

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2021-05

March 4, 2021

CITY OF EDMONTON

Case File Number 004183

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Summary: The Complainant complained to the Commissioner that two managers with the City of Edmonton (the Public Body) had made statements criticizing his work as a project manager to a reporter and that these statements had been published in the Edmonton Journal and the Edmonton Sun. The Complainant attached the newspaper articles to his complaint, as well as a report prepared by the City Auditor regarding a project he had managed.

The Adjudicator found that the evidence did not establish that the statements in the newspaper article had, as a source, recorded information in the custody or control of the Public Body, and dismissed the complaint.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 4, 72

Authorities Cited: AB: Orders F2006-002, F2016-20, F2017-14, F2018-08, F2020-10

I. BACKGROUND

[para 1] On October 11, 2016, the Complainant complained to the Commissioner that two managers with the City of Edmonton had made statements criticizing his work as a project manager to a reporter and that these statements had been published in the Edmonton Journal and the Edmonton Sun. The Complainant attached the newspaper

articles to his complaint, as well as a report prepared by the City Auditor regarding a project he had managed.

[para 2] The Commissioner accepted the complaint as a complaint about disclosure of personal information in circumstances not authorized by the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) and authorized a senior information and privacy manager to investigate and attempt to settle the matter. At the conclusion of this process, the Complainant requested an inquiry.

II. ISSUE: Did the Public Body disclose the Complainant’s personal information in contravention of Part 2 of the *Freedom of Information and Protection of Privacy Act*?

[para 3] Section 1(i)(n) of the FOIP Act defines “personal information” within the terms of the FOIP Act as “*recorded* information about an identifiable individual.”

[para 4] Section 4 of the FOIP Act requires that personal information within the terms of section 1 be in the custody or control of a public body before the FOIP Act will apply to it. If a public body discloses recorded personal information in its custody or control and the information is not subject to an exemption in section 4, then the FOIP Act will apply to the disclosure.

[para 5] In Order F2006-002, former Commissioner Work stated:

The Act clearly states that personal information must be recorded, that is, it must be contained in a record. In my view, the Legislature appears to have decided that personal information must be recorded in order to fulfill the purposes set out under section 2 of the Act, which include rights of access and correction, and obligations of public bodies concerning the manner of collecting personal information.

Consequently, I agree with the Public Body’s argument. Merely hearing an individual’s personal information as a result of a conversation does not amount to a collection of that personal information under the Act, because there is no ability under the Act to access that personal information, or to correct it, or to control the manner in which it is collected.

[para 6] In Order F2017-14, the Adjudicator followed the reasoning in Order F2006-002 and determined that a public body had not disclosed personal information within the terms of the FOIP Act when a superintendent disclosed information that was not recorded information within the custody or control of the public body.

[para 7] In Order F2020-10, the Adjudicator said:

Personal information only includes recorded information. Personal information that arises only in conversation, and is not recorded anywhere, is not captured under the Act. (See Order F2006-002 at paras. 10 to 11). If information is recorded, then verbal use and disclosure of it are captured under the Act. (See Order F2008-022 at para. 11). A complainant alleging improper use and disclosure of personal information bears the onus of providing evidence that personal information was used and disclosed in contravention of the Act. (See Order F2007-019 at para. 9).

The Complainant complains that the Public Body disclosed his personal information when two of its managers spoke with the press about a project he managed. The Edmonton Journal and the Edmonton Sun then published articles attributing comments, which could be interpreted as critical of the Complainant's work, to the managers.

[para 8] The Edmonton Journal article states:

But city officials said the real issue isn't that a mistake was made. It's that their project manager thought he would fix it by ordering 17 quality assurance tests for \$500 each on a 200-metre stretch of path rather than working with the contractor to make sure the path was correct from the beginning.

"It is about changing the culture," said Adam Laughlin, head of the new infrastructure department created last fall to ensure best practices across the organization. "It's a culture on being proactive around everything and anything we're doing:"

[...]

That's one reason why the project manager was concerned from the beginning about the quality of the pavement. City officials need to be working with contractors from Day 1 to make sure they know how their work is going to be evaluated, to address concerns as they emerge, said Jason Meliefste, branch manager for facilities and landscape infrastructure.

Instead, the project manager ordered the tests. Sixteen failed for density and 14 failed for thickness.

His supervisor thought his approach was "overzealous," Meliefste said. The supervisor ignored the tests, choosing instead to deal with the issue during the joint end-of-job inspection, when they would have been caught and fixed on the contractor's dime. But someone called the auditor in first.

[para 9] The articles were written regarding a report of the City Auditor about a project for which the Complainant was project manager. As project manager, the Complainant had ordered tests to determine pavement quality. The Edmonton Journal article contains evaluations of the Complainant's personal qualities as an employee that were attributed to representatives of the Public Body, including his supervisor. Past orders of this office have determined that information about an employee may be personal information within the terms of the FOIP Act if the information in question has a personal dimension, such as the situation in which the information has personal consequences for the employee. Disciplinary proceedings and performance evaluations are examples of information that has a personal dimension and may be the personal information of an employee. (See Orders F2016-20 at paragraph 22 and F2018-08 at paragraph 15.) The information contained in the article appears to be evaluative information about the Complainant's performance for the Public Body.

[para 10] If the officials who spoke with the Edmonton Journal made the statements attributed to them, and the statements had, as their source, recorded information within the custody or control of the Public Body, then I must find that the Public Body disclosed the Complainant's personal information, and the question would become whether it had the authority under the FOIP Act to do so. However, if the evidence does not support

finding that the officials made the statements attributed to them, or it does not support finding that the source of the information is a record within the custody or control of the Public Body, then I am unable to find in the Complainant's favor.

[para 11] The Complainant supported his complaint with the newspaper articles making reference to his work as a project manager

[para 12] As the newspaper articles give rise to the possibility that the Public Body disclosed the Complainant's personal information in the circumstances he alleges, I asked the Public Body to provide evidence as to the source of each piece of information about the Complainant disclosed to the media. I stated:

"Personal information" within the terms of section 1 of the FOIP Act means "*recorded* information about an identifiable individual." Section 4 of the FOIP Act requires that personal information within the terms of section 1 be in the custody or control of a public body before the FOIP Act will apply to it. If a public body discloses recorded personal information in its custody or control and the information is not subject to an exemption in section 4, then the FOIP Act will apply to the disclosure. However, if a public body discloses personal information that is not contained in a record in the custody or control of a public body, such as when a representative of a public body provides an "off the cuff" opinion to the media, then the FOIP Act does not apply to that disclosure. Such a disclosure may properly be the subject of Court or labour relations proceedings; however, the FOIP Act is not engaged.

I ask that the Public Body provide evidence as to the source of each piece of information about the Complainant disclosed to the media, whether the information is about the Complainant as a representative or as an identifiable individual. (As noted above, I have underlined the information that is arguably about the Complainant as an identifiable individual.)

It is also unclear what exactly the Public Body's representatives communicated to the media. Parts of the newspaper story appear to be contradictory or incomplete, such as those portions referring to proactivity. It is therefore possible that the reporter misunderstood or misquoted some of the things that were said. I therefore ask that the Public Body provide further explanation as to what was communicated to the media.

[para 13] The Public Body provided the following explanation:

Both Mr. Meliefste and Mr. Laughlin indicated to us that because nearly four years have passed since the interview, their memory is, understandably, not as clear. Neither Mr. Meliefste nor Mr. Laughlin had notes relating to the June 13, 2016 media event. However, both Mr. Meliefste and Mr. Laughlin were able to recall certain details regarding the media interview, which are summarized below.

Mr. Meliefste recalled that the interview with media was quite brief. He also recalled that he did not mention the Complainant personally. The main focus of the media interview was on the asphalt testing process and quality control issues with contractors as well as the future direction for contract management. His recollection is that the interview responses reflected information that was publicly available in the report prepared by the Office of the City Auditor. Mr. Meliefste also noted that they were not told the questions for the media interview in advance and he had not prepared any notes or responses prior to being asked the questions by reporters.

Mr. Meliefste's responses in the media interview on June 13, 2016 were general responses reflecting the typical processes employed by the Public Body when dealing with contractor quality

issues and responding to the planned future direction the Public Body intended on taking for project management.

Mr. Laughlin, like Mr. Meliefste, recalls little relating to the specifics of the media interview in June of 2016. However, he does recall being asked a number of questions about why so many tests were required for the asphalt, what the Public Body was intending to do to hold contractors accountable, and what the Public Body was doing to improve project management, generally, for the Public Body. In light of these questions, Mr. Laughlin provided a number of responses regarding how the Public Body intended to change its approach to project management moving forward. These comments were broad and related to steps the Public Body intended to take; they did not relate to the Complainant specifically.

Like Mr. Meliefste, none of the statements made by Mr. Laughlin were prepared in advance or noted down in any way.

It appears that both Mr. Meliefste and Mr. Laughlin provided responses in the media interview on June 13, 2016 based on information publicly available in the City Auditor's Report or based on information regarding steps being taken by the Public Body to deal with project management and contractor quality issues generally.

Regarding the statement, "[t]hey want project managers to be visible and active on-site, not sitting back to pass judgment at the end when the fix is expensive," the Public Body submits this is a statement relating to the general approach the Public Body wanted to take towards project management moving forward. It was not a comment relating to the Project or the Complainant, specifically, and may have been the reporter's interpretation of what was included in the City Auditor's Report. Further, this comment was not based on any specific record which the Public Body is aware is in its possession.

The Public Body acknowledges the discrepancies in the reporting noted in your letter, but is not able to explain them. If Mr. Meliefste did use certain terms, it is nevertheless clear that they were extemporaneous statements made in the context of a short media interview. Further, we cannot verify the accuracy of the reporting by the Edmonton Sun and Edmonton Journal. Where information was not directly quoted from Mr. Laughlin or Mr. Meliefste, it is possible the statements were crafted entirely by the reporters and, therefore, may not accurately represent what was stated at the time.

The Public Body submits, in addition to its original submissions in this Inquiry, that the information contained in the Edmonton Sun and Edmonton Journal articles was not personal information which, after careful review, the Public Body is aware it possesses.

[para 14] The Public Body explained that the comments reported in the media regarding project management did not refer to the Complainant's work and were not intended to do so, although the newspaper article appears to interpret the statements of the Public Body's managers as critical of the Complainant's performance as a project manager. The Public Body also confirmed that it does not have recorded information in its custody or control corresponding to the comments attributed to it in the media regarding the Complainant and project management.

[para 15] It is clear that the statement "It's that their project manager thought he would fix it by ordering 17 quality assurance tests for \$500 each on a 200-metre stretch of path rather than working with the contractor to make sure the path was correct from the beginning", which appears in the articles, could have no basis in a record of the Public Body, given that the Complainant indicates in his submissions he did not order

that many tests. Moreover, assuming that the Auditor's Report otherwise reflects what happened, the tests were ordered not to "fix" anything, but to ensure that the path was properly constructed.

[para 16] The Auditor's Report does not provide information regarding the Complainant or refer to his work, but for the fact that he ordered tests. However, I accept that the reporter may have drawn an inaccurate inference from reading the auditor's report that the problems with the project were the result of the former project manager's actions, an error then compounded by Mr. Laughlin and Mr. Meliefste speaking in general terms about how they would like to see projects managed in the future.

[para 17] However, the Public Body's assertions do not address the following information in the article:

His supervisor thought his approach was "overzealous," Meliefste said.

[para 18] The foregoing excerpt refers to the Complainant directly and to his supervisor's opinion of his work. This information is attributed to Mr. Meliefste and is information that is not present in the Auditor's Report. In the Public Body's submissions, it explains that the statements directly attributed to Mr. Meliefste are statements he likely made.

[para 19] In his complaint, the Complainant referred to records created by Mr. Meliefste and his supervisor regarding his employment. This suggested that there was documentation in the custody or control of the Public Body containing the Complainant's supervisor's views (and those of Mr. Meliefste) regarding the Complainant's work. I therefore asked the Public Body for a sworn affidavit from Mr. Meliefste regarding the statement that the Applicant's supervisor "thought he was overzealous" and the source of it.

[para 20] The Public Body provided the affidavit of Mr. Meliefste, which states:

I do recall the media questions were focused more generally on the future direction of the newly created IIS Department at the City with an interest to understand how the new vision and mandate for the Department focused on relationships. I recall providing general comments relating to the vision of the Department and shared information related to the direction the City was taking on enhancing project management.

I do not recall using the term "overzealous" when speaking with the media and do not believe that I would have used that term as it is not one that I would typically use.

[para 21] From the foregoing, I understand that Mr. Meliefste does not believe that he would refer to someone as "overzealous", and does not recall doing so.

[para 22] The Public Body also provided an email exchange between the Complainant, his supervisor, and Mr. Meliefste regarding the project that was the subject of the newspaper articles and the Auditor's Report. As it contains evaluative information about the Complainant's performance as an employee and does not correspond to any

information in the newspaper article, I have not reproduced it. At no time does anyone who participated in the email exchange describe the Complainant as “overzealous” or use synonymous language. The discussion in the email is not about testing. I note, too, that the Auditor’s Report does not refer to the testing as “overzealous”, but rather, relies on the results of the testing in arriving at conclusions.

[para 23] I am unable to find that the statement that the “Applicant’s supervisor thought his approach was overzealous” is based on recorded information in the custody or control of the Public Body. As discussed above, before the FOIP Act will apply to personal information, it must be recorded and in a public body’s custody or control. It appears that the statement is either an “off the cuff” remark without a basis in recorded information, or was inaccurately reported in the newspaper. In either case, the FOIP Act does not apply, as the complaint in this case is not about a disclosure of recorded personal information in the custody or control of the Public Body.

[para 24] To conclude, I am unable to find that the information in the newspaper articles regarding the Complainant is recorded personal information within the custody or control of the Public Body. As a result, I am unable to find that the Public Body contravened Part 2 of the FOIP Act when its managers spoke with the media regarding the project. That is not to say that the Complainant does not have valid concerns regarding the newspaper article – only that the FOIP Act does not address them.

III. ORDER

[para 25] I make this Order under section 72 of the Act.

[para 26] I find it has not been established that the Public Body contravened Part 2 of the FOIP Act.

Teresa Cunningham
Adjudicator
/bah