

May 23, 2014

Privacy Legislation Tangles with the Civil Litigation Process

Written by: Linda McKay-Panos

Case commented on: *Calgary Board of Education v Alberta (Office of the Information and Privacy Commissioner)*, [2014 ABQB 189](#)

A recent Court of Queen's Bench decision demonstrates the intricacies of public bodies holding personal information and seeking to use that information in unrelated legal proceedings.

Harold McBain was formerly employed by the Calgary Board of Education (CBE). He was the subject of harassment complaints in 2003, which were settled. In 2007, Mr. McBain was called as a witness in an unrelated proceeding at the Board of Reference (an appeal process that addresses terminations and suspensions of teachers). The CBE sought to use documents and information related to the 2003 harassment complaints in 2007 in order to attack Mr. McBain's credibility. The Board of Reference ordered that these documents, which had been obtained by the CBE from one of its human resources employees, be fully disclosed to all other parties in the 2007 matter.

Mr. McBain complained to the Office of the Information and Privacy Commissioner (Commissioner) that the CBE had violated the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 (*FOIP*). There were two aspects to the complaint: 1) the CBE had wrongfully used and disclosed his personal information and 2) the CBE failed to protect McBain's personal information. The Adjudicator determined that the CBE had used and disclosed Mr. McBain's personal information contrary to the *FOIP*, but that it did not violate the *FOIP* by failing to protect his information.

The CBE applied to the Court of Queen's Bench for judicial review of the Adjudicator's decision. The Commissioner was permitted to make submissions on the appropriate standard of review, the record, the jurisdiction of the Commissioner, and the Commissioner's specialized jurisdiction and expertise, among other issues (at para 11). In order to decide the issues before her, Madam Justice S.L. Hunt McDonald examined the relevant provisions of the *FOIP*, the *Public Inquiries Act*, RSA 2000, c P-39, which describes the powers of commissioners, and the *School Act*, RSA 2000, c S-3, which provides that a Board of Reference has the powers of a commissioner under the *Public Inquiries Act* (at paras 13-21).

In determining the correct standard of review, Justice Hunt McDonald considered submissions from the CBE, the Commissioner and Mr. McBain, and concluded that the standard of review of the Adjudicator's decision should be reasonableness. The court noted that although the decision

involved statutes other than the *FOIP*, the *FOIP* is paramount to those other statutes, and it is also the Adjudicator's home statute (the statute that the Adjudicator follows and applies). The decision was therefore within the Adjudicator's specialized area of expertise (at para 44).

The CBE argued that the Commissioner did not have jurisdiction to rule on the broad scope of cross-examination to which a party is legally entitled at either common law or under the *FOIP* (at para 45). The Court concluded that the Adjudicator's decision did not rule on the broad scope of cross-examination, but rather on the use, disclosure and failure to protect Mr. McBain's information by the CBE in a situation where there was "no existing, codified regime for document production" (at para 46).

Justice Hunt McDonald held that the Adjudicator was reasonable in concluding that the CBE had used Mr. McBain's personal information in contravention of the *FOIP*. The CBE decided to use the information in order to challenge Mr. McBain's credibility before the Board of Reference, and the Adjudicator held that the personal information was not used for the purpose for which it was collected, or for a use consistent with that purpose under *FOIP* section 41 (at paras 63-66).

The CBE argued that *FOIP* section 40(1)(v) allowed for disclosure of information for use in a legal proceeding, but Mr. McBain argued that the CBE was not authorized to use his file for its defence in the Board of Reference proceeding (at para 68). The Adjudicator had agreed with Mr. McBain, and Justice Hunt McDonald held that the Adjudicator's reasons on the issue of use of Mr. McBain's personal information were "justifiable, transparent and intelligible" (at para 69). Justice Hunt McDonald was also unconcerned that the Adjudicator's reasons did not discuss the importance of cross-examination because the "Adjudicator properly limited her decision to the application of the *FOIP* in the circumstances" (at para 71).

The Adjudicator had also noted that the CBE originally disclosed Mr. McBain's information without a requirement to do so in a proceeding to which Mr. McBain was not a party. Further, *FOIP* section 40(1)(v) provides that the public body can only make disclosures on its own accord into legal proceedings where the Government of Alberta or the public body is itself a party, and thus should "only make disclosures of its own accord that relate specifically to its own, or the government's, involvement as a party to the proceedings" (at para 76). Justice Hunt McDonald held that these reasons were justifiable, intelligible and transparent (at para 77). She also noted that it was open to the public body to apply to the tribunal to allow disclosure of the documents; if this application were granted, then the information would be disclosed and subject to use for cross-examination (at para 77).

Justice Hunt McDonald upheld the Adjudicator's decision.

Commentary

Justice Hunt McDonald stressed that the Adjudicator's decision was not about the right to cross-examine witnesses, but rather about the "production and use of documents containing personal information under *FOIP* in the specific context of the *CBE* and the provisions of the *School Act*" (at para 42). Additionally, this was not a case about parties disclosing information during the course of litigation. Presumably, if you are a party, you must disclose relevant information

(subject to a claim of privilege). However, here we had a case about a party who happened to possess information about a witness in an unrelated matter. The party sought to use the information to impugn the credibility of the witness.

The Adjudicator had acknowledged that limiting what information a public body might introduce or use voluntarily or on its own motion might be seen as interfering with the judicial (or quasi-judicial) process (at para 42, citing the Adjudicator’s decision at paras 55-57). The Adjudicator also indicated that these limits would not apply to legal proceedings where the proceeding was related to the purpose for which the information was collected, which would be authorized under *FOIP* section 39(1)(a) (at para 42, citing the Adjudicator’s decision at paras 55-57). She also noted that *FOIP* section 3(c) applied to eliminate restrictions that might apply during the discovery process in legal proceedings.

One difficulty pointed out by the Adjudicator was that no processes for the disclosure of personal information in Board of Reference proceedings had been provided for under the regulations of the *School Act* (at para 42, citing the Adjudicator’s decision at paras 55-57). However, Justice Hunt McDonald held that the Adjudicator’s decision was made in light of this reality.

As stated by Justice Hunt McDonald, this decision demonstrates how one requires a “sophisticated understanding of the provisions of the *FOIP* and the realities of working with information as a public body under the *FOIP* regime” (at para 71). Justice Hunt McDonald also noted that the Adjudicator’s decision did not limit the importance of the legal tenet of cross-examination in any way (at para 71). In these circumstances, the proper procedure would be (as noted by Justice Hunt McDonald) for the public body to apply to the tribunal to allow disclosure of the information.

To subscribe to ABlawg by email or RSS feed, please go to <http://ablawg.ca>
Follow us on Twitter @ABlawg