ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2023-14

April 11, 2023

CALGARY POLICE SERVICE

Part 2 of the Inquiry in Case File Number 001826

Office URL: www.oipc.ab.ca

Summary: This inquiry relates to information in the possession of the Calgary Police Service (CPS) relating to a specified RCMP file (RCMP file 2011-691476), which the Applicant requested a second time after the related prosecution had been completed. In responding to the second request, the CPS provided 65 pages of records, some of which were partially redacted in reliance on a number of exceptions. In her decision in the first part of this Inquiry, the Adjudicator reserved jurisdiction to decide whether section 17(1) applied to withheld information in a number of instances in which she determined that third parties whose information was at issue should be notified.

The present part of this Inquiry (Part 2) deals with the third party information regarding which jurisdiction was reserved. The Adjudicator held that some of this information should be disclosed, and that some of it, although it had been provided to the CPS for the purposes of the response to the access request, was not in the CPS's custody or control at the time the request was made, nor was it responsive to the terms of the Applicant's access request. She held that it had been proper for the CPS to decline to provide this information to the Applicant.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 4, 6, 17, 18, 59, and 72.

Authorities Cited: AB: Orders F2004-026, F2018-37, F2019-05, F2021-19, F2022-33, and F2022-37.

Court Cases Cited: *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2012 ABQB 247.

I. BACKGROUND

[para 1] On approximately November 22, 2014, the Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* ("the Act" or "the FOIP Act") to the Calgary Police Service ("CPS" or "the Public Body") for "[a]ll information obtained, provided to, or created by the CPS that related to the investigation of RCMP file 2011-691476 on or after June 13/11 and/or Court Dkt# 120767462P1 on or after June 28/12 at Districts 1, 2 and/or 6 of the CPS and/or the Central General Investigations of the CPS ."

[para 2] In its response of January 22, 2015, the CPS informed the Applicant that it was denying access to the related information for the specified file number in reliance on section 4(1)(k) of the Act, on the basis that it was the subject of an ongoing prosecution. After the prosecution had been concluded, the Applicant made a new request, asking for any records that had been withheld in reliance on section 4(1)(k) of the FOIP Act, as well as for records documenting the destruction or release of any such records. The CPS responded on August 19, 2015, providing some records but redacting some portions of them in reliance on a number of statutory exception to access, including on section 17(1).

[para 3] The Applicant requested a review, and the associated Inquiry resulted in Order F2021-19. In that Order I reserved jurisdiction to decide whether section 17(1) applied to withheld information in instances in which I determined that two third parties (referred to within as Affected Party A and Affected Party B) needed to be notified. The part of this information that relates to Affected Party A is described at para 202 of OIPC Order F2021-19. This is the information located on pages 2 (the sixth redaction – the 12th line on the page), 5 (the third redaction), 6 (the second redaction), 8 (the first and next-to-last redactions in the body of the final email), 9 (the first and next-to-last redactions in the body of the final email), 14 (the final redaction in the first email, the redactions in the "From" line in the second email, and the second redaction in the "Cc" line of the last email), 15 (the fifth redaction), 24 (the final redaction), 26 (the fourth redaction) and 28 (the final redaction in the "Cc" line of the email). The part of this information that relates to Affected Party B is described at para 202 of OIPC Order F2021-19 (this is the information on pages 56 and 58).

[para 4] Both Affected Party A and Affected Party B provided initial submissions, and as well Affected Party B, and the CPS, provided answers to further questions which I posed to them. These questions and answers were not disclosed to the Applicant as they revealed information about the withheld records. However, I informed the Applicant about a number of issues that were raised by the answers to the questions as far as this was possible without disclosing information in the records, and provided her with an opportunity to respond. The Applicant provided a response.

II. ISSUES

[para 5] The issues were set out in the Notice of Inquiry as follows:

Does section 17(1) of the Act (disclosure an unreasonable invasion of personal privacy) apply to the information to which the Public Body applied this provision?

A question relative to this issue in the present case is whether the information that the CPS withheld is the personal information of the individuals to whom it relates, or whether it relates to the performance of work duties.

Another question is whether all of the information relating to Affected Party B is information in the custody and control of the CPS (as "custody and control" has been interpreted in earlier decisions of this office), and responsive to the access request.

III. DISCUSSION OF ISSUES

Information associated with Affected Party A

[para 6] The information associated with Affected Party A is found on pages 2, 5, 6, 8, 9, 14 15, 24, 26 and 28. Most of this information consists of the name of an individual who was involved in the file as an adviser to the CPS, as well as some advice given by that individual. As noted in Order F2021-19, while someone's name and professional qualifications are personal information, disclosure only of qualifications and of the fact the person participated in a work-related discussion would not generally be an unreasonable invasion of privacy. With respect to professional advice given by such a person, this would not generally be regarded as personal information unless there is something about the information that gives it a personal dimension. (See Order F2004-026 at para 111.) The same applies to references to such advice (such as appears on page 6).

[para 7] Affected Party A was given an opportunity to provide submissions, and did so. These submissions consist primarily of Affected Party's A's concerns that if the information associated with them that is at issue here is disclosed, they could become subject to harassing activity on the part of the Applicant. Affected Party A states:

> The file in question, at its core, relates to a case of alleged stalking and harassment. As I understand, the disruption to the day-to-day life satisfaction of the complainant(s) in the CPS matter was prolonged and significant. As a result, I am concerned that disclosure of my personal information could reasonably be anticipated to expose me to similar behaviour on the part of the applicant in this matter, as evidenced by, inter alia, the applicant's continued pursuit of information relating to this matter. Due to the nature of my work my personal cell phone number and my address are readily accessible online by anyone who knows even only my name. In consequence, I respectfully request that my personal information not be disclosed.

[para 8] Affected Party A refers to the information about them that is at issue here as "personal information", but does not directly address the question set out in the Notice of Inquiry as to whether information relating to the performance of work duties is personal information. Possibly Affected Party A means to argue that due to the prospect of being subjected to harassment, a description of or reference to their performance of work duties acquires a personal dimension. Assuming such behaviour on the part of the Applicant to be reasonably in prospect, one might

then take Affected Party A to be arguing either that this threat would outweigh any considerations favouring disclosure such that disclosure would be an unreasonable invasion of their privacy, or alternatively, that the threat of harassment from the disclosure of this information could be said to constitute a threat to their safety or mental or physical health within the terms of section 18 of the FOIP Act[1].

[para 9] If the foregoing or some of it is Affected Party A's position, I do not accept its premises. I do not believe there is sufficient evidence to constitute a reasonable likelihood that "harassing" behaviour would occur relative to Affected Party A. While the documents in the file show that the Applicant in this case has engaged in repetitious contact relative to particular individuals, there have been many people involved in the matters that form the subject of this file relative to whom the Applicant has taken no such actions. Although the redacted information in the record provides some information about the nature of Affected Party A's involvement in the matter, there is no apparent feature of this involvement such as is likely, in my view, to prompt significant actions of this nature on the part of the Applicant relative to them. For this reason, I cannot find that the foregoing work-related information associated with Affected Party A has a personal dimension, the disclosure of which would constitute an unjustifiable invasion of their personal privacy within the terms of section 17(1).

[para 10] The redactions include an email address associated with the Affected Party A. While Affected Party A spoke of some of their personal contact information being available online, they did not indicate that the email address is other than a work email address. Though it could be used to contact the Affected Party, for the reasons just given, I would not regard the work email address as having a personal dimension.

[para 11] As well, because I do not regard the anticipated behaviour which Affected Party A posits as being reasonably in prospect, I cannot conclude that disclosing the information associated with Affected Party A would constitute a threat to their health or safety within the terms of section 18(1)(a) of the Act.

[para 12] For the foregoing reasons I find the information of Affected Party A was not properly withheld, and I will order that it be disclosed.

Information associated with Affected Party B

[para 13] In their initial submission, Affected Party B expressed concerns, similar to those expressed by Affected Party A, about "the Applicant pursuing civil liability, complaints, etc.". I do not need to decide whether I agree that there is a reasonable prospect of the anticipated

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[1] Section 18(1)(a) provides:

> *18(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to*
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> *(a) threaten anyone else's safety or mental or physical health … .*

This provision applies whether the information is personal information or not. I do not believe it applies regardless whether the information at issue in this case is or is not properly characterized as personal information.

behaviors relative to Affected Party B, since I find below that the information was not in the custody or control of the CPS at the time of the access request, and that it was not responsive to the terms of the Applicant's request.

[para 14] I turn to the question of whether the information associated with Affected Party B was in the CPS's custody or control, and whether it is responsive to the access request.

[para 15] The information associated with Affected Party B is found on pages 56 and 58. It is described at para 202 of Order F2021-19 as follows:

- page 56: with respect to the seven lines below the chart: the following words of the first sentence: words one to three, five to ten and sixteen to twenty-four; the second sentence; the remainder of the seven lines excluding the last nine words of the third sentence
- page 58: the information that replicates the information described in the preceding bullet point.

[para 16] This information was part of the record (an email) that a CPS member who had received it provided in response to the CPS disclosure analyst's call for records when the access request was first received. (The same email appears twice in the records: on pages 55-56, and again with the same content but in a different format on pages 57-58. Similarly, the information presently at issue appears on both pages 56 and 58. Since they are replicated, I will refer to these parts of the records below as though they appeared only once.)

[para 17] Some of the records that had been received by the disclosure analyst in response to the call were associated with an ongoing investigation. This appears to be the case with respect to *parts of* the email (provided by the CPS member) that also includes the items of information presently in dispute. The analyst had designated all these records, including the email, as subject to section 4(1)(k), and they had been withheld on that basis.

[para 18] Following the conclusion of the investigation, and the Applicant's second request for the same records and second request for review, a different disclosure analyst dealt with the file. On making an inquiry to this office as to whether the records at issue should be provided for the Commissioner's review a second time, the analyst was told by this office that the records did not need to be provided again. The second analyst assumed that the records that had been provided earlier were responsive. According to the CPS's submission, since the portion here at issue did not deal with CPS business, the analyst decided this portion should be withheld as third party personal information that met the terms of section 17(1).

[para 19] However, on my review of the redacted portion of the email that is presently at issue, it seemed to me that the content of this portion suggested that it had not been created by the CPS, and that it may not have been in the "custody or control" of the CPS, as that term has been interpreted by this office, at the time of the access request. The content also raised a question as to whether this redacted portion of the email related to the investigation of the specified RCMP file, within the terms of the access request.

[para 20] Given this, I asked both Affected Party B and the CPS specific questions about this portion of the redacted information which would allow me to determine if it was information that had been obtained, provided to, or created by the CPS, that related to the investigation of the aforementioned RCMP file. I asked for this information without involving the Applicant because my questions disclosed withheld information contained in the records at issue (which I am prohibited from doing by section 59(3)(a) of the FOIP Act), and I received the answers *in camera* because the answers likewise disclosed such information.

[para 21] However, the answers to the questions raised issues about which I was able, to some extent, to inform the Applicant without disclosing information in the portion of the email here at issue. These included the issue of whether, assuming the relevant portions were not about CPS business, they could be regarded as in the 'custody and control' of the CPS as that term has been interpreted by this office, and as responsive to the terms of the access request. The Applicant provided a response. She argued as follows:

> At no time did the CPS assert that any of these 65 pgs records, or the 1 recording, were NOT under its custody or under its control and, in fact, by invoking s. 4(1)(k) with respect to all of these records, the CPS acknowledged that these records were under in the custody of or under the control of the CPS.
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> Further, and specifically, with respect to the Feb 22/23 Response of the CPS to Question 1, the CPS is a public body that is a law enforcement/policing body and as such, the handling of any records that are provided to the CPS at any point in time, and for any reason, that the CPS asserts are records that are related to a prosecution, and it this case, are records that are specifically stated by the CPS to be related to a prosecution in a criminal case, with a designated RCMP File number, are records about the work or business of the CPS. Moreover, it is absolutely clear, from the non-redacted portions of the records of the 65 pg PDF File that the CPS provided in its Aug 19/15 CPS Response to FOIP Request 2015-P-0827, that the CPS was actively involved in, and involving itself in, these events and information that was being exchanged that form/that are related to these 65 pgs of records as part of its work and, in fact, that the CPS personnel were engaging in these communications and these events while using their official CPS email addresses and while using their "titles"/roles with the CPS. The records form an ongoing and inter-related series of events, materials shared with the CPS and communications engaged in by others with, engaged in and by, the CPS that were, as asserted by the CPS, and were considered by the CPS, as ones related a prosecution that was not yet completed and, in which the CPS has engaged itself, assertedly, as part of its work.

[para 22] At the time of the access request, the email in which the redacted information here at issue is contained had been received and retained by a CPS member on the CPS's email systems. The email consists of "minutes" of a meeting, the topic of which is described in the first paragraph (most of which was disclosed to the Applicant). Some portions of the email appear to relate to CPS business (some of these were redacted and the redactions withheld on other grounds, and some – appearing in the final row of the chart on page 56 [and the same information on pages 57-58] – were disclosed). However, as noted above, the redacted information at issue appears to describe a discussion about a matter that did not involve the work of the CPS. The answers to my questions to the CPS and Affected Party B confirmed that this was the case.

[para 23] Previous orders of this office, and court decisions, have held that the very fact a public body employee has personal or non-public-body business on a public body's email system does not, on that account alone, confer on the public body the requisite "custody or control" of the email to make it subject to the section of the Act creating the right of access (section 6(1)). See, for example, *University of Alberta v. Alberta (Information and Privacy Commissioner)*, 2012 ABQB 247, in which the University of Alberta was held not to have custody or control of records in relation to SSHRC grants that had been held by an employee on the University's computer system; see also the discussion at paras 31-43 of Order F2019-05, wherein the public body was held not to have custody or control over records related to an employee's personal and health information and files related to volunteer work, which they kept on public body systems.

[para 24] The indicia of "custody or control" have been set out in earlier orders of this office and other offices across Canada. The Adjudicator in Order F2018-37 stated (at paras. 20 to 21):

> Previous orders of this office have considered a non-exhaustive list of factors compiled from previous orders of this office and across Canada when answering the question of whether a public body has custody or control of a record. In Order F2008-023, following previous orders of this office, the Adjudicator set out and considered the following factors to determine whether a public body had custody or control over records:
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> - Was the record created by an officer or employee of the public body?
> - What use did the creator intend to make of the record?
> - Does the public body have possession of the record either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?
> - If the public body does not have possession of the record, is it being held by an officer or employee of the public body for the purposes of his or her duties as an officer or employee?
> - Does the public body have a right to possession of the record?
> - Does the content of the record relate to the public body's mandate and functions?
> - Does the public body have the authority to regulate the record's use?
> - To what extent has the record been relied upon by the public body?
> - How closely is the record integrated with other records held by the public body?
> - Does the public body have the authority to dispose of the record?
>
> Not every factor is determinative, or relevant, to the issues of custody or control in a given case. Custody or control may be determined by the presence of only one factor. If it can be said, after consideration of the factors, that a public body has an enforceable right to possess records or obtain or demand them from someone else, and has duties in relation to them, such as preserving them, it follows that this entity would have control or custody over the records. …

[para 25] As noted above, the pertinent portion of the email was a summary of a discussion that took place during the meeting about a particular matter. The content of this summary did not meet any of the criteria listed above in a way that would indicate CPS had custody or control over it at the time of the access request: neither the summary nor the information it summarized had been created by a person acting as an officer or employee of the CPS; it was not intended to be used for CPS purposes; although existing on the CPS email system, at the time of the request, it had not been provided to the CPS; it was not being held by a public body officer or employee for the purposes of their employment; the public body did not have a right to possess it, dispose of it or regulate its use; the content did not relate to the CPS's mandate or functions; it had not been relied on by the CPS, and; it had not been integrated with other CPS records. Consequently, although this portion of the email was provided in response to the disclosure analyst's call for records for the purposes of the access request, as part of the entire email, there had been no obligation on the part of the CPS member to provide this portion of the email for this purpose.

[para 26] Further, the "custody or control" issue arises relative to the time at which an access request is made (See Order F2022-37 at para 28.) The fact the portion of the email in question was conveyed to the CPS disclosure analyst in response to a disclosure analyst's call for records did not give the CPS retroactive custody or control over the record referable to the relevant point in time.

[para 27] Similarly, though the disclosure analysts treated the entirety of the email as responsive, the sequence of events did not make the pertinent part of the record responsive to the access request. While the CPS must necessarily make decisions as to whether records provided by employees are responsive, the determination that the first disclosure analyst made on receiving the record that it was responsive did not confer this character on the record, such that the CPS thereby gained the power to decide whether or not to disclose it on the basis of consideration of the exceptions in the Act. Similarly, the fact the second disclosure analyst accepted the characterization of the information as responsive third-party information (in contrast to information that was not in the custody or control of the public body, and not responsive to the request) did not make the information responsive to the request.

[para 28] Order F2022-33 dealt with an error by a public body. The Adjudicator said:

> [para 57] The Public Body responded (rebuttal submission, at paras. 5-6):
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> > In conducting its search, the Public Body erred by failing to consider the threshold issue of the legal custody and control of potentially responsive records. The Public Body's response to the access request flowed from its incorrect assumption that the records were in its custody and control. This error resulted in the Public Body stating that there were 261 responsive records, and referring to section 4(1)(a) of the *FOIP Act* to exclude the records from disclosure (Public Body's Initial Submission, paragraph 8). The Public Body should have responded by stating that it did not have custody or control over any responsive records (Public Body's Initial Submission, paragraph 22).
> >
> > Neither the Public Body's error in conducting the search, nor the resulting response, can impair the Courts' custody and control over their own records, nor create jurisdiction in the Commissioner to review or access the Courts' records.

> [para 58] I agree that if the Public Body made an error when processing the Applicant's request, that error cannot grant the Public Body custody or control that it did not already have.

[para 29] Finally, even if the pertinent portion of the email could be said to be in the "custody or control" of the CPS, this would not, despite the Applicant's assertions, mean that the information is related to the RCMP (or CPS) investigation, within the terms of the Applicant's request. I acknowledge that "relating to" is a broad term, capable of a wide range of interpretations. Despite this, the topic and content of the redacted information is not connected to the investigation, such as would bring it within the terms of this element of the Applicant's request.

[para 30] The foregoing discussion raises the question of why this information was included in the response to the call for records in the first place, and why it was treated as responsive by both of the disclosure analysts.

[para 31] The CPS explained that its practice in calling for records at the time of the access request was to take the broad approach of calling for all records involving an applicant, and then making decisions as to responsiveness and whether redactions are required. The CPS indicated that in his response to the call for records, the CPS member who had received the email had provided all records involving the Applicant that he had in his CPS email. As the disclosed parts of the email reveal, this included communications, involving the Applicant, received by both the CPS member and the Law Society. As already noted, some of the information in this email related to CPS business, and some did not.

[para 32] As explained above, the first disclosure analyst identified all records that related to the RCMP investigation and withheld them under section 4(1)(k). Possibly because the email containing the information at issue contained at least some information that appeared to relate to the investigation, she included this email in its entirety in the group of records withheld under this provision. (I have no way of determining if she regarded all of the information in the email as having this character or only some of it, but regardless, whether it does or does not is a matter for me to decide.) The second disclosure analyst assumed that all the records that had been provided for the purposes of the response to the request in the first inquiry were responsive; since the portion here at issue did not deal with CPS business, the analyst decided this portion should be withheld as third party information, relying on section 17(1).

[para 33] I acknowledge that because a CPS member was involved in the email exchange of which the email of October 16, 2012 was a part, it would not have been unreasonable to assume, as the Applicant did, that the CPS member's participation in the discussion meant the information related entirely to their CPS role. The same assumption could not unreasonably arise from the fact the CPS member provided the entire email in response to the call for records.

[para 34] Nonetheless, an examination of the content of the email makes it clear that while some of the information in the email appears to relate to CPS work, this is not the case for the portion of the email that is presently at issue.

[para 35] To conclude, having regard to the information itself as well as the information the CPS and Affected Party B provided *in camera* in response to my questions, I find that the disputed portions of the records that are at issue here need not have been provided to the disclosure analyst for the purposes of responding to the access request. For the same reasons, it was not necessary for the CPS to consider whether an exception (in this case, section 17(1)), applied. Given the information at issue associated with Affected Party B was not in the CPS's custody or control, and that is was non-responsive to the terms of the Applicant's request, I find that it was proper for the CPS to decline to provide this information to the Applicant.

IV. ORDER

[para 36] I make this order under section 72 of the Act.

[para 37] I order the CPS to disclose the information here at issue that is associated with Affected Party A.

[para 38] I uphold the CPS's decision to withhold the information here at issue that is associated with Affected Party B.

[para 39] I further order the CPS to notify me and the Applicant, in writing, within 50 days of receiving a copy of this Order, that it has complied with it.

Christina Gauk, Ph.D.
Adjudicator and Director of Adjudication