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Police Information Check, Vulnerable Sector Check and Privacy Rights

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Case Commented On: *Edmonton (Police Service) v Alberta (Information and Privacy Commissioner)*, 2019 ABQB 587 (CanLII)

This case comes shortly after our Centre (Alberta Civil Liberties Research Centre (ACLRC)) published a report entitled *Collection, Storage and Disclosure of Personal Information by the Police: Recommendations for National Standards* (ACLRC Report) which tackled similar issues to those decided upon by the Court of Queen's Bench.

In this case, the appellant, Edmonton Police Service (EPS), sought judicial review of portions of a decision of Adjudicator Teresa Cunningham from the Office of the Information and Privacy Commissioner, under the provisions of the *Freedom of Information and Protection of Privacy Act (FOIP)*. The Adjudicator had ordered EPS: (1) not to use AB's personal information in contravention of Part 2 of *FOIP* (2) not to disclose AB's personal information in contravention of Part 2 of *FOIP*; and (3) to notify her and AB within fifty days of receiving these orders that EPS would comply with them (at para 5).

According to the Office of the Privacy Commissioner of Canada, personal information is data about an "identifiable individual". It usually means information about your age; marital status; religion; race; national or ethnic origin; medical, education and employment history; driver's licence and social insurance number, etc. (see ACLRC Report at pp 8-9).

Facts

On March 12, 2013, after working with young people for about eleven years, AB was told by his employer's representative that they had "information about a historical sexual assault allegation" given to them by EPS. AB was given a copy of an email from an EPS detective advising that the employer obtain a "vulnerable persons check/Enhanced Security" instead of a criminal record check only. The representative then demanded AB to provide an EPS police check (at para 8).

AB had previously provided an RCMP criminal record check to his employer, which disclosed no criminal convictions (at para 9). In late March, 2013, AB was suspended from his employment (at para 10).

As required by his employer, AB applied for an EPS police check, and on April 8, 2013, he signed EPS's Consent Form, which has five parts. The first part asks to check the appropriate box indicating the purpose of the Personal Information Check (PIC). AB checked "employment" (at para 11).

The second part of the Consent Form, which was filled out, contained details about the applicant and his employer (at para 12).

The third part relates to "vulnerable sector" and specifies that it must be completed if "you are working with or being involved with Vulnerable Persons." AB checked off that box (at para 13).

Part 4 is a consent for searches in relation to the vulnerable person sector (at para 14). Part 4 describes the search process and authorizes the RCMP to disclose the information to the police force or other authorized body making the request, and then authorizes the police force or authorized body to disclose it to the applicant (at para 15). AB signed this part (at para 16).

Part 5 is a consent for the PIC (at para 17). Part 5 contains a release and waiver in favour of the EPS and others "arising or in any way related to the police information check process described above" (at para 18). AB signed the waiver (at para 20).

On June 13, 2013, EPS issued a Police Information Check Certificate, signed by the Manager of that branch of EPS at the time. The Certificate states that the search revealed the police had files regarding the occurrence of two sexual assaults: on November 9, 2003 and May 22, 2006; and an assault July 19, 2006 (at para 21).

On July 19, 2013, a Vulnerable Sector Check (VSC) was issued that mentioned, in addition to the two sexual assaults described in the PIC, the occurrence of three sexual assaults on May 24, 1992; January 15, 1995 and November 9, 2003 (at para 22).

On August 13, 2013, AB made a *FOIP* request, which showed that an EPS detective had begun her own investigation of him following an allegation that he had sexually assaulted someone many years earlier, possibly when he was 18. The detective learned later that the allegation was in 1992. She was not investigating AB at the time. She received that information while she was investigating another person who told her of this alleged earlier assault. With that information, and not knowing if AB had ever been charged, the detective requested information on her own initiative by making many criminal record checks on AB. She also consulted within EPS as to how to contact AB's employer and what could be disclosed to the employer (at para 32).

In late September 2013, AB's employment was terminated after providing the PIC and VSC to his employer. He grieved his termination through his union, and a grievance arbitration was held in 2014 (at para 23) where he learned that EPS had disclosed personal information in 2011, stating to his employer "he should not be working with kids" without his knowledge or consent (at para 24).

The grievance arbitration also disclosed that in early January 2013, there had been a meeting between a representative of AB's employer and an EPS detective. An email was sent by the representative to other representatives of AB's employer, and it stated:

> The representative had gathered information from a meeting with an EPS detective, who had given him 'very specific and detailed information about AB's involvement with EPS;

> that the information is not being investigated by EPS; and that AB is listed on the EPS's 'EPROS' System (Edmonton Police Reporting and Occurrence System) as a sex offender[']. (at para 25)

In addition, AB learned that his employer knew in 2006 about the 1995 matter, which involved a finding of guilt and an absolute discharge when he was a youth. The information was protected by the then *Young Offenders Act* (YOA) at the time of the absolute discharge and then the *Youth Criminal Justice Act (YCJA)* "at the time of its apparent disclosure to AB's employer in 2006" (at para 26). AB complained to Alberta Information and Privacy Commissioner that EPS had gained access to his personal information held in its files and records and disclosed this information, without his consent, to his employer. He also complained that EPS had unsuitably used his personal information to create a PIC and a VSC (at para 2).

AB's complaint was referred to an Adjudicator who issued her decision on December 18, 2017 as Order F2017-87 (Adjudicator Decision). According to the Adjudicator, the disclosure to AB's employer violated Part 2 of *FOIP*. The Adjudicator also decided that EPS produced the PIC and the VSC without recognizing the nature of the information to be used in creating those reports (at para 3).

The judicial review application was made on the following grounds: (1) Misunderstanding of EPS Authority; (2) Misinterpreting *FOIP* and the term "identified"; (3) The Adjudicator ignored evidence; (4) The Adjudicator failed to consider all of the evidence; (5) The Adjudicator ignored evidence and unreasonably interpreted the *Freedom of Information and Protection of Privacy Regulation* in finding that the consent signed by the Complainant did not meet the requirements of the *Regulation*; and (6) The Adjudicator unreasonably interpreted s 39(1)(b) of the Act and s 7 of the *Regulation* in a manner that unreasonably limited EPS's discretion (at para 71).

Thus, the EPS sought judicial review of the portions of the Adjudicator's Decision that relate to the preparation of the PIC and VSC. The EPS did not appeal the portions of the decision relating to disclosures to AB's employer by the EPS detective (at para 6).

Decision

Justice Graesser held that the Adjudicator's Decision as a *whole* and in light of the record was reasonable. The isolated error(s) as identified by EPS's "treasure hunt for errors" had no impact on the overall reasonableness of the Adjudicator's conclusions (at para 206).

Discussion

1. Standard of Review

With respect to the standard of review, Justice Graesser stated that reasonableness, in judicial review, "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within

a range of possible, acceptable outcomes which are defensible in respect of the facts and law" citing *Dunsmuir v New Brunswick*, 2008 SCC 9 (CanLII) (*Dunsmuir v New Brunswick* at para 47) (*Edmonton Police Service* at para 78).

Justice Graesser also relied on *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 (CanLII), where the Supreme Court stated that:

> Reasonableness is a single standard that takes its colour from the context. One of the objectives of ***Dunsmuir*** was to liberate judicial review courts from what came to be seen as undue complexity and formalism. Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution.... There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome (*Edmonton Police Service* at para 79). (*Canada (Citizenship and Immigration) v Khosa* at para 59)

2. Adjudicator did not Misunderstand EPS Authority

Justice Graesser noted that the EPS had submitted an affidavit stating that the process followed by EPS in providing PICs and VSCs is the one adopted by the Alberta Association of Chiefs of Police in 2003. The affidavit added that information in a PIC and VSC could include "all police information or police files that contained information relevant to the Police Information Check request" (at para 44).

The affidavit also stated that the PICS Supervisor and PICS Manager looked into the nature and responsibilities of the position, people who the applicant would be dealing with, the frequency and recency of the assaults, and any pattern of behaviour that can be risk to public safety (at para 46). The affidavit mentioned that an individual may have not "cleared a Police Information Check if the individual had previously been the subject of a police investigation, regardless of whether the investigation was ongoing, suspended, or closed, and regardless of whether or not the complaint that led to the investigation resulted in charges or a conviction" (at para 48).

Justice Graesser mentioned that the affidavit added that the Supervisor determined that with respect to the November 2003 file, the May 22, 2006 file and the July 2006 matter, AB "has a long history of violence, he is a threat to youth & Children in his care and poses a risk working with vulnerable people" (at paras 49-51).

Moreover, Justice Graesser declared that the Adjudicator "correctly referenced the system under the *Criminal Records Act*, and accurately described the process adopted by the Alberta Association of Chiefs of Police." He added that the Adjudicator also considered the evidence in the affidavit provided by EPS, considered "a police service's legal authority to compile a PIC," and "concluded

that the Adjudicator was unable to find any specific Federal or Provincial authority for them to do so, stating that EPS relied on the Alberta Association of Chiefs of Police Policy (at para 103).

Justice Graesser mentioned that to the extent that the Adjudicator's Decision might be interpreted as stating that the authority of EPS to provide PICs and VSCs is governed by the *Criminal Records Act*, that would be incorrect and unreasonable. According to Justice Graesser, the *Criminal Records Act* does not purport to govern the collection of personal information or its disclosure: see, ss 6.3(3) and (4). This section deals only with records of convictions, not complaints or investigations (at para 104).

Justice Graesser added that there is no express statutory authority for a police force in Alberta to release any criminal record information to any third party, including a person seeking release of his or her own criminal record (or the absence of a criminal record) (at para 105). He added that Alberta policy is managed by the 2003 Alberta Association of Chiefs of Police Resolution (at para 106).

Justice Graesser affirmed that the Adjudicator did nothing other than reference the system that generally authorizes a police force to respond to a vulnerable sector check for convictions (at para 107).

3. Interpretation of the FOIP Act and the Term "Identified" was reasonable

Justice Graesser mentioned that the Adjudicator found that the disclosure by the detective to AB's employer in January 2013 breached AB's privacy rights (at para 66). He referred to her following reasoning:

> I find that the Complainant did not consent to the Public Body's use of his personal information to create the PIC or VSC within the terms of section 39(1)(b) of the *FOIP Act* or section 7 of the *Regulation*. As I find that the Public Body used the Complainant's personal information without valid consent in circumstances where it was required to obtain his consent to use it, I intend to order the Public Body to cease using the Complainant's personal information in its custody or control in contravention of the *FOIP Act* (*Edmonton Police Service* at para 67). (Adjudicator Decision at para 63)

Moreover, Justice Graesser noted that the cases cited by EPS did not make the Adjudicator's interpretation of "identify" unreasonable. According to Justice Graesser, the Adjudicator had the right to interpret "identify" in the context of protecting privacy concerns and in the context of her home statute. There were no restrictions on her interpretation (at para 141). The Adjudicator's reasons on this issue satisfy the standards of justification, transparency, intelligibility and defensibility (at para 142).

Justice Graesser affirmed that the reference to "police files" in the EPS Consent Form provides no description at all. According to Justice Graesser, to be valid, a consent needs to be an informed consent. "Police files" tells individuals what information the police collect and how and where they store it and for how long they store it (at para 144).

Justice Graesser added that "no individual would intuitively understand that "police files" would include information about unsubstantiated complaints to the police, matters that have been investigated by police for which no action was taken, or matters where charges were laid but the accused was acquitted" (at para 146).

EPS said that they are only providing the applicant with the information it has on the applicant who in turn decides to do with that information. Justice Graesser stated that that might be the case when someone is simply curious to see what the police may have on them. But in the context of a PIC request, the applicant must identify why he or she wants the search. For a VSC, it is known that a search is usually required for volunteer or employment purposes, whether it be to obtain a job in the vulnerable sector or to keep a job in the vulnerable sector. Justice Graesser added that EPS knows what use is intended to be made of the search, and that negative results on the search will most likely have negative results on the applicant (at para 147).

Justice Graesser referred to the *Investigation Report F14-01, Use of Police Information Checks in British Columbia*, 2014 BCIPC No 14 at 28 (*Investigation Report*): "information in the police agency's database was collected for law enforcement and changing its use to employment-related decisions for private or public-sector employers removes safeguards provided by the criminal justice system and leaves the individual the information is about without any recourse to challenge the accuracy of the information" (at para 148).

Justice Graesser recognized that Part 4 of the Consent Form allows limited release of the information gathered under that part, while Part 5 authorizes release "for law enforcement purposes." By signing the form, the applicant authorizes EPS to use the information for "law enforcement purposes" (at para 160). That is very broad that it does not provide a layperson with sufficient identification of the circumstances under which the information may be disclosed to allow for meaningful consent (at para 161).

Justice Graesser added:

> As an indication of what senior EPS personnel consider to be included in 'law enforcement purposes,' the detective who breached AB's privacy rights requested access to AB's police files specifying the law enforcement purpose for her request as 'duty to warn employer.' It is very doubtful that when signing Parts 4 and 5 an applicant understands that he or she is consenting to EPS disclosing police file information to anyone or any entity as long as the disclosure is made in the context of some aspect of police work (at para 162). Therefore, the Adjudicator's conclusion that the purpose described in the request is insufficient is reasonable. (at para 163)

4. Evidence and Reasonable Interpretation of the Regulation

Section 7(2)(b) of the *Regulation* states that the consent of an individual must specify how the personal information may be used.

The Adjudicator (Adjudicator Decision at para 60) defined the term "specify" as "name or mention expressly". She added that while the PIC waiver signed by AB refers to a search for information of general kinds being conducted, the waiver does not refer to the information that is located and considered relevant by the Public Body being included in a PIC (*Edmonton Police Service* at para 179).

Justice Graesser explained that the Adjudicator interpreted section 7(2)(b) of the *Regulation* as requiring disclosure reasonably necessary to allow an applicant sufficient identification of the information that would enable him/her to provide an informed consent to its use, that interpretation is reasonable (at para 181).

Justice Graesser mentioned that a good example in the materials provided to the Adjudicator is that the police files contained a complaint made to EPS which AB was unaware of. EPS did not contact him about it. The complaint was only put on a "police file" and there were no charges. Justice Graesser added that the question that can be posed here is the following: How could it be unreasonable for the Adjudicator to conclude that any use of AB's personal information, without it being first identified or made known to AB, had been consented to by AB? That would be like writing a "blank cheque" and handing it to someone without any restrictions on use (at para 182). Justice Graesser concluded that AB had no say in what information might be collected about him (at para 184).

5. Legislative Reform

Justice Graesser recognized that "in Alberta, PICs or VSCs are entirely unregulated other than under the *Act*. There is no statutory authorization for checks to be performed. They are only authorized by a service contract between the police service and the applicant. The terms are as specified by the police service. Essentially, in Alberta the system is: If you want a police check, we will give you one but only on our terms" (at para 199).

Justice Graesser mentioned that Ontario enacted the *Police Record Checks Reform Act*, SO 2015, c-30 to deal with the fairness of police records checks. This *Act* allows a process where an initial decision about non-conviction information may be reviewed (at para 201). Justice Graesser recognized that "until Alberta has similar legislation, applicants are essentially held ransom to a police force's mandated terms before information can be disclosed (at para 202)".

Justice Graesser added:

> The review process demonstrated in this case reveals that there is no objective oversight on what gets used and disclosed. 'Relevance checks' are unregulated and left to the subjective determination of the police employee tasked with reviewing requests. Fairness and objectivity are most certainly called into question when no differentiation is made between information on convictions and acquittals, or between unsubstantiated complaints resulting in no action and complaints that resulted in criminal charges. (at para 203)

At the end, Justice Graesser encouraged the Alberta Law Reform Institute to review legislation in Alberta similar to the one enacted in Ontario (at para 215) (see ACLRC Report at p 66).

Commentary

The effects of non-conviction disclosures can be tragic.

According to the police, any contact with them and any non-conviction record should be revealed on police record checks. Police forces disclose different kinds of information which makes it really difficult for individuals to know what is going to be included in their record check. Non-conviction records can be disclosed even if there was no charge or no findings of guilt since no law covers what can be revealed on a police record check. In Alberta, no law forbids employers from discriminating on the basis of conviction or non-conviction record, however, in other jurisdictions (e.g., federal, Ontario), employers cannot discriminate on the basis of a pardoned conviction (ACLRC Report at p 33).

Disclosing police records of individuals who have not been charged or who have had their charges withdrawn or dismissed violates the principle of the presumption of innocence. Despite the fact that there is no guilt against them, these individuals can lose any employment opportunities or can be fired from their current jobs. They have no opportunity to clear their name and they have no ways to defend themselves.

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