

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2013-26

August 28, 2013

**EAST CENTRAL ALBERTA
CHILD AND FAMILY SERVICES AUTHORITY (REGION 5)**

Case File Number F5983

Office URL: www.oipc.ab.ca

Summary: The Complainant complained that the Public Body disclosed her personal information as well as that of her current spouse and their child to her former husband contrary to the *Freedom of Information and Protection of Privacy Act*.

The Adjudicator found that the Public Body did disclose the information of the Complainant, her current spouse and their child to her former husband when it disclosed notes to him from an interview of one of the children of the Complainant and her former husband. However, the Adjudicator found that the Public Body had the authority to disclose the information pursuant to section 126(1)(b) of the *Child, Youth and Family Enhancement Act* and section 40(1)(f) of the *Freedom of Information and Protection of Privacy Act*.

Statutes Cited: **AB:** *Child, Youth and Family Enhancement Act*, R.S.A. 2000 c. C-12 ss. 1, 6, and 126; *Family Law Act*, S.A. 2003, c. F-4.5, s. 20, *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 17, 40 and 72.

Authorities Cited: *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 112; **AB:** Orders P2006-008, and F2008-029.

I. BACKGROUND

[para 1] The Complainant was divorced from her former husband (the third party) in 2007. She was granted sole custody of their two children (the children) and the third party was given access.

[para 2] In August of 2011, an employee of East Central Alberta Child and Family Services Authority (Region 5) (the Public Body) interviewed one of the children. The employee of the Public Body provided the interview notes to the third party who then attached the notes as an exhibit to an affidavit he filed and presented in Court in support of his application to gain custody of the children. On August 30, 2011, the Court granted the third party his application and ordered that the children live with the third party.

[para 3] On November 8, 2011, the Complainant submitted a Request for Review to the Office of the Information and Privacy Commissioner (this Office). In it, the Complainant stated that the Public Body had disclosed the interview notes to the third party contrary to the *Freedom of Information and Protection of Privacy Act* (the Act or the FOIP Act).

[para 4] A portfolio officer was assigned to try to attempt to resolve the issues between the parties. This was not successful and on April 26, 2012, the Complainant requested an inquiry. In her request for inquiry the Complainant mentions that the interview notes were disclosed to the third party as well as some other information, disclosed verbally, regarding a third child of the Complainant who is not related to the third party. I received initial and rebuttal submissions from both the Complainant and the Public Body.

II. INFORMATION AT ISSUE

[para 5] The information at issue in this inquiry consists of the interview notes of the employee of the Public Body from August of 2011 (the interview notes) and information regarding the Complainant's third child.

III. ISSUES

[para 6] The Notice of Inquiry dated November 14, 2012 lists the issues for this inquiry as follows:

1. Did the Public Body disclose the Complainant's personal information to her former husband?
2. If the Public Body did disclose the Complainant's personal information to her former husband, did it do so in contravention of Part 2 of the Act?

[para 7] Throughout the Complainant's submissions, she says the Public Body did not follow proper procedures when dealing with the issues of custody and protection of the children. For the purposes of this inquiry, I have no jurisdiction to review the acts and decisions of the Public Body beyond those that relate to the disclosure of personal information. Therefore, I will only make findings on whether the Public Body adhered to or violated the FOIP Act.

[para 8] As well, the Complainant argues that section 17 of the Act applies. She also argues that section 40(1)(b) of the Act (which permits disclosure if it would not be an unreasonable invasion of privacy within the term of section 17) takes precedence over other subsections of section 40 because it appears first. For this reason she argues that if section 40(1)(b) of the Act does not apply, the Public Body has no authority to disclose personal information.

[para 9] This is not how section 40 of the Act operates. Each subsection of section 40 can equally provide the Public Body with authority to disclose information. For reasons which I will explain below, section 40(1)(f) of the Act gave the Public Body the authority to disclose the information at issue. As a result, there is no need to do a section 17 analysis.

IV. DISCUSSION OF ISSUES

1. Did the Public Body disclose the Complainant's personal information to the third party?

[para 10] As I noted above there are two incidents in which the Complainant believes her personal information was disclosed. The first is the disclosure of the interview notes to the third party and the second is the verbal disclosure of information about her third child to the third party. In addition, in responding to questions I posed, the Complainant also complained that the interview notes contained personal information of her current spouse and personal information of the third child and that that information was disclosed to the third party when the interview notes were disclosed to him.

[para 11] In response to questions I posed to the Public Body on April 25, 2013, the Public Body has admitted to disclosing the interview notes to the third party, which contain personal information of the third child. The Public Body denies disclosing any further information about the third child. I note that the Complainant believes that the information about her third child was disclosed only because it is information she thinks the Public Body knew, and she does not believe the third party would have any other way of knowing the information.

[para 12] In Order P2006-008, the former Commissioner determined that an initial, evidential burden of proof rests with complainants to provide some evidence that the Organization disclosed their own personal information. If a complainant is able to do this, the onus to prove that the disclosure was justified shifts to the organization (Order P2006-008 at para 10). In *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 112, the Court accepted that this approach to the burden of proof applies to complaints made under the *Freedom of Information and Protection of Privacy Act*.

[para 13] On the basis of the evidence before me, I find that the Complainant met her burden insofar as the interview notes are concerned but not insofar as the other information about her third child is concerned. I find that the Public Body did disclose

the interview notes to the third party but that there is insufficient evidence of a verbal disclosure of information about the Complainant's third child. Therefore, for the remainder of this Order, I will deal only with the information in the interview notes.

[para 14] 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 15] The interview notes refer to the Complainant's family and marital status, and opinions about her. Therefore, I find that the Public Body disclosed the Complainant's personal information to the third party when it gave the third party the interview notes. Given that the interview notes detail events that occurred at the Complainant's home, which she shares with her current spouse and their child (the third child), the interview notes also contain personal information of the Complainant's current spouse and third child, including their family and marital status.

2. If the Public Body did disclose the Complainant’s personal information to her former husband, did it do so in contravention of Part 2 of the Act?

[para 16] The Complainant argues that the information that was disclosed was protected by the Act and that the third party had no entitlement to it because he is not a guardian of the children. She bases her contention that he is not a guardian on the fact that the divorce judgment gives her sole custody of the children and grants the third party access only. The Complainant believes that this means the interview notes are, therefore, “legally” hers.

[para 17] I take the Complainant’s argument on this point to mean that only she has a right to the have and use the interview notes because the information in the interview notes belong to the child and she is the guardian of the child who was interviewed. This is incorrect. While the notes contain the personal information of her children as well as of herself and her current spouse, this does not mean that the notes themselves are “legally” her child’s or, by extension, the Complainant’s. The Act concerns itself with the protection of the personal information in the records at issue. Therefore, for the purposes of this inquiry, what is important is whether the Public Body was authorized by the Act to disclose the personal information in the interview notes to the third party.

[para 18] Section 40 of the Act lists the circumstances in which a public body may disclose personal information. The Public Body argues that section 40(1)(f) of the Act applies to the personal information that was disclosed. Section 40(1)(f) of the Act states:

40(1) A public body may disclose personal information only
...
(f) for any purpose in accordance with an enactment of Alberta or Canada that authorizes or requires the disclosure,
...

[para 19] The Public Body argues that provisions of the *Child, Youth and Family Enhancement Act (CYFEA)* gave the Public Body the authority to disclose the interview notes to the third party. Specifically, the Public Body argues that the children were in need of intervention as defined by sections 1(2) and 1(3) of the CYFEA which state:

1(2) For the purposes of this Act, a child is in need of intervention if there are reasonable and probable grounds to believe that the survival, security or development of the child is endangered because of any of the following:

- (a) the child has been abandoned or lost;*
- (b) the guardian of the child is dead and the child has no other guardian;*
- (c) the child is neglected by the guardian;*

(d) the child has been or there is substantial risk that the child will be physically injured or sexually abused by the guardian of the child;

(e) the guardian of the child is unable or unwilling to protect the child from physical injury or sexual abuse;

(f) the child has been emotionally injured by the guardian of the child;

(g) the guardian of the child is unable or unwilling to protect the child from emotional injury;

(h) the guardian of the child has subjected the child to or is unable or unwilling to protect the child from cruel and unusual treatment or punishment.

(i) repealed 2003 c16 s3.

1(3) For the purposes of this Act,

(a) a child is emotionally injured

(i) if there is impairment of the child's mental or emotional functioning or development, and

(ii) if there are reasonable and probable grounds to believe that the emotional injury is the result of

(A) rejection,

(A.1) emotional, social, cognitive or physiological neglect,

(B) deprivation of affection or cognitive stimulation,

(C) exposure to domestic violence or severe domestic disharmony,

(D) inappropriate criticism, threats, humiliation, accusations or expectations of or toward the child,

(E) the mental or emotional condition of the guardian of the child or of anyone living in the same residence as the child;

(F) chronic alcohol or drug abuse by the guardian or by anyone living in the same residence as the child;

(b) a child is physically injured if there is substantial and observable injury to any part of the child's body as a result of the non-accidental application of force or an agent to the child's body that is evidenced by a laceration, a contusion, an abrasion, a scar, a fracture or other bony injury, a dislocation, a sprain, hemorrhaging, the rupture of viscus, a burn, a scald, frostbite, the loss or alteration of consciousness or physiological functioning or the loss of hair or teeth;

(c) a child is sexually abused if the child is inappropriately exposed or subjected to sexual contact, activity or behaviour including prostitution related activities.

[para 20] The Public Body points out that section 6(1) of the CYFEA requires it to investigate a child's need for intervention when information is received that a child may be in need of intervention. Section 6(1) of the CYFEA states:

6(1) If a director receives information in the form of

(a) a request for intervention services,

(b) a report under section 4 or 5, or

(c) any other allegation or evidence that a child may be in need of intervention,

the director must investigate the child's need for intervention unless the director is satisfied that the information was provided maliciously or is unfounded or that the report or allegation was made without reasonable and probable grounds.

[para 21] I do not understand the Public Body's argument as to how these sections in themselves give the Public Body authority to disclose the Complainant's personal information to the third party. However, the Public Body also cites section 126 of the CYFEA which, if applicable, may constitute authority. Section 126 of the CYFEA states:

126(1) The Minister and any person employed or assisting in the administration of this Act, including an agency providing services on behalf of a director, may disclose or communicate personal information that comes to the Minister's or person's or agency's attention under this Act only in accordance with the Freedom of Information and Protection of Privacy Act, in proceedings under this Act, in accordance with Part 2, Division 2 or this Part or as follows:

(a) to any person or organization, including an agency providing services to a child, if the disclosure is necessary to plan services for or provide services to the child or the

child's family or to plan or provide for the day-to-day care or education of the child;

(b) to the guardian of the child to whom the information relates or the guardian's lawyer;

(c) to the child to whom the information relates or the child's lawyer;

(d) to any person employed in the administration of child protection legislation in another province or territory of Canada;

(e) to any person with the written consent of the Minister.

(2) Notwithstanding subsection (1), no information shall be disclosed or communicated pursuant to this section without the consent in writing of the Minister of Justice and Attorney General or that Minister's agent if that information was provided by an agent of the Minister of Justice and Attorney General.

...

[para 22] This section, if applicable, would provide the Public Body authority to disclose the Complainant's personal information to the third party. In order for this section to apply, the Public Body must show that:

1. The information was necessary to plan or provide for the day-to-day care or education of the child; or
2. The third party is a guardian of the children as defined in the CYFEA;
3. Section 126(2) of the CYFEA was not applicable to the information at issue; and
4. The Public Body's disclosure was reasonable within the terms of section 40(4) of the FOIP Act.

[para 23] After reading the submissions of the Public Body regarding section 126, I was not certain that it was applicable. I was not convinced that the information disclosed was "...necessary...to plan or provide for the day-to-day care or education of the child...".

[para 24] As well, the Public Body did not provide evidence that the third party was a guardian as defined by section 1(1) of the CYFEA which states:

1(1)(l) "guardian" means

(i) a person who is or is appointed a guardian of the child under Part 2 of the Family Law Act, or

(ii) a person who is a guardian of the child under an agreement or order made pursuant to this Act;

[para 25] Finally, I did not know if section 126(2) of the CYFEA was applicable to the information disclosed.

[para 26] As a result, on April 25, 2013, I asked the Public Body elaborate on its argument.

a. Day-to-Day Care:

[para 27] The Public Body did not elaborate further on the how the information disclosed to the third party was “necessary” to plan or provide for the day-to-day care of the children. I understand that the information provided may have played a role in having the Court determine custody arrangements, but without more information and/or explanation, I am not able to find that the information at issue in falls within the terms of section 126(1)(a) of the CYFEA.

b. Guardianship

i. Does the information “relate to” the children?

[para 28] Section 126(1)(b) of the CYFEA uses very broad language. Information need only “relate” to a child to fit under this section. The interview notes detail the living conditions of the children and discipline that the children were allegedly subjected to. I find that this information relates to the children within the terms of section 126(1)(b) of the CYFEA.

[para 29] As mentioned above, the information in the interview notes is not only the personal information of the children but also that of the Complainant, her current spouse and their child. However, section 126(1)(b) of the CYFEA does not limit disclosure to the personal information of the children only. The children were living with the Complainant, her current spouse and their child at the time that incidents detailed in the information took place. In these circumstances section 126(1)(b) of the CYFEA gives the Public Body the authority to disclose the personal information of the Complainant, her current spouse and their child because this personal information also “relates” to the children.

ii. Is the third party the guardian of the child?

[para 30] The Public Body cited section 1(1)(l) of the CYFEA (quoted above). It then cited section 20(3)(a) of the *Family Law Act*. Section 20 of the *Family Law Act* states:

20(1) This section is subject to any order of the court regarding the guardianship of a child.

(2) Subject to this section, a parent of a child is a guardian of the child if the parent

(a) has acknowledged that he or she is a parent of the child, and

(b) has demonstrated an intention to assume the responsibility of a guardian in respect of the child within one year from either becoming aware of the pregnancy or becoming aware of the birth of the child, whichever is earlier.

(3) For the purposes of this section, a parent has demonstrated an intention to assume the responsibility of a guardian in respect of a child by

(a) being married to the other parent at the time of the birth of the child,

...

[para 31] The Public Body noted that the third party was married to the Complainant when the children were born and that the Divorce Judgment did not terminate the third party's guardianship rights.

[para 32] I also note that the Complainant believes that when she was granted sole custody of the children, she became the only guardian, and the third party has only a limited guardianship role. However, she has not argued that there is any order of the court that terminates the guardianship rights of the third party.

[para 33] On the basis of the evidence and argument before me, I find that the third party was the guardian of the children at the time the Public Body disclosed the interview notes to him.

[para 34] In her rebuttal to the information provided by the Public Body, the Complainant argues that at the time of the disclosure, the Public Body did not know that the third party was a guardian. While this does not change the fact that the third party was, in fact, a guardian at the time of the disclosure, it does raise an important point. That is, if the Public Body wishes to rely on this provision, it is in its best interest to ensure that the provision is actually applicable before disclosing the information. In this case, its apparent assumption that the third party was a guardian was correct, but that may not always be the case. Therefore, it would be prudent for the Public Body to ask the questions and obtain the proper documentation before disclosing information pursuant to section 126(1)(b) of the CYFEA. The CYFEA gives the Public Body a broad ability to disclose personal information to third parties. However, it is still essential that the Public Body make sure that the limited parameters set out by section 126 of the CYFEA are actually met because if they are not, the Public Body may be in violation of the *Freedom of Information and Protection of Privacy Act*.

[para 35] In accordance with my conclusion that the third party is the children's guardian, I find the Public Body has met the terms of section 40(1)(f) in disclosing the information, as the disclosure was authorized by section 126(1)(b).

iii. Section 40(4)

[para 36] Even where it meets the terms of section 40(1)(f), the Public Body must still comply with section 40(4) of the Act which states:

40(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 37] While section 40(1)(f) speaks of “any purpose”, and thus by its terms information can be given to a guardian for “any purpose”, in my view this provision imposes a requirement that it must be reasonable for the Public Body to disclose the information in the circumstances. The Public Body has a discretion under both sections 40(1)(f) and 126(1)(b) to disclose or not – it is not obliged to do so. Thus, for example, a disclosure to a guardian within the terms of section 126(1)(b) that would be an unreasonable invasion of someone else’s personal privacy might not meet the condition of carrying out the public body’s purposes – of meeting the terms of section 126(1)(b) - in a reasonable manner.

[para 38] In its initial submission, the Public Body submitted that its purpose for disclosing the interview notes was:

In responding to Child Intervention concerns regarding children in need of protection services, [the Public Body] exercised its’ mandated authority to provide for the safety and well-being of Alberta children...

[para 39] In response to the questions I posed, the Public Body stated:

The information was properly disclosed in order to assist the guardian in protecting his children when he attended [the] Court of Queen’s Bench a few days later because of reported protection concerns about the other parent and the other parent’s partner.

[para 40] From the Public Body’s submissions I understand that the Public Body believed that the children were in need of intervention and that the interview notes were provided to the third party so that he, as the children’s’ guardian, could intervene on the children’s behalf. Having reviewed the notes, I believe it was reasonable for the Public Body to disclose the information in question so it could be used for this purpose, in these circumstances.

[para 41] Therefore, I find that it was reasonable for the Public Body to disclose the entirety of the records at issue, and that this was done in accordance with section 40(4) of the Act.

c. Applicability of Order F2008-029:

[para 42] The Public Body also argued in its initial submissions that this Office has previously held that the Public Body's employees have a duty to investigate situations where children may be in need and in doing so they have the authority to disclose personal information pursuant to section 40(1)(f) of the Act. The Public Body then went on to quote Order F2008-029 in support of this argument.

[para 43] In Order F2008-029 the complainant argued that information had been disclosed by the Calgary Police Service to Child and Family Protective Services. That Order held that the Calgary Police Service has a duty to disclose information about a child in need of intervention pursuant to the CYFEA. That Order says nothing about the Public Body's ability to disclose information pursuant to the CYFEA or the FOIP Act, and it does not support the Public Body's argument. Therefore, I asked the Public Body to provide examples of orders from this Office that support its argument. The Public Body offered no further or compelling argument on this point. I find that Order F2008-029 does not affirm the ability of the Public Body to disclose personal information when conducting an investigation. This Order is not applicable in this inquiry.

d. Section 126(2) of the CYFEA:

[para 44] Section 126(2) of the CYFEA requires written consent of the Minister of Justice and Attorney General for disclosing information when the information in question was supplied by an agent of the Minister of Justice and Attorney General.

[para 45] In response to my question on this point, the Public Body did confirm that the information was not provided by an agent of the Minister of Justice and Attorney General and therefore, section 126(2) of the CYFEA was not applicable. I accept this and find that section 126(2) of the CYFEA is not applicable.

V. ORDER

[para 46] I make this Order under section 72 of the Act.

[para 47] I find that the Public Body had authority to disclose the interview notes to the third party pursuant to section 40(1)(f) of the Act, and that it did so in accordance with section 40(4) of the Act.

Keri H. Ridley
Adjudicator