

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2020-05

April 7, 2020

REGIONAL MUNICIPALITY OF WOOD BUFFALO

Case File Number 003848

Office URL: www.oipc.ab.ca

Summary: The Complainant made a complaint to the Commissioner that the former chief administrative officer (CAO) of the Regional Municipality of Wood Buffalo (the Public Body) had disclosed details of a whistleblower complaint he had made to the councillor who was the subject of the complaint.

The Adjudicator found that there was insufficient evidence in the inquiry to support the Complainant's allegations and dismissed the complaint.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 39, 65, 72

Authorities Cited: **AB:** Orders P2005-001 and P2006-008

Cases Cited: *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 112

I. BACKGROUND

[para 1] The Complainant made a complaint to the Commissioner that the former chief administrative officer (CAO) of the Regional Municipality of Wood Buffalo (the Public Body) had disclosed details of a whistleblower complaint he had made to the councillor who was the subject of the complaint. He stated:

March 17, 2016 On advice of the Regional Municipality's [lead counsel] transmitted to me through Mayor [...] in December, I submitted a Whistleblower complaint to Ernst & Young, agents on behalf of the Regional Municipality consistent with the policy and process established by Regional Council. Councillor [...] coincidentally, made the motion for the Regional Municipality to adopt the policy. I have attached a copy of the Regional Council's resolution to adopt the Whistleblower policy, the Regional Municipality's Code of Conduct policy, and my complaint as submitted to Ernst & Young.

Over the next week, Ernst & Young requested that I provide formal consent to be identified as the complainant and to clarify whether or not other previously employed persons named in the complaint would consent to be identified. That would all have been resolved the week of March 28.

March 31, 2016 Ernst & Young formally submitted the complaint to the Regional Municipality's lead investigator, [...], also its legal counsel referenced above. [Legal counsel] shared the complaint with CAO [...] that day.

I learned from one of the witnesses identified in my complaint that CAO [...] shared the complaint with [the Councillor who was the subject of the complaint] the morning of Friday, April 1, 2016, well in advance of the Regional Municipality's lead investigator, [...], beginning his investigation into the complaint. [The Councillor] subsequently had at least one aggressive telephone conversation with one witness I had identified, questioning why this witness had informed me about [the councillor's] defamatory allegations. The witness told me he would have to sue me for "dragging him into this mess," though he did affirm that [the councillor] had said the things that led to the Whistleblower complaint. Another witness, too, was challenged by [the councillor].

[...]

It is my belief that my privacy was seriously breached in contravention of Alberta legislation when the CAO, [...] shared the Whistleblower complaint – which identified me and my witnesses – with [the councillor]...

[para 2] The Commissioner authorized a senior information and privacy manager (SIPM) to investigate and attempt to settle the matter. The SIPM contacted the council member who was the subject of the whistleblower complaint and asked him questions as to whether information regarding the whistleblower complaint was communicated to him, and if so, how he obtained the information. The SIPM documented that the council member explained that the CAO had not provided him with any information about the complaint, but that he had learned of it from legal counsel at an *in camera* council meeting.

[para 3] At the conclusion of the investigation / mediation process, the Complainant requested an inquiry. He cited the following grounds:

In short however, when [the council member who was the subject of the complaint] spoke to [the SIPM] he gave a false statement. As he and I are the only parties on record in this matter, I am requesting an inquiry to collect evidence from others that will provide a truthful account to the OIPC to support whatever decision the OIPC thinks is appropriate.

[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 use the Complainant's personal information in contravention of Part 2 of the FOIP Act?

Issue B: Did the Public Body disclose the Complainant's personal information in contravention of Part 2 of the FOIP Act?

III. DISCUSSION OF ISSUES

[para 5] As noted above, the Complainant alleges that the CAO of the Public Body communicated details of his whistleblower complaint to the councillor who was the subject of his complaint, prior to the investigation of his complaint by the Public Body's lawyer.

[para 6] 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 [...]

[...]

(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 7] The complaint here is that a representative of the public body – the CAO – provided information about the Complainant to a councillor of the Public Body, not that the CAO communicated information *outside* the Public Body. The complaint is therefore one that the Complainant's personal information was *used* in contravention of the FOIP Act, as opposed to being disclosed outside it.

[para 8] The Public Body states:

The Regional Municipality of Wood Buffalo is responding to the Commissioner's Notice of Inquiry and is providing its initial submission below. Please note that the Municipality's response is based solely on recorded evidence as many of the individuals involved in the Complainant's allegations are no longer employed by the Municipality.

Issue #1 Did the Public Body use the complainant's information in contravention of Part 2 of the Act?

The Municipality searched all records in our custody and control, including the email accounts of [the CAO], [the councillor who was the subject of the complaint] and [the Public Body's legal counsel]. We found no recorded evidence to confirm or deny that the Complainant's personal information was used in contravention of part 2 of the FOIP Act.

Issue #2 Did the Public Body disclose the complainant's information in contravention of Part 2 of the Act?

The Municipality searched all records in our custody and control including the email accounts of [the CAO], [the councillor who was the subject of the complaint] and [the Public Body's legal counsel]. We found no recorded evidence to confirm or deny that the Complainant's personal information was disclosed in contravention of part 2 of the FOIP Act.

[para 9] From the Public Body's submissions, I understand that it believes it lacks sufficient information about the circumstances giving rise to the complaint to take a position or to defend itself in the inquiry.

[para 10] In an inquiry, the complainant has the initial or "evidential burden" of proof, in that the complainant must point to some evidence as to why the complainant believes his or her personal information was used or disclosed by the Public Body in the circumstances he alleges; once the evidential burden has been discharged, the Public Body then has the burden to show that its use or disclosure of the Complainant's personal information was in accordance with Part 2 of the FOIP Act (Order P2005-001 at para. 8; Order P2006-008 at para. 11). In *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 112, the Court accepted that this approach to the burden of proof applies to complaints made under the *Freedom of Information and Protection of Privacy Act*.

[para 11] In this case, the Complainant bears the burden of pointing to some evidence that supports finding that the Public Body's CAO provided information, sufficient to identify him as the maker of the complaint and to understand the details of the complaint, to the counsellor who was the subject of the complaint, without any authority to do so. I turn now to the question of whether this burden has been met.

Is there evidence to support finding that the CAO of the Public Body communicated information about the Complainant's complaint to the councillor who was the subject of the complaint, as the Complainant alleges?

[para 12] As set out in the background, above, the Complainant asserts that he had formed the opinion that the CAO disclosed his personal information after he had spoken with a representative of the chamber of commerce. In his submissions, he indicates that legal counsel for the Public Body subsequently confirmed this version of events. The Complainant is unable to provide any evidence to confirm these accounts. In his submissions, he asks that I contact the representative and the Public Body's legal counsel to obtain evidence to assist me to assess his complaint.

[para 13] I turn now to the evidence the Complainant submitted for the inquiry. The Complainant also included a portion of the letter of findings the SIPM prepared to conclude the mediation / investigation process in his submissions. The SIPM stated:

I spoke to [the councillor who was the subject of the whistleblower complaint]. He denied that [the CAO] disclosed information about the Complainant's whistleblower complaint to him. He stated that the municipality's lawyer, Mr. [...] advised councillors, at an *in camera* meeting, that the Complainant had made a complaint. However, [the municipality's lawyer] did not provide specifics about the whistleblower complaint. Several weeks later, [the councillor] was told by [the municipality's lawyer] that the complaint was against him but, again, he did not provide specifics about the complaint. Several weeks again went by and [the councillor] stated that [the CAO] advised him that the investigation into the whistleblower complaint continued. [The councillor] stated that [a representative of the chamber of commerce] had contacted him to talk about the complaint. [The councillor] advised that the representative of the chamber of commerce had received a letter about the complaint from [the municipality's lawyer]. However, [the councillor] indicated that he declined to meet and discuss the matter with [the representative of the chamber of commerce]. [The councillor] claimed that, to this day, he does not know what the whistleblower complaint was about. He also denied disclosing information about the whistleblower complaint to anyone else.

[para 14] The Complainant submitted the whistleblower policy under which he had made the whistleblower complaint for the inquiry. This policy states, in part:

1. Purpose

The purpose of this Policy is to further the Municipality's core principles of accountability, integrity, transparency and ethical behavior on the part of all municipal employees and elected officials, by empowering and directing Administration to create and maintain Administrative Procedures to:

- a) Establish a process for whistleblowers (who may be employees or members of the public) to make allegations of wrongdoing by municipal employees, for such allegations to be screened for legitimacy and investigated, and for appropriate discipline to be imposed when an allegation is substantiated;
- b) Establish a process for whistleblowers to make allegations of wrongdoing by elected officials, for such allegations to be screened for legitimacy and investigated, and for Council to receive investigation reports involving elected officials and decide upon disciplinary measures; and
- c) Ensure that a whistleblower whose allegation of wrongdoing is made in good faith on the best information available to the whistleblower is protected from retaliation regardless of the outcome of the ensuing process.

2. Objective

The objective of this policy is to promote a corporate culture and environment in which there is no tolerance for wrongdoing and in which Employees and members of the public are encouraged to identify and report wrongdoing whenever it comes to their attention in the secure knowledge that if they do so on good faith they will be protected from retaliation.

[para 15] The Complainant submitted emails he had sent and received after he submitted the whistleblower complaint. While these emails are contemporaneous with the

events that are the subject of the complaint and involve the Complainant, counsel for the Public Body, and the representative of the chamber of commerce, none of emails refers to the CAO providing the whistleblower complaint to the councillor who was the subject of the complaint. The Complainant's understanding that the CAO provided his complaint to the councillor appears based on his conversations with the Public Body's lawyer, although he does not recount what was said that led him to this understanding.

[para 16] The Complainant submitted a letter from a former mayor of the Public Body. This letter states:

I listened to the details of the alleged breach [from the Complainant] and asked if I could contact the person who had shared the allegations with [the Complainant] and he agreed. [The representative of the chamber of commerce] was either a Director on / or the President of the Chamber of Commerce at the time and I did confirm the general details with him directly. [The representative then indicated that he was concerned about his need to maintain good relations with [the councillor who was the subject of the complaint] and the Regional Municipality of Wood Buffalo, consequently he would not participate in anything further related to the matter. I shared that confirmation with [the Complainant] and committed to addressing the issue of the breach of confidentiality with [the CAO] at the time.

At my first opportunity following my weekend away, I met with [the CAO] and shared the concerns of [the Complainant] and my confirmation with [the representative] (who would not participate further). [The CAO] confirmed his understanding of the situation, the specifics I can no longer recall, and I expressed my extreme disappointment and frustration that the original allegations and subsequent disclosure of the whistleblower complaint had in fact happened at all.

[para 17] The Complainant states:

The [Public Body's] whistleblower process requires a complainant to submit his or her complaint to Ernst and Young, the agent whose responsibility it is to review the complaint and submit it to municipal administration. E&Y's representative, [...], contacted me by email on March 23 to inquire whether my identity or the identity of corroborating witnesses could be revealed to the [Public Body] when the complaint was officially tabled. We also spoke by telephone and, on Thursday, March 30, I e-mailed to [...] the consent form that would identify me as the complainant but not reveal the names of any witnesses in the original complaint. E & Y officially filed my whistleblower complaint with [the Public Body's legal counsel] on [the] same day.

On Friday, April 1, 2016 I received an e-mail from [the representative from the chamber of commerce] with the subject line: "We need to talk now!" In a subsequent telephone conversation with [the representative] later that day, I learned that [the councillor] had telephoned him to complain to [the representative] that he had betrayed [the councillor's] confidence by revealing the allegations [the councillor] made against me that I identified in my whistleblower complaint. [The representative] said that [the councillor] had been quite aggressive during the call. The reason [the councillor] knew he had been named in a whistleblower complaint, later confirmed by [the lawyer], is that [the Public Body's CAO] showed the complaint to [the councillor] on Friday morning.

[para 18] The Complainant provided the names of witnesses he believes would support his understanding of events and what he believes to be their contact information. He asks that I contact these witnesses in order to gather evidence confirming his understanding of events and contradicting the account of the councillor.

[para 19] From the Complainant's evidence and submissions, I understand that he made a whistleblower complaint regarding a councillor. He signed a consent that enabled the Public Body to identify him as the maker of the complaint; however, he did not agree to the disclosure of personal information regarding witnesses to whom he had referred in his complaint. He understood that his personal information would be shared with council when the complaint was tabled, after the lawyer had conducted an investigation into the complaint. He did not expect the CAO to provide details of the complaint to the councillor before it was tabled.

[para 20] The evidence the Complainant submitted for the inquiry, does not support concluding on the balance of probabilities that the CAO of the Public Body provided details of the complaint to the councillor who was the subject of the complaint, as he alleges. Neither the letter from the former mayor nor the contemporaneous emails state, or contain details that would permit a finding, that the CAO provided the complaint to the councillor. I would add that the evidence regarding the councillor's version of events is also unsatisfactory. It is purely hearsay, given that it was apparently reported to the SIPM, who then reported it to the Complainant, who then reproduced it in his submissions. I am unable to conclude on the basis of this evidence that the councillor received details of the complaint from the lawyer, as the SIPM apparently reported, although I accept it is possible.

[para 21] I acknowledge that the letter of the former mayor is intended to support the Complainant's position in the inquiry. However, this letter provides insufficient detail as to what was said. Moreover, the former mayor indicates an inability to recall the specifics of conversations, given the passage of time. As a result, it is unclear in the letter what is being confirmed. The mayor apparently expressed disappointment about the original allegations and the subsequent disclosure of the whistleblower complaint, but it is unclear from the account how the disclosure happened and whether it contravened the Public Body's whistleblower policy. While the mayor states that the allegations were confirmed, it is unclear whether this statement refers to the particulars of the whistleblower complaint, or confirmation that the representative of the chamber of commerce had been contacted by the councillor who was the subject of the complaint and that this had happened because the CAO had provided the details of the whistleblower complaint to the councillor.

[para 22] I also accept the Complainant's version of events is possible. I accept that the Complainant was informed by a representative of the Chamber of Commerce that the councillor who was the subject of the complaint discussed the complaint with the representative. The Complainant had firsthand knowledge of his own conversation with the representative and recounted it for the inquiry. However, his account of this conversation does not establish *how* the councillor learned about the details of the complaint – whether information was disclosed by a representative of the Public Body or whether the councillor obtained the information from someone else.

[para 23] In this case, I do not know whether the CAO revealed the details of the complaint to the councillor. I also do not know what his purpose would have been,

assuming he did so. It has not been alleged in the inquiry that the CAO communicated the information to the councillor for a purpose inconsistent with the Public Body's whistleblower policy. Rather, the complaint appears based on the Complainant's understanding that the information was communicated at all, as opposed to being communicated for an unauthorized purpose.

[para 24] My jurisdiction to conduct an inquiry in relation to a complaint lies in section 65(3) of the FOIP Act. This provision states:

65(3) A person who believes that the person's own personal information has been collected, used or disclosed in contravention of Part 2 may ask the Commissioner to review that matter.

[para 25] In this case, the complaint appears to be that a representative of the Public Body, other than the Public Body's legal counsel, shared the complaint with the subject of the complaint, prior to the complaint being tabled. On the information before me, I do not know that these actions on behalf of the Public Body, should they have been taken as the Complainant alleges, would offend the Public Body's whistleblower policy. If the CAO of the Public Body did in fact communicate the details of the complaint to the councillor, it would not necessarily mean that the Public Body was in breach of Part 2 of the FOIP Act because he did so. Whether such a communication, assuming one took place as the Complainant alleges, contravened the FOIP Act, would depend on the purpose of the CAO in communicating the information. As it stands, assuming the CAO communicated information about the complaint to the councillor, it appears possible that it was done for the purpose of addressing the complaint. Section 39(1)(a) permits a public body to use personal information for the purpose for which it was collected. In other words, section 39 permits a public body to use personal information for the purpose of addressing a complaint, if that was the public body's purpose in collecting a complaint (and the personal information it contains).

[para 26] Before I may take the step of summoning witnesses or demanding the production of records, as the Complainant asks that I do, I must be satisfied that the witnesses are likely to possess information relevant to a matter under my jurisdiction and that the records are likely to contain such information. If the witnesses do not have information relevant to a matter under my jurisdiction, then I do not have jurisdiction to obtain evidence from them. In this case, I am unable to say that the individuals the Complainant asked that I contact have evidence relevant to a matter under my jurisdiction. This is because there is insufficient evidence before me to support the Complainant's allegations.

[para 27] To answer the question I posed earlier in this order, I find that the Complainant has not adduced sufficient evidence to support the allegation that the Public Body used or disclosed personal information in circumstances that contravened Part 2 of the FOIP Act. For that reason, I must dismiss the complaint.

IV. ORDER

[para 28] I make this Order under section 72 of the Act.

[para 29] I am unable to conclude that the Public Body failed to meet any duties under the FOIP Act.

Teresa Cunningham
Adjudicator
/kh