ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2021-08

March 12, 2021

CALGARY POLICE SERVICE

Case File Numbers 007788, 008588, 008983

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Summary: The Applicant requested an audit log from the Calgary Police Service (the Public Body) of all the times its employees and members had accessed his personal information. Once he received the audit, the Applicant asked the Public Body why the employees listed in the audit had accessed his name. The Public Body obtained answers from the individuals who had accessed the name and created a chart of their answers, which it then provided to the Applicant. The Public Body indicated on the chart that it could not provide some of the explanations it received because of sections 20 and 24 of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act). The Applicant also requested information from the Public Body's Behavioral Sciences Unit about him. The Public Body severed information from the records it located, citing sections 20 and 24 of the FOIP Act.

The Adjudicator determined that the FOIP Act did not apply to the chart that the Public Body had created to answer the Applicant's questions. She noted that its references to sections 20 and 24 were to explain why it would not answer the questions. As the FOIP Act does not contemplate that a public body will create records in order to answer questions, the Adjudicator determined she had no jurisdiction in relation to the chart.

With regard to the information the Public Body severed from records, the Adjudicator found that section 20 did not apply, but that section 18 did. She also confirmed the decision of the Public Body to apply section 24.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 18, 20, 24, 72

Authorities Cited: AB: Orders 2001-33, F2008-016

I. BACKGROUND

[para 1] The Applicant made an access request to the Public Body under the FOIP Act. He requested information from the Public Body about who had searched his name in its systems since 2006. He received an audit of all the occasions in which a member of the Public Body searched his name. Once he received the audit, the Applicant asked the Public Body why the employees listed in the audit had accessed his name. The Public Body obtained answers from the individuals who had accessed the name and created a chart of their answers, which it then provided to the Applicant. The Public Body indicated on the chart that it could not provide some of the explanations it received under sections 20 and 24 of the FOIP Act. The Applicant also requested records from the Behavioral Sciences Unit about him, which the Public Body refused to provide, citing sections 20 and 24 of the FOIP Act.

[para 2] The Applicant asked the Commissioner to review the Public Body's application of sections 20(1)(m) and 24(1)(a) and (b) of the FOIP Act.

[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 Applicant requested an inquiry regarding the Public Body's application of sections 20 and 24 of the FOIP Act. He stated:

> Reason I want to know what those denied records are is because I have been trying to get hired on with different places since 2013 and each time I get declined the job without a proper explanation. 2 times with 911 centre, 2 times with Commissionaires, 1 time with Calgary Police recently, and many more civilian jobs in the City of Calgary and outside agencies including Edmonton Police and RCMP. I want to know what they are so I can clarify any misleading information that's on there. I find this rule somewhat ridiculous that the whole city knows things about me but I cannot know what they are - I think it's unfair. I know there has to be something under my name that they do not want me to see and I am confident it's because they know that me knowing what those are will get them in trouble because they're just accusations and untrue stuff. Thank you for your time and I appreciate you helping me with this matter.

[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 properly apply section 20(1) of the Act (disclosure harmful to law enforcement) to the information in the records?

ISSUE B: Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information the records?

III. DISCUSSION OF ISSUES

ISSUE A: Did the Public Body properly apply section 20(1) of the Act (disclosure harmful to law enforcement) to the information in the records?

[para 5] Section 20 of the FOIP Act authorizes a public body to withhold different types of "law enforcement" information. It states, in part:

> *20(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*
>
> *[…]*
>
> *(c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement […]*
>
> *[…]*
>
> *(m) harm the security of any property or system, including a building, a vehicle, a computer system or a communications system […]*

[para 6] The Public Body applied section 20(1) in two ways. It referred to section 20 as a reason for not disclosing information in a document created to answer the Applicant's questions. It also applied section 20 to withhold information from the Applicant that was the subject of his access request. The Public Body provided the following background information:

> Some of the information in the audit record (which was created for the Applicant based on information obtained by the Disclosure Analyst) [my emphasis] was withheld pursuant to sections 20(1)(m) and 20(1)(c) of the FOIP Act. Additional redactions pursuant to ss. 20(1)(m) and 24(1) of the FOIP Act appear in the other nine pages of responsive records. These redactions are at issue in this Inquiry.

[para 7] With regard to the application of section 20(1)(c) and section 24(1) in the chart, I lack jurisdiction to address this application. This is because the Public Body created the chart in order to answer the Applicant's questions. The FOIP Act does not create a right in an applicant to ask public bodies questions, but only to ask for records that may serve to answer questions.

[para 8] In Order 2001-033, former Commissioner Work considered whether section 10(1) incorporates a duty to answer questions. He concluded:

> Section 10(1) also requires a public body to respond to each applicant openly, accurately and completely. One of a public body's duties in this regard is to tell an applicant whether there are records that respond to the applicant's access request.

> The Applicant's access request consists partly of a series of questions he wanted the Public Body to answer. The Public Body attempted to answer those questions (the Applicant provided me with the Public Body's initial and subsequent responses). However, some of the Public Body's responses do not tell the Applicant whether there are records that respond to the Applicant's access request. Certain of those responses seem vague or evasive as to whether the Public Body has records.
>
> The Applicant has a right of access to records (section 6(1) of the Act). The Applicant does not have a right to have the Public Body answer questions. Similarly, the Public Body does not have a duty to answer the Applicant's questions (it may do so if it wishes), but the Public Body does have a duty to respond to the Applicant about whether it has records that will answer the Applicant's questions.
>
> In brief, the Public Body should have responded to the Applicant in the following manner: "You asked for (a)…, (b)…, and (c)... We searched.... Here's what we have... We don't have anything else."
>
> Therefore, because the Public Body did not tell the Applicant whether it had records that would answer the Applicant's questions, I find that the Public Body did not respond openly, accurately and completely to the following parts of the Applicant's access request: (a)10 ((a)1, 3-9 are not at issue); (b)1, 2, 3, 5, 6, 7; (c)7.
>
> I intend to order the Public Body to respond to foregoing parts of the Applicant's access request in the following way: "The Public Body does/does not have records that answer the Applicant's questions about (a) the Coleman Sportsplex…; (b) the Blairmore-Bellvue pipeline and the well drilled in Blairmore…; and (c) The Crowsnest Centre… I am telling the Public Body to be direct in its responses as to whether it has records, as opposed to answering the Applicant's questions.

The FOIP Act does not impose a duty on public body to answer questions, only to search for and provide records that may serve to answer questions, subject to the exceptions in the Act. In this case, the Public Body answered questions and confirmed the extent to which it has responsive records.

[para 9] The chart the Public Body created was not made from pre-existing recorded information, but from the responses of employees and members, in answer to the Applicant's questions, as to why they had reviewed the Applicant's information. Section 20(1)(c) was not applied to recorded information in existence at the time of the access request, but as a reason why the Public Body could not answer the Applicant's questions. Its reference to sections 20 and 24 appears intended to mean that it cannot provide an explanation as to why a particular employee reviewed the Applicant's personal information because to do so would undermine the effectiveness of a procedure it had decided to follow or would interfere with its ability to give and take advice. Whether these are appropriate reasons is not an issue in this inquiry, as the FOIP Act did not, and does not, require the Public Body to answer questions.

[para 10] In addition to creating the chart to answer the Applicant's questions, the Public Body also searched for records that might serve to answer his questions. It located records in the Behavioral Science Unit that were responsive to the Applicant's request and applied section 20(1)(m) to withhold information from the Applicant. This action of the Public Body is subject to the FOIP Act, as the FOIP Act requires a public body to

provide responsive records to an applicant, subject to the application of exceptions and the payment of fees.

[para 11] The Public Body argues:

> Section 20(1)(m) permits the head of a Public Body to refuse to disclose information if the disclosure could reasonably be expected to harm the security of any property or system, including a building, a vehicle, a computer system or a communication system. For redactions pursuant to section 20(1) to be valid, the harms test must be satisfied.
>
> The harms test that must be satisfied in order to justify the application of s. 20(1) of the Act has been articulated as follows:
>
> > a. There must be a clear cause and effect relationship between the disclosure and the harm which is alleged;
> >
> > b. The harm caused by the disclosure must constitute "damage" or "detriment" to the matter and not simply hindrance or minimal interference; and
> >
> > c. The likelihood of harm must be genuine and conceivable.
>
> In the present case, disclosure of the procedures (20(1)(c)) and the disclosure of communications systems (20(1)(m)) in questions are not generally known to the public and the disclosure of this information would have the effect of undermining the effectiveness of the procedures or systems. The protection of the information in questions is a matter of officer and public safety.

[para 12] The Public Body also provided *in camera* submissions regarding its application of section 20. It provided these submissions *in camera* in order to refer to the substance of the information it withheld to support its application of section 20 and to provide more detailed reasons with respect to the severed information.

[para 13] As I accepted the Public Body's submissions *in camera*, I cannot refer to them in detail. However, in general, the Public Body is concerned that disclosing the information it severed could undermine or vitiate strategies and procedures it has in place to ensure employee safety.

[para 14] I am unable to agree with the Public Body that section 20 is engaged by the information it severed, as I am unable to find that disclosing the information at issue would make law enforcement techniques or systems less effective.

[para 15] Law enforcement is defined in section 1(h) of the FOIP Act in the following terms:

> *1(h) "law enforcement" means*
>
> > *(i) policing, including criminal intelligence operations,*
> >
> > *(ii) a police, security or administrative investigation, including the complaint giving rise to the investigation, that leads or could lead to a penalty or sanction, including a penalty or sanction imposed by the body*

> *conducting the investigation or by another body to which the results of the investigation are referred, or*
>
> *(iii) proceedings that lead or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the proceedings or by another body to which the results of the proceedings are referred […]*

[para 16] I was unable to identify information in the records that would interfere with law enforcement techniques, as defined above, or to systems used in law enforcement. The Public Body adopted a strategy developed and recommended by its Behavioral Science Unit to ensure the safety of its employees. Strategies of this nature are not unique to public bodies involved in law enforcement and may be adopted by all public bodies with responsibilities to protect the safety and physical and mental wellbeing of employees. A procedure or strategy is not a "law enforcement technique" simply because a public body that is involved in law enforcement uses it. Rather, as required by section 1(h), the technique must be used in an investigation, proceedings, or policing operations, before it will be considered a law enforcement technique falling within the terms of section 20. I am unable to find that the recommendations of the Behavioral Sciences Unit before me fall within these categories.

[para 17] In addition, it was not clear that any of the Public Body's communications systems would be affected by disclosure. While I accept its argument, below, that communications could be expected to be less frank in the future, should the advice of the Behavioral Sciences Unit be disclosed, I am unable to accept that its systems of communication would be affected by disclosure of the information at issue.

[para 18] Although I am not satisfied that the information severed under section 20 falls within the terms of this provision, I am satisfied from the Public Body's submissions and evidence that the information falls within the terms of section 18 of the FOIP Act. This provision states:

> *18(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to*
>
> *(a) threaten anyone else's safety or mental or physical health, or*
>
> *(b) interfere with public safety.*

[para 19] In its submissions in relation to section 24(1), which it also applied, the Public Body explained:

> In both CPS files, section 24 was used to withhold access to records from the CPS's Behavioral Science Unit ("BSU"). One of the main functions of the BSU is as an advisory group to the CPS to help ensure police officers have the information necessary for them to stay safe and go into potentially dangerous or confrontational situations with the knowledge necessary to reduce the risk

> of violence to them or to members of the public. The recommendations and advice that BSU provides to members through its consultative process is an important part of keeping officers informed and ensuring that officers are equipped to deal with potentially confrontational encounters in a manner that will foster de-escalation and deconfliction.

[para 20] The Public Body adopted the strategy in the withheld records on the basis of evidence and consultation with experts. It is clear to me from the evidence of the Public Body and the content of the records that disclosing the withheld information would reduce the effectiveness of this strategy. I therefore find that section 18(1)(b) is engaged by the information in the records, given that disclosure would interfere with the ability of the Public Body to maintain the safety of its employees and those visiting its premises. To put the point differently, disclosing the information would interfere with its ability to maintain public safety.

[para 21] In Order F2008-016, the Adjudicator considered whether it was appropriate to find that an exception applies, even though the Public Body did not apply it, but applied a different provision. She said:

> Although sections 27(1)(b) and 27(1)(c) were not explicitly referred to on the responsive documents or in the EPS' submissions, I find that the substance of the EPS submissions allows me to find that it took into consideration all appropriate elements of sections 27(1)(b) and 27(1)(c) when severing the records, even though the EPS ultimately decided to sever under a provision of the Act that was not correct. Since the principle the EPS used to withhold these records (the confidential seeking of advice or consultations with lawyers employed at the Ministry of Justice) fits within section 27(1)(c), I see no reason to deprive the EPS of its ability to apply section 27(1)(c) at this point.

[para 22] In the case before me, the Public Body's submissions establish that it created its procedures for reasons of public safety and that the effectiveness of its procedures would be undermined or obviated by disclosure in response to an access request. The principle behind the Public Body's severing conforms to section 18. Section 18 should always be considered if it appears to apply, even though the public body has not considered its application.

[para 23] I note, too, that the Applicant has interpreted the Public Body's severing as done for risk mitigation reasons, rather than law enforcement reasons, as he states:

> Sorry, I am just angry. Even typing this up is amping me up and boiling my blood. I have been with well over 50 girls (I'm not even exaggerations, count the ones I only went on dates with and the ones I actually was in a relationship with) and I'm begging you, please go talk to them and see if I showed one ounce of anger or abuse to any of them. Dont these morons think that one of them should have come forward and said "I dated [the Applicant] for x amount of time and he was this and that". That piece of dog fece has a video me talking to it in February 2014 and again, I'm begging you to watch it and see what I said in order for this piece of fece to accuse me of something like that. Look at the news and see how many employees of this criminal enterprise has been charged with (or are under investigation) beating up their wives, so who is dangerous to women, me or these wastes of air?
>
> In the submission we received before Christmas, this dog order taker is saying "our people need to have information to encounter dangerous hostile situations". Are you out of your mind? What dangerous situation? Am I El Chapo or something? Like I said, even right now typing this email

> up is making me all amped up. Imagine what the past 8 years have been like, especially the last 3 knowing why I cannot get a job across Canada all because of that filthy piece of fece [police officer badge number]. I know many places across Canada are hiring right now but frankly I'm just too scared to even apply because I don't want waste my time and get told to leave at the end. They will not even listen to me, they will believe whatever that criminal fraud enterprise tells them.

[para 24] The Applicant has not assisted his case by referring to the Public Body's members as "morons", "dogs" and as "feces" and as a criminal organization, and by asserting that a member of the Public Body has prevented him from obtaining employment and that police members privately engage in violence. Correspondence containing verbal abuse and unfounded allegations, such as that contained in the Applicant's submissions, may reasonably give rise to concerns about the physical or emotional wellbeing of employees who come into contact with the author, and may also reasonably be the subject of public safety policies. The Applicant's submissions are abusive to the representatives of the Public Body. In other words, the Applicant's submissions could reasonably be construed as abusive and be the subject of public safety procedures. In any event, from my review of the records and the Public Body's submissions, I am satisfied that the information at issue should be severed under section 18.

[para 25] To summarize, I find that the FOIP Act does not apply to the records the Public Body created in order to answer the Applicant's questions. I also find that the information the Public Body severed under section 20 is properly severed under section 18(1)(b) and the Public Body appropriately exercised its discretion within the terms of this provision when it did so, despite referencing section 20.

ISSUE B: Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information the records?

[para 26] Section 24(1) authorizes public bodies to withhold advice and recommendations from a requestor. This provision states, in part:

> *24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*
>
> *(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,*
>
> *(b) consultations or deliberations involving*
>
> *(i) officers or employees of a public body,*
>
> *(ii) a member of the Executive Council, or*
>
> *(iii) the staff of a member of the Executive Council […]*

[para 27] The Public Body argues that section 24 serves the following purposes:

> The purpose of section 24 is to allow employees and officers of the Public Body who make decisions to obtain advice and recommendations, discuss potential courses of action and arrive at well-reasoned decisions without that process having to occur in public. It is meant to foster candid and frank discussions (see for example Orders F2016-57 at para. 32-34, F2015-34 at para. 67 and F2008-021 at para. 54).
>
> On the one hand, s. 24(1) encourages employees of the Public Body to ask questions without the fear of the question being made public. No one wants to ask what might be a dumb question (although questions are rarely dumb), if it might become public. On the other hand, the section also protects the giver of advice from retribution or harassment where the advice concerns a difficult situation or individual and permits the advisor to give candid and fulsome advice without fear of retribution.

[para 28] I agree with the Public Body's submissions regarding the application of section 24.

[para 29] From my review of the records and the Public Body's explanation of its purpose in severing them, reproduced in my analysis in relation to section 18, above, I find that the information severed under section 24(1) is information subject to this provision, as it consists of advice and recommendations. I also consider that the Public Body considered relevant factors when it exercised its discretion in favor of severing information.

IV. ORDER

[para 30] I make this Order under section 72 of the Act.

[para 31] I confirm the decisions of the Public Body to withhold information from the Applicant.

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Teresa Cunningham
Adjudicator
/ah