

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2015-27

September 25, 2015

ALBERTA JUSTICE AND SOLICITOR GENERAL

Case File Number F6895

Office URL: www.oipc.ab.ca

Summary: The Complainant, a former employee of Alberta Justice and Solicitor General (“the Public Body”), complained that the Public Body collected, used and/or disclosed his personal information in contravention of the *Freedom of Information and Protection of Privacy Act* (“the Act”) when it searched his name in the Alberta Community Offender Management database (“ACOM”) while he was employed by the Public Body. The Public Body claimed that the search was done in order to verify the Complainant’s honesty and integrity.

The Adjudicator found that the ACOM search was not a collection of the Complainant’s personal information, since the search was of the Public Body’s own database. She also found that the Complainant did not consent to the use and/or disclosure of his personal information. Also, the Adjudicator found that the Public Body did not have the authority to use the Complainant’s personal information from the ACOM database because the information was used in a way that was not consistent with the purpose for which it was collected.

Statutes Cited: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 33, 39, 40, 41, and 72.

Authorities Cited: AB: Orders: 2000-002, and F2006-004

I. BACKGROUND

[para 1] The Complainant was employed as a correctional officer with the Public Body from July 17, 2011 to October 21, 2011. According to the Public Body, it is a requirement that candidates for the position held by the Complainant provide a criminal record check. According to the Complainant, as part of applying for the position he submitted a criminal record check. This showed that he had no criminal convictions.

[para 2] The Public Body was unable to tell me the sequence of events that led to the Complainant's complaint. What it did tell me is that on August 7, 2011, during the course of his employment with the Public Body, the Complainant was called into a meeting to discuss his performance. According to the Public Body, during the meeting the Deputy Director of Operations ("DDO") became concerned about the Complainant's honesty. At some time after that meeting but before August 11, 2011, the DDO wrote an undated memo to the Acting Director that stated:

Please review the attached letter addressed to [the Complainant]. I would like to give it to him on our first day back August 11, 2011.

Please confirm that [the Complainant] acknowledged a prior criminal conviction as confirmed by the attached COMIS printout. I don't think anyone else is aware of this at this time. I was checking as I am not convinced of his honesty.

[para 3] According to the Public Body, the COMIS printout refers to the results of a search the DDO conducted of the Complainant's name in the Alberta Community Offender Management System ("ACOM"). The search returned one result, which indicated the Complainant had had some kind of contact or involvement with the ACOM program, but did not on its face reveal the nature of that involvement. At some point after this but before his termination, "...the DDO took the subsequent step of determining that the [Complainant] had provided a criminal record check at the time of his initial hiring" (Public Body's rebuttal submission at page 3).

[para 4] The Complainant eventually became aware of the ACOM search and on March 4, 2013, requested that the Office of the Information and Privacy Commissioner ("this Office") review the Public Body's collection, use, and disclosure of his personal information. The Commissioner authorized a Portfolio Officer to investigate this matter and attempt to resolve the issues between the parties. This was unsuccessful and on July 18, 2014, the Complainant requested an inquiry. I received initial and rebuttal submissions from the parties. As well, I received additional submissions from the parties in response to questions I asked.

II. ISSUES

[para 5] The Notice of Inquiry dated January 14, 2015, lists the issue in this inquiry as follows:

Did the Public Body collect, use and/or disclose the personal information of the Complainant in contravention of, or compliance with, Part 2 of the Act?

III. DISCUSSION OF ISSUES

Did the Public Body collect, use and/or disclose the personal information of the Complainant in contravention of, or compliance with, Part 2 of the Act?

[para 6] Section 33 of the Act governs the collection of personal information as follows:

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.

[para 7] Section 39 of the Act governs the use of an individual's personal information and states:

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 8] Section 41 of the Act further defines what is meant by a consistent purpose and states:

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

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

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

a. Was the ACOM search a new collection of the information?

[para 9] As mentioned above, the issue is if the Public Body had the authority to search the ACOM database for personal information about the Complainant. The Public Body argues that the search was an authorized collection. However, it also seems to argue it is actually a use of information it already had collected to put in the ACOM database. In its submissions, the Public Body states that ACOM is “its own” database and that ACOM is managed by the Public Body.

[para 10] A previous order issued by this office found that when an employee of a Public Body accesses information already in the custody and control of a Public Body it not a new collection (see Order 2000-002). Another order stated that when information is put into a database by a public body, when that same Public Body retrieves it, it is a use and not a collection (See Order F2006-004 at para 12).

[para 11] In this inquiry, the ACOM database was the Public Body’s own database in which it stored information for the use of its employees. The DDO was an employee of the Public Body, acting in the course of her employment, when she performed the search. Based on this, and applying the precedents I have cited, I find that the ACOM search was not a new collection of the Complainant’s personal information. It is therefore not necessary for me to consider the arguments the Public Body made in support of its retrieval of the information, viewed as a ‘collection’.

[para 12] However, the DDO did use the Complainant’s information when she provided the COMIS printout to the Acting Director. I will discuss this use below, as well as whether this constituted a disclosure, and if there was authority for that disclosure.

b. Was the information that the Public Body used and /or disclosed the Complainant’s personal information?

[para 13] 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 14] The information from the ACOM database that was used and/or disclosed included the Complainant's name, date of birth and gender. These are all enumerated examples of personal information in section 1(n) of the Act.

[para 15] The fact that a search of the Complainant's name produced a "hit" on the ACOM database also reveals information about him insofar as it indicates that he was someone who at some point had his information entered into the ACOM database. However, the 'hit' provided minimal information. Therefore, I do not know from looking at the printout from the ACOM database why the Complainant's information had been entered in it, and so I cannot find that the information on the ACOM printout was about some criminal involvement or any other type of personal information enumerated in section 1(n) of the Act. However it seems to be information about the Complainant.

[para 16] In any event, given that his name, birthdate and gender were retrieved as the result of the search, I find that the information at issue is the Complainant's personal information. The Public Body does not contest this point. As well, the fact of the entry reveals that the Complainant had some type of involvement with the ACOM program, which is also personal information.

c. Did the Complainant consent to the use and/or disclosure of his personal information?

[para 17] The Public Body argues that the Complainant consented to the collection, use and/or disclosure of his personal information by applying for his position and completing the required forms to become an employee of the Public Body.

[para 18] I asked the Public Body to expand on this argument and provide supporting evidence. The Public Body provided me with blank forms consisting of a "Declaration and Consent to Release Information" form, "Academic Credentials" form, and "Official

Oath” form. The Public Body argues that from these forms, consent for the collection, use and/or disclosure of his personal information found during the ACOM search can be implied.

[para 19] The Public Body did not provide me with the forms that the Complainant signed, so, while I believe it likely that he completed these forms before the ACOM search, I cannot be certain. In any event, these forms, either individually or taken together, and given the broadest reading, do not imply that the Complainant consented to the use and/or disclosure of his personal information from the ACOM database.

[para 20] The Declaration and Consent to Release Information form is specific to the release of an applicant’s criminal record check to the Public Body as a prospective employer and is also limited to being used for consideration of a job that is being applied for. The Academic Credentials form is specific to checking an applicant’s post-secondary academic credentials, and the Official Oath limits the information an employee is allowed to disclose. None of these forms give the Public Body the ability to imply consent to use and/or disclosure of an employee’s information beyond the actual consent the forms specifically speak to.

[para 21] The Public Body also gave me a copy of a Security Screening Directive which states when a screening is required. The Public Body advised it determined that security screening of the Complainant was authorized by this Directive. However, the Directive states that level one security screening (which is what would apply to the Complainant) requires a candidate to provide a criminal record check, which the Complainant had already provided. Therefore, this Directive cannot be used as evidence of implied consent for the ACOM search.

[para 22] Therefore, I find that the Complainant did not consent, either expressly or by implication, to the use and/or disclosure of his personal information at issue in this inquiry.

d. Did the Public Body have the authority to use the Complainant’s personal information?

[para 23] Section 39 of the Act governs the use of an individual’s personal information and states:

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 24] The Public Body argues that section 39(1)(a) of the Act was authority for the Public Body to use the information in the ACOM database as it did. In its initial submissions, the Public Body states:

Section 39(1)(a) also states that the purpose for collection of the information has to have a “consistent” purpose with the original purpose for such collection. In order for there to be a consistent purpose there has to be a direct connection. In this situation there was a need to verify the [Complainant’s] past, given the position of trust and authority that he was placed in when performing his duties. Concern was not only for his safety, but for the safety of his co-workers, the inmates within the facility and the facility itself.

(Public Body’s initial submissions at page 6)

[para 25] To determine the purpose of that original collection, I asked the Public Body what the purpose of the ACOM database was. It responded:

ACOM (Alberta Community Offender Management) was an information system that was designed to track adult and youth offenders who are serving their time in the community. The system supported probation officers, administrative staff, surveillance staff, and correctional staff at adult and youth correctional centers.

(Public Body’s additional submissions at page 1, question 2)

[para 26] So, the purpose of the collection of information posted on the ACOM database was to track offenders serving in the community and to assist employees of the Public Body involved with these offenders.

[para 27] The purpose of the ACOM search done by the DDO was to verify the Complainant’s past, and specifically (as mentioned several times by the Public Body in other parts of its submissions), if he was being honest and had integrity.

[para 28] In my view, the DDO’s purpose in accessing the database was neither “for the purpose for which the information was collected or compiled” within the terms of section 39(1)(a), nor was it “for a use consistent with that purpose” within the terms of that provision, as supplemented by section 41(a) and (b).

[para 29] First, at the time the DDO did the search, the Complainant was not an offender serving time in the community and so the DDO was not searching the database in order to track an offender serving time in the community. Thus her purpose of assessing integrity and honesty was not *for* the purpose for which the information was initially collected and placed on the ACOM database.

[para 30] Neither was the DDO’s purpose of assessing the Complainant’s honesty and integrity *consistent with* the original purpose for which the information was collected or compiled. Consistency requires that sections 41(a) and (b) both be met.

[para 31] With regard to section 41(a), the DDO's purpose did not have any reasonable and direct connection to "tracking an offender" or "support[ing] probation officers, administrative staff, surveillance staff, and correctional staff at adult and youth correctional centers".

[para 32] With regard to section 41(b), the use must also be "necessary for performing the statutory duties of, or for operating a legally authorized program of, the public body". The explanation the Public Body gave for the DDO's use of the information to this end was that "...it was reasonable to use its own databases to provide information that would assist in assessing the credibility, honesty and integrity required of its employees."

[para 33] I agree that accessing information about a prison guard's honesty and integrity could relate directly to and be necessary for the operation of the prison, in the sense that this would help to determine the individual's suitability for continued employment in the operation of its program.

[para 34] My problem with this justification is that the Public Body has not provided any satisfactory explanation as to why and how the DDO's search of the ACOM database could reasonably be expected to, or did in the result, help her to assess the Complainant's honesty. The DDO apparently thought the ACOM printout disclosed a criminal conviction (her message to the Acting Director states this). However, the Public Body has told me the ACOM printout did not disclose a criminal conviction. Nor did the Complainant have a criminal conviction, so there was no conviction that could have been confirmed. Moreover, all prospective employees must submit a criminal record check. There was no need to go to the ACOM database first to determine if there was a criminal conviction, and then follow up to see if it had been disclosed via a criminal record check. Any criminal conviction would necessarily have been disclosed through the mandatory criminal record check process.

[para 35] I am left with an explanation and justification for the DDO's action that I find to be unsatisfactory. Thus neither section 41(a) nor 41(b) are met, and the use of the information was not a use consistent with the purpose of the collection of the information on the ACOM database. Therefore, the Public Body had no authority to use the Complainant's personal information in the manner it did.

e. Did the Public Body have the authority to disclose the Complainant's personal information?

[para 36] The Public Body considered that the DDO's provision of the information to the Acting Director was a disclosure, but argued that this was authorized under various sub-clauses of section 40. I believe this information transfer is better regarded as a use than a disclosure.

[para 37] For the reasons I have already given, I do not believe this use was authorized under section 39(1)(a), nor do I believe the Complainant gave his consent for this use within the terms of section 39(1)(b). Neither does section 39(1)(c) (use for a purpose for

which the information may be disclosed to the public body under section 40) apply, since most of the sub-clauses of section 40 on which the Public Body relies do not authorize disclosure *to* the Public Body. The one that does authorize disclosure to the Public Body (section 40(1)(q)) does not apply, since the DDO's use of the information that had already been collected and compiled in the database was not for the purposes specified in subclauses (i) and (ii) of that provision.

[para 38] Although the Public Body did not argue this, the DDO's access of the personal information on the ACOM database could, in other circumstances, arguably be regarded as a disclosure to her for the purposes of performing her duties, within the terms of section 40(1)(i). The subsequent transfer to the Acting Director might conceivably also be seen as a disclosure by the DDO to the Acting Director to enable that person to perform their duties. However, because I have found above that there is no convincing explanation for why the DDO accessed the database, or shared the information with the Acting Director I cannot conclude that these actions were for the purpose of enabling these persons to perform their duties.

IV. ORDER

[para 39] I make this Order under section 72 of the Act.

[para 40] I find that the Public Body used the Complainant's personal information in contravention of Part 2 of the Act and order the Public Body to stop using the Complainant's personal information in contravention of Part 2 of the Act.

[para 41] I order the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that it has complied with the Order.

Keri H. Ridley
Adjudicator