveying something personal about the employees.

In that case, the Adjudicator found that information solely about an employee acting as a representative of a public body was information about the public body, and not information about the employee as an identifiable individual. In *Mount Royal University v. Carter*, 2011 ABQB 28 (CanLII), Wilson J. denied judicial review of Order F2009-026.

In Order F2011-014, the Adjudicator concluded that the name and signature of a Commissioner for Oaths acting in that capacity was not personal information, as it was not information about the Commissioner for Oaths acting in her personal capacity. She said:

Personal information under the FOIP Act is information about an identifiable individual that is recorded in some form.

However, individuals do not always act on their own behalf. Sometimes individuals may act on behalf of others, as an employee does when carrying out work duties for an employer. In other cases, an individual may hold a statutory office, and the actions of the individual may fulfill the functions of that statutory office. In such circumstances, information generated in performance of these roles may not necessarily be about the individual who performs them, but about the public body for whom the individual acts, or about the fulfillment of a statutory function.

I find that the names and other information about employees of the Public Body and the University of Calgary acting in the course of their duties, as representatives of their employers, cannot be withheld as personal information, unless the information is at the same time that of an individual acting in the individual's personal capacity.

[para 19] From the foregoing, I conclude that information about a third party acting in a representative capacity will not be personal information, unless the information has a personal dimension. In cases where it is unclear from context that information has a personal dimension, it must be proven, with evidence that the information has this quality.

[para 20] The emails that are the basis of the Complainant's complaint refer to the Complainant as an agent representing others in Court proceedings. The discussion concerns in part whether or not the Complainant is a lawyer, which would be relevant to the prosecutors' dealings with him when he was acting in his representative capacity. While information that challenged the Complainant's authority to represent others in legal proceedings might conceivably affect the Complainant's livelihood, there is no indication in the emails that they were part of a process that would affect the Complainant's ability to act on behalf of others in proceedings. I am, as a result, unable to identify a personal dimension to the information in the records.

[para 21] For the reasons above, I find that the evidence does not establish that the Complainant's personal information was collected in contravention of the FOIP Act.

Issue B: If yes, did the Public Body collect the Complainant's personal information directly or indirectly? If indirectly, did it do so in compliance with, or contravention of, section 34 of the FOIP Act?

[para 22] I have found no evidence to support finding that the Complainant's personal information was collected by the Public Body. As a result, I need not address this question.

Issue C: Did the Public Body use the Complainant's personal information? If yes, did it do so in compliance with or in contravention of section 39 of the Act?

[para 23] Section 39 of the FOIP Act establishes the circumstances in which a public body may use personal information. It states, in part:

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

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

(b) if the individual the information is about has identified the information and consented, in the prescribed manner, to the use, or

(c) for a purpose for which that information may be disclosed to that public body under section 40, 42 or 43.

[...]

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

[para 24] I have found above that the Complainant has not supported the allegations he made in his complaint with evidence. In addition, I found that the emails the Complainant submitted for the inquiry contain information about the Complainant acting in a representative capacity, and not in a personal capacity. It follows from this that I find that any information about the Complainant that was used from the emails is not personal information, but information about the Complainant acting in a representative capacity.

[para 25] Even if I were to find that the information in the emails was the Complainant's personal information, it would not necessarily be subject to the FOIP Act. I note that 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 26] In this case, there is inadequate evidence before me to find that the email correspondence of the prosecutors relates to the conduct of a specific prosecution.

However, as it appears possible that the correspondence may have been regarding a specific prosecution in which the Complainant acted as agent, I have decided to discuss the potential application of section 4(1)(k) to the emails the Complainant submitted for the inquiry. Even though any such prosecution may be complete now, it would not have been at the time the emails were created.

[para 27] 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 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 28] In Order F2014-42, I made the following finding:

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

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.

[para 29] In that case, I found that the FOIP Act did not apply to the disclosure of a record relating to an ongoing prosecution, if the disclosure was made at a time when the prosecution was ongoing. Similarly, if the emails in this case were created in relation to a particular, ongoing prosecution, a complaint regarding collection, use, or disclosure of the information they contain could not be made, given that any collection, use, and / or disclosure resulting from the creation and transmission of the email would be in relation to an ongoing prosecution.

[para 30] In any event, as I find that the emails do not contain the personal information of the Complainant, it follows that I find the Public Body did not use the Complainant's personal information in contravention of the FOIP Act.

Issue D: Did the Public Body disclose the Complainant's personal information? If yes, did it do so in compliance with or in contravention of section 40(1) and 40(4) of the Act?

[para 31] The Complainant did not describe the personal information he considered to have been disclosed by the Public Body in his complaint. The emails the Complainant submitted for the inquiry do not indicate that the Complainant's personal information was disclosed outside the Public Body, or within it. Instead, I find that the only information in the emails is information about the Complainant acting in a representative capacity.

IV. ORDER

[para 32] I make this Order under section 72 of the Act.

[para 33] I confirm that the Public Body has not failed to meet any duties to the Complainant under the FOIP Act.

Teresa Cunningham
Adjudicator