

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2011-019

December 15, 2011

CALGARY POLICE SERVICE

Case File Number F5425

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Summary: The Complainant made a complaint to the Commissioner that the Calgary Police Service (the Public Body) had used and disclosed his personal information contrary to the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) when a member disclosed to the Complainant's former spouse that he had a Saskatchewan driver's license.

The Adjudicator found that the member had collected and used the Complainant's personal information in order to investigate a complaint that he was driving without a license or insurance. She also found that the status of the Complainant's driver's license had been disclosed to the former spouse to ease her concerns that her children were being driven by an unlicensed, uninsured driver. The Adjudicator noted that the *Family Law Act* empowers a guardian to receive from third parties information that could significantly affect children under the guardian's care. The Adjudicator found that information regarding the status of the Complainant's driver's license was information affecting the former spouse's children and that the *Family Law Act* therefore authorized disclosure of the information to her. As the *Family Law Act* authorized disclosure in this case, the disclosure was not an unreasonable invasion of the Complainant's personal privacy.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 17, 39, 40, 72; *Family Law Act*, S.A. 2003, c. F-4.5, s. 20, 21

Authorities Cited: **AB:** Order P2006-008

Sopinka, John, et al. *The Law of Evidence in Canada* 2nd ed. Markham: Butterworths, 1999.

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

I. BACKGROUND

[para 1] On June 1, 2010, the Complainant made a complaint to the Commissioner that members of the Calgary Police Service (the Public Body) had disclosed to his former spouse that he had a valid Saskatchewan driver's license. To establish the particulars of his complaint, the Complainant provided an affidavit sworn by his former spouse in relation to proceedings in which she is the plaintiff. The affidavit states:

I do not agree that the Defendant [should] be able to travel with the children to Saskatchewan. At present, the Defendant does not have [a] valid Alberta driver's license, the children should not be driven to and from any Province or anywhere with the Defendant until the Defendant has a valid Alberta driver's license. Attached to this my affidavit as Exhibit "A" is a copy of the Alberta Justice print out evidencing his license suspension.

On or about May 20, 2010, the Defendant arrived at my place of residence to pick up the children in his van to leave for Saskatchewan as per the direction of the Court for the Victoria long weekend. I asked the Defendant if he had a valid Alberta driver's license and he did not produce one, instead he immediately left with 3 of our 4 children in his van.

I immediately contacted the Calgary City Police and I was informed that the Defendant has a valid Driver's license in the Province of Saskatchewan not Alberta.

The Complainant complained that the Public Body had used and then disclosed his personal information contrary to Part 2 of the FOIP Act when it accessed information regarding his Saskatchewan driver's license, and then disclosed its findings to his former spouse.

[para 2] The Commissioner authorized mediation to resolve the dispute between the Complainant and the Public Body. As mediation was unsuccessful, the matter was scheduled for a written inquiry. Both parties provided initial submissions for the inquiry.

II. ISSUES

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

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

III. DISCUSSION OF ISSUES

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

[para 3] In Order P2006-008, the Commissioner explained the burden of proof in relation to complaints made under the *Personal Information Protection Act* in the following way:

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.

[para 4] In *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 112, Yamauchi J. approved this approach to the burden of proof in complaints made under the FOIP Act. He said:

FOIPPA s. 71 deals with the burden of proof when a person seeks access to records. In some cases, the burden rests on the applicant. In others, the burden rests on the head of the public body. However, FOIPPA does not contain any provision that tells us on whom the burden of proof rests when a person lodges a complaint with the OIPC alleging that they believe a public body has used or disclosed their personal information in contravention of FOIPPA Part 2. Thus, the usual principle of "he who alleges must prove" applies. The OIPC takes this approach on these types of matters, see e.g. Order F2002-020: Lethbridge Police Service (August 7, 2002) at para. 20, which said:

... in this inquiry, the Complainant has the burden of proving that his personal information was disclosed by the Public Body. The Complainant has not met this burden of proof. Before I am able to find that a breach of Part 2 of the Act has occurred, there must be a satisfactory level of evidence presented in support of the allegation. If this were not the case, a public body could be put into the untenable position of proving a negative (e.g. that a breach did not occur) based on any allegation raised by a complainant.

But see, Order P2006-008: Lindsay Park Sports Society (March 14, 2007) at paras. 9-21, where the OIPC said that complainants under FOIPPA do not have a legal burden, but an evidential burden. Once the complainant satisfies the evidential burden, the burden shifts to the public body to show "that it has the authority ... to collect, use or disclose personal information," at para. 20. Because of FOIPPA's structure, this Court agrees with the Lindsay Park analysis of the burden of proof and evidentiary burden.

[para 5] The authors of *The Law of Evidence* 2nd Edition describe the evidential burden in the following way:

A party... may satisfy an evidential burden without doing anything; for example, a witness called by the Crown testifies to facts, which raise the issue of self-defence. Thus, a party may discharge

an evidential burden by pointing to some evidence already on the record. In these circumstances, the defendant does not adduce evidence but rather, the issue is raised by the evidence...

The term “evidential burden” means that a party has the responsibility to insure that there is sufficient evidence of the existence or non-existence of a fact or of an issue on the record to pass the threshold test for that particular fact or issue.

[para 6] A complainant bears the initial burden of adducing or pointing to evidence that establishes his or her personal information was collected, used or disclosed, depending on the nature of the complaint.

[para 7] Personal information is defined by section 1(n) of the FOIP Act. This provision states:

1 In this Act,

- (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;*

Personal information under the FOIP Act is information about an identifiable individual.

[para 8] The parties are in agreement that the fact the Complainant has a valid Saskatchewan driver’s license is information about him as an identifiable individual, and is therefore his personal information. The parties are also in agreement that the Public Body accessed this information from the Canadian Police Information Centre (CPIC) in order to investigate the Complainant’s former spouse’s complaint that the Complainant was driving their children without a license. Both parties are in agreement that this

application of this information about the Complainant constitutes a “use” for the purposes of the FOIP Act. I will therefore consider whether this use was authorized by Part 2 of the FOIP Act.

[para 9] Section 39 of the FOIP Act limits the circumstances in which public bodies may use personal information. It states, in part:

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

(a) for the purpose for which the information was collected or compiled or for a use consistent with that purpose...

(4) A public body may use personal information only to the extent necessary to enable the public body to carry out its purpose in a reasonable manner.

[para 10] The Public Body submitted an affidavit from a Calgary Police Service member (CPS member) who investigated the former spouse’s complaint for the inquiry. This affidavit states:

On May 20, 2010 at approximately 6:57 p.m. I investigated a complaint from [the Complainant’s former spouse’s address] in response to a non-emergency complaint. The computer-aided dispatch terminal in my police vehicle (CAD) indicated that the complainant, [the former spouse], had called the Calgary Police Service to report that her ex-husband, [the Complainant] had just picked up two of their children in a light blue Town and Country Chrysler van... The CAD terminal indicated that [the former spouse] advised the call-taker that she was aware [the Complainant] does not have a driver’s license as it was taken away by maintenance enforcement in November of 2006.

I called CPIC (Canadian Police Information Centre) and had [the Complainant’s] name queried Canada wide to see if he possessed a driver’s license. It was determined that he did possess a valid driver’s license in the province of Saskatchewan.

I then advised [the former spouse] that [the Complainant] did have a valid driver’s license in the Province of Saskatchewan, in order to allay her stated concern that her children were being driven in a vehicle by an unlicensed and therefore uninsured driver. I do verily believe it was my duty to provide this information in order to fully address the complainant’s concerns for the safety of her children.

I did not provide any further information to [the former spouse] about [the Complainant] and did not take any further action in regard to this complaint.

[para 11] The CPS member’s evidence establishes that information as to whether the Complainant had a valid driver’s license was obtained in order to investigate the former spouse’s complaint that the Complainant was driving her children without a valid driver’s license or insurance.

[para 12] The Public Body argues the following:

The Public Body submits that it collected the Complainant's personal information by having the Complainant's name queried on the CPIC database in order to determine if he had a valid driver's license in Canada. ...

Section 39 of the Act lists the only circumstances under which a public body may use personal information. Section 39(1)(a) states that a public body may only use personal information for the purpose for which the information was collected or compiled or for a use consistent with that purpose.

The Public Body states that it used the Complainant's personal information to further a law enforcement investigation when [the Constable] confirmed the status of the Complainant's driver's license in order to ensure he was driving legally and was insured. Having been advised by the Complainant's ex-wife that the Complainant did not have a valid driver's license in Alberta, the Public Body's officer would have been neglecting his duty under the *Police Act* to investigate a complaint had the CPIC inquiry not been made.

[para 13] I find that the CPS member collected the Complainant's personal information from CPIC in response to a complaint made by the Complainant's former spouse. The complaint was that the former spouse's children were in a car being driven by the Complainant, whom she believed did not have a driver's license or motor vehicle insurance. The former spouse expressed concern for the safety of her children for that reason. The affiant collected the Complainant's personal information to investigate the former spouse's complaint and used it to determine that Complainant did have a driver's license.

[para 14] The CPS member used the personal information collected from CPIC for the purpose for which it was collected, that is, to investigate a complaint that the former spouse's children were in an unsafe situation, given that the former spouse thought them to be in a vehicle driven by an unlicensed, uninsured driver. I therefore find that the Public Body complied with the requirements of section 39(1)(a) when the member used the Complainant's personal information to confirm the existence of a driver's license.

[para 15] Turning to the question of whether the CPS member used the Complainant's personal information only to the extent necessary to carry out his purpose in a reasonable manner, within the terms of section 39(4), I find that the CPS member used the Complainant's information solely for the purpose of investigating the former spouse's complaint. In addition, the CPS member did not use any more of the Complainant's personal information than was necessary for the purpose of conducting the investigation into the complaint. The affiant used only information establishing that the Complainant had a Saskatchewan driver's license and that was all that was necessary to complete the investigation in this case.

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

[para 16] Section 40 of the FOIP Act establishes the circumstances in which a public body may disclose personal information. It states, in part:

40(1) A public body may disclose personal information only...

...

(b) if the disclosure would not be an unreasonable invasion of a third party's personal privacy under section 17,

(c) for the purpose for which the information was collected or compiled or for a use consistent with that purpose,

...

(f) for any purpose in accordance with an enactment of Alberta or Canada that authorizes or requires the disclosure,

...

(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.

The Public Body points to sections 40(1)(b) and (c) as authority for the affiant's disclosure regarding the Complainant's driver's license to his former spouse.

Does section 40(1)(b) of the FOIP Act authorize the disclosure of the Complainant's driver's license information?

[para 17] The Public Body argues that the disclosure of the Complainant's driver's license information to his former spouse was authorized by section 40(1)(b) of the FOIP Act. It states:

Section 40(1)(b) of the Act permits disclosure of personal information where the disclosure would not be an unreasonable invasion of a third party's personal privacy under section 17 of the Act.

Section 17(4) sets out particular types of personal information the disclosure of which is presumed to be an unreasonable invasion of a third party's personal privacy. This presumption may be rebutted by evidence to the contrary. In determining whether disclosure would be an unreasonable invasion of a third party's personal privacy, all relevant circumstances may be considered, in addition to the types of circumstances enumerated in section 17(5).

Section 17(4)(b) states that:

A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if... the personal information is an identifiable part of a law enforcement record, except to the extent that the disclosure is necessary to dispose of the law enforcement matter or to continue an investigation. [emphasis in original]

As the Privacy Commissioner has not previously interpreted the above-underlined phrase, the Public Body submits that the phrase "dispose of" should be given its ordinary meaning, which is "to settle a matter finally".

The Public Body submits that the Complainant's driver's license information in the CPIC database was part of a law enforcement record.

The Public Body submits that this officer was disposing of the ex-wife's complaint in communicating the Complainant's driver's license information to her. Accordingly, the presumption under section 17(4)(b) does not apply.

The Public Body submits that none of the circumstances described in section 17(5) are applicable to the disclosure of the Complainant's information to his ex-wife. The Public Body submits that in all of the circumstances and for the reasons mentioned previously, the disclosure was not an unreasonable invasion of the Complainant's personal privacy.

[para 18] Section 17 of the FOIP establishes the circumstances in which it is, or is not, an invasion of a third party's personal privacy to disclose that party's personal information to an applicant who has made an access request. If, under section 17, disclosure would not be an unreasonable invasion of a third party's personal privacy, then section 40(1)(b) authorizes disclosure.

[para 19] Section 17 states in part:

17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

...

(c) an Act of Alberta or Canada authorizes or requires the Disclosure...

...

(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

...

(b) the personal information is an identifiable part of a law enforcement record, except to the extent that the disclosure is necessary to dispose of the law enforcement matter or to continue an investigation,

...

(g) the personal information consists of the third party's name when
(i) it appears with other personal information about the third party, or
(ii) the disclosure of the name itself would reveal personal information about the third party...

(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

...

- (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,*
- (b) the disclosure is likely to promote public health and safety or the protection of the environment,*
- (c) the personal information is relevant to a fair determination of the applicant's rights,*
- (d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,*
- (e) the third party will be exposed unfairly to financial or other harm,*
- (f) the personal information has been supplied in confidence,*
- (g) the personal information is likely to be inaccurate or unreliable,*
- (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and*
- (i) the personal information was originally provided by the applicant.*

[para 20] Section 17 does not say that a public body is *never* allowed to disclose third party personal information to an applicant. It is only when doing so would be an unreasonable invasion of a third party's personal privacy that a public body must refuse to disclose the information to an applicant under section 17(1). Section 17(2) establishes that disclosing certain kinds of personal information in certain circumstances is not an unreasonable invasion of personal privacy.

[para 21] To determine whether disclosure of personal information subject to a presumption or presumptions under section 17(4) would be an unreasonable invasion of the personal privacy of a third party, a public body must consider and weigh all relevant circumstances under section 17(5), (unless section 17(3), which is restricted in its application and is not reproduced here), applies. Section 17(5) is not an exhaustive list and any other relevant circumstances weighing for or against disclosure must also be considered and weighed.

[para 22] The Public Body argues that the affiant disclosed information about the Complainant's driver's license to the Complainant's former spouse in order to dispose of the former spouse's complaint. It then suggests that the disclosure falls within the exception to the presumption created by section 17(4)(b) for that reason.

[para 23] I accept that the CPS member disclosed the Complainant's personal information for the purpose of "allaying the former spouse's concerns regarding the status of the Complainant's license", and that the disclosure therefore had the effect of concluding the Complainant's former spouse's complaint. However, it does not follow from the fact that section 17(4)(b) does not apply to the Complainant's personal information, that another presumption contained in section 17(4) would not apply to the Complainant's personal information. For example, section 17(4)(g) would continue to apply to the information in question, as it consists of the Complainant's name in the context of other personal information about him; i.e., that he has a Saskatchewan driver's license. The disclosure of the personal information would therefore still be subject to a presumption that it would be an unreasonable invasion of the Complainant's personal privacy to do so.

[para 24] The Public Body argues the following in relation to the application of section 17(5):

The Public Body submits that none of the circumstances described in section 17(5) are applicable to the disclosure of the Complainant's information to his ex-wife. The Public Body submits that in all of the circumstances and for the reasons mentioned previously, the disclosure was not an unreasonable invasion of the Complainant's personal privacy.

[para 25] The Public Body states that none of the factors set out in section 17(5) apply in this case. If that is so, then there would be no factors outweighing the presumption created by section 17(4)(g), and it would be an unreasonable invasion of the Complainant's personal privacy to disclose to the former spouse that he had a Saskatchewan driver's license. As a result, the public body's arguments do not establish that section 40(1)(b) authorizes its disclosure of the Complainant's personal information. However, I agree with the Public Body that section 40(1)(b) authorizes the CPS member's disclosure of the Complainant's driver's license information, but for different reasons.

[para 26] Neither the Public Body nor the Complainant addressed the application of the *Family Law Act* in their submissions. However, for the reasons that follow, I find that the evidence submitted by both parties establishes that the disclosure of the Complainant's personal information was authorized by the *Family Law Act*, which is a statute of Alberta within the terms of section 17(2)(c) of the FOIP Act. Although the Public Body did not address this provision in its submissions, and bears the burden of proof in this inquiry, I find that the evidence submitted by both the Public Body and the Complainant establishes that section 17(2)(c), and therefore section 40(1)(b), applies.

[para 27] The affidavit of the former spouse establishes that she is a parent of the children who were the subject of her complaint to the Public Body. Under section 20 of

the *Family Law Act*, this status makes her a guardian of the children. Section 21 of the *Family Law Act* establishes the rights and duties of guardians. Section 21(6)(1) states:

21(6) Except where otherwise limited by law, including a parenting order, each guardian may exercise the following powers:

(a) *to make day-to-day decisions affecting the child, including having the day-to-day care and control of the child and supervising the child's daily activities...*

...

(1) *to receive from third parties health, education or other information that may significantly affect the child...*

[para 28] The CPS member's affidavit establishes that the former spouse contacted the Public Body because she was concerned that her children, over whom she has responsibility for providing the necessities of life and making decisions regarding their day to day care under the *Family Law Act*, were being driven by an unlicensed and uninsured driver. The CPS member states:

I then advised [the former spouse] that [the Complainant] did have a valid driver's license in the Province of Saskatchewan, in order to allay her stated concern that her children were being driven in a vehicle by an unlicensed and therefore uninsured driver. I do verily believe it was my duty to provide this information in order to fully address the complainant's concerns for the safety of her children.

[para 29] I find that the CPS member's statement that the Complainant's former spouse was concerned for the safety of her children is supported by the affidavit of the former spouse. Moreover, it is conceivable that had the Complainant not had a driver's license or insurance and his vehicle had been stopped by the police, he would have faced arrest while accompanied by the children, and the former spouse would then have had to make arrangements for the children. In addition, if there were no valid motor vehicle insurance in place, which would be the case if the Complainant lacked a driver's license, it is also conceivable that in the event of a catastrophic accident, the children might not be adequately compensated for any injuries suffered. These are both consequences of driving without a license that could significantly affect the children for the purposes of section 21(6)(1) of the *Family Law Act*.

[para 30] As a guardian of the children being driven by the Complainant, the former spouse had a right under section 21(6)(1) of the *Family Law Act* to receive information from the CPS member that the driver of the vehicle in which her children were riding had a license. Moreover, she had a right to receive information about the jurisdiction of that license, given her knowledge that the Complainant's Alberta driver's license had been suspended, or was going to be suspended, and given that it would be necessary for her to know the status of the Complainant's license when making decisions regarding any future car trips involving her children and the Complainant.

[para 31] I do not read section 21(6)(1) of the *Family Law Act* as necessarily imposing a duty on the CPS member to disclose the details of the Complainant's driver's license, such that the CPS member was required to disclose the driver's license information to the former spouse. However, in my view, section 21(6)(1) implicitly authorizes the disclosure of information that could significantly affect children under a former spouse's care, to the former spouse, should the CPS member, as a third party, decide to provide such information to her. There would be little value in legislating a right for a guardian to receive information from third parties if it is not implicit in this right that a third party may also provide or disclose the information to a guardian under the authority of this provision.

[para 32] The CPS member effectively disclosed to the former spouse information that could significantly affect her children, when he disclosed the status of the Complainant's driver's license. I say this because the status of the driver's license, and the fact that it was from Saskatchewan, established whether the Complainant could legally drive the children on that occasion and on subsequent occasions.

[para 33] I note that the CPS member disclosed the particular jurisdiction from which the former spouse had obtained his driver's licence. It might be argued that this was more information than was necessary to achieve his purpose of providing information that affected the children. However, naming the particular jurisdiction in which the license had been obtained provided an element of definition and certainty in relation to the CPS member's statement that the former spouse had a valid license, and served to substantiate this assertion. This degree of certainty was necessary, given the former spouse's knowledge that the Complainant no longer had a valid Alberta driver's license. Thus it was reasonable for the CPS member to give this item of information to accomplish his purpose.

[para 34] I therefore find that the disclosure was authorized by section 21(6)(1) of the *Family Law Act*. As section 17(2)(c) of the FOIP Act establishes that disclosures authorized by a statute of Alberta are not an unreasonable invasion of personal privacy, I find that section 40(1)(b) authorizes the disclosure.

[para 35] In addition, I am satisfied that the affiant disclosed no more personal information than was necessary for meeting the purpose of satisfying the former spouse that her children were being driven by a licensed driver. He stated only that the Complainant had a valid Saskatchewan driver's license, and provided no further details. I therefore find that the requirements of section 40(4) are met.

V. ORDER

[para 36] I make this Order under section 72 of the Act.

[para 37] I confirm that the Public Body used the Complainant's personal information in compliance with Part 2 of the FOIP Act.

[para 38] I confirm that the Public Body disclosed the Complainant's personal information in compliance with Part 2 of the FOIP Act.

Teresa Cunningham
Adjudicator