

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2022-43

September 21, 2022

EDMONTON POLICE SERVICE

Case File Number 011737

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Summary: The Complainant complained to the Commissioner that she had been informed that Alberta Justice Crown Prosecutor's Office (Alberta Justice) had provided her sensitive personal information to an accused in criminal proceedings. The accused was charged with uttering death threats against the Complainant, who is a social worker. The Complainant became known to the accused because of her work.

In particular, the Complainant was told that the accused had obtained her date of birth, home address, and driver's license number through disclosure of documents in the criminal proceedings against the accused. The Complainant decided to move her family to mitigate the risk posed by the accused to their safety.

The Complainant complained about the disclosure of her personal information and questioned whether adequate safeguards were in place to protect her personal information. The Complainant noted that a former chief Crown prosecutor had acknowledged the breach and informed her that Alberta Justice would take full responsibility for the disclosure.

The Complainant also complained that the Edmonton Police Service (the Public Body) had collected her personal information and disclosed it to Alberta Justice without taking adequate steps to protect it from the risk of unauthorized disclosure.

The Commissioner decided not to conduct an inquiry in relation to Alberta Justice's disclosure of the Complainant's personal information as section 4(1)(k) applied to the information that was disclosed. Section 4(1)(k) applies to records relating to prosecutions that are not yet complete. The Commissioner decided to conduct an inquiry in relation to the Public Body's actions.

The Adjudicator found that the Public Body had collected the Complainant's personal information in compliance with Part 2 of the FOIP Act. The Adjudicator also found that the information that was disclosed was subject to section 4(1)(k) when it was disclosed. As a result, she found that she lacked jurisdiction to address the complaint. However, the Adjudicator noted that the Complainant had raised a serious issue and recommended that the public bodies involved in preparing disclosure for accused persons and protecting witnesses consider addressing those issues.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 4, 33, 38, 40, 72

Authorities Cited: AB: Order F2014-42

1. BACKGROUND

[para 1] The Complainant complained to the Commissioner under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) that she had been informed that Alberta Justice Crown Prosecutor's Office (Alberta Justice) had provided her sensitive personal information to an accused in criminal proceedings. The accused was charged with uttering death threats against the Complainant, who is a social worker. The Complainant became known to the accused because of her work.

[para 2] In particular, the Complainant was told that the accused had obtained her date of birth, home address, and driver's license number through disclosure of documents in the criminal proceedings against the accused. The Complainant decided to move her family to mitigate the risk posed by the accused to their safety.

[para 3] She complained that she had requested that the Public Body create a professional file for her but that it had not done so. She also complained about the disclosure of her personal information and questioned whether adequate safeguards were in place to protect her personal information. The Complainant noted that a former chief Crown prosecutor had acknowledged the breach and informed her that Alberta Justice would take full responsibility for the disclosure.

[para 4] The Commissioner authorized a senior information and privacy manager to investigate and attempt to settle the complaint. At the conclusion of this process, the Complainant requested inquiries regarding the issues she had raised.

[para 5] The Commissioner decided to exercise her discretion not to conduct an inquiry in relation to the Complainant's complaint regarding Alberta Justice. The Commissioner did so because the disclosed information related to an ongoing

prosecution. Records relating to an ongoing prosecution are exempt from the application of the FOIP Act by section 4(1)(k) of the FOIP Act. Former Commissioner Clayton decided that an inquiry should be conducted regarding the issues raised by the Complainant as they related to the Public Body.

II. ISSUES

ISSUE A: Does section 4(1)(k) (records relating to a prosecution) apply to this complaint, in whole or in part?

ISSUE B: Did the Public Body collect the Complainant's personal information in contravention of Part 2 of the Act?

ISSUE C: Did the Public Body disclose the Complainant's personal information in contravention of Part 2 of the Act? [In particular, was the disclosure authorized under section 40(1) and 40(4)?]

ISSUE D: Did the Public Body fail to protect the Complainant's personal information in contravention of Part 2 of the Act?

III. DISCUSSION OF ISSUES

ISSUE A: Does section 4(1)(k) (records relating to a prosecution) apply to this complaint, in whole or in part?

[para 6] In her request for inquiry, the Complainant suggested that the Public Body could adopt a system by which it would create "professional files" for professionals who are obliged to report to authorities that individuals pose a risk to themselves or to others. The Complainant argued in support of this idea:

Mandated reporters are obligated to report to authorities in cases where an individual is determined to be an immediate risk to themselves or the community, or in instances of child abuse, and elder abuse. Some professionals avoid reporting to police officers in order to protect their personal information. For example, I was advised that during the EPS investigation, a psychiatrist refused to provide a statement to police to avoid the potential of personal repercussions from writing the report. This scenario should be concerning to everyone. From my own experience, filing a report eventually led to a breach of my personal information, which put my family at risk. If professionals were aware they were potentially putting their own families at risk by reporting, who would be willing to report?

Given the EPS is anticipating the delivery of a new records management system, would EPS be willing to work transparently with the OIPC to address the issues with professional and personal identities in work environments?

[para 7] The Public Body provided the following account of the process it follows when it prepares a disclosure package to the Crown:

Once a person is in police custody, the EPS begins to prepare a disclosure package to send to the Crown which includes a summary of events, charge arrest reports, police officer reports and

attachments, and anything else relevant to the charges. The EPS is required to provide all relevant information pertaining to the file to the Crown, but may mark information for the Crown's attention that it believes is confidential with a warning not to disclose that information to an accused.

Personal information like phone numbers and addresses for involved persons is disclosed through an "Involved Persons Contact Information" sheet, so the Crown can contact the necessary individuals while preparing to prosecute. The Involved Persons Contact Information sheet is not meant to be disclosed to the accused and includes a large warning at the top of the page, stating "CONFIDENTIAL NOT FOR DISCLOSURE".

[para 8] The parties are in agreement that the Complainant's personal information was disclosed to an accused when Alberta Justice provided a disclosure package to the accused that likely included an "Involved Persons Contact Sheet" containing the Complainant's contact information. The Public Body provided this record to Alberta Justice as part of its duty to provide all relevant information pertaining to a criminal investigation to the Crown for a prosecution.

[para 9] Section 4(1)(k) 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 [...]

If a record relates to an ongoing or incomplete prosecution, the FOIP Act does not apply to it.

[para 10] In Order F2014-42, I determined that a complaint cannot be made under the FOIP Act about the collection, use, or disclosure of personal information in a record, if the record was subject to a provision of section 4 at the time of the collection, use, or disclosure that is the subject of the complaint. I said:

The evidence of the parties establishes that the police officer told the Applicant's parents the details of the Certificate of Analyst when she visited their home with the intention of serving the Applicant. The records indicate that a Crown prosecutor directed the Public Body to serve the Applicant with the Certificate of Analyst and a Notice of Intention. It is also clear from the evidence that serving the Applicant with these records was a step taken to further an ongoing prosecution and that the records relate to the prosecution.

Section 4(1)(k) of the FOIP Act 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;

As discussed in Order F2009-013, section 4(1)(k) is intended to ensure that prosecutions may proceed without interference.

At the time information regarding the existence of the Certificate of Analyst and the Notice of Intention was disclosed to the Applicant's parents, a prosecution was ongoing. These records relate to this prosecution. Any information disclosed by the police officer regarding these records was also information relating to a prosecution that had not yet been completed. I find that the information regarding the Certificate of Analyst and the Notice of Intention that was disclosed falls within the scope of section 4(1)(k), and any disclosure of details regarding these documents falls outside the scope of the FOIP Act for that reason.

The Crown is responsible for providing disclosure to the accused. The EPS relies on the Crown to prevent sensitive information, like the information contained in the Involved Persons Contact Information sheet, from being disclosed to accused persons. The EPS has no control over, or knowledge of, what information is provided to an accused – the Crown has ultimate control, based on their legal obligations.

[para 11] The Public Body argues that the information that is the subject of the complaint was contained in a record relating to an ongoing prosecution within the terms of section 4(1)(k) when it provided it to the Crown:

On March 1, 2014, [the accused] was arrested and charged with two counts of uttering threats contrary to the *Criminal Code*. This was in addition to two other counts [the accused] was charged with on February 28, 2014, comprising one count of uttering threats and one count of criminal harassment contrary to the *Criminal Code*.

The disclosure package for the February 28, 2014 charges was provided to the Crown's office between February 28 and March 1, 2014. The disclosure package for the March 1, 2014 charges [was] provided to the Crown's office between March 1 and March 2, 2014.

On May 9, 2014, [the accused] was convicted of criminal harassment and uttering threats against the Complainant. The other two charges were dropped. Given the above, there was an ongoing prosecution of [the accused] between February 28, 2014 and May 9, 2014.

[para 12] I find the information that is the subject of this complaint – that is, the personal information of the Complainant that was provided to Alberta Justice in a disclosure package – related to an ongoing prosecution at the time it was provided to Alberta Justice. As a result, the information that is the subject of the complaint before me is subject to section 4(1)(k) and exempt from the application of the FOIP Act.

[para 13] I acknowledge that the Complainant argued the following in her request for inquiry:

"Under section 4(1)(k), the FOIP Act does not apply to a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed".

I respectfully disagree with the OIPC investigator's interpretation of section 4(1)(k) of the FOIP Act for the following reason:

Although section 4(1)(k) may exclude a complaint while proceedings of a prosecution " ... *have not been completed*", it does not explicitly state a complaint cannot occur once the proceedings of a prosecution have been completed.

A review of the EPS collection, use and disclosure processes would not interfere with any court proceedings in this case, because the prosecution has concluded. There seems to be no valid reason why the OIPC would be prohibited from reviewing these processes, especially given the serious nature surrounding the privacy breach my family endured. Critical reflection and assessment of EPS processes is in the public interest. Transparency and accountability could ensure preventative measures are in place to protect the personal information of individuals in the future.

Worth noting, regardless of the interpretation of section 4(1)(k), the EPS could choose to work transparently with the OIPC, especially with the upcoming implementation of its new records management system.

[para 14] The Complainant argues that because the prosecution is complete, she can now make a complaint under the FOIP Act regarding the Public Body's disclosure of her personal information to Alberta Justice. While I accept that this is a possible reading of section 4(1)(k), in my view, it would create uncertainty as to extent to which information could be collected, used, or disclosed in the course of a prosecution, even when it is necessary to do so to advance the prosecution.

[para 15] The Crown has a duty to disclose information to an accused in order to permit the accused to make full answer and defence. Police services, such as the Public Body, have duties to gather relevant information and disclose it to the Crown so that the Crown may prosecute the accused. The information that may be collected, used, and disclosed in the course of a prosecution may be personal information. Section 4(1)(k) removes the requirement that the collection, use, and disclosure of the personal information in records relating to a prosecution be in compliance with the FOIP Act. This removes the requirement that public bodies comply with sections 39, 40, and 41 when personal information used or disclosed is contained in a record relating to a prosecution. Sections 39, 40, and 41 impose duties to use and disclose only the personal information necessary for meeting a public body's purpose in collecting information which could be too onerous for police services and Crown prosecutors to meet when they are in the course of determining whether information is relevant.

[para 16] It would also create uncertainty as to the state of the law if a police service could share information with the Crown during a prosecution without offending the FOIP Act, but would then be in contravention of the FOIP Act once the prosecution has ended.

[para 17] The foregoing does not mean that records relating to a prosecution are always exempt from the scope of the FOIP Act once the prosecution has ended. Such may be the subject of an access request, and they may also be the subject of a complaint, provided the collection, use, or disclosure of the information that is the subject of the complaint was not made at a time that the record related to an ongoing prosecution. For example, if the information that is the subject of this complaint were disclosed in contravention of the FOIP Act *after* the prosecution had been concluded, then that could be the subject of a complaint to the Commissioner and the Commissioner would have jurisdiction to address it.

[para 18] In this case, the disclosure that is the subject of the complaint was from a record that related to an ongoing prosecution at the time of the disclosure. As a result, the disclosure is not subject to the FOIP Act.

ISSUE B: Did the Public Body collect the Complainant's personal information in contravention of Part 2 of the Act?

[para 19] The Complainant suggests that the Public Body could create a system in which it collects and discloses only the professional information of social workers and other professionals who work with vulnerable populations and who may be called to give evidence in criminal proceedings:

On February 9, 2021, I had the opportunity to speak with EPS legal representative [...]. [The legal representative] advised EPS were aware of the concerns raised in this complaint, indicating that EPS were in the process of getting a new records management system in the future (in approx. 1-1/2 years). She advised an EPS legal representative was previously working on the issue of separating personal and professional identities, however this work was discontinued in anticipation of the new records system. Another issue we briefly discussed was the existence of two prevailing views on police creating professional vs. personal identities in their records management system - one view supporting the notion that professional identities should be separated from personal identities, and another view believing only one singular identity should be entered into the police data base.

[Why] is a professional file important?

The purpose of the professional file is to safeguard the personal information of professionals. A social work role in Children Services includes working directly with vulnerable populations experiencing high risk circumstances (i.e. high conflict separation/divorce, family violence, mental health concerns, substance abuse issues, etc.). Working in these environments can place social workers at risk, leading to the need contact police for assistance. Social workers often work in partnership with police and other professionals. Additionally, social workers are acting as representatives for their employers (in my case - Government of Alberta), and their professional duties should not subject them to personal privacy breaches that put their own families at risk. When police officers take the extra step of creating a professional file for social workers, they initiate a first line of defense, alleviating the risk of a privacy breach in future proceedings.

The Complainant suggests that the Public Body should collect only the professional information of social workers and similar professionals in order to ensure that privacy breaches do not put their personal information and personal safety at risk.

[para 20] Section 33 of the FOIP Act limits the ability of public bodies to collect personal information. It states:

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 21] Section 33 authorizes a public body to collect personal information for the purposes of law enforcement. Provided its purpose in collecting personal information in law enforcement, the collection is authorized.

[para 22] The Public Body states:

The Complainant first reported [the accused's] conduct to the EPS on July 5, 2013. At that time, she provided her personal information to the EPS, including her contact information and home address. The Complainant's information was collected and stored in EPROS during the EPS investigation of [the accused's] threats against the Complainant. EPROS would also contain personal information belonging to the Complainant that was collected during any previous encounters that she had with the EPS.

When collecting information, it is foreseeable that information the EPS initially collected for the purposes of an investigation may ultimately be used and disclosed for other law enforcement purposes and activities of the EPS like investigating other potential offences. The purpose for collection in this case was a law enforcement purpose, and as such the Complainant's personal information was collected within the meaning of s. 33(b) of the Act.

Additionally, the EPS collected the Complainant's personal information that was directly related to and necessary for an operating program or activity of the EPS, namely investigating potential breaches of the law. The collection of contact information for the primary complainant of such serious allegations is undoubtedly necessary to the EPS activity of investigating those allegations. As such, the Complainant's information was collected in accordance with the Act.

While EPS members should not have to second guess the personal information that they need to collect in order to fulfill their investigative duties, in this instance, consideration was given by the author of EPS police report CA13090311 to limit the amount of the Complainant's sensitive personal information collected within the report. CA13090311 is the initial report that was created after the Complainant reported threats that she had received on June 28, 2013.

The Complainant's personal information, including her contact information, was disclosed to the Crown by the EPS when charges were laid against the accused and a prosecution was initiated. As described below, the EPS took steps to mark this information as being confidential and not for disclosure.

[para 23] The Public Body collected the Complainant's personal information when she reported the threats she had received. The Public Body marked her personal information as confidential and not for disclosure.

[para 24] As the Public Body collected the Complainant's personal information for the purposes of law enforcement, I find that its collection of the Complainant's personal information was authorized by the FOIP Act.

ISSUE C: Did the Public Body disclose the Complainant's personal information in contravention of Part 2 of the Act? [In particular, was the disclosure authorized under section 40(1) and 40(4)?]

[para 25] As I have found that the disclosure that is the subject of this complaint is information contained in a record relating to a prosecution that was not yet concluded at the time of the disclosure, it follows that I find that section 4(1)(k) applies to the information that was disclosed, and the FOIP Act does not apply for that reason.

ISSUE D: Did the Public Body fail to protect the Complainant's personal information in contravention of Part 2 of the Act?

[para 26] Section 38 of the FOIP Act requires a public body to take reasonable measures to safeguard personal information from such risks as unauthorized access and disclosure. This provision states:

38 The head of a public body must protect personal information by making reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or destruction.

[para 27] As discussed above, I have found the disclosure of the Complainant's personal information that is the subject of the complaint is not subject to the FOIP Act by operation of section 4(1)(k). I note, too, that the evidence of the parties establishes that the Public Body did not disclose the Complainant's personal information to the accused, but a representative of the Crown prosecutor's office may have done so. Finally, I note that the Public Body indicates that it marked the Complainant's personal information as "confidential" and as "not for disclosure". While the FOIP Act does not require the Public Body to safeguard personal information in a record relating to a prosecution, I believe that the Public Body took reasonable measures to safeguard the Complainant's personal information from the risk of unauthorized disclosure.

[para 28] The Complainant argues:

I would like to point out that I have now heard three different stories about what happened to my personal information. These stories are as follows:

- 1) The Crown prosecutor mistakenly gave her own file to the [accused] instead of the separate file that was prepared for him.
- 2) A temp, or student, did not properly vet the file before it was given to the [accused].
- 3) My personal information was on an I-TRAC assessment.

I want to know exactly what happened to my personal information. Human error is inevitable, but a comprehensive assessment would alleviate similar errors from happening in the future. Privacy is a fundamental human right and aligns closely with our guaranteed rights in society.

[para 29] I lack the authority to investigate the circumstances in which the Complainant's personal information was provided to the accused, given that a record relating to an ongoing prosecution was disclosed and such records are exempt from the application of the FOIP Act. That being said, I believe the Complainant has raised a very serious issue, despite the fact that the FOIP Act does not apply in the circumstances of this case. The Complainant has also proposed a solution to mitigate the risk of

unauthorized disclosure. I recommend that those public bodies responsible for providing disclosure to accused persons and ensuring witness safety consider addressing the Complainant's concerns and her proposed solution.

IV. ORDER

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

[para 31] I confirm that the Public Body did not contravene the FOIP Act when it collected, and disclosed the Complainant's personal information to Alberta Justice.

Teresa Cunningham
Adjudicator