

## ***Selim v Alberta: Reasonableness is Not Always Fairness***

**By: Geeva Atanase**

**Case Commented On:** *Selim v Alberta (Information and Privacy Commissioner)*, [2016 ABQB 562 \(CanLII\)](#)

### **Summary**

This case involves a judicial review, on a standard of reasonableness, of a refusal by the Information and Privacy Commissioner to conduct an inquiry stemming from a decision by the Calgary Police Service (CPS) to close an access to information request file. The decision of Alberta Court of Queen’s Bench Justice J.B. Veit hinges on the legislative intent behind the *Freedom of Information and Protection of Privacy Act (FOIPPA)*, RSA 2000 c F-25, and the authority of the Commissioner to refuse to conduct an inquiry, as well as on the reliability of the evidence on which the Commissioner relied in making the decision. However, the decision in this case has wider implications that fall outside of the scope of judicial review, and points to a striking lack of accountability on the part of CPS when it comes to the conduct of one of its own. Rather than address the magnitude of the injustice to which the appellant was subjected in this case, Justice Veit focuses almost exclusively on applying a standard of reasonableness in reviewing the decision of the Commissioner.

### **Facts**

Mr. Selim fell victim to scammers who used photographs of a model, identified in this case as JC, to elicit payment of \$2,000. Mr. Selim believed that JC had also been scammed by the con men and developed an obsession with her. He found a photo of JC on a Hawaiian modelling agency website, and inundated the agency with phone calls about JC. An employee from the agency contacted her friend, a detective with the Calgary Police Service (CPS), and the detective contacted Mr. Selim to explain the concept of criminal harassment and to ask him to stop calling the agency, as JC had not worked with the agency for eight years (at paras 9-10).

Extensive communication between the detective and Mr. Selim followed, with the detective engaging in an elaborate pretend police ‘investigation’ to locate JC. Although the detective did not open an investigation with CPS and only corresponded with Mr. Selim as a favour to his friend from the modelling agency, his communications with Mr. Selim came from the CPS website, had formal CPS insignia on it, and used official sounding language in an attempt to persuade Mr. Selim to end his obsession with JC. The detective’s emails to Mr. Selim used language such as “completed my preliminary investigation and can now report to you” and “update my records associated with this investigation.” Additionally, the detective told Mr. Selim that JC was living in Alaska with her family, and wrote a letter to Mr. Selim, which was stated to be ‘from JC’ and which advised Mr. Selim that JC did not return his affections. The detective had an acquaintance mail the letter from Juneau, Alaska; the Juneau postmark was intended to make the ruse more convincing (at paras. 10-12, 17).

On September 25, 2013, after being inundated with 27 emails in one day from Mr. Selim, the detective advised him that they would no longer be working together, and on November 14, 2013, he advised Mr. Selim that he would not be communicating with JC again. In January 2014, Mr. Selim made a freedom of information (FOIP) request to CPS for records on JC. During an investigation into the records, the detective explained to CPS staff that had not conducted any sort of investigation, and that he had engaged in the ruse in an attempt to stop Mr. Selim's delusional thinking. CPS informed Mr. Selim that no such records existed and that they were closing the FOIP request file. In June 2014, pursuant to section 65(1) of the *Freedom of Information and Protection of Privacy Act (FOIPPA)*, [RSA 2000 c F-25](#), Mr. Selim requested from the Commissioner a review of the decision to close the file. In such cases, as outlined in section 68 of the *FOIPPA*, the Commissioner advises its staff to try to settle the matter, but the Commissioner does not receive copies of the report or any information other than that regarding the attempt to settle the matter and whether or not it was successful. Following an unsuccessful attempt to settle, Mr. Selim was told that the review was finished (at paras. 11-15).

Mr. Selim asked the Commissioner for an inquiry into the review in February 2015, pursuant to his right to do so under section 69(1) of the *FOIPPA*. A civilian member of the CPS, who was also a Senior Disclosure Analyst, met with the detective and affirmed an affidavit that stated that the detective did not have information about JC and that he did not know her, that he communicated with Mr. Selim in his own personal capacity, and that he fabricated information about JC to attempt to persuade Mr. Selim to give up his obsession with JC. However, the declaration was taken improperly, and the person who took the declaration did not certify that the declarant was entitled to make an affirmation. Additionally, CPS failed to provide the Commissioner with some of the facts relating to the detective's deception. Namely, the Commissioner was not made aware of the letters that Mr. Selim exchanged with the detective, who was posing as JC, or of the arrangement to mail a letter from Juneau so it bore an Alaskan postmark. The Commissioner was also unaware that correspondence from the detective came from a CPS computer and bore CPS insignia, or of the many phone calls between the detective and Mr. Selim related to this matter (at paras. 16-17, 36).

In January 2016, the Commissioner informed Mr. Selim that he was refusing to conduct an inquiry based on the fact that CPS had searched for records and that no records about JC existed because the detective had never been in contact with her (at para 18). Section 70 of the *FOIPPA* states that:

“the Commissioner may refuse to conduct an inquiry pursuant to section 69 if in the opinion of the Commissioner (a) the subject-matter of a request for a review under section 65 has been dealt with in an order or investigation report of the Commissioner, or (b) the circumstances warrant refusing to conduct an inquiry.”

Mr. Selim applied to the Alberta Court of Queen's Bench for judicial review of the Commissioner's decision.

## Issues

The Alberta Court of Queen's Bench addressed two issues:

1. What is the standard of review?
2. Was the Commissioner's refusal to conduct an inquiry reasonable?

## Decision

### ***1. What is the standard of review?***

Justice J.B. Veit refers to *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, [2010 SCC 23 \(CanLII\)](#), ("*Criminal Lawyers' Association*") at paragraph 70 in stating that the standard of review is reasonableness. In that case, the SCC stated that review of the Assistant Commissioner's decisions that interpret and apply the *FOIPPA* are usually subject to a reasonableness standard. In this case, the *FOIPPA* confers upon the Commissioner the ability to refuse to conduct an inquiry, and that "the decision about whether or not an inquiry is undertaken is deep within the core of the Commissioner's rights and responsibilities" (at para 21).

### ***2. Was the Commissioner's refusal to conduct an inquiry reasonable?***

Justice Veit found that the Commissioner's refusal to conduct an inquiry was reasonable, and dismissed the application for judicial review. In assessing the reasonableness of the decision, Justice Veit considered the principles of interpretation of the Commissioner's obligation to hold an inquiry and whether the Commissioner gave reasons for refusing to conduct an inquiry. Justice Veit also considered whether these reasons were reasonable in light of the veracity of the evidence on which the Commissioner relied to make the decision and whether the Commissioner was entitled to rely on this evidence. However, Justice Veit acknowledged that Mr. Selim may find this conclusion difficult to accept, and states that because of the conduct of the detective, "even though Mr. Selim has not been successful in his application for judicial review, he will not pay costs to either the CPS or the Commissioner" (at para 46).

Section 2(a) of the *FOIPPA* states that "the purposes of this Act are to allow any person a right of access to the records in the custody or under the control of a public body subject to limited and specific exceptions as set out in this Act." A purposive interpretation of the legislation would lead to the inference that the default standard is to hold an inquiry, particularly in light of the SCC's position in *Criminal Lawyers' Association* that access to information is an important aspect of a transparent and democratic society. However, the legislation is clear that the decision to hold an inquiry is discretionary, and the Commissioner may refuse to hold an inquiry if she provides an adequate explanation, as the court noted in *Alberta Teachers' Association v Alberta (Information and Privacy Commissioner)*, [2011 ABQB 19 \(CanLII\)](#). As the Senior Disclosure Analyst also stated in her statutory declaration, even if the records that Mr. Selim is seeking existed, CPS would have to refuse disclosure under section 17(1) of the *FOIPPA* because they would violate the personal privacy of JC, a third party. However, in this case, Justice Veit concluded that because CPS and the Commissioner have stated that the records that Mr. Selim is seeking do not exist, this basis to refuse disclosure does not apply (at paras 22-29). Justice Veit also found that the reasons that the Commissioner gave for refusing to hold an inquiry, despite being relatively brief because of their reliance on the affidavit of the Senior Disclosure Analyst, "were sufficient to meet the obligation to explain to Mr. Selim why an inquiry was refused" (at para 31).

Justice Veit also assessed the affidavit on which the Commissioner relied to make his decision in considering whether the decision of the Commissioner was reasonable. Affirmations must follow specific guidelines and formalities under the Alberta Evidence Act, [RSA 2000, c A-18](#); this ensures that the evidence is reliable and that declarant knows that making a false statement constitutes perjury. Despite the issues with the affirmation in this case, however, Justice Veit concluded that the Commissioner was entitled to rely on the affidavit as evidence because the

affirmation of the Senior Disclosure Analyst “demonstrates an intention to make a solemn declaration for which she could be charged with perjury if it was false” (at paras 33-37).

As Justice Veit points out, section 2(e) of the *FOIPPA* states that one of the purposes of the legislation is to resolve complaints and to “provide for independent reviews of decisions made by public bodies” (at para 22). In assessing whether this legislative purpose was met by CPS in this case, Justice Veit found that although the Commissioner relied on evidence submitted by CPS, the same public body to which Mr. Selim made a FOIP request, which would suggest that the legislative purpose of the *FOIPPA* was not met, the Commissioner’s staff “appears to be the ideal independent investigator,” and the affidavit presented sufficient information regarding the interactions between CPS and Mr. Selim that the Commissioner was entitled to rely on it as evidence (at paras 39-41)

Further, Justice Veit concluded that the character of the evidence presented to the Commissioner was such that it indicates awareness on the part of Mr. Selim regarding the role of the detective in the matter. Justice Veit writes that Mr. Selim should have been aware that CPS would not have a file related to JC because it was “abundantly clear” that he knew that there was never a criminal investigation involved; the detective, known to Mr. Selim as a member of the homicide unit, was simply ‘helping’ him to communicate with JC, not investigating a homicide. Additionally, the evidence presented to the Commissioner also included statements made by the detective against his own interest, including admitting that over a period of time, the detective repeatedly misled Mr. Selim and used his position as a police officer for personal purposes, namely to help his friend from the modelling agency. The law regarding statements made against one’s own interest in both criminal law and civil procedure establishes the principle that these admissions are generally reliable (at paras 42-45).

## **Comment**

If objectively, no records exist, then it follows that there are no records to produce when they are requested. However, from the outset, CPS was aware that the matter involved a detective’s attempt to mislead Mr. Selim by using official language and a false investigation scenario. In effect, CPS was aware that one of its own officers was using his position as a detective to advance a personal interest. CPS was also aware that Mr. Selim had obsessive tendencies and likely suffered from some form of delusional thinking, given the facts of the situation. While the fact remains that there were no records to produce and that even if records existed, CPS would be unable to produce them because they would contain personal third party information about JC, Mr. Selim was not made aware of any reason for a lack of existence of records. He was simply told that no records existed and that the matter was closed.

It is difficult to accept on the face of the evidence here, as Justice Veit has, that Mr. Selim should have known that there would be no police file or record related to JC. If Mr. Selim had been aware that no such records existed at any point, he would not have made a FOIP request, nor would he have had any reason to go forward with a request for review or a request for an inquiry. In Justice Veit’s own words, the detective “abused his authority as a police officer” (at para 44) and Mr. Selim was “made subject to a rather elaborate deception” (at para 46). Mr. Selim came to believe that JC was a victim of the same men who scammed him and took a great deal of his money, and the detective specifically told him that he was conducting an “investigation” and that there existed a “file” and “records associated with this investigation” (at para 11). As Canadians,

we tend to place a great deal of trust in police officers. We expect them to uphold the law and act in a fair and just manner. Given this reliance and the extent of the deception perpetrated against him, Mr. Selim had every reason to believe that a real investigation had taken place.

Further, the Commissioner chose not to conduct an inquiry based only on the limited information to which she had access. The fact that the detective's correspondence came from a CPS computer and bore CPS insignia, for example, is a key fact that illustrates why Mr. Selim would have reasonably believed that the detective was conducting an investigation into the matter. Although there do not appear to have been any inconsistencies in the affidavit of the Senior Disclosure Analyst, the affidavit did not provide the Commissioner with enough information about the scenario to make an informed decision regarding an inquiry. It does not appear that the information in the affidavit was of the same type as that to which the Commissioner was not privy, as Justice Veit concludes. The affidavit simply showed that the detective admitted that he lied to Mr. Selim and communicated with him only in his personal capacity, while the information that the Commissioner did not obtain showed that the detective used official emails, corresponded with Mr. Selim *at length*, and even went so far as to arrange to have a letter mailed from Alaska. The information in the affidavit implies some deception for the purposes of helping a friend, while the other information indicates a gross abuse of power that explains Mr. Selim's reliance on the detective's statements. Of course, it is not possible to deduce whether the Commissioner would have decided to open an inquiry if she had been privy to all of this information. As Justice Veit herself points out, the Commissioner's reasons for refusing to hold an inquiry are brief because they rely on very little information. At the very least, however, she may have felt compelled to give Mr. Selim additional details about the case in her written reasons had she been privy to all the necessary information.

Putting aside these issues, and whether one agrees with the decision in this case or not, it is impossible to ignore the fundamental unfairness with which Mr. Selim was treated by a police officer. Perhaps Justice Veit's hands were tied by the fact that addressing a punishment for the detective would have been outside the scope of judicial review. Indeed, Justice Veit manages to avoid contemplating the gross mistreatment of Mr. Selim by focusing simply on the reviewable issues. In fact, save for the decision not to levy costs against Mr. Selim, Justice Veit does not address the fact that he experienced injustice in his dealings with CPS. Mr. Selim's conduct throughout his interactions with the detective demonstrates that he lacked the knowledge and understanding that the detective was advancing a personal cause. When this issue first came to light, CPS could have taken the opportunity to fully explain the situation to Mr. Selim and perhaps even to offer an apology for the way in which he was treated, potentially avoiding the request for review and the resulting inquiry and judicial review.

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