

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2008-001

February 15, 2008

CALGARY POLICE SERVICE

Case File Number 3383

Office URL: www.oipc.ab.ca

Summary: The Complainant complained that a member of the Calgary Police Service (the Public Body) had disclosed personal information contained in her youth and police records to her former husband.

The Public Body conceded that a staff sergeant (the staff sergeant) had collected, used and disclosed the Complainant's personal information in contravention of Part 2 of the *Freedom of Information and Protection of Privacy Act* (the Act). Following the complaint, the Public Body introduced new policies prohibiting improper access of police databases by its members.

The Adjudicator ordered the Public Body to cease collecting and disclosing personal information in contravention of Part 2 of the Act.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 17, 33, 39, 40, 66, 69, 70, 72; *Police Act* RSA 2000 c. P-17 s. 43; *Provincial Offences Procedure Act* R.S.A. 2000 c. P-34 s.2

Authorities Cited: AB: Orders 99-032, P2006-008

Cases Cited: *Regina Police Association v. Regina Board of Police Commissioners* [2000] 1 S.C.R. 360

I. BACKGROUND

[para 1] On August 18, 2005, the Complainant complained to the Commissioner that a police officer employed by Calgary Police Service (the Public Body) had accessed her police record, including her youth record and disclosed it to her husband.

[para 2] The Commissioner authorized mediation, but mediation did not resolve the issue. The matter was then set down for a written inquiry.

[para 3] Both parties provided initial submissions. The Complainant also provided rebuttal submissions. In its initial submissions, the Public Body conceded the following:

It is conceded by the Public Body that one of its members, (a staff sergeant), accessed the Applicant's personal information in contravention of the Act. It is also conceded by the Public Body that its member (the staff sergeant) disclosed the Applicant's personal information in contravention of the Act.

[para 4] The Public Body describes the contravention in the following terms:

The Public Body concedes that its member, (the staff sergeant) used and disclosed the Applicant's personal information in contravention of the FOIP Act in that he:

- I. Accessed the Applicant's name and Case file information for non-law enforcement purposes;
- II. Disclosed to the Applicant's then-husband that there were no warrants for the Applicant; and
- III. Told the Applicant's then-husband that if he believed the information he had heard about the Applicant's past he should rely on it.

II. RECORDS AT ISSUE

[para 5] There are no records at issue.

III. ISSUES

Issue A: Did the Public Body collect, use or disclose the Applicant's personal information in contravention of Part 2 of the Act?

IV. DISCUSSION OF ISSUES

Preliminary Issue: Does the Commissioner have jurisdiction to conduct this inquiry?

[para 6] The Public Body argues that no order should be made by this office as the Law Enforcement Review Board (LERB) also held a hearing into the matter. It submits that the staff sergeant, whom it concedes accessed, used and disclosed the Complainant's

personal information, was counseled in accordance with section 6 of the Police Service Regulation after the Law Enforcement Review Board made a finding that there was insufficient evidence that a charge of breach of confidence could be sustained.

[para 7] The Public Body states:

It is the submission of the Public Body that there is no further action that may be taken against (the Staff Sergeant) as he has already been subject to the Police Act disciplinary process in relation to the alleged privacy breach.

It is further submitted that there is no further action that may be taken against (the Staff Sergeant) as he is no longer a member of the Public Body...

It is further submitted that no further complaint may be made against the Public Body or anyone employed by the Public Body in relation to the Applicant's complaint since more than one year has elapsed since the alleged breach occurred. [Police Act, section 43(11)]

[para 8] The Public Body argues that this office lacks jurisdiction to hold this inquiry, as review of complaints about police services and police officers is the exclusive jurisdiction of the LERB under the *Police Act*.

[para 9] The Commissioner's jurisdiction to hold an inquiry stems from section 69, which states, in part:

69(1) Unless section 70 applies, if a matter is not settled under section 68, the Commissioner must conduct an inquiry and may decide all questions of fact and law arising in the course of the inquiry.

[para 10] The Commissioner's jurisdiction to decline to conduct an inquiry lies in section 70 of the Act, which states:

70 The Commissioner may refuse to conduct an inquiry pursuant to section 69 if in the opinion of the Commissioner

- (a) the subject-matter of a request for a review under section 65 has been dealt with in an order or investigation report of the Commissioner, or*
- (b) the circumstances warrant refusing to conduct an inquiry.*

[para 11] The subject matter of the Complainant's complaint has not been dealt with in an order by the Commissioner or an investigation report. In addition, I do not find that the circumstances warrant refusing to conduct an inquiry. The complaint alleges a breach of Part 2 of the Act by the Public Body and the Public Body has failed to establish that the circumstances warrant refusing to conduct the inquiry. On the contrary, it concedes that it has in fact breached provisions of Part 2.

[para 12] Section 43 of the *Police Act*, on which the Public Body relies, states in part:

43(1) All complaints with respect to a police service or a police officer, other than the chief of police, shall be referred to the chief.

(11) The chief of police, with respect to a complaint under subsection (1) or the commission, with respect to a complaint under subsection (2) or section 46(1) shall dismiss any complaint that is made more than one year after the events on which it is based occurred.

[para 13] Section 43 of the *Police Act* does not create exclusive jurisdiction over the subject matter of all complaints that may arise with respect to a police service or a police officer. While section 43 creates a statutory scheme in which complaints against police officers and the police service are addressed, it does not displace other fora that may also have jurisdiction over matters involving the police service, such as the courts or the Office of the Information and Privacy Commissioner. For example, if a complaint turned on conduct that would also be contrary to the *Criminal Code*, the Crown would have jurisdiction to prosecute, even though the matter could also be the subject of a disciplinary review. Similarly, this office may review complaints about contraventions of the Act, even though the LERB has also made a decision about a complaint against the employee or employees involved under the *Police Act*.

[para 14] In *Regina Police Association v. Regina Board of Police Commissioners* [2000] 1 S.C.R. 360, cited by the Public Body, the Supreme Court of Canada determined that the scheme of the *Police Act* is to create exclusive jurisdiction to address discipline of police officers. The Court stated:

As Vancise J.A. outlined extensively in his dissent, both *The Police Act* and the Regulations specifically address the procedural issues at the investigative, adjudicative and appeal stages of a disciplinary process. The detailed provisions in the legislative scheme governing disciplinary matters are a clear indication that the legislature intended to provide a complete code within *The Police Act* and Regulations for the resolution of disciplinary matters involving members of the police force. This is reflective of a well-founded public policy that police boards shall have the exclusive responsibility for maintaining an efficient police force in the community. The ability to discipline members of the force is integral to this role. Accordingly, no discretion exists to select another legal mechanism, such as arbitration, to proceed against a police officer in respect of a disciplinary matter...

Although the Public Body takes the view that holding this inquiry will discipline the staff sergeant, whom it concedes collected, used and disclosed the Complainant's personal information in contravention of the Act, inquiries under the Act are not disciplinary proceedings.

[para 15] The provisions of the Act are relevant when considering the purpose of an inquiry. The Act is intended to hold public bodies accountable, both in terms of access to information and the protection of personal privacy of individuals. While the Act does contain penalties for persons who collect, use and disclose personal information contrary

to the Act, these penalties can only be assessed by a provincial court judge under section 2 of the *Provincial Offences Procedure Act*. An inquiry by this office cannot discipline or assess penalties against employees of public bodies. Following an inquiry under section 69, the Commissioner, or the Commissioner's delegate, is limited to making an order under section 72. Section 72 states in part:

72(1) On completing an inquiry under section 69, the Commissioner must dispose of the issues by making an order under this section.

(2) If the inquiry relates to a decision to give or to refuse to give access to all or part of a record, the Commissioner may, by order, do the following:

- (a) require the head to give the applicant access to all or part of the record, if the Commissioner determines that the head is not authorized or required to refuse access;*
- (b) either confirm the decision of the head or require the head to reconsider it, if the Commissioner determines that the head is authorized to refuse access;*
- (c) require the head to refuse access to all or part of the record, if the Commissioner determines that the head is required to refuse access.*

(3) If the inquiry relates to any other matter, the Commissioner may, by order, do one or more of the following:

- (a) require that a duty imposed by this Act or the regulations be performed;*
- (b) confirm or reduce the extension of a time limit under section 14;*
- (c) confirm or reduce a fee or order a refund, in the appropriate circumstances, including if a time limit is not met;*
- (d) confirm a decision not to correct personal information or specify how personal information is to be corrected;*
- (e) require a public body to stop collecting, using or disclosing personal information in contravention of Part 2;*
- (f) require the head of a public body to destroy personal information collected in contravention of this Act.*

(4) The Commissioner may specify any terms or conditions in an order made under this section.

[para 16] Section 72 allows the Commissioner to make orders in relation to a public body, or the head of the public body, but not in relation to individual employees of the public body. Consequently, this inquiry cannot in any way result in the discipline of the staff sergeant, but is limited only to addressing whether the Public Body collected, used, or disclosed the Applicant's personal information in contravention of Part 2 of the Act, and to make an appropriate order under section 72 once that question has been answered.

[para 17] I note that section 1(i)(x) of the Act defines a local government body as including a police service. As a consequence, a police service is both a local public body and a public body under the Act. In addition, section 20 of the Act creates exceptions to

the disclosure of information on the basis that disclosure may harm law enforcement in specific circumstances. From the incorporation of these provisions into the Act, it is clear that the legislature intended the Office of the Information and Privacy Commissioner to accept and investigate complaints about police services.

[para 18] I disagree with the position of the Public Body that privacy complaints about the Police Service are governed by the time limitation periods in the *Police Act*, and not the time limitation periods of the Act.

[para 19] Section 66 of the Act establishes the time frame for making complaints. It states:

66(1) To ask for a review under this Division, a written request must be delivered to the Commissioner.

(2) A request for a review of a decision of the head of a public body must be delivered to the Commissioner

- (a) if the request is pursuant to section 65(1), (3) or (4), within*
 - (i) 60 days after the person asking for the review is notified of the decision, or*
 - (ii) any longer period allowed by the Commissioner,*
or
- (b) if the request is pursuant to section 65(2), within 20 days after the person asking for the review is notified of the decision.*

(3) The failure of the head of a public body to respond in time to a request for access to a record is to be treated as a decision to refuse access, but the time limit in subsection (2)(a) for delivering a request for review does not apply.

[para 20] The Act, rather than the *Police Act*, establishes the jurisdiction of the Information and Privacy Commissioner. As a result, this office is bound by the time limitations in this Act, rather than those of the *Police Act*. Under the Act, a complainant may make a complaint within 60 days of being notified of the decision of the head of a public body, or any longer period allowed by the Commissioner. In the present case, the Complainant made her complaint to this office on August 18, 2005. The Commissioner accepted this complaint and authorized mediation. Therefore, the complaint meets the requirements of section 66(2)(a).

[para 21] For these reasons, I find that I have jurisdiction to conduct this inquiry.

Issue A: Did the Public Body collect, use or disclose the Applicant’s personal information in contravention of Part 2 of the Act?

Personal Information

[para 22] Section 1(1)(n) of the Act defines “personal information” as:

- (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;*

This definition is not exhaustive; in other words, section 1(n)(i) through (ix) are examples of personal information, but are not the only examples of personal information. Essentially, personal information under the Act is recorded information about an identifiable individual.

Collection

[para 23] The Act limits the circumstances in which public bodies may collect personal information. Section 33 of the Act states:

- 33 *No personal information may be collected by or for a public body unless*
- (a) *the collection of that information is expressly authorized by an enactment of Alberta or Canada,*
 - (b) *that information is collected for the purposes of law enforcement, or*
 - (c) *that information relates directly to and is necessary for an operating program or activity of the public body.*

There is no dispute that the staff sergeant, an employee of the Public Body, accessed the personal information of the Complainant contrary to section 33 when he used the

Complainant's name to search for her youth record and police records for non-law enforcement purposes. A collection of information by an employee in the course of employment is a collection by a public body. This is because a public body can only act through the acts of its employees. In Order 99-032, the former Commissioner noted:

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

Consequently, when the staff sergeant collected the Complainant's personal information, from the Police Information Management System so did the Public Body. As a result, the Public Body contravened section 33 of the Act.

Use

[para 24] "Use" is not defined in the Act. In general, "using" information under the Act means to apply information for a purpose other than disclosure. Section 39 of the Act limits the uses to which a public body can put personal information. It states in part:

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

- (a) for the purpose for which the information was collected or compiled or for a use consistent with that purpose,*
- (b) if the individual the information is about has identified the information and consented, in the prescribed manner, to the use, or*
- (c) for a purpose for which that information may be disclosed to that public body under section 40, 42 or 43.*

[para 25] There is no evidence before me that the staff sergeant used the Complainant's information, other than the Public Body's concession that he did. As the Public Body has conceded that its employee used the Complainant's personal information contrary to section 39 of the Act, I find, as a consequence of that concession, that the Public Body used the Complainant's personal information contrary to section 39 of the Act.

Disclosure

[para 26] Section 40 limits the circumstances in which a public body may disclose personal information.

[para 27] The Public Body submits that the staff sergeant did not disclose the contents of the Complainant's records, but disclosed her personal information when he told her former husband that there were no warrants and told the Complainant's former husband that if he believed the information he had heard about the Complainant's past, he should rely on it.

[para 28] The Complainant argues that the staff sergeant disclosed her Young Offenders Record to her former husband.

[para 29] In order to decide the issue, it will be necessary to evaluate the evidence provided by the parties and consider which party bears the evidentiary burden. In Order P2006-008 the Commissioner said:

In *R v. Stone* [1999] 2 S.C.R. 290, the Supreme Court of Canada cited Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* which contrasted the evidential burden with the legal or persuasive burden as follows:

The significance of the evidential burden arises when there is a question as to which party has the right or the obligation to begin adducing evidence. It also arises when there is a question as to whether sufficient evidence has been adduced to raise an issue for determination by the trier of fact. The legal burden of proof normally arises after the evidence has been completed and the question is whether the trier of fact has been persuaded with respect to the issue or case to the civil or criminal standard of proof. The legal burden, however, ordinarily arises after a party has first satisfied an evidential burden in relation to that fact or issue.

The *Personal Information Protection Act* (“PIPA”) like the *Freedom of Information and Protection of Privacy Act* (the “FOIP Act”) is silent with regard to where the burden of proof rests for an inquiry into a complaint about the collection, use and disclosure of personal information. In Order P2005-001, I adopted the approach previously taken in Order 97-004 with regard to the FOIP Act that addressed the burden of proof issue and applied the following criteria:

- a) who raised the issue; and
- b) who is in the best position to meet the burden of proof

Relying on these criteria in Order P2005-001, I stated that a complainant has to have some knowledge of the basis of the complaint and it made sense to me that the initial burden of proof can, in most instances, be said to rest with the complainant. An organization then has the burden to show that it has authority under the Act to collect, use and disclose the personal information.

This initial burden is what has been termed the “evidential burden”. As I have said, it will be up to a complainant to adduce some evidence that personal information has been collected, used or disclosed. A complainant must also adduce some evidence about the manner in which the collection, use or disclosure has been or is occurring, in order to raise the issue of whether the collection, use or disclosure is in compliance with the Act...

As stated in by the Supreme Court of Canada in *R. v. Schwartz* [1988] 2 S.C.R. 443 at paragraph 38:

The party with an evidential burden is not required to convince the trier of fact of anything, only to point out evidence which suggests that certain facts existed.

As the Complainant has raised the initial issue as to the reasonableness of the Organization’s collection of personal information, it will be the Organization who will be best placed to demonstrate the reasonableness of such collection and the other issues raised in this inquiry. The Complainant has raised a *prima facie* case. The Organization is far better placed than the Complainant to meet the burden of proof with regard to the issues touching its commercial activities, the authority and reasonableness of its collection of personal information and the security and notification arrangements undertaken...

[para 30] For the greater part, the Complainant met the evidential burden only because the Public Body conceded that an employee had collected, used and disclosed her personal information contrary to Part 2 of the Act and led evidence to that effect.

Otherwise, the majority of her allegations were too vague to make a determination that her personal information had been disclosed. Her evidence referred only to “information”, rather than specific information or details with which I could determine whether the Public Body had in fact disclosed her personal information. In addition, she referred to statements being made in front of “witnesses” in her complaint, but did not provide the details of the statements or the names or corroborating statements of the witnesses. If, for example, the Complainant had provided specific details of exactly what was disclosed, when, and to whom, and provided an explanation of why she believed that this specific information came from her police and youth records, then she would have met the evidential burden.

[para 31] The Complainant did provide evidence in relation to one instance in which her former husband disclosed specific information that may have been obtained from her youth records. She did meet the evidential burden in relation to this aspect of her complaint when she provided details of a disclosure made by her husband to her family physician of information contained in her youth record. However, the documents entitled “List of Users” submitted by the Public Body and the Complainant indicate that the Staff Sergeant did not access the case file containing the specific information the Complainant alleges her husband told her family physician.

[para 32] I do note that the List of Users provided by the Public Body in its submissions indicates that the Staff Sergeant accessed the Complainant’s records on five occasions on June 3, 2004. However, I also note that the List of Users provided by the Public Body to the Applicant documents that the Staff Sergeant accessed the Complainant’s records on six occasions on June 3, 2004.

[para 33] Because the entries on the list apparently vary with the search parameters, it is possible that the staff sergeant accessed more records than the lists suggest. It is also possible that the records accessed contained the information communicated to the family physician. However, on a balance of probabilities, I am unable to find that the staff sergeant disclosed the specific information to the Complainant’s former husband, which the Complainant’s former husband disclosed to the Complainant’s family physician.

[para 34] For these reasons, I find that the Public Body disclosed the Complainant’s personal information to the extent that the Public Body conceded it did.

Conclusion

[para 35] The Public Body states that following this incident, and following orders of this office relating to CPIC searches, it has implemented policies prohibiting the inappropriate access of police data systems by police personnel. It submitted Directives dated December 6, 2005 as evidence of the policy changes. In addition, the Public Body provided evidence that it has implemented random audits of members’ access to the Police Information Management System and has changed its policies regarding access to this system to ensure that the system is used for legitimate purposes only.

[para 36] I am satisfied that the Public Body took appropriate measures to limit collection, use and disclosure of personal information that contravenes the Act following this complaint. However, as the Order must address the circumstances leading to the complaint, I will order the Public Body to cease collecting, using and disclosing the Complainant's personal information. Even though the Public Body has already done so voluntarily, the purpose of an order is to confirm that it is required to do so.

V. ORDER

[para 37] I make this Order under section 72 of the Act.

[para 38] I order the Public Body to cease collecting, using and disclosing the Complainant's personal information in contravention of Part 2 of the Act.

[para 39] I further order the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that the Public Body has complied with this Order.

Teresa Cunningham
Adjudicator