ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2023-30

July 11, 2023

CALGARY POLICE SERVICE

Case File Number 011609

Office URL: www.oipc.ab.ca

Summary: The Applicant, the Criminal Trial Lawyers' Association (CTLA) made an access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to the Calgary Police Service (the Public Body). The Applicant requested:

> Access to information relating to the Calgary Police Service's reaction to the comments of the Judge in the *R. v. Girbav* matter [R. *v. Girbav*, 2012 ABPC 219] (*Girbav*) as well as the reaction to [the Applicant's representative's] letters of October 17, 2012 and February 24, 2017 and the administrative review and recommendations and administrative conclusion referred to by the Chief in his letter of April 18, 2017.

The Public Body located responsive records. It responded to the Applicant on January 2, 2019. It withheld some information under sections 17(1) (disclosure harmful to personal privacy), 24 (advice from officials), and 27 (privileged information).

The Applicant requested review by the Commissioner. The Commissioner authorized a senior information and privacy manager to investigate and attempt to settle the matter. At the conclusion of this process, the Applicant requested an inquiry into the fact that the Public Body did not apply section 17(5)(a) of the FOIP Act when making its decision.

The Adjudicator found that section 17(5)(a) had not been demonstrated to apply and confirmed the Public Body's decision to apply section 17(1) to the personal information in the records.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act,* R.S.A. 2000, c. F-25, ss. 1, 17, 24, 27, 72

Cases Cited: *R. v. Girbav*, 2012 ABPC 219, *Calgary Police Service v. Alberta (Information and Privacy Commissioner)*, 2010 ABQB 82

I. BACKGROUND

[para 1] The Applicant, the Criminal Trial Lawyers' Association (CTLA) made an access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to the Calgary Police Service (the Public Body). The Applicant requested:

> Access to information relating to the Calgary Police Service's reaction to the comments of the Judge in the *R. v. Girbav* matter [R. *v. Girbav*, 2012 ABPC 219] (*Girbav*) as well as the reaction to [the Applicant's representative's] letters of October 17, 2012 and February 24, 2017 and the administrative review and recommendations and administrative conclusion referred to by the Chief in his letter of April 18, 2017.

[para 2] The Public Body located responsive records. It responded to the Applicant on January 2, 2019. It withheld some information under sections 17(1) (disclosure harmful to personal privacy), 24 (advice from officials), and 27 (privileged information).

[para 3] The Applicant requested review by the Commissioner. The Commissioner authorized a senior information and privacy manager to investigate and attempt to settle the matter. At the conclusion of this process, the Applicant requested an inquiry into the fact that the Public Body did not apply section 17(5)(a) of the FOIP Act when making its decision.

[para 4] The Commissioner agreed to conduct an inquiry and delegated the authority to conduct it to me.

II. Did the Public Body properly apply section 17(1) (disclosure harmful to personal privacy)?

[para 5] Section 17(1) requires a public body to withhold the personal information of an identifiable individual when it would be an unreasonable invasion of the individual's personal privacy to disclose his or her personal information.

[para 6] Section 1(n) of the FOIP Act defines personal information. It states:

> *1 In this Act,*
>
> *(n) "personal information" means recorded information about an identifiable individual, including*
>
> *(i) the individual's name, home or business address or home or business telephone number,*

(ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,

(iii) the individual's age, sex, marital status or family status,

(iv) an identifying number, symbol or other particular assigned to the individual,

(v) the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,

(vi) information about the individual's health and health care history, including information about a physical or mental disability,

(vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,

(viii) anyone else's opinions about the individual, and

(ix) the individual's personal views or opinions, except if they are about someone else;

[para 7] Information is personal information within the terms of the FOIP Act if it is recorded and is about an identifiable individual.

[para 8] Section 17 sets out the circumstances in which a public body may or must not disclose the personal information of a third party in response to an access request. It states, in part:

17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

[...]

(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

[...]

(b) the personal information is an identifiable part of a law enforcement record, except to the extent that the disclosure is necessary to dispose of the law enforcement matter or to continue an investigation,

[…]

(d) the personal information relates to employment or educational history,

[…]

(g) the personal information consists of the third party's name when

(i) it appears with other personal information about the third party, or

(ii) the disclosure of the name itself would reveal personal information about the third party[…]

[…]

(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,

(b) the disclosure is likely to promote public health and safety or the protection of the environment,

(c) the personal information is relevant to a fair determination of the applicant's rights,

(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,

(e) the third party will be exposed unfairly to financial or other harm,

(f) the personal information has been supplied in confidence,

(g) the personal information is likely to be inaccurate or unreliable,

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and

(i) the personal information was originally provided by the applicant.

[para 9] Section 17 does not say that a public body is *never* allowed to disclose third party personal information. It is only when the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy that a public body

must refuse to disclose the information to an applicant under section 17(1). Section 17(2) (not reproduced) establishes that disclosing certain kinds of personal information is not an unreasonable invasion of personal privacy.

[para 10] When the specific types of personal information set out in section 17(4) are involved, disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. To determine whether disclosure of personal information would be an unreasonable invasion of the personal privacy of a third party, a public body must consider and weigh all relevant circumstances under section 17(5) (unless section 17(3), which is restricted in its application, applies). Section 17(5) is not an exhaustive list and any other relevant circumstances must be considered.

[para 11] The Public Body applied section 17(1) to withhold information that would reveal the names and other personally identifying information of individuals whose personal information is contained in the requested records. It withheld information regarding witnesses involved in the Court case to which the Applicant referred in the access request. The Public Body also withheld information about the police officers involved in the Court case.

[para 12] Section 17(4)(b) and (d) apply to the foregoing information as some of the information is from a police investigation, while other information is about the employment of police officers. The personal information is subject to a presumption that it would be an unreasonable invasion of personal privacy to disclose it.

[para 13] The Public Body made arguments in relation to its decision to sever personal information about the police officers. It stated:

> Section 17(5) outlines the various relevant circumstances that the public body must consider in determining whether or not a disclosure is deemed unreasonable. In this request the CPS reviewed section 17(5) and determined that sections (b), through (i) did not apply in this instance. We will address the remaining section below.
>
> Section 17(5)(a) requires the following to be considered when determining whether the public scrutiny argument applies.
>
> > 1. Whether more than one person has suggested public scrutiny is necessary;
> > 2. Whether the applicant's concerns are about the actions of more than one person within the public body; and
> > 3. Whether the public body has not previously disclosed sufficient information or investigated the matter in question.
>
> The criteria for 17(5)(a) was reviewed and taken into consideration in determining whether to apply it to this request. As the onus is on the Applicant to make this argument, no public scrutiny argument was made at the time of the request. According to F2016-32 at [para 25]:
>
> > *In addition, the Court of Queen's Bench has determined that in cases where public scrutiny is necessary, that role is fulfilled by public membership on the LERB in police disciplinary matters. (see Calgary Police Service v. Alberta (Information and Privacy Commissioner), 2010 ABQB 82.*

As the [officers] were not charged criminally in this matter, 2010 ABQB 82 is clear in that the information pertaining to the outcomes of a Professional Standards investigation is the personal information of the officer and does not need to be disclosed.

The public body must disclose personal information only in accordance with section 40(1) of the FOIP Act. Section 40(1)(a) says that it must be in accordance with Part 1 which we have identified how we determined the denial under section 17(1) as outlined above. The Calgary Police Service took into account sections 6, 17(2), 17(4) and 17(5) in determining whether or not to release the records to the Applicant without any consents. Additionally, the Calgary Police Service reviewed section 40(1)(b), which outlines that information may be disclosed if it would not be an unreasonable invasion under section 17, as the CPS deemed the records an unreasonable invasion of privacy 40(1)(b) did not apply.

[para 14] The Applicant argues:

Based on the correspondence referenced in the CPS letter to the CTLA dated January 2, 2019, (the letters of October 17, 2012 and February 24, 2017); it had to be obvious that the CTLA's position was that more than one person has suggested public scrutiny was necessary, since the CTLA has many members; the CTLA's concerns were about the actions of the two officers mentioned in the Court's decision and the response of many employees of the CPS to that decision; and the CPS had not previously disclosed sufficient information or investigated the matter in question (the three (3) factors mentioned in the CPS letter of April 10, 2013).

The CPS submits that the public scrutiny role is fulfilled by the LERB. As the CPS knows, the CTLA had no standing to make a *Police Act* complaint because the provisions of the 2010 amendment to the *Police Act* eliminated standing for organizations like the CTLA (s. 42.1):

42.1(1) Subject to subsection (2), a person may make a complaint respecting the conduct of a police officer.

(2) The following persons may make a complaint referred to in subsection (1):

(a) a person to whom the conduct complained of was directed;

(b) a person who was present at the time the incident occurred and witnessed the conduct complained of;

(c) an agent of a person referred to in clause (a);

(d) a person who

(i) was in a personal relationship with the person referred to in clause (a) at the time the incident occurred, and

(ii) suffered a loss, damage, distress, danger or inconvenience as a result of the conduct complained of.

There were no complaints by those who had standing so there could be no scrutiny by the LERB.

[para 15] The Public Body's arguments refer to *Calgary Police Service v. Alberta (Information and Privacy Commissioner)*, 2010 ABQB 82 (*Calgary Police Service*), a decision of the Court of King's Bench directly addressing the application of section 17(5)(a) to allegations of police misconduct. At paragraphs 88 – 98, the Court said:

The Commissioner's decision treats all police disciplinary decisions as one common product. Decisions resulting from allegations of criminal misconduct are treated the same as decisions flowing from simple administrative misconduct. Decisions based upon proven allegations are treated the same as those arising from baseless allegations. Decisions arising even from allegations that are withdrawn are placed in the same disclosure basket as those that proceed to a conviction (paragraph 73 and 84). The personal information – names and identification numbers – of officers against whom allegations have been withdrawn or proven baseless are placed in that same disclosure basket as the names and identification numbers of those guilty of misconduct, including criminal misconduct (paragraphs 77 - 79).

In my view, this "one answer fits all" approach is not reasonable.

To fall within the range of reasonableness the decision must give weight to the clear intent of the legislature. Section 17(1) requires that a public body (the CPS) refuse to disclose personal information if the disclosure would be an unreasonable invasion of a third party's (the police officer's) personal privacy. Section 17(4) presumes an unreasonable invasion if the personal information, as acknowledged here, relates to employment history or discloses the third party's name along with other personal information.

The required considerations under Section 17(5) must be applied to each decision or document which is the subject of the application.

The Commissioner here seems to have first concluded that because of Section 17(5)(a) and because of who they are, namely police officers, any invasion of their personal privacy would not be unreasonable (paragraph 79). The Commissioner then looked for exceptions to that broad conclusion, such as medical and psychological information.

Thus the Commissioner appears to have reversed the presumption, i.e., that if the third party is a police officer, there is very limited personal privacy that will be unreasonably invaded ("because of their role in society" – para. 79).

The Commissioner also justified disclosure of all disciplinary decisions on the basis that it was necessary to scrutinize the CPS resolution process (paragraph 73). Given the public component provided by the *Police Act*, as reflected by the public membership on the LERB and the Calgary Police Commission, their authority to independently conduct inquiries and attend disciplinary hearings as well as the Minister's authority regarding any matters that may involve federal or provincial offences, I see no basis for concluding that additional public scrutiny of the process by the media is "desirable".

With respect, the Commissioner seems to have wrongly concluded that absent public scrutiny via the media, there is necessarily inadequate public scrutiny.

Nor did the Commissioner have any evidence for an assumption that the legislated public protections against police misconduct were inadequate. The Commissioner said that public accountability, public interest or public fairness were most important in the reference to the desirability of public scrutiny. In my view, those needs are generally met by the careful balance of public and private interests contained within the *Police Act* and the PSR.

Also unreasonable was the logic the Commissioner followed to justify the invasion of personal privacy even where allegations (as opposed to charges) are proven unfounded or have been withdrawn. At paragraph 85, he said:

> However I agree with the applicant that even where allegations are not founded, scrutiny of the conduct of the individual officer is desirable on the basis that the allegations involved criminal misconduct and/or proceeded to a formal disciplinary hearing. In either case, the

> allegations were serious and a police officer was involved, who the public holds to a high standard of conduct.
>
> This comes perilously close to an assumption that because a serious allegation is made there must be something to it even if proven false. A spurious allegation of serious misconduct is nevertheless a spurious allegation.

[para 16] The foregoing case provides direction for this office as to the application of section 17(5) in relation to police officers and police services. The Court noted that the *Police Act*, R.S.A. 2000, c. P-17 (the *Police Act*) contains systems for the careful balancing of public and private interests; that is, it contains processes by which the public may hold officers to account for misconduct, such as a hearing by the Law Enforcement Review Board (LERB).

[para 17] The Applicant argues, in this case, that no one with standing made a complaint to the LERB. The Applicant reasons that the conduct that is the subject of the access request has not been subjected to public scrutiny, despite its seriousness.

[para 18] In response, the Public Body argues:

> A section 17(5)(a) argument puts the onus on the Applicant to prove that the release of the information requires public scrutiny. The test outlined in our initial submission, which the Applicant indicates has been satisfied from their perspective, did not meet the test from our perspective. In the letter that was provided in the release of records it indicated to the Applicant that the individual involved chose not to make a complaint. However, CPS opened a file to review and investigate the matter that was brought forward by the Judge. As indicated in our previous submission, the Applicant did not have consent of any of the involved parties when they made the request for information regarding CPS' investigation into the incident. We further indicated that in a previous decision from the King's bench, 2010 ABKB 82, that when the matter is deemed not criminal, disclosure is not required. Regarding the third part of the public scrutiny test, which indicates that part of the test is whether an investigation was completed or not, in this case it was. Given the investigation and the resulting recommendations involved third parties and the Applicant did not have consent, the information was deemed a mandatory redaction under section 17(1) after reviewing the relevant considerations. However, 248 pages were supplied that did include information on the actions CPS took when the CTLA and the Applicant inquired about the case. In addition, the file was before ASIRT at the time. Since then, ASIRT completed their investigation and provided a news release on January 10, 2022, with the results of their investigation. As there has been public disclosure of the incident and multiple investigations completed, we believe the argument for public scrutiny has not been met at the time of the request and currently.

[para 19] As the Public Body notes, it conducted an internal investigation and also provided information to the Applicant regarding the findings of the investigation. The Alberta Serious Incident Response Team (ASIRT) also conducted an investigation. ASIRT is a civilian-led investigative body created under the *Police Act.* Its investigations may be viewed as means by which public scrutiny is achieved under the *Police Act*, as described by the Court in *Calgary Police Service*.

[para 20] The ASIRT investigation report of January 10, 2022 is a public report. It was not available to the Applicant at the time the access request was made or at the time the Applicant requested an inquiry. The Applicant did not have the benefit of the report

when the access request was made. The ASIRT report notes that there was evidence not available to the Court that led ASIRT to come to different conclusions than the Court in *Girbav* regarding the conduct of police officers in that case.

[para 21] Although the Public Body withheld information from the Applicant under sections 17, 24, and 27, it also disclosed information to the Applicant indicating that it conducted an investigation and what the result of the investigation was. For example, it disclosed the following information to the Applicant:

> Considering all of the circumstances, the Service proceeded with an administrative review of the Judges' comments and the officers' actions in any event. On conclusion of the review, recommendations were made and the matter was concluded administratively. Criminal charges against the involved officers were not recommended.

[para 22] The Public Body conducted an investigation into the police conduct referenced in *Girbav*, and ASIRT also conducted an independent investigation. As a result it cannot be said that the findings of the Court in *Girbav* in relation to the conduct of police officers were not investigated or subjected to public scrutiny within the terms of the *Police Act*. I am unable to agree with the Applicant that section 17(5)(a) applies to the personal information of third parties contained in the records at issue.

[para 23] I find that the information at issue is subject to presumptions under section 17(4) that it would be an unreasonable invasion of personal privacy to disclose it. I also find that no factors have been shown to apply or outweigh the presumption. For these reasons, I find that the Public Body is required to withhold the information it severed under section 17(1) from the Applicant.

IV. ORDER

[para 24] I make this Order under section 72 of the FOIP Act.

[para 25] I confirm that the Public Body is required by section 17(1) of the FOIP Act to withhold the information to which it applied this provision from the Applicant.

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Teresa Cunningham
Adjudicator