

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2020-09

May 21, 2020

CITY OF EDMONTON

Case File Number 001720

Office URL: www.oipc.ab.ca

Summary: The Complainant made a complaint to this Office that the City of Edmonton (the Public Body) contravened the *Freedom of Information and Protection of Privacy Act* (FOIP Act) by using and disclosing her personal information in the course of prosecuting a municipal bylaw offence.

Subsequent to the investigation conducted by this Office, the Complainant requested an inquiry.

The Adjudicator found that section 4(1)(k) (records relating to an ongoing prosecution) applied to the records at the time of the use and disclosure. Therefore, the FOIP Act did not apply and the adjudicator did not have jurisdiction to review the use or disclosure.

Statutes Cited: **AB:** City of Edmonton Bylaw 14600 Community Standards Bylaw s.43, *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 4, 72, *Provincial Offences Procedure Act*, RSA 2000, c P-34

Authorities Cited: **AB:** Orders F2008-031, F2009-013, F2014-42, **Ont:** Order MO-3103

I. BACKGROUND

[para 1] The Complainant wrote to the mayor of the City of Edmonton (the Public Body) about derelict housing and parking issues in her neighbourhood. Subsequently, the details of her letter were used as evidence in a prosecution regarding a nuisance property and her letter became part of the prosecution file. The Public Body Law Branch attempted to redact the Complainant's

personally identifying information from the complaint before providing the file to the owner of the nuisance property, but her personally identifying information remained visible when the prosecution file was provided to the owner of the nuisance property. The owner of the nuisance property then brought the complaint to a hearing before the Subdivision and Appeal Board (SDAB) where the SDAB referred to the Complainant by name in its written decision.

[para 2] The Complainant made a complaint to this Office that the Public Body contravened the *Freedom of Information and Protection of Privacy Act* by using and disclosing her personal information that was included in the complaints she had made about other properties.

[para 3] Subsequent to the investigation conducted by this Office, the Complainant requested an inquiry.

II. ISSUES

[para 4] The Notice of Inquiry dated May 28, 2018 states the issues in this inquiry as follows:

1. Did the Respondent use the Complainant's personal information in her letter to the mayor? If yes, did it do so in compliance with, or in contravention of, section 39 of the Act?

If the Respondent is relying on section 39(1)(a), the parties may wish to consider whether the requirements of section 41 are met.

2. Did the Respondent make reasonable security arrangements to protect the Complainant's personal information from the risk of unauthorized access, collection, use, and disclosure as required by the requirements of section 38 of the Act?

[para 5] The following issue was later added to the inquiry:

Did the Respondent disclose the Complainant's personal information in her complaints? If yes, did it do so in compliance with, or in contravention of, section 40(1) and 40(4) of the Act?

[para 6] In its initial submission, the Public Body raised the application of section 4(1)(k) to the information in the Complainant's complaint. The Complainant also addressed the application of that section.

[para 7] Section 4(1)(k) excludes records relating to an ongoing prosecution from the scope of the Act. As this provision affects my jurisdiction to decide the complaint, I will consider this section first.

III. DISCUSSION OF ISSUES

Preliminary issue – application of section 4(1)(k)

[para 8] Section 4(1)(k) excludes certain records from the scope of the FOIP Act. It states:

4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

(k) a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed;

[para 9] The Complainant states that at a Subdivision and Development Appeal Board (SDAB) hearing relating to a particular residential property, the owner of that property produced records containing the Complainant's personal information (including her name, email address, personal opinions, and place of residence). The Complainant states that these records are from September – November 2014.

[para 10] The Public Body acknowledges that the records attached to the Complainant's complaint were provided to the property owner by the Public Body in a disclosure package relating to a municipal prosecution of the owner.

[para 11] The Public Body states that in responding to the Complainant's concerns about the particular property, it initiated enforcement action regarding the property in October 2014, and issued a violation ticket at the end of that month. That ticket related to a violation of Bylaw 14600 Community Standards Bylaw. The Public Body further states that this ticket led to a prosecution under Part 2 of the *Provincial Offences Procedure Act*, RSA 2000, c P-34. A trial date had been set for August 2015 but adjourned to November 23, 2015, when the prosecution ended with a withdrawal of the ticket.

[para 12] Prior to the trial date, the Public Body states that it received a request for disclosure from the property owner. The Public Body states that “[p]ersons charged with offences have a legal right to disclosure of all relevant and material information” (Public Body initial submission at para. 11). The information that had been provided to the prosecutor relating to the enforcement action included the complaints made about the property by the Complainant. This information was then provided to the property owner as part of the disclosure package, “with some redactions to remove irrelevant information” (Public Body initial submission at para. 11). The Public Body further advised that the SDAB hearing, where the property owner provided that same information about the Complainant, occurred in August 2015.

[para 13] The dates provided by the Public Body were not disputed by the Complainant. Given those dates, it is clear that the disclosure of the Complainant's personal information by the Public Body to the property owner occurred while the municipal prosecution was ongoing.

[para 14] The use of the Complainant's personal information relates to the Public Body's internal use of the information for the prosecution. The Public Body's use of the Complainant's personal information also must have occurred while that prosecution was ongoing.

[para 15] In Order F2014-42, the adjudicator addressed a complaint about the disclosure of personal information in a Recognizance, a Certificate of Analyst and Notice of Intention relating the complainant, by the Calgary Police Service. The Certificate of Analyst and Notice of

Intention related to a prosecution that had not been completed. The terms of the Certificate and Notice were disclosed to third parties at the time a police officer attempted to serve the complainant.

[para 16] The adjudicator cited Order F2009-013, in which it was stated that the purpose of section 4(1)(k) was to ensure prosecutions may proceed without interference. The Adjudicator determined that the Certificate and Notice related to the prosecution, which had not yet been completed. As such, section 4(1)(k) applied to the records at the time of disclosure. She also noted that “any disclosure details regarding these documents falls outside the scope of the FOIP Act for that reason” (at para. 22).

[para 17] In Order F2008-031, the adjudicator considered whether an investigation conducted by the Alberta Insurance Council (a regulatory body responsible for licensing of insurance agents) into alleged contraventions of the *Insurance Act* is a ‘prosecution’ within the terms of section 4(1)(k). He determined that it was not. The adjudicator reviewed decisions related to similar provisions in other jurisdictions, as well as case law from the Supreme Court of Canada. He said (at paras. 19-24):

Regardless of whether the overall proceedings involving the Applicant are complete, I find that section 4(1)(k) does not apply in this inquiry, as the proceedings are not a “prosecution”. In reaching my conclusion, I note the meaning of “prosecution” that has been used in other jurisdictions with respect to provisions virtually identical to section 4(1)(k) [being section 3(1)(h) of B.C.’s *Freedom of Information and Protection of Privacy Act* and section 65(5.2) of Ontario’s *Freedom of Information and Protection of Privacy Act*].

Under Schedule 1 of B.C.’s *Freedom of Information and Protection of Privacy Act*, “prosecution” means the prosecution of an offence under an enactment of British Columbia or Canada. An analogous definition has been used in Ontario [Ontario Order PO-2703 (2008) at para. 38]. Orders in both jurisdictions have added, however, that – in the context of access to information legislation – not every breach of a provincial or federal enactment is an “offence” so as to render the associated proceedings a “prosecution”. For there to be an “offence”, it must result in true penal consequences [B.C. Order 290-1999 at paras. 26 to 34; Ontario Order PO-2703 (2008) at paras. 38 to 41].

The Supreme Court of Canada has stated that a true penal consequence is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within a limited sphere of activity [*R. v. Wigglesworth*, 1987 CanLII 41 (SCC), [1987] 2 S.C.R. 541 at para. 24]. The Supreme Court distinguished matters “of a public nature, intended to promote public order and welfare within a public sphere of activity” from “private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity” [*R. v. Wigglesworth* at para. 23].

I agree with and adopt the foregoing principles in defining “prosecution” for the purpose of section 4(1)(k) of the Act. A “prosecution” is accordingly a prosecution of an offence under an enactment of Alberta or Canada, in which the offence carries true penal consequences.

Here, the Applicant was investigated for alleged contraventions of sections 480(1)(a) and (b) of the *Insurance Act*. Section 13(1) of the *Certificate Expiry, Penalties and Fees Regulation* sets out a fine of up to \$5,000 for a matter referred to in section 480(1)(a) of the *Insurance Act*, and a fine of up to \$1,000 for a matter referred to in section 480(1)(b).

The charges faced by the Applicant under the *Insurance Act* are in relation to the Applicant's ability to have a certificate of authority to act as an insurance agent. The fines that may be imposed for contraventions of section 480(1)(a) and (b) are not, in my view, significant enough to mean that there are true penal consequences and that the associated proceedings are therefore a prosecution. The purpose of the Public Body's investigations and the penalties that may result is to regulate the professional activities of the Applicant, rather than redress larger wrongs done to society. The fact that the possible penalties appear in the same regulation that governs the duration and expiry of an insurance agent's certificate, and the fees payable by insurance agents for certificates and examinations, suggests to me that the penalties are imposed from an internal perspective in order to maintain discipline, professional integrity and professional standards within the limited sphere of the insurance profession.

[para 18] I agree with the above analysis and conclusions. In this case, the prosecution related to an alleged contravention of the Public Body Bylaw 14600. Section 43 of that Bylaw sets out the fines and penalties associated with an offence. Fines include a mandatory minimum depending on which provision has been contravened, with a maximum of \$10,000.00 or imprisonment of six months or less for non-payment. Orders of the Ontario Information and Privacy Commissioner's Office suggest that the prosecution of municipal bylaw offences are prosecutions for the purposes of the provision equivalent to Alberta's section 4(1)(k) (see Order MO-3103).

[para 19] In my view, prosecuting an offence under a municipal bylaw is a prosecution within the terms of section 4(1)(k) of the Act. To refer back to the Supreme Court of Canada decision cited in Order F2008-031 (above), the prosecution of an offence under a municipal bylaw is "of a public nature, intended to promote public order and welfare within a public sphere of activity", rather than a "private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity".

[para 20] Regarding the Public Body's submissions on section 4(1)(k), the Complainant states (rebuttal submission at page 7):

The City asserts that [the Complainant] did not raise section 4(1)(k), but correctly states that the section applies only to access requests during active investigations.

[para 21] What the Public Body said in its initial submission is (at para. 33):

The Public Body acknowledges that the intent of this section is to limit access requests under Part 1 of the Act until such time as a prosecution is completed (see Order F2009-013), however the Public Body submits that the reasoning for this protection is to prevent a prosecution from being interfered with (see para 7). This concept of insulating a prosecution from interference directly aligns with the decisions from the Supreme Court of Canada confirming that full disclosure to an accused person is an absolute right protected by the Charter of Rights and Freedoms, and submits that it can be applied to give a broad and purposeful interpretation to the ability of a public body

to disclose information in the context of a prosecution process, similar to the reasoning in Order F2009-048.

[para 22] I understand the Public Body's argument to be that the purpose of section 4(1)(k) discussed in Order F2009-013 – to prevent interference in a prosecution – is also applicable to the collection, use and disclosure of personal information made before a prosecution concludes. Even if the Public Body didn't make this argument, I am not restricted to consider only arguments put before me by the parties, especially in the case of jurisdictional issues.

[para 23] I disagree that section 4(1)(k) applies only to access requests during active investigations. Section 4(1)(k) excludes all records relating to an ongoing prosecution from the scope of the Act entirely. In contrast, section 6 of the Act excludes several types of records from Part 1 of the Act (access to information) but not the remainder of the Act. For example, section 6(4) states:

6(4) The right of access does not extend

(a) to a record created solely for the purpose of briefing a member of the Executive Council in respect of assuming responsibility for a ministry, or

(b) to a record created solely for the purpose of briefing a member of the Executive Council in preparation for a sitting of the Legislative Assembly.

[para 24] The records identified in the above provision are excluded from the right of access under Part 1 of the Act but are not excluded from the privacy protections in Part 2. Had the Legislature intended to exclude records relating to an ongoing prosecution from Part 1 of the Act but not the remainder of the Act, it presumably would have included these records in section 6 and not section 4(1).

[para 25] The Complainant argues that her personal information was not related to the prosecution of the owner of the particular property. From the Public Body's submissions it is clear that enforcement action was taken as a result of the Complainant's complaints about the property. That enforcement action led to the prosecution. The complaints were therefore directly related.

[para 26] I agree that particular information about the Complainant in the records, such as her email address and other such information, was not necessary for the prosecution. However, section 4(1)(k) applies to records, and not particular information in records. The records of the complaints are directly related to the prosecution, and therefore excluded from the Act under section 4(1)(k), even if not all of the information in the records is necessary for the prosecution.

[para 27] In her complaints to the Public Body, the Complainant referenced other concerns that do not relate to the property owner in particular, such as concerns about event parking in her neighbourhood. Those concerns are raised in the same records that refer to the complaints about the particular property. Again, while some concerns raised by the Complainant in the records do not relate to the prosecution, each record does contain information that is related. Therefore, the whole record is excluded under section 4(1)(k).

[para 28] As the Public Body's use and disclosure of the Complainant's personal information at the time the prosecution of the bylaw offence was ongoing, following Order F2014-42 I find that section 4(1)(k) applies and I do not have jurisdiction to review the Public Body's use or disclosure. I also do not have jurisdiction to consider whether the Public Body made reasonable security arrangements to protect the Complainant's personal information from the risk of unauthorized access, collection, use, and disclosure as required by the requirements of section 38 of the Act. Accordingly, I will not consider the issues that were set out in the Notice of Inquiry.

[para 29] That said, I note that the Public Body acknowledged it did an insufficient job of redacting the Complainant's personal information from the records it provided the property owner in the disclosure package. The Public Body states that it undertook to improve its process in 2016. It states (at para. 30, initial submission):

With regard to the disclosure to the property owner, the Public Body acknowledges that it made errors with regard to how irrelevant information was redacted from the disclosure package provided to the property owner. Errors were made that resulted in certain aspects of the Complainant's personal information being disclosed inappropriately. The Public Body acknowledges that the method of redacting certain information used in relation to this matter was insufficient to ensure it did not remain readable, and since 2016 has implemented an electronic method of redaction that fully removes any redacted portions. Further, the Public Body has, since 2016, implemented an enhanced process for processing requests for disclosure, which includes a set of guidelines that clearly state that third party personal information should be removed except where it is required to be provided to fulfill the legal duties of the Crown. Finally, all disclosure packages must be reviewed by the assigned prosecutor, and any exceptions to the general guidelines must be documented in writing. As well, released disclosure packages are accompanied by a covering letter that clearly conveys the legal rule that records provided as part of disclosure for a court proceeding may only be used for that proceeding.

IV. ORDER

[para 30] I make this Order under section 72 of the Act.

[para 31] I find that section 4(1)(k) applied to the records containing the Complainant's personal information at the time it was used and disclosed by the Public Body. As such, I do not have jurisdiction to review the Public Body's use or disclosure.

Amanda Swanek
Adjudicator