

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2021-10

April 1, 2021

CITY OF EDMONTON

Case File Number 008483

Office URL: www.oipc.ab.ca

Summary: A former employee of the City of Edmonton (the Public Body) made a complaint to this Office that the Public Body disclosed his personal information in contravention of the *Freedom of Information and Protection of Privacy Act* (FOIP Act). Specifically, the Complainant alleges that the Public Body disclosed his information to a medical expert without his consent, during a grievance process.

Mediation was authorized but did not fully resolve the issues between the parties and the Commissioner agreed to conduct an inquiry.

The Adjudicator found that the Public Body had authority to disclose the Complainant's personal information to the medical expert without the Complainant's consent.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 40, 41, and 72

Authorities Cited: AB: Orders F2013-31, F2020-26

I. BACKGROUND

[para 1] A former employee of the City of Edmonton (the Public Body) made a complaint to this Office that the Public Body disclosed his personal information in contravention of the *Freedom of Information and Protection of Privacy Act* (FOIP Act).

[para 2] The Public Body states that the Complainant's employment with the Public Body had been terminated in 2014, which the Complainant's union grieved. This grievance was resolved with a settlement agreement (Agreement) between the Public Body and the Complainant in 2016. The Agreement contained conditions, including: a requirement for the Complainant and Public Body to enter into a Last Chance Agreement (LCA), which was signed in 2016; that a breach of the LCA by the Complainant would result in termination; and that the Complainant had the right to initiate a dispute resolution process up to the Formal Review level (as set out in the collective agreement) if there was a question as to his adherence to the LCA.

[para 3] The LCA also contained conditions, including a requirement for the Complainant to abstain from drug and alcohol use, and attend random screening tests. If the Complainant failed to attend a test or had a positive result, he would be in breach of the LCA, resulting in his termination. A termination could be grieved only to the point of the Formal Review level outlined in the collective agreement.

[para 4] The Public Body states that within months of the Agreement and LCA being signed, one of the Complainant's screening tests had a positive result for THC, resulting in his termination per the agreements. The Complainant grieved this termination; the grievance went to the Formal Review stage. The Complainant hired an expert, Dr. T, to prepare a report (Report) regarding drug testing in the workplace. The Complainant provided the Report to the Public Body.

[para 5] The Public Body sought to obtain its own expert opinion regarding this Report. It asked the Complainant to sign a consent form permitting the Public Body to disclose the report to CannAmm Occupational Testing Services to prepare a response (Response). The Complainant and Public Body both provided a copy of this consent form to me. The consent form permits CannAmm to "further share this report within their organization, limited to those individuals required to prepare a written response to the arguments therein...".

[para 6] The Public Body states that it then retained Dr. Demers, an expert in drug testing in the workplace, to prepare the Response. It states that at this time, the Public Body believed that Dr. Demers would be preparing the Response as an employee of CannAmm.

[para 7] The Complainant requested a copy of this Response; the Public Body states that it asked Dr. Demers to sign a consent form permitting the Response to be shared with the Complainant, Dr. T, and the union. In this consent form, Dr. Demers crossed out the reference to CannAmm and replaced it with "B.A. Demers Medicine Prof. Corp."; in the accompanying email from Dr. Demers to a Public Body employee (provided to me by the Complainant with a copy of the consent form) Dr. Demers' states that the Response was "independent of [CannAmm] and provided through [Dr. Demers'] professional corporation" (attachments to Complainant's request for review).

[para 8] With his rebuttal submission, the Complainant provided copies of redacted records he appears to have obtained from the Public Body in response to an access request. Those records include emails between Public Body employees and CannAmm employees. Most of the content

is redacted but I can see that Dr. Demers used a CannAmm email address to communicate with the Public Body, and that other CannAmm employees were involved in coordinating the Response (for example, discussing the timeframe in which the Public Body required the response).

[para 9] The Public Body states that after it received the consent form amended by Dr. Demers along with his explanation, it did not take steps to amend the consent form previously signed by the Complainant to disclose Dr. T's Report; that form listed CannAmm instead of Dr. Demers as the intended recipient.

[para 10] After the Formal Review was concluded, the Complainant filed a complaint with the Alberta Human Rights Commission (AHRC) against the Public Body.

[para 11] The Complainant states that the Public Body provided information about him to the AHRC in response to his complaint without authority – specifically, information relating to a previously settled grievance (the grievance that resulted in the Agreement and LCA).

II. ISSUES

[para 12] The Notice of Inquiry dated January 6, 2021, states the issues in this inquiry as follows:

1. Did the Public Body have authority under sections 40(1) and 40(4) to disclose the Complainant's personal information to Dr. Demers?
2. Did the Public Body have authority sections 40(1) and 40(4) to disclose the Complainant's personal information to the Alberta Human Rights Commission?

III. DISCUSSION OF ISSUES

Preliminary issue – scope of inquiry and materials before me

[para 13] The Notice of Inquiry set out the Complainant's main concerns as follows:

1. On September 23, 2016, he signed a "Consent to Release Medical and Health Related Information" form. That form identified CannAmm Occupational Testing Services as the recipient of the information (i.e., related to fluid testing). A subsequent "Consent to Disclosure and/or Use of Personal information" form includes the name "CannAmm Occupational Testing Services" but this was crossed out and "B.A. Demers Medicine Prof Corp" was handwritten in its place. The Complainant believes this document was "deceitfully altered." The Complainant stated that he did not consent to disclosure of his personal information to Dr. Demers.
2. In April 2017, the Complainant initiated a complaint with the Alberta Human Rights Commissioner (AHRC) against the Public Body (i.e., the City of Edmonton). During that process, the Complainant complained that the Public Body disclosed to the AHRC

information related to a previous grievance as well as detailed employment history and health information-related information. He stated that this was without his consent and believes this was a breach of his privacy.

3. Also related to the AHRC complaint, the Complainant complained that a copy of a Peace Bond he provided to the Public Body (ostensibly collected for the purposes of managing his return to work) was disclosed to the AHRC.

[para 14] The Complainant's initial and rebuttal submissions focus on the Public Body's disclosure of his personal information to Dr. Demers, and whether it was appropriate for the Public Body to refer the matter to Dr. Demers. The Complainant does not discuss the disclosure of his personal information to the AHRC.

[para 15] In his rebuttal submission the Complainant states (at page 2):

The Peace Bond and AHR issues have already been dealt with – I do not dispute the Peace Bond release, and I have no recourse under AHR.

[para 16] In his initial submission, the Complainant outlines the issues he wants addressed in the inquiry. He states (at page 1):

I believe the OIPC Inquiry should determine the following as central issues of my complaint:

- Was Mr. DEMERS working as an employee of CANNAMM when he was provided with my personal medical and health information, as was determined by OIPC Investigation?
- Was Mr. DEMERS not working as an employee of CANNAMM when he was provided with my personal medical and health information, as was determined by AHRC?
- What was the reason for Mr. DEMERS to replace CANNAMM with BA DEMERS MEDICINE PROF CORP if CANNAMM was involved? Why did the Public Body not question the alteration, or why they themselves accepted a report from an unauthorized entity?

[para 17] While the Complainant provides information about his complaint to the AHRC, this information is provided in support of his arguments regarding whether Dr. Demers was an employee of CannAmm when he prepared the Response. The Complainant argues that in the AHRC process, the Public Body argued that Dr. Demers was not an employee of CannAmm when he prepared the Response. He argues that the Public Body cannot now state otherwise, for the purpose of this proceeding.

[para 18] Given the above, Issue #2 set out in the Notice of Inquiry regarding a disclosure to the AHRC is no longer an issue the Complainant is interested in pursuing and will not be considered in this inquiry.

[para 19] In his rebuttal submission the Complainant states (at page 1):

If the OIPC has the authority to un-redact an extensive amount of information redacted upon my FOIP Request under Sec. 24(1) of the FOIP Act around this timeframe (October 4- November 25, 2016) it may be relevant to this inquiry. I believe it would be especially pertinent given the

knowledge of the Public Body's demonstrated lack of a framework for Conflict of Interest which had resulted in the Public Body's employees' actions and conduct to obscure facts and cover up their misstep; events leading up to the unauthorized disclosure of personal information related to my employment and grievance process.

[para 20] The Complainant is referring to the records provided with his rebuttal submission that he apparently received in response to an access request to the Public Body. As well as the emails between the Public Body and CannAmm, and/or Dr. Demers, the records appear to include notes of conversations between the Public Body and Dr. Demers. The substantive content of the emails and notes is largely withheld under section 24.

[para 21] Throughout his submissions, the Complainant has referred to the Public Body being in a conflict of interest. The submissions are not terribly clear about what this conflict might be; however, it seems that CannAmm is the organization that performs the drug and alcohol testing on behalf of the Public Body. The Complainant seems to argue that the Public Body obtained the Response from Dr. Demers and not CannAmm directly, because CannAmm's involvement in the Response would be a conflict of interest. He states (rebuttal submission, page 2):

During the re-hire and "grievance process", the PB chose to follow direction and guidance from the very Service Provider (employing the test)/ contractor/ "employee", (DEMERS) and not another (the Substance Abuse Expert). What was in the PB's "best interests," they followed; what was not, they suppressed or ignored. Mr. DEMERS's selection as the best candidate to provide the response paper where in which I identified that the PB's choice was not independent, is akin to the City's lack of a governance framework for Conflicts of Interest as reported in the City of Edmonton - Office of the City Auditor, Conflict of Interest Program of Audit ([https://www.edmonton.ca/city_government/documents/PDF/Conflict of Interest Program Audit.pdf](https://www.edmonton.ca/city_government/documents/PDF/Conflict_of_Interest_Program_Audit.pdf), December, 2019). An external stakeholder (a service provider to the PB), participated in an employment decision-making process knowing that the decision might benefit themselves (CANNAMM and Mr. DEMERS) and the [Public] Body; it was not impartial and this connection tainted the grievance process.

[para 22] At issue in this inquiry is whether the Public Body had authority to disclose the Report to Dr. Demers for the purpose of obtaining his expert response. So long as Dr. Demers is a person who could reasonably be expected to provide an expert response (as opposed to a person who lacks the relevant expertise), whether he is the best choice is not a question I have jurisdiction to review under the FOIP Act. Similarly, whether Dr. Demers' relationship with CannAmm creates a conflict of interest is not a question I can review here. This may have been a relevant question for the decision-maker in the grievance process.

[para 23] The records responsive to an access request provided by the Complainant appear to relate to the Public Body's decision to obtain an expert opinion (the Response) from Dr. Demers. The records indicate that the Public Body at least initially contacted Dr. Demers via CannAmm. The Complainant has provided these records apparently in support of his argument that the Public Body's reliance on an opinion from Dr. Demers resulted in a conflict of interest. As this is not a matter I can review under the FOIP Act, these records are not relevant to this inquiry. Therefore, there is no reason for me to request an unredacted copy of those records from the Public Body, as the Complainant has suggested.

[para 24] The Complainant has also alleged that the Public Body failed to fulfill its duties imposed by the LCA insofar as it failed to require the Complainant to complete a medical evaluation and counselling prior to his new work assignment. This is a concern that would be relevant to the grievance process, but is not a matter I have jurisdiction to review under the FOIP Act.

[para 25] Much of the Complainant's submissions relate to whether the grievance process was fair. I do not have jurisdiction to review the fairness or procedural correctness of the grievance process. I will consider these arguments only to the extent that they are relevant to the Public Body's authority to disclose the Complainant's personal information.

[para 26] In his initial submission, the Complainant raises concerns about past incidents that occurred while he was employed with the Public Body, which he believes were a breach of his privacy. These incidents do not appear to be connected to the concerns raised in his initial complaint to this Office, and subsequent Request for Inquiry. It may be that the Complainant raises these other concerns to show a pattern of behaviour within the Public Body. In any event, whether those incidents did or did not amount to a breach of the Complainant's privacy is not at issue in this inquiry.

1. Did the Public Body have authority under sections 40(1) and 40(4) to disclose the Complainant's personal information to Dr. Demers?

[para 27] 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 28] The information provided to Dr. Demers by the Public Body is the Report that the Complainant had prepared on his behalf by Dr. T. Neither party has told me what is in the Report, other than to say that it relates to drug testing in the workplace. It was prepared after the Complainant was terminated for testing positive for THC.

[para 29] The consent form signed by the Complainant to provide the report to CannAmm is a Consent to Release medical and Health Related Information form. The form refers to personal information collected under the FOIP Act.

[para 30] The Public Body also provided me with the decision of the Alberta Human Rights Tribunal concluding the Complainant's complaint to that body (*Fermaniuk v. City of Edmonton and CannAmm Occupational and Bruce Demers*, 2020 AHRC 3). In that decision, the Tribunal describes the report by Dr. T as opining whether the Complainant's positive drug test could have been a result of second-hand exposure to THC, as the Complainant lived with individuals who used the substance.

[para 31] From the above, I conclude that the report of Dr. T that was provided to the Public Body by the Complainant and then to Dr. Demers by the Public Body contains the Complainant's personal information.

[para 32] The Public Body states that Dr. Demers was retained by the Public Body to review the Report and provide an independent expert opinion in response.

[para 33] The Complainant has objected to the Public Body's argument that the disclosure of the Report was appropriate under the FOIP Act because Dr. Demers falls within the scope of "employee" found in section 1 of the Act. The Complainant points out that during the AHRC process, the Public Body stated that Dr. Demers was an independent contractor; he argues that the Public Body cannot have it both ways.

[para 34] I understand the Complainant's confusion on this point. The FOIP Act's definition of "employee" in section 1(e) includes "a person who performs a service for the public body as an appointee, volunteer or student or under a contract or agency relationship with the public body." This definition of "employee" is far broader than what is usually meant by the term. It is generally understood that this definition applies only where the term "employee" is used in the Act (for example, in section 40(1)(h), which permits disclosure to an officer or employee of the public body).

[para 35] I note as well that the Public Body's argument is that Dr. Demers was an employee of the *Public Body* for the purposes of the FOIP Act, not that he was an employee of CannAmm. In this case, I can make a determination regarding the disclosure that does not depend on whether

Dr. Demers falls within the definition of “employee” under the Act, so I do not need to decide that question.

[para 36] The Complainant argues that the Public Body did not have consent to disclose his personal information in the Report to Dr. Demers because the consent form he signed specified that the information would be provided to CannAmm and not Dr. Demers. His arguments regarding Dr. Demers’ employment status with CannAmm are that if Dr. Demers was *not* acting for CannAmm then the Public Body lacked authority to disclose his information in the Report to Dr. Demers. The Complainant has referred to the Public Body as having contravened section 40(1)(d).

[para 37] Section 40(1) of the Act sets out circumstances in which a public body may disclose personal information. Section 40(1)(d) permits disclosure where the individual has provided consent to the disclosure, in the prescribed manner. However, disclosing personal information without consent is not a contravention of section 40(1)(d), or section 40(1) more broadly, if there is another provision that permits disclosure.

[para 38] Therefore, whether the consent form the Complainant signed, authorizing the Public Body to disclose the Report to CannAmm, is valid vis-à-vis Dr. Demers is not an issue I have to decide, if I find that the Public Body was authorized to disclose the Report under another provision.

[para 39] The Public Body has argued that the disclosure was authorized under section 40(1)(c) of the Act; section 40(1)(x) is also relevant. Those provisions, as well as section 40(4), state:

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,

...

(x) for the purpose of managing or administering personnel of the Government of Alberta or the public body,

...

(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 40] Section 41 defines what constitutes a “consistent purpose” under section 40(1)(c):

41 For the purposes of sections 39(1)(a) and 40(1)(c), a use or disclosure of personal information is consistent with the purpose for which the information was collected or compiled if the use or disclosure

(a) has a reasonable and direct connection to that purpose, and

(b) is necessary for performing the statutory duties of, or for operating a legally authorized program of, the public body that uses or discloses the information.

[para 41] The Public Body argues that it collected the Report from the Complainant for the purpose of determining whether the Complainant contravened the LCA, and whether it should reconsider the Complainant's termination that resulted from his positive drug test result. Based on the Alberta Human Rights Tribunal's decision, Dr. T apparently opined in the Report that the Complainant's positive drug test may have been due to second-hand exposure to THC. The Public Body sought Dr. Demers' expert opinion as to the likelihood of that occurring. The Public Body states that "Dr. Demers, in the Public Body's reasonable opinion, was the best employee to provide this response based on his expertise regarding drug testing in the workplace" (initial submission at para. 33).

[para 42] The Complainant does not deny that Dr. Demers has expertise in this area. As stated, the Complainant's objections relate primarily to what Dr. Demers' relationship to CannAmm was at the time, and whether it was appropriate for the Public Body to seek Dr. Demers' opinion. From the information before me, I accept that Dr. Demers has expertise such that he could reasonably be expected to provide an expert response to the Report.

[para 43] The Public Body argues that the disclosure of the Report to Dr. Demers was for a purpose consistent with the purpose for which it was collected: to determine whether it should reconsider the Complainant's termination that resulted from his positive drug test result.

[para 44] I agree that the disclosure of the Report to obtain an expert response on its contents has a reasonable and direct connection to the purpose for which it was collected by the Public Body, as required by section 41(a).

[para 45] Regarding section 41(b), past Orders of this Office have found that managing employees is an operating program or activity of a public body (see Orders F2013-31, F2020-26). The Report and Response both related to a grievance process following the Complainant's termination. I accept that when the Public Body essentially sought a second opinion on the Report, this was necessary for performing the statutory duties or for operating a legally authorized program of, the Public Body, as set out in section 41(b). Therefore, I accept that the disclosure of the Complainant's personal information in the Report was authorized under section 40(1)(c).

[para 46] For similar reasons, I also find that the disclosure was authorized under section 40(1)(x), as it was for the purpose of managing the Complainant's employment; specifically, for determining whether the Complainant contravened the LCA such that his termination was appropriate.

[para 47] With respect to section 40(4), the Public Body states that the disclosure of the Report was necessary to obtain an accurate and full response from Dr. Demers. The Complainant's arguments focus on whether Dr. Demers was an appropriate person from whom to seek an expert response, and therefore whether he was an appropriate recipient of the Report. The Complainant has not argued that the disclosure of the Report constituted a disclosure of more information than was necessary for the purpose. I accept the Public Body's reasons for providing the Report to Dr.

Demers, and agree that the disclosure of the whole Report was necessary for the purposes of section 40(4). There is no indication that the Public Body disclosed more personal information to Dr. Demers than was necessary for the stated purpose.

2. Did the Public Body have authority sections 40(1) and 40(4) to disclose the Complainant's personal information to the Alberta Human Rights Commission?

[para 48] As the Complainant is no longer interested in pursuing the Public Body's authority to disclose his personal information to the AHRC, I have decided not to make a determination regarding this issue.

IV. ORDER

[para 49] I make this Order under section 72 of the Act.

[para 50] I find that the Public Body had authority to disclose the Complainant's personal information to Dr. Demers.

Amanda Swanek
Adjudicator