

ALBERTA
INFORMATION AND PRIVACY COMMISSIONER

ORDER 96-007

June 5, 1996

ALBERTA JUSTICE

REVIEW NUMBER 1013

BACKGROUND:

On November 20, 1995, a complaint was made under the *Freedom of Information and Protection of Privacy Act* to the Office of the Information and Privacy Commissioner (hereinafter referred to as the “Act” and “IPC” respectively), that certain branches within the Department of Justice (hereafter referred to as “Alberta Justice”), had collected, used or disclosed the Complainant’s personal information in violation of Part 2 of the Act.

The matter was assigned to a Portfolio Officer who, over the next several months, worked with the Complainant to define the exact nature of the complaints and then investigated them. This process was time consuming in part due to the nature of the complaints and in part due to the fact that the Complainant was incarcerated during a portion of the time period.

Ultimately the following summary of the complaints was agreed to by the Complainant:

1. An employee of Alberta Justice provided copies of a letter contained in a confidential file to the Complainant’s former spouse’s lawyer.
2. Alberta Justice employees made inquiries into the Complainant’s working past with a former employer.
3. Alberta Justice compiled a list of persons that are to be contacted when the Complainant is released from custody.
4. Information has been provided to the senior Crown Prosecutor in Edmonton from a Senior Official of Alberta Justice. The Assistant Director of the Calgary Correctional Centre supplied written information that the Complainant alleges to be incorrect.

By letter dated February 2, 1996, the Complainant was advised that Alberta Justice was not able to satisfy him on any of his complaints. On or about March 22, 1996, the Complainant requested that I conduct an inquiry into the complaints. The inquiry was set down for May 2, 1996.

ISSUES:

1. Do the complaints involve “personal information” within the meaning of the Act?
2. Do I have jurisdiction with respect to complaints of conduct which occurred prior to the coming into force of the Act?
3. Are the Complainant’s complaints respecting the use and disclosure of the Complainant’s personal information justified?

COMPLAINANT’S SUBMISSIONS

The Complainant was invited to make submissions to me on May 1, 1996. What follows is a summary of the Complainant's submissions.

First complaint

That an employee of Alberta Justice provided copies of a letter contained in a confidential file to the Complainant's former spouse's lawyer.

A letter written by the Complainant to Alberta Justice appeared in an Affidavit deposed in Court by his former spouse dated June 9, 1995. The Complainant indicated that his letter to Alberta Justice would have been delivered by government courier to Alberta Justice. The Complainant did not make copies of this four-page letter. The Complainant believes the letter which appears in the file from the court was provided by someone within Alberta Justice to legal counsel for the Complainant's former spouse. From the Affidavit, the Complainant believes the letter was sent by fax some time prior to the Affidavit being filed with the court.

Second Complaint

That Alberta Justice made inquiries into the Complainant's working past with a former employer.

The Complainant believes an employee of Alberta Justice contacted his former employer outside Alberta. At the time Alberta Justice contacted the former employer, the Complainant was no longer directly employed by the company named. The Complainant believes his former employer was contacted as long as a year after the Complainant was no longer employed by the company.

Third Complaint

That Alberta Justice has compiled a list of persons that are to be contacted when the Complainant is released from custody.

Around December 15, 1995, while housed at the Edmonton Remand Centre, the Complainant says he overheard a guard tell another guard that there was a "list of agencies" to be contacted when he was released. The Complainant wants to know what agencies are on this list and what justification there is for the list. He describes this type of list as "stalking."

Fourth Complaint

That information about the Complainant has been provided to the senior Crown Prosecutor in Edmonton from a Senior Official of Alberta Justice and that the Assistant Director of the Calgary Correctional Centre supplied written information to Alberta Justice officials that the Complainant alleges to be incorrect.

The Complainant advised that his counsel told him that counsel heard from a Crown Counsel that Correctional officials went from the Calgary Correctional Centre to Edmonton and made a statement that the Complainant had uttered threats against law enforcement officers. Although he has been told that this statement is in writing, the Complainant does not know if in fact it does exist.

SUBMISSIONS BY ALBERTA JUSTICE

Alberta Justice provided verbal submissions on May 2, 1996.

It was agreed that the information provided at this hearing could be referred to collectively as the “submission by the Department of Justice”. Accordingly in this Order, submissions by any official from the Department of Justice will be referred to as “Alberta Justice”.

Alberta Justice raised a jurisdictional issue. Of the four complaints made by the Complainant, three incidents predated the coming into force of the *Freedom of Information and Protection of Privacy Act* on October 1, 1995. It was Alberta Justice’s submission that the Commissioner did not have jurisdiction on those issues. However, given the nature of this complaint, Alberta Justice was prepared to provide information to the Commissioner to assist him in his review of this complaint.

First Complaint

That an employee of Alberta Justice provided copies of a letter contained in a confidential file to the Complainant’s former spouse’s lawyer.

The jurisdictional question was raised as this incident is alleged to have occurred in June or July of 1995.

It is Alberta Justice’s submission that this incident never took place.

The letter in question was four pages long, handwritten and sent by the Complainant to the Alberta Justice. Alberta Justice acknowledges receiving the letter.

The file was reviewed by Alberta Justice officials. There is no indication that any person from Alberta Justice provided a copy of the letter to the former spouse’s lawyer. None of the staff at the hearing had any personal knowledge of how the letter might have been made available to the lawyer and could only speculate on how it might have been obtained by the former spouse’s lawyer.

There is no correspondence on Alberta Justice files that indicates that the letter in question was forwarded by Alberta Justice to the former spouse’s lawyer.

Due to the contents of the letter written by the Complainant, the letter was provided to law enforcement officials, including the Edmonton Police Service and the Calgary Correctional Centre. An official from the Royal Canadian Mounted Police also had access to the

Complainant's file at the Calgary Correctional Centre. There was, therefore, access to this information by a number of agencies -- all of the agencies involved are law enforcement agencies.

Second Complaint

Complaint that Alberta Justice made inquiries into the Complainant's working past with a former employer.

Alberta Justice again raised the jurisdictional question. Contact between Alberta Justice and the Complainant's former employer took place between March/April 1994 and September 1994 and therefore those actions predated the coming into force of the Act on October 1, 1996.

Alberta Justice offered the following explanation relating to this complaint.

Alberta Justice contacted the Alberta office of the former employer in September 1994 and information was obtained from an employee, not the owner. The purpose of the contact was to follow up on a garnishee of the Complainant's wages and was made to the employer's Alberta office as Alberta Justice has no jurisdiction to make inquiries outside the province. There is no indication that Alberta Justice contacted any person outside Alberta on this file.

In response to questions, Alberta Justice indicated there was nothing on the file to show that attempts were made to elicit information beyond what the body is legally authorized to inquire into. Notations on the file with Alberta Justice refer only to information relating to issues within the mandate of maintenance enforcement.

The employer provided written information that the Complainant was no longer on the company's payroll. As a result of the information provided, a notation was placed on the file that the file should be transferred to another jurisdiction.

Alberta Justice provided information relating to the handling of its files and advised that because of workloads and changes in staff, a particular file may be handled by more than one officer. All contacts by Alberta Justice staff are recorded on the file. Computerized records of correspondence are also maintained (no hard copies of form letters are placed on the file). All contact information is available to whichever officer is currently handling a particular case.

Information on this type of file is not available to other public bodies. The information is maintained under strict confidence and would only be provided if a search warrant or court order was produced. There was no search warrant or court order produced in this case.

Alberta Justice does maintain an information line so that individuals involved in a particular case may obtain information relating to the file. The information provided through that service relates solely to the status of the file and no personal information (e.g. employment or addresses or phone numbers) is available through that information line.

Officials were asked if various branches within Alberta Justice would be aware of the fact that a particular individual was in custody. The answer was that it would be highly unlikely. The branch involved in this complaint does not advise other branches of Alberta Justice of persons against whom the branch has taken action.

Third Complaint

That Alberta Justice is compiling a list of agencies that are to be contacted when the Complainant is released from custody.

Alberta Justice acknowledged that this issue was within the jurisdiction of the Commissioner as it occurred after implementation of the Act.

Alberta Justice confirmed that a list was developed. On the list were:

Calgary Police Service (at their request)
Edmonton Police Service (at their request)
RCMP (at their request)
Officials within Alberta Justice

Alberta Justice submitted that the release date of an inmate is not personal information and therefore informing these parties of the Complainant's release would not be a breach of the Act. In the alternative, if the release date is viewed as personal information, Alberta Justice argued that the information may be released to the other law enforcement agencies on the list under section 38(1) (o) and (p).

According to Alberta Justice, "the officials within Alberta Justice" were listed as a matter of routine where an inmate is transferred from a correctional centre to a remand centre. Certain officials are notified as they are the persons who would assume responsibility for the supervision of the inmate upon his arrival at a new institution or on release, i.e. probation officers.

Alberta Justice acknowledged that, beyond requirements under the *Freedom of Information and Protection of Privacy Act*, there is no specific statutory authority for this notification. No members of the public, including in this case, the Complainant's former spouse, were included on the list of persons to be contacted.

Fourth Complaint

That information about the Complainant has been provided to the senior Crown Prosecutor in Edmonton from a Senior Official of Alberta Justice. The Assistant Director of the Calgary Correctional Centre supplied written information to Alberta Justice officials that the Complainant alleges to be incorrect.

Alberta Justice again raised the jurisdictional question as these incidents took place prior to October 1, 1995.

The information that the Complainant believes was provided related to certain remarks made by the Complainant around May 8, 1995. Officials verbally passed on the nature of those remarks to the RCMP. Also, prior to the Complainant's transfer from the Calgary Correctional Centre in July 1995, officials at the Centre were interviewed by the RCMP and a search warrant was produced to enable the RCMP to review the Complainant's file at the Centre. Therefore, the RCMP had legal access to the Complainant's file.

Alberta Justice officials state that departmental staff did not contact the Crown Prosecutor. Officials, under oath, stated that no staff travelled from Calgary to Edmonton for the purposes of providing information about the Complainant and no written information was provided.

DISCUSSION:

1. Do I have jurisdiction with respect to complaints of conduct which occurred prior to the coming into force of the Act?

I agree with the submission of Alberta Justice that the Act does not have retroactive effect. Justice Dickson, writing for the Supreme Court of Canada in *Gustavson Drilling (1964) Ltd. v. M.N.R.* [1977] 1 S.C.R. 271 said:

The general rule is that statutes are not to be construed as having retrospective [retroactive] operation unless such a construction is expressly or by necessary implication required by the language of the Act.

Driedger on the Construction of Statutes explains at page 513 that to change the law governing a matter after the event has occurred makes compliance with the law impossible. "...(T)he fundamental tenet on which the rule of law is built is that in order to comply with the law, or rely on it in a useful way, the subjects of the law have to know in advance what it is."

Therefore, I do not have jurisdiction with respect to the first complaint because the relevant events took place in June 1995; the second complaint because contact between Maintenance Enforcement and the former employer took place in 1994; and the fourth complaint because the relevant events took place between May and August 1995. Since these events occurred prior to October 1, 1995, they fall beyond the scope of the Act.

While I might stop there as far as those three complaints are concerned, I think that to do so would leave the impression that Alberta Justice had breached the Act and was avoiding censure as the result of what might be called a technicality. I do not want to leave this impression so I will comment on these issues at the end of this Order.

2. The one complaint over which I have jurisdiction is the third complaint, namely:

That Alberta Justice compiled a list of persons that are to be contacted when the Complainant is released from custody.

Alberta Justice argued that the Complainant's release date is not personal information under the Act. Section 1(1)(n) of the Act defines "personal information" as recorded information about an identifiable, including:

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

and

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

and

(viii) anyone else's opinions about the individual

and

(ix) the individual's personal views or opinions except if they are about someone else;

The Complainant's release date is his personal information. It is part of his criminal history: section 1(1)(n)(vii).

Alberta Justice argued, in the alternative, that if it is personal information, the disclosure is permitted by section 38(1)(o) or (p). These sections read:

38(1) A public body may disclose personal information only

(o) to a public body or a law enforcement agency in Canada to assist in an investigation

(i) undertaken with a view to a law enforcement proceeding,
or

(ii) from which a law enforcement proceeding is likely to result,

(p) if the public body is a law enforcement agency and the information is disclosed

(i) to another law enforcement agency in Canada, or

- (ii) to a law enforcement agency in a foreign country (etc.)

The requirements of section 38(1)(o) are that the information is disclosed to a public body or a law enforcement agency to assist in an investigation. The requirements of section 38(1)(p) are that the information is disclosed by one law enforcement agency to another law enforcement agency. In either case, disclosure of personal information is permitted. “Law enforcement agency” is defined in section 1(1)(h). In this case, the Edmonton Remand Centre informed the following agencies of the Complainant’s release date:

Calgary Police Service (at their request)
Edmonton Police Service (at their request)
RCMP (at their request)
Alberta Justice officials

Is it necessary to decide if the Edmonton Remand Centre is a “law enforcement agency”? It is part of the Correctional Services Division of the Department of Justice. Section 1(1)(p) defines “public body” as a department, branch or office of the Government of Alberta. “Branch or office” refers to the Government of Alberta, not to a “department”. Section 38(1)(p) refers to disclosure by a “public body.” I must take a public body as a single entity and I cannot subdivide it to say that one part of the Department of Justice is a law enforcement agency and another part is not. I am of the opinion that the Department of Justice is, as part of its functions, involved in law enforcement. It is a law enforcement agency. By that reasoning, the various branches within that public body are part of that law enforcement agency. The Calgary Police Service, Edmonton Police Service and the RCMP are all clearly law enforcement agencies in their own right.

The result is that one law enforcement agency has disclosed personal information about the Complainant to other law enforcement agencies. That is exactly what section 38(1)(p) allows. Therefore, I find that there was no breach of the Act with respect to the Edmonton Remand Centre informing the agencies listed of the release date of the Complainant.

A final word on this issue is needed. This is not a ruling on my part. It is important to draw the attention of public bodies involved in cases like this to section 31. That section requires the head of a public body to disclose information about risks to others or information which is in the public interest to affected persons. Section 31 overrides any other provision of the Act. In April of this year, the Department of Justice, the RCMP and the Chiefs of Police throughout Alberta entered into a “*Protocol Regarding the Release of Information in Respect of Individuals Who Are Believed to Present a Risk of Significant Harm to the Health or Safety of Any Person Group of Persons or the General Public*”. The public should be aware that, by virtue of this section, privacy considerations will, in the right circumstances, give way to considerations of public or individual safety. Individuals who place themselves in the position of posing a threat to the public or to individuals should be aware that their right to non-disclosure of their personal information can be overridden.

Where section 31 is applied, there is an important issue about the delegation of authority under the Act by the head of a public body to persons in other parts of the same public body: section 80. I would remind the heads of public bodies that such delegation must be in writing. Section 31 can only be applied by the “head” or delegate. Application of that section by anyone else could be a breach of the Act.

3. The other complaints.

As stated, while I do not have jurisdiction over these complaints, I want to make some comment on them.

The letter written by the Complainant to Alberta Justice, referred to in the first complaint, contains personal information of the Complainant. Disclosure of the letter by Alberta Justice to the Edmonton Police Service, would be justified under section 38(1)(o) as submitted by Alberta Justice. However, the question arises as to how that letter came into the possession of the Complainant’s former spouse’s lawyer. One possibility was that the Edmonton Police Service released it; another possibility was that the RCMP released it. At this time, I do not have jurisdiction over either of these so I did not attempt to extend my investigation to either one. I hope that it will be of some assistance to these police forces if I tell them that I do not think that section 38(1)(o) would allow the disclosure of personal information to a private citizen. Section 31 might apply, but section 31 would only be exercised by the head of the public body or designate and the other conditions of section 31 would have to be adhered to. The Protocol referred to above should be applied in such a case. The head of the public body should consider whether to release the actual record or a warning based on the contents of the record.

As to the matter of the second complaint, that Alberta Justice made inquiries into the Complainant’s working past with a former employer relates to events which occurred prior to the coming into force of the Act, I would comment that the enactments under which the specific branch of Alberta Justice operates gives officials authority to require certain information from debtors and employers. Section 32(a) of the *Freedom of Information and Protection of Privacy Act* allows public bodies to collect only that personal information which it has authority to collect. I suggest that Alberta Justice ensure that it is collecting personal information in accordance with its authority.

The information provided to the RCMP by Corrections officials referred to in the fourth complaint is personal information under section 1(1)(n)(viii). They are the opinions of Corrections officials as to the Complainant’s state of mind. Again, personal information should only be disclosed as permitted by section 38 of the Act or, where it is believed that a section 31 risk exists, the recourse is for the head of the public body or delegate to apply section 31. In applying section 31, some thought must be given to whether to release the actual record or to release a summary of it or to simply release a warning of the risk. As to the Complainant’s concerns about the information on the record itself, the Complainant can request a correction to the report containing the opinion. However, an opinion itself is not capable of correction. The facts upon which an opinion is based are capable of correction or a notation may be added to the file to indicate that a correction was requested.

Finally, in reviewing the documents filed by the Complainant's former spouse in the Court proceeding, I noticed that a psychological profile performed at the Calgary Correctional Centre was included. This Court record is public so I am not breaching any part of the Act by referring to it. I do not know how this assessment came to be in the former spouse's Affidavit. Since the event occurred prior to the coming into force of the Act, I do not have jurisdiction to investigate how it happened. The profile is however, personal information: section 1(1)(viii). It should not have been released unless section 38 or section 31 applied. My comments on the application of section 31 are relevant here as well.

ORDER:

Having found that the events referred to in complaints 1, 2 and 4 occurred prior to the coming into force of the Act, I make no order in respect of them.

As to complaint 3, I find that the release of the information complained of to the bodies named is justified under section 38(1)(p) and, accordingly, I make no order.

Robert C, Clark
Commissioner