

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2023-33

July 18, 2023

CALGARY POLICE COMMISSION

Case File Number 015796

Office URL: www.oipc.ab.ca

Summary: The Applicant made a request for access under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to the Calgary Police Commission (the Public Body) for records in the custody of the Calgary Police Service relating to complaints he had made to the Public Body.

The Public Body informed the Applicant that it was unable to obtain the records the Applicant was seeking. The Public Body searched for, and provided, records it did have in its custody with the Applicant's personal information. The Public Body directed the Applicant to the Calgary Police Service for records in the custody of that public body.

The Applicant asked the Commissioner to review the matter.

The Commissioner's delegated adjudicator found that the Public Body did not have custody or control over the records the Applicant was seeking. The Adjudicator found that the Public Body had met its duty to assist the Applicant.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 6, 10, 72; *Police Act*, R.S.A. 2000, c. P- 17, s. 32

Authorities Cited: **AB:** Orders F2002-014, F2007-029, F2008-023. P2010-007, F2010-023

I. BACKGROUND

[para 1] On August 3, 2019, the Applicant sent a complaint to the Public Body's Public Complaint Director. He asked the Public Body to investigate his complaint that the Calgary Police Service had improperly used force against him in 2015. He indicated that he had previously sent the complaint to the Public Body.

[para 2] The Public Complaint Director responded:

Thank you for writing the Calgary Police Commission to express your concerns about the two times you were arrested by the Calgary Police Service. I have read your file and am aware of the concerns you have about the first arrest.

The Commission has no power or ability to grant your request that an agency other than Professional Standards Service investigate your complaint. The Commission was created by the *Police Act* and its "powers" and obligations are created and defined by that Act. You are asking for documents and video from CPS files. As you have been told in the past, the mechanism by which you must request those materials is by making a FOIP request of the CPS.

You conclude your e-mail by calling it an "e-mail complaint". I am therefore treating it as such and have copied PSS on this response to you.

[para 3] The Applicant then made a request to the Public Body for access under the FOIP Act to the records regarding a 2015 incident involving the Calgary Police Service. He stated:

This is a Freedom of Information request for disclosure of all materials relating to my 2 complaints to the Calgary Police Commission, one of which was sent on 3rd August and intercepted [the Public Body's Public Complaint Director] (see below). [The Public Complaint Director has openly lied about my right to request and obtain my records from the Calgary Police Commission – it is listed as subject to FOI requests and you are listed as the contact. Please now provide me with the file of mine she refers to and all related materials.

[para 4] On August 7, 2019, the Public Body's Executive Director and Legal Counsel wrote to the Applicant and stated:

I am confirming receipt of your request below and writing to both provide and seek clarification.

First, to provide clarification:

You are correct that the Commission is subject to FOIP.

However, [the Public Complaint Director] is also correct in that the files you and she are referencing are Calgary Police Service files. [...], as the Public Complaint Director, has a statutory right to review CPS complaint files.

The Commission cannot respond to a FOIP request for CPS files.

You must make a FOIP request to the Service for the materials I understand you are interested in. Please find request information here: [Calgary Police Service Website URL].

Second, to seek clarification:

Would you like the Commission to conduct a search pursuant to FOIP, for Commission records pertaining to you? To be clear, a Commission search will not disclose the files you are referencing below.

[para 5] The Applicant responded to this correspondence stating:

I find your reply to me of Wednesday incorrect and in bad faith, much like your colleague [the Public Complaint Director's] email to me on Tuesday. Since the Calgary Police Commission is THE oversight body for the Calgary Police there is nothing I am not entitled to via you from my records in CPS files. The Police Act requires the Commission to oversee Calgary Police investigations into Complaint and should, in fact, have been the agents liaising between me and the CPS when they were previously failing to investigate my complaints. You/the Commission should, therefore, have all the CPS materials relating to my complaints in your possession.

You say the Director for Complaint has a statutory right to review CPS complaint files; I say she has a legislated *obligation* to do so, especially with such serious matters of police brutality. I interpret the Police Act provisions as requiring the Commission to review and monitor complaint investigations. Therefore those records are in the Commission's possession and I am entitled to see exactly what the Commission sees especially when the Commission's competence, integrity and good faith is called into question, as it is here.

To be clear, the Commission is obligated by law to provide me all materials in its and the CPS possession that relate to complaints, disciplinary matters, officers breaching federal and provincial law and regulation of the CPS. The Chief of CPS must also follow instruction and directions issued to him by the Calgary Police Commission, so I suggest you either obtain the materials or instruct the Chief of Police to provide them to me - complete, unedited and unredacted.

As you are no doubt aware, I have already applied to the CPS for full and complete disclosure of my records and they refuse to provide the key materials required to properly formulate my complaints - which constitutes another complaint.

I certainly do want all records relating to me and the CPS investigation in the Commission's possession released to me forthwith, including the file [the Public Complaint Director] admits she has and the Use of Force report the CPS was required to send to the Commission and the Minister responsible. I asked the CPS for it but never received it, nor an adequate explanation for why it wasn't provided to me. I think a broken nose, broken ribs, fractured bones in my foot, hearing loss, loss of a tooth, contusions, lacerations, holes in my back from taser prongs, excessive blood loss from my eyes, mouth, nose and ears constitutes a serious enough incident under the Police Act to require a report on the Use of Force causing injury to a member of the public be provided to the Commission and Minister.

I have copied my letter to [the Public Complaint Director] to you and seeing you are also a lawyer. My comments to her about deceitful, bad faith acts and omissions apply equally to you. I have also forwarded my YouTube video to you which confirms which materials should be readily available under FOIP. As I informed your colleague, this video is going to be followed by many more uploaded information in the public interest, including the Commission's incompetence and bad faith, unless these matters are now appropriately resolved.

[para 6] The Public Body responded:

I have read your letters and understand the dissatisfaction you have expressed following your correspondence with [the Public Complaint Director]. She and I have discussed your comments and I thank you for sending them.

I have read the sections of the *Police Act* you identified as addressing your situation and expected outcomes. However, they are not intended to usurp a police service's authority to investigate and dispose of a complaint as otherwise provided by the *Act*. The Commission will not redirect complaints in this way.

I appreciate this will not address your concerns. You may wish to raise your concerns about both the *Act* and the Commission with the Provincial Public Complaint Director, who works within the Ministry of Justice and Solicitor General. The email address is [...]

Having received your August 9th reply to my request for confirmation, your FOIP request for CPC records is in progress and you will receive a response by September 9, 2019.

Despite your assertions, the Calgary Police Commission does not have custody or control of CPS files for FOIP purposes. If you wish to access CPS records, you must submit a FOIP request to CPS directly which you say you have already done so I will not re-direct you to their request form.

[para 7] The Applicant responded to the Public Body's correspondence. He expressed disagreement with its interpretation of its home statute and indicated that he considered the Public Body's competence and integrity to be in question.

[para 8] The Public Body subsequently provided access to the records containing information about the Applicant in its custody or control on September 9, 2019. The Public Body did not provide information in the custody or control of the Calgary Police Service regarding the 2015 incident.

[para 9] The Applicant requested review by the Commissioner of the Public Body's response. In particular, he noted:

The few documents I did receive appear to have been generated by the Calgary Police Service in collusion with the Police Commission to fabricate an investigation and are woefully inadequate.

[para 10] 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 on the following grounds:

Attached at pages 1-10 are screenshots and printed text of the CPC website describing its powers and mandates. I have highlighted portions of the text relevant and applicable to these matters. Unless the site is one big lie, these mandates replicate the governing provisions of Alberta's *Police Act*, RSA 2000, c. P-17.

Each page clearly states the legislated mandates of the Calgary Police Commission and its Public Complaint Director, which include (but are not limited to):

- a) acting via the complaints process, to resolve issues between Calgarians and the Calgary Police Service "in a fair, transparent and reasonable manner"
- b) establishing policies for efficient and effective policing
- c) issuing instructions to the CPS Chief, as necessary, in regards to those policies
- d) ensuring sufficient persons are employed by the CPS, to carry out its legislated functions
- e) appointing the Chief of Police and evaluating his performance
- f) providing independent oversight and governance of the CPS
- g) ensuring a safe community
- h) tracking all citizen Complaint and concerns

- i) monitoring all public Complaint
- j) handling Complaint regarding the Chief of CPS
- k) handling appeals relating to CPS policies and services
- l) auditing CPS files of public Complaint to ensure investigations are appropriate
- m) reporting findings to CPC
- n) receiving Complaint from the public
- o) being actively involved in the CPS complaint process
- p) overseeing and regulating the CPS day to day
- q) issuing directions to the CPS Chief and to the CPS via the Chief
- r) allocating funding for CPS
- s) answering to Alberta's Solicitor General and Minister of Public Security
- t) operating in accordance with Calgary City & Police Commission Bylaw # 25M97

The CPC website repeatedly confirms complaints against the CPS and/or its Chief may be submitted to the CPC, clearly to fulfil the CPC's legislated obligations to supervise, oversee and regulate the CPS in all policing matters and especially its complaints process.

[para 11] The Commissioner agreed to conduct an inquiry and delegated the authority to conduct it to me. The Commissioner determined that the issues for inquiry are the following:

1. Did the Public Body meet its duty to assist applicants as provided by section 10 (duty to assist) of the FOIP Act?
2. Did the Public Body refuse the Applicant access to the information in the records?

II. DISCUSSION OF ISSUES

1. Did the Public Body meet its duty to assist applicants as provided by section 10 (duty to assist) of the FOIP Act?

[para 12] Section 10(1) of the FOIP Act creates a duty to assist applicants. It states:

10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.

Past orders of this office have interpreted the duty to assist as including the duty to conduct a reasonable search for responsive records.

[para 13] In Order F2007-029, the Commissioner made the following statements about a public body's duty to assist under section 10(1):

The Public Body has the onus to establish that it has made every reasonable effort to assist the Applicant, as it is in the best position to explain the steps it has taken to assist the applicant within the meaning of section 10(1).

[...]

Previous orders of my office have established that the duty to assist includes the duty to conduct an adequate search for records. In Order 2001-016, I said:

In Order 97-003, the Commissioner said that a public body must provide sufficient evidence that it has made a reasonable effort to identify and locate records responsive to the request to discharge its obligation under section 9(1) (now 10(1)) of the Act. In Order 97-006, the Commissioner said that the public body has the burden of proving that it has fulfilled its duty under section 9(1) (now 10(1)).

Previous orders . . . say that the public body must show that it conducted an adequate search to fulfill its obligation under section 9(1) of the Act. An adequate search has two components: (1) every reasonable effort must be made to search for the actual record requested and (2) the applicant must be informed in a timely fashion what has been done.

[para 14] Section 10 includes a duty to conduct a reasonable search for responsive records in the custody or control of a public body.

[para 15] In this case, the Applicant argues that the Public Body's search was inadequate as it did not demand records from the Calgary Police Service he believes the Public Body is empowered to demand.

[para 16] The Public Body's position, as set out in its response to the Applicant, is that it lacks custody and control over the Calgary Police files that the Applicant is seeking. It explains that it may review information regarding the statutory complaint process, but otherwise lacks authority to demand records from the Calgary Police Service. The Public Body also explained that there are statutory limits on its ability to accept and investigate complaints.

[para 17] As the Applicant does not take issue with the search for records over which the Public Body has custody, the issue for the inquiry is whether the Public Body has the power to demand the requested records from the Calgary Police Service as the Applicant asserts. This is because the right of access created by section 6(1) of the FOIP Act only extends to records in the custody or control of a public body.

[para 18] The Applicant disagrees with the Public Body's explanation that it lacks sufficient control over Calgary Police Service records to be able to provide them in response to an access request and asserts the view that the Public Body does have such control.

[para 19] The Applicant argues:

To determine if the Calgary Police Commission ("CPC") has failed to disclose documents in its possession/care and control concerning me, the Freedom of Information and Privacy Commissioner ("FOIPC") must determine:

- a. what records the CPC was obligated to obtain and retain, as the statutory body that regulates and oversees the Calgary Police Service ("CPS")
- b. what authority it has over the Calgary Police Service ("CPS") to compel their production and release to me.

CPC's statutory mandate specifically includes overseeing, monitoring, and reviewing the CPS's complaints process.

Decisions of appeals to the Law Enforcement Review Board of Alberta , discussed [later] show the CPC and Chief of CPS's decisions are subject to review.

The CPC's governing and binding legislation, policies and bylaw confirm the CPS reports and is answerable to the CPC, which is legally obligated to create its own records of CPS materials when executing its statutory obligations, specifically in monitoring Complaint.

Consequently, failure to disclose my records constitutes that either the CPC:

1. falsely misrepresented the facts by denying it has access to/possession or care and control of the relevant records, OR
2. failed to execute its statutory obligations to the complainant by not reviewing the complaint process.

The Calgary Police Chief ("Chief") reports to the CPC and is answerable to the Commission, which can direct the Chief to do or not do whatever the CPC deems necessary for regulation and oversight of the CPS, especially for monitoring complaints.

Summary of the [Applicant's] position

Considering the CPC's powers and role are conferred by statute, and the CPS and its Chief are answerable and subordinate to the CPC, there is no doubt the CPC has its own extensive records relating to me that it continuously refuses to disclose.

As discussed later in this document, it is also obvious the CPC did not fulfil its legislated mandate concerning my matters; nevertheless, it also obviously communicated with the Chief and received information and records about me, which I am entitled to.

[para 20] While the Applicant asserts that the Public Body is misrepresenting its authority, there is no reason to reject the Public Body's interpretation of its powers and duties under the *Police Act*. The powers and duties of the Public Body listed on its website, cited by the Applicant, do not contradict the Public Body's position that it lacks control over the requested records.

[para 21] In Order F2002-014, former Commissioner Work considered the concepts of custody and control and said:

Under the Act, custody and control are distinct concepts. "Custody" refers to the physical possession of a record, while "control" refers to the authority of a public body to manage, even partially, what is done with a record. For example, the right to demand possession of a record, or to authorize or forbid access to a record, points to a public body having control of a record. A public body could have both custody and control of a record. It could have custody, but not control, of a record. Lastly, it could have control, but not custody, of a record. If a public body has either custody or control of a record, that record is subject to the Act. Consequently, in all three cases I set out, an applicant has a general right of access to a record under the Act.

[para 22] Former Commissioner Work interpreted “custody” as referring to physical possession of a record. He also suggested that it would be possible for a public body to have custody over a record but not control over it. Subsequent decisions of this office have moved away from this position and have determined that custody, like control, requires that a public body have rights and duties in relation to the record in question before a public body could be said to have custody over it.

[para 23] In Order P2010-007, the Adjudicator considered how the terms custody and control have been defined in previous orders of this office. He said:

In prior FOIP orders, the term “custody” was defined as the physical possession of a record, whereas the term “control” was defined as the authority of a public body to manage, even partially, what is done with a record. Furthermore, prior orders have held that in order for the FOIP Act to apply to the records it is sufficient for a public body to have custody or control of them; the public body does not have to have both custody and control (Order F2002-014). A recent Order of this Office also held that “bare” possession of information does not amount to custody, as the word “custody” implies that there is some right or obligation to hold the information in one’s possession (Order F2009-023).

[para 24] In Order F2010-023, I said:

In section 6 of the FOIP Act, the word “custody” implies that a public body has some right or obligation to hold the information in its possession. “Control,” in the absence of custody, implies that a public body has a right to obtain or demand a record that is not in its immediate possession. I find that the question “Does the Public Body have a right to obtain the records?” must be answered when determining whether a public body has control over records it does not possess. If a public body has rights it may exert over a record it may be able to obtain the record; if it does not have any rights in relation to the record, it may not be able to obtain it. As the Commissioner noted in Order F2002-014, the right to demand production of records speaks strongly in favor of a finding of control.

[para 25] The phrase “custody or control”, where it is used in the FOIP Act, refers to the legally enforceable right of an entity to possess a record or to obtain or demand it, if the record is not in its immediate possession. If the Public Body has a legally enforceable right to demand the records the Applicant is seeking from the Calgary Police Service, then the Calgary Police Service would also have a legal obligation to provide the records.

[para 26] 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:

- 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?

[para 27] 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 the public body would have control over the records.

[para 28] In considering the foregoing factors, I note that the kinds of records the Applicant is seeking would be in the custody and control of the Calgary Police Service. They would have been created by the Calgary Police Service and in its possession. They would be created in the course of its policing function, for policing purposes. The records would be subject to the Calgary Police Service's retention schedule and stored in its systems.

[para 29] I am unable to say that consideration of the factors leads to the conclusion that the Public Body has custody or control over the requested records. The Public Body did not create the records and its governing statute does not grant it any authority to demand them in the circumstances of this case. It does not have custody of the records. The Public Body does not have any authority to regulate the collection, use, or disclosure of records in the custody of the Calgary Police Service.

[para 30] The Applicant argues that the oversight function of the Public Body gives it custody or control over the records. He states:

CPC's statutory mandate specifically includes overseeing, monitoring, and reviewing the CPS's complaints process.

Decisions of appeals to the Law Enforcement Review Board of Alberta, discussed [later], show the CPC and Chief of CPS's decisions are subject to review.

The CPC's governing and binding legislation, policies and bylaw confirm the CPS reports and is answerable to the CPC, which is legally obligated to create its own records of CPS materials when executing its statutory obligations, specifically in monitoring complaints.

Consequently, failure to disclose my records constitutes that either the CPC:

1. falsely misrepresented the facts by denying it has access to/possession or care and control of the relevant records, OR
2. failed to execute its statutory obligations to the complainant by not reviewing the complaint process.

The Calgary Police Chief (“Chief”) reports to the CPC and is answerable to the Commission, which can direct the Chief to do or not do whatever the CPC deems necessary for regulation and oversight of the CPS, especially for monitoring complaints.

[para 31] I am unable to agree with the Applicant that the Public Body has the power to demand police files from the Calgary Police Service for the purpose of responding to access requests. It appears that the only situation in which a police commission would have the power to demand records is in the course of conducting an inquiry (section 32). This provision would not empower the Public Body to demand records for the purpose of responding to an access request.

[para 32] The Public Body has broad oversight powers, but it does not follow from this that it has the power to demand records from the Calgary Police Service, or having duties in relation to each record created by the Calgary Police Service.

[para 33] The Public Complaint Director of the Public Body does have a duty to “review the investigation conducted in respect of a complaint”; however, this review power does not mean that the Public Complaint Director has the power to demand the contents of police files. Instead, this power refers to auditing the process by which the Chief of the Calgary Police Service investigates a complaint. This process may involve reviewing information in police files, but that does not mean the Public Body would have custody or control over the content of any files reviewed by the Public Complaint Director.

[para 34] In an inquiry, I may review the adequacy of the Public Body’s response to the Applicant, as the FOIP Act authorizes me to do so. The FOIP Act does not authorize me to require a public body to demand records from another public body if it does not have authority to do so. There is no purpose served by ordering a public body to obtain records if it cannot do so.

[para 35] I accept the Public Body’s position, as set out in its response to the Applicant, that it lacks custody or control over the records the Applicant has requested, and has no power to demand them.

[para 36] I note that the Public Body explained that it does not have custody or control over the records the Applicant is seeking and took the additional step of explaining to the Applicant how he could obtain the records he requested from the Calgary Police Service, which would have custody and control over them. The Public Body also provided the records it did have in its custody or control containing

information about the Applicant. There is nothing further that I could order in relation to the Public Body's search or response to the Applicant.

2. Did the Public Body refuse the Applicant access to the information in the records?

[para 37] The Public Body informed the Applicant that it could not provide him with access to records in the custody of the Calgary Police Service, as it lacks custody or control of these records within the terms of the FOIP Act. It provided the Applicant with access to information it did have in its custody or control regarding his complaints.

III. ORDER

[para 38] I make this Order under section 72 of the Act.

[para 39] I confirm that the Public Body met its duty to assist the Applicant as provided by section 10 of the Act.

Teresa Cunningham

Adjudicator

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