

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2018-72

December 3, 2018

CALGARY POLICE SERVICE

Case File Number F6960

Office URL: www.oipc.ab.ca

Summary: The Complainant made a complaint that the Public Body had disseminated his personal information in contravention of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) when its former FOIP Manager provided information about a letter comprised of questions he had written regarding his access request to the Chief and to other officials of the Calgary Police Service (the Public Body). He also complained that the Public Body had disseminated his personal information without authority when the law firm Bennett Jones was chosen to respond to the access request. Finally, the Complainant argued that Bennett Jones was not properly delegated to respond to the access request and was in a conflict position.

The Adjudicator determined that the Public Body had not disseminated the Complainant's personal information in contravention of the FOIP Act. She determined that Bennett Jones had been delegated to respond to the Complainant's letter in accordance with section 85 of the FOIP Act. The Adjudicator determined that the process for independent reviews of public body decisions set out the FOIP Act cured any defects attributable to potential conflicts of interest or bias.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 2, 10, 39, 40, 41, 65, 72, 85

Authorities Cited: AB: Orders F2006-006, F2007-012, F2008-029, F2013-51, F2016-35, F2016-56

Case Cited: *R. v. Arkinstall* 2011 ABPC 23

I. BACKGROUND

[para 1] On July 16, 2012, the Complainant, a representative of the Criminal Trial Lawyers' Association (CTLA), made a request for access under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to the Calgary Police Service (the Public Body). The Complainant requested all records relating to the response of the Public Body to *R. v. Arkinstall* 2011 ABPC 23 (CanLII), a decision of the Provincial Court of Alberta, which was reported in the *Toronto Star* in a story entitled: *Police who lie: How officers thwart justice with false testimony*.

[para 2] The Public Body conducted a search for responsive records and responded to the Complainant on August 21, 2012.

[para 3] On February 20, 2013, the CTLA's representative wrote to the Public Body's FOIP Manager. He indicated that he had learned that the Chief and one of the police members involved in the *Arkinstall* case had played football together. He also asked whether the search for responsive records had included correspondence between the Chief and the police member. The CTLA's representative also wrote another letter on the same day addressed to several different parties: a lawyer who represented the Calgary Police Chief, the Public Complaints Director of the Alberta Solicitor General, the Alberta Justice Legal Services Division, and the Public Complaints Director of the Calgary Police Commission. The Complainant's representative stated in that letter that he had heard that the Chief of Police was a friend of one of the officers named in *Arkinstall* and suggested that the Calgary Police Service was in a position of conflict in relation to the *Arkinstall* matter. He concluded the letter stating, "I do not know what the Calgary Police Service PSB policy states in relation to this issue but I trust that it is not necessary to cite authority for the proposition that a police service should not be handling a complaint against the friend of the Chief of the same Police Service."

[para 4] The Chief of the Public Body directed counsel to respond to both letters. The responses denied all allegations.

[para 5] The CTLA's representative complained to the Commissioner that the Public Body failed in its duty to assist the Complainant by not responding to his letter of February 20, 2013 to the FOIP Manager.

[para 6] In Order F2016-56, I determined that the Public Body had responded to the CTLA when it denied all allegations. The Chief directed counsel for Bennett Jones, which represented the Public Body, to deny all allegations made by the CTLA's representative. The Chief, who would have knowledge as to whether he communicated with any of the police officers involved in the *Arkinstall* matter or with anyone else, could be interpreted as denying that there were any responsive communications. As a

result, I found that the Public Body had met any duty to assist the Applicant arising from his correspondence of February 20, 2013.

[para 7] On August 21, 2013, the 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). It requested “all records, as defined by s.1(q) of [the FOIP Act] in relation to the processing of my request to the FOI Coordinator of the CPS dated February 20, 2013.”

[para 8] The law firm Bennett Jones responded to the CTLA’s access request on behalf of the Public Body on September 20, 2013. It stated that responsive records had been located, but that it had withheld information from them under sections 24(1)(a), 24(b)(i), 27(1)(a), and 27(1)(b)(iii) of the FOIP Act. In Order F2016-35, I confirmed the decision of the Public Body to sever some of the information in the records, but directed it to disclose the remainder. That order is currently the subject of a judicial review application.

[para 9] On March 21, 2013, the CTLA’s representative (the Complainant) made a complaint to the Commissioner that the Public Body had improperly disclosed the identity of the Complainant when the Public Body distributed the Complainant’s letter of February 20, 2013 internally. The Complainant argued that distributing the letter to personnel not involved in processing the access request contravened the *Freedom of Information and Protection of Privacy Act*. The Complainant argued that the Public Body failed to process the Complainant’s access request and failed to assist the Complainant. Finally, the Complainant argued that the Public Body had not acted impartially when it dealt with the access request, as it had retained the law firm of Bennett Jones LLP to respond to the Complainant’s questions and the Complainant’s access requests.

[para 10] In the Complainant’s request for inquiry, the Complainant questioned whether the head of the Public Body (the Chief of Police) had properly delegated Bennett Jones the authority to act as head in responding to the Complainant’s access requests, and also questioned aspects of the Public Body’s response, because of the delegation.

[para 11] The Commissioner agreed to conduct an inquiry into the issue of whether the Public Body had disclosed the Complainant’s personal information in contravention of the FOIP Act when it was discussed internally and when the Complainant’s questions regarding his access request were provided to Bennett Jones for response. The notice of inquiry described the issues for inquiry as follows:

Did the Public Body disclose the Complainant’s personal information (his name) in contravention of Part 2?

In answering this question, the parties may wish to address the following:

- a) Did the Public Body improperly disclose the Complainant’s name to its senior officers for the purpose of enabling them to decide how to deal with the Complainant’s letter of February 20, 2013?

b) Did the Public Body improperly disclose the Complainant's name to [a lawyer] of Bennett Jones when it did so to enable him to respond to the Complainant's letter of February 20, 2013?

c) Having regard to the fact [the lawyer] was representing the Public Body in a particular matter, was the Public Body required to formally delegate its power to respond to the February 20, 2013 letter from the Complainant? If so, did it do so?

II. ISSUE: Did the Public Body disclose the Complainant's personal information in contravention of Part 2?

[para 12] Section 40 of the FOIP Act restricts the ability of a public body to disclose personal information. It states, in part:

40(1) A public body may disclose personal information only

[...]

(e) for the purpose of complying with an enactment of Alberta or Canada or with a treaty, arrangement or agreement made under an enactment of Alberta or Canada [...]

[...]

[...]

(4) A public body may disclose personal information only to the extent necessary to enable the public body to carry out the purposes described in subsections (1), (2) and (3) in a reasonable manner.

[para 13] The Complainant complains that the Public Body disclosed the Complainant's personal information when the Public Body's former FOIP Manager sent the Complainant's correspondence internally to the Chief and to senior officials within the Public Body and to Bennett Jones.

[para 14] The Complainant states:

It must be remembered that [the former FOIP Manager] processed the original FOIPPA request which required some significant effort whereas the follow up request could have been answered off the top of her head. That suggests the purpose of the dissemination of my letter was to alert senior officers and [a representative of Bennett Jones] of the basis for my request.

The CPS submission that "The public body was not required to formally delegate its power to respond to the February 20, 2013 letter from the complainant and if it was, it did so"

It appears that the CPS position is that the only delegation was an email stating "Let's kick this to Bennett Jones".

Did the Public Body disclose the Complainant's personal information when the former FOIP Manager emailed the Chief and informed other senior officials regarding the Complainant's correspondence?

[para 15] The Public Body argues that the information communicated by the Public Body's former FOIP Manager was not personal information, as the information was about the Complainant acting as the representative of the CTLA, and not in his personal capacity. The Complainant argues that personal information about him was disseminated among officials of the Public Body, in addition to information about him acting in a representative capacity.

[para 16] Section 1(n) of the FOIP Act defines personal information for the purposes of the Act. It states:

I 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 17] Not all information referring to an individual is necessarily personal information. Information associated with an individual in a professional, official or representative capacity may not be “about” the individual, but about the public body or organization employing the individual. Information about the actions of an employee performing work duties, may not be about the employee as an individual, unless the information has personal consequences for the employee, or there is something else about the information that gives the information a personal dimension. In Order F2013-51, the Director of Adjudication considered the question of whether information relating to an individual’s work duties was personal information and said:

In Order F2011-014, the Adjudicator concluded that the name and signature of a Commissioner for Oaths acting in that capacity was not personal information, as it was not information about the Commissioner for Oaths acting in her personal capacity. She said:

Personal information under the FOIP Act is information about an identifiable individual that is recorded in some form.

However, individuals do not always act on their own behalf. Sometimes individuals may act on behalf of others, as an employee does when carrying out work duties for an employer. In other cases, an individual may hold a statutory office, and the actions of the individual may fulfill the functions of that statutory office. In such circumstances, information generated in performance of these roles may not necessarily be about the individual who performs them, but about the public body for whom the individual acts, or about the fulfillment of a statutory function.

I find that the names and other information about employees of the Public Body and the University of Calgary acting in the course of their duties, as representatives of their employers, cannot be withheld as personal information, unless the information is at the same time that of an individual acting in the individual’s personal capacity.

[para 18] The question I must address is whether the information about the CTLA’s representative, where such was disclosed among employees of the Public Body and to Bennett Jones, has a personal dimension, or whether it was solely about him acting in a representative capacity.

[para 19] In Order F2016-56, which addressed whether the Public Body responded appropriately to the correspondence of February 20, 2013, I noted the following:

The Applicant also states:

It is submitted that the right of access of the CTLA to the records at issue is not subject to any limited or specific exceptions set out in the Act since none of the sections cited by the CPS can be reasonably interpreted to restrict the Applicant’s right of access. [my emphasis]

The Applicant states that the Public Body had a duty in relation to its representative’s letter of February 20, 2013 and that this duty was not met.

[para 20] In Order F2016-56, Complainant indicated that the correspondence of February 20, 2013 and the access request to which it related, were sent on behalf of the CTLA. This indication could reasonably be taken to mean that the Complainant’s actions

in submitting the access request, and in asking questions regarding the manner in which the Public Body searched for records, were done as a representative of the CTLA.

[para 21] At the same time, some of the comments made by officials of the Public Body, which appear to be the basis of the Complainant's complaint regarding disclosure, do not refer to the CTLA, but to the Complainant personally. For example, the former FOIP Manager's email informing the Chief of the Complainant's letter of February 20, 2013, is entitled "Another salvo from [the Complainant]". The email states: "When I received his FOIP request regarding Arkinstall, ALL of the Chief's Office was asked for records, which is really not the issue, I am sure." The title of the email, and its content, suggest that the FOIP Manager considered the Complainant to be acting on his own behalf in making the access request and sending the letter of February 20, 2013 and that the references to the Complainant in her analysis of the letter are about him as an individual.

[para 22] Assuming that the FOIP Manager conveyed personal information about the Complainant to the Chief in her email, what is that information? In my view, the information is the last name of the Complainant and the FOIP Manager's opinion that he had other reasons for writing the letter of February 20, 2013 than following up in relation to an access request. The FOIP Manager's email also contains details of an allegation she attributes to the Complainant about the Chief.

[para 23] Under section 1(n) of the FOIP Act, cited above, personal opinions about someone else are the personal information of the individual who is the subject of the opinion and not the personal information of the opinion holder. However, the fact that an individual holds a personal opinion about someone else may be his or her own personal information. In Order F2006-006, the Adjudicator stated:

A third party's personal views or opinions about the Applicant - *by that reason alone* - are expressly not their personal information under section 1(n)(ix). However, the identification of the person providing the view or opinion may nonetheless result in there being personal information about him or her. Section 1(n)(ix) of the Act does not preclude this conclusion, as that section only means that the content of a view or opinion is not personal information where it is about someone else. In other words, the *substance* of the view or opinion of a third party about the Applicant is not third party personal information, but the *identity* of the person who provided it is third party personal information. [emphasis in original]

Turning to the case before me, the Complainant's views regarding the Chief, where they can be gleaned from the FOIP Manager's email and from his correspondence, are the Chief's personal information; however, the fact that the Complainant holds and expressed those views about the Chief would be his personal information.

[para 24] I do not view the exchange of information between the Chief and the former FOIP Manager or between the former FOIP Manager and other officials within the Public Body to be a disclosure of personal information, but a *use* of information, given that the information was sent up the chain of command and did not leave the Public Body until the Chief decided to have Bennett Jones respond to the Complainant's

correspondence. Therefore, although the first issue is framed in terms of the disclosure of the information, I will instead deal with it as a use.

[para 25] Section 39 of the FOIP Act restricts a public body from using personal information except in certain circumstances. It states:

39(1) A public body may use personal information only

(a) for the purpose for which the information was collected or compiled or for a use consistent with that purpose [...]

[...]

(4) A public body may use personal information only to the extent necessary to enable the public body to carry out its purpose in a reasonable manner.

[para 26] Section 41 of the FOIP Act explains when a purpose in using personal information is consistent with a public body's purpose in collecting the information. It states:

41 For the purposes of sections 39(1)(a) and 40(1)(c), a use or disclosure of personal information is consistent with the purpose for which the information was collected or compiled if the use or disclosure

(a) has a reasonable and direct connection to that purpose, and

(b) is necessary for performing the statutory duties of, or for operating a legally authorized program of, the public body that uses or discloses the information.

[para 27] In Order F2008-029, the Director of Adjudication discussed the meaning of "necessary" in relation to a disclosure of information for the purposes of meeting the goals of a program of the Public Body within the terms of section 41(b). She said:

[...] I find that "necessary" does not mean "indispensable" - in other words it does not mean that the CPS could not possibly perform its duties without disclosing the information. Rather, it is sufficient to meet the test that the disclosure permits the CPS a means by which they may achieve their objectives of preserving the peace and enforcing the law that would be unavailable without it. [...]

[...] Again, I find that "necessary" in this context does not mean "indispensable", and is satisfied as long as the disclosure is a significant means by which to help achieve the goals of the program.

[para 28] The Public Body states in its submissions:

The Chief decided that the Follow-Up Letter would be responded to by external counsel and communicated that in writing to the team handling the matter: "Let's kick this to Bennett Jones."

[para 29] From the foregoing, I conclude that the former FOIP Manager disseminated the Complainant's personal information to the Chief, and to other senior officials, as part of their roles in handling the matter of responding to the Complainant.

[para 30] It appears that the Public Body and the Complainant are in agreement that the FOIP Manager and the senior officials with whom the FOIP Manager discussed the Complainant's correspondence were handling the matter of the Complainant's correspondence until the Chief made the decision to refer the matter to Bennett Jones for response.

[para 31] I find that the Public Body used the Complainant's personal information, to the extent that his personal information is contained in the emails of the FOIP Manager, which were sent to various officials, and that it did so to decide how to respond to the Complainant's letter of February 20, 2013. In my view, this is a purpose consistent with the Public Body's purpose in collecting the Complainant's personal information, as it reviewed (collected) the Complainant's correspondence for the purpose of responding to it. It does not matter that the Chief subsequently decided that Bennett Jones would prepare the response to the Complainant's letter; the FOIP Manager and other senior officials initially handled the matter of deciding how best to respond to the letter.

[para 32] In my view, section 39(1)(a) authorized the Public Body's use of the Complainant's personal information when the former FOIP Manager disseminated it to the Chief and other senior officials. Assessing and analyzing the letter, as the FOIP Manager did, and sending the letter and her analysis up the chain of command had a reasonable and direct connection to the purpose of responding to the letter. In addition, the Complainant's letter contained content relating to the Public Body's duties and obligations under the FOIP Act. Assessing the Complainant's letter in order to respond to it was necessary for the Public Body to perform its functions – in this case, responding to the letter – under the FOIP Act in a reasonable way.

[para 33] Further, I am unable to say that the Public Body used any personal information that was not reasonably necessary for the purpose of responding to the Complainant's access request, given that the personal information was his name, the former FOIP Manager's view that the Complainant had concerns outside the FOIP Act, and the fact that he had made allegations against the Chief, were all elements of the Complainant's letter of February 20, 2013 to which the Public Body was deciding how to respond.

Did the Public Body improperly disclose the Complainant's personal information to a lawyer of Bennett Jones?

[para 34] The Complainant argues:

At paragraph 22, the CPS argues that it would be prudent to have a public body communicate through a lawyer, which ignores the fact that [the FOIP Manager] was a lawyer and was in-house counsel for the CPS. That, in and of itself, may have made it prudent to have [the FOIP

Manager] delegate the matter because her role as in-house counsel may have put her in a conflict of interest. However, obviously it should not have been delegated to [the lawyer from Bennett Jones] as outside counsel for the reasons explained above.

[para 35] I believe that where the Complainant refers to an argument “above” that makes it obvious that the lawyer for Bennett Jones should not have received a delegation, he is referring to the following passage in his submissions:

It is obvious that [the lawyer] was retained by the Calgary Police Service to thwart my efforts to have the Calgary Police Service deal with the issues raised in *R. v. Arkinstall*, 2011 ABPC 23 by a process that conformed to the *Police Act*, the principles underlying the *Police Act*, and with transparency. That did not happen and [the lawyer] was part of the problem but at that time was thought to be part of the CPS’ solution.

[para 36] In addition, the Complainant argues that Bennett Jones was not appropriately delegated under the FOIP Act for the purposes of exercising the head’s authority to respond to the Complainant’s questions regarding his access request. He states:

It appears that the CPS position is that the only delegation was an email stating “Let’s kick this to Bennett Jones.”

I dispute whether there was a formal or informal delegation as opposed to simply sending the letter to [the lawyer] to have him deal with it along with all other Arkinstall issues [...]

[para 37] The Public Body argues that it was understood between itself and Bennett Jones that Bennett Jones was receiving a delegation under section 85. It states:

Even if there was a need for formal section 85 delegation, subsection 85(2) requires only that the delegation be in writing. While it may be best [practice] to establish a formal delegation instrument that is reviewed from time to time where authority is delegated on a relatively permanent basis, it is submitted that for “one off” delegations of the kind normally made to counsel in a particular matter, even best practices may be to issue a simple delegation in writing. Requiring a specialized instrument is excessive and overly technical in such cases.

Here the head of the body delegated authority to Bennett Jones to respond to the Follow-Up Letter using some [casual] language in a written email to do so, as was his style, but there was complete understanding within his team and within Bennett Jones as to what “Let’s kick this to Bennett Jones” meant. A written delegation was made.

[para 38] The Complainant’s concern regarding the delegation appears to be that he considered the lawyer who received the delegation to act as the head of the Public Body for the purpose of responding to his letter, to be in a position of conflict.

[para 39] It is not clear to me that the wisdom of a delegation is a matter within my jurisdiction. In any event, I am not persuaded by the Complainant’s arguments that the lawyer who received the Chief’s delegation was in a conflict that could preclude him from fulfilling the head of the Public Body’s duty under section 10 of the FOIP Act to respond to the Complainant’s questions. It is not clear to me why representing the Public Body in the past would mean that the lawyer could not make decisions under the FOIP Act on behalf of the Public Body at a later date.

[para 40] Further, I agree with the Public Body that section 85 does not require particular formality. It states:

85(1) The head of a public body may delegate to any person any duty, power or function of the head under this Act, except the power to delegate under this section.

(2) A delegation under subsection (1) must be in writing and may contain any conditions or restrictions the head of the public body considers appropriate.

Section 85(1) requires a delegation to be in in writing; however, it contains no requirements as to the language to be used in a delegation. I agree with the Public Body that the instruction to “kick it to Bennett Jones” is sufficient to meet the requirements of section 85.

[para 41] As I find that the Chief delegated his duty to answer the Complainant’s questions to the lawyer for Bennett Jones, it follows that I find that any disclosure of the Complainant’s personal information to Bennett Jones for that purpose was authorized by section 40(1)(c) of the FOIP Act. As noted above, I found that the Public Body collected the Complainant’s personal information for the purpose of responding to his correspondence. Sending the correspondence to Bennett Jones in order for Bennett Jones to prepare the head of the Public Body’s response to it, in accordance with the head’s obligations under the FOIP Act, has a reasonable and direct connection with the Public Body’s purpose of collecting the Complainant’s personal information in order to respond to the letter. The requirements of section 41(a) (which elaborates on the requirements of section 40(1)(c) in addition to section 39(1)(a)) are therefore met. Moreover, as it was necessary to prepare a response under section 10 of the FOIP Act, the terms of section 41(b) are met.

[para 42] I acknowledge that the Complainant is concerned that the access requests he makes on behalf of himself and his clients are treated differently than those of other requestors. However, the FOIP Act contains no restrictions as to who may receive a delegation of a head’s authority under section 85. Instead, section 2(e) of the FOIP Act makes it a purpose of the Act to provide independent reviews of the access decisions of public bodies. Section 65 of the FOIP Act allows a requestor to obtain an independent review by the Commissioner of a public body’s response.

[para 43] In Order F2007-012, I addressed a similar argument regarding the potential for conflict of interest in a public body’s decision-making under the FOIP Act. I rejected this argument, stating:

I do not agree with the Applicant’s argument that a conflict of interest results in a failure to meet the Public Body’s duty to assist. Under the Act, the head of the public body is accountable for any failures or omissions of the public body in responding to an access request. The head of a public body, by the very nature of the position, will often have duties to the public body that may compete with the head’s duties under the Act. Delegating the head’s responsibility to

respond to an access request to an employee such as a FOIP coordinator does not mitigate the potential for conflict of interest. For this reason, the Act provides individuals who have made access requests the right to an independent review of the head's decisions by a neutral third party, the Information and Privacy Commissioner. The independent review rectifies any issues of conflict of interest or potential bias. As the Applicant in this case has exercised his right to request an independent review, any miscarriage of natural justice he perceives will be remedied by the review. See *Harelkin [v. University of Regina]*, 1979 CanLII 18 (SCC).

The Complainant has already obtained an independent review of the Public Body's response in Order F2016-56, and its response to his subsequent request for records that would explain the steps the Public Body took to respond to the letter of February 20, 2013, in Order F2016-35. Finally, I am reviewing the Complainant's complaint regarding the use and disclosure of his personal information independently, as the Commissioner's delegate. The FOIP Act does not provide any remedies beyond these with regard to the issues raised by the Complainant.

[para 44] In conclusion, I find that the Public Body's use of the Complainant's personal information was authorized by section 39(1)(a) of the FOIP Act, and its disclosure of the Complainant's personal information was authorized by section 40(1)(c) of the FOIP Act. I also find that the Public Body used and disclosed only the personal information reasonably necessary for meeting its authorized objectives, given that the Public Body disclosed the letter for which Bennett Jones received the delegation to respond.

III. ORDER

[para 45] I make this Order under section 72 of the Act. I confirm that the Public Body did not contravene the FOIP Act in relation to the Complainant's personal information.

Teresa Cunningham
Adjudicator