# access privacy conference 2015

**2014 - 2015**

**Highlights of Alberta Orders from the Commissioner's Office**

# The Year in Review

Over the past year there have been:

- 43 OPIC Orders, Decisions, Reconsiderations and Investigation Reports
- 4 Judicial Reviews
- 4 Court of Appeal judgements

# Questions that are Addressed

Section 4(1)(a) -- Information in a court file

Section 10(1) e …every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely

Section 16 -- third party business interests

Section 17 - personal privacy – Powers of attorney

Section 24 -- Advice from officials

Section 27 -- Privileged information
Section 30(1) -- The public body must give notice
Section 34 -- Manner of collection
Section 56 -- Powers of Commissioner in conducting investigations or inquiries
Section 72 -- Commissioner's Orders
Section 75 -- Adjudicator to investigate complaints and review decisions

# Section 4(1)(a) -- Information in a court file

…information in a court file, a record of a judge of the Court of Appeal of Alberta, the Court of Queen's Bench of Alberta or The Provincial Court of Alberta, a record of a master of the Court of Queen's Bench of Alberta, a record of a justice of the peace other than a non-presiding justice of the peace under the *Justice of the Peace Act*, a judicial administration record or a record relating to support services provided to the judges of any of the courts referred to …

Section 4(1)(a) encompasses several different types of records that are exempt from the operation of the FOIP Act.

These include: a record filed with the Court, and therefore “in a court file”

Information need not be filed with the Court to meet the requirements of section 4(1)(a) if it falls under one of the other categories of information listed in this provision (Orders F2013-13[17], F2014-42 [9]).

- section 4(1)(a) was possibly intended to protect the privacy of persons charged with offences as well as to protect the administration of justice from interference.

- 4(1)(a) is intended to recognize that Courts have inherent jurisdiction to control their own processes, including the manner in which information is collected, used, disclosed, and accessed in proceedings before them.

If it were not for section 4(1)(a), the manner in which information is collected, used, disclosed or accessed by parties in a Court proceeding, such as a trial, would be reviewable by the Commissioner in circumstances where a public body, such as the Crown,

is a party to a proceeding or otherwise has possession of information entered in such proceedings. Such a result would undermine the jurisdiction and independence of the courts.

Order F2014-42 [17]

In Order F2014-33, a request to a Police Service for access to the contents of his cell phone.

The contents of his cell phone included a video of the death of a person

Applicant's cell phone and its contents were entered into evidence at the Applicant's trial

The Public Body has made copies of the recorded information

The records at issue in this case are reproductions of the information on the Applicant's cell phone, which was accepted into evidence in a court proceeding. Applying the reasoning in Order F2007-021, copies of evidence would be subject to section 4(1)(a).

Order F2014-33 [7-8]

**Section 10(1) …every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely**

Unless a requestor's motive may have some bearing on the application of particular provisions, generally speaking, the requestor's identity is not to influence how a request is processed.

F2014-30 [16].

The fact that a public body decides to charge fees as authorized by sections 93 or 95 of the FOIP Act, but is unsuccessful at an inquiry into the matter, does not mean that the public body responded in bad faith or has otherwise failed to meet the requirements of section 10.

Order F2014-43 [27]

## Section 16 -- third party business interests

... must refuse to disclose to an applicant information that would reveal trade secrets or commercial, financial, labour relations, scientific or technical information of a third party….

The test is whether disclosure of the document "would reveal" protected information.

The Act strikes this balance between the demands of openness and commercial confidentiality in two main ways.

First, it affords substantive protection of the information by specifying that certain categories of third party information are exempt from disclosure.

Second, it provides procedural protection. The third party whose information is being sought has the opportunity, before disclosure, to persuade the institution that exemptions to disclosure apply and to seek judicial review of the institution's decision to release information which the third party thinks falls within the protected sphere. . . .

*Imperial Oil Limited v Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231 [67]

In *Imperial Oil Limited v Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231, the record in question was a Remediation Agreement.

The section does not necessarily require that the disputed document “contain” the disputed information, nor that the disputed document itself be the protected information.

The test is whether disclosure of the document "would reveal" protected information.

"A cursory review of the Remediation Agreement and the numerous exhibits attached to it confirms that its disclosure "would reveal" a great deal of protected information. Any finding to the contrary would clearly be unreasonable."

The expression “of the third party” must be interpreted in its context

- the section talks about private commercial or financial information relating to the business or affairs of that private party that has been supplied in confidence.
- The exception does not necessarily require ownership in the strict sense;

the Commissioner concluded that even if the information was “of the third party”, it somehow lost that characteristic if the public body then used the information for some purpose.  -- to negotiate or vary a settlement agreement or other disposition

The Commissioner held that certain information did not qualify under s. 16 because “they were developed at the request of the Public Body or in consultation with it”.

“of the third party” refers to the source of the information. In context, it clearly refers to information developed by the private entity, and disclosed to the public body.

The Section does not draw any distinctions based on:

- what is done with the information after it is received by the public body;
- whether the information was volunteered by the private entity, or requested or demanded by the public body.

Thus, information can be “of the third party” even if it is specifically requested by the public body, and even if the information did not exist until before the request was made.

*Imperial Oil Limited v Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231 [69-73]

# The "harm" …test  the disclosure of which could reasonably be expected to…

the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence “well beyond” or “considerably above” a mere possibility of harm in order to reach that middle ground

how much will ultimately depend on the nature of the issue and “inherent probabilities or improbabilities or the seriousness of the allegations or consequences”

Orders F2014-35 [27][92], F2014-44 [58], F2014-49 [87]

## **Section 17 -** personal privacy

"….decisions and acts made under a personal directive are performed in the exercise of a statutory authority with corresponding statutory obligations, in my view acts and decisions of an agent are not properly primarily characterized as the personal information of the agent, much the same as the acts of employees…."

Orders F2013-24/H2013-02 [30-34], F2013-50/H2013-03 [75-79]

On Judicial Review the court said:

That the agent happens to make decisions on behalf of a person does not in any way diminish the significance that as agent she has a separate legal personality and is entitled to protect her own privacy interests. The agent's privacy interests cannot be whittled away just because her decisions affect someone else.

*Covenant Health v Alberta (Information and Privacy Commissioner)*, 2014 ABQB 562 [108-120]

Application for records containing information about an incident in which he had been involved at the Edmonton Remand Centre - video tapes

….it would not be an unreasonable invasion of inmates' personal privacy to give access to a final recording if the Applicant used and disclosed the information in it exclusively for the purposes of instructing counsel and pursuing a legal case….

…use or disclosure for any other purpose would be an unreasonable invasion of third parties' personal privacy.

Public Body to give access to the recording by allowing the Applicant and / or his legal counsel to examine the record at the Public Body's premises, as doing so would ensure that the personal information was safeguarded from use or disclosure for any other purpose.

ORDER F2015-02

## Section 24 -- Advice from officials

….refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal … advice, proposals, recommendations,… analyses or policy options developed by or for a public body or a member of the Executive Council …. consultations or deliberations

The Act does not require a s. 24 discretion decision to have to provide a comprehensive account of his/her reasoning process. An officer meets legislative expectations if he/she considers relevant legal principles and facts before making her decision.

The *Act*' s goals are met if the head of a public body acts in good faith, demonstrates a solid grasp of the interests at stake and the relevant facts and makes a reasonable decision.

The final decision, according to the *Act*, must be made by the public body. The adjudicator is not the ultimate decision maker.

(*Covenant Health v Alberta (Information and Privacy Commissioner)*, 2014 ABQB 562 [149])

In *Covenant Health v Alberta (Information and Privacy Commissioner)*, 2014 ABQB 562, a review of F2013-24/ H2013-02 on consultations or deliberations

The OIPC narrow approach:

"To fall within section 24(1)(b) the consultations or deliberations must be (i) sought or expected to be part of the responsibility of a person, by virtue of that person's position, (ii) directed toward taking an action, and (iii) made to someone who can take or implement the action"

This definition is too restrictive. It is not consistent with the rest of the paragraphs in s. 24(1) which are drawn in broad language. There is no basis to insist that one of the persons in the group has the authority to “take or implement an action”.

*Covenant Health v Alberta (Information and Privacy Commissioner)*, 2014 ABQB 562 footnote 87

# Section 27 - Privileged information

….the public interest in protecting solicitor-client privilege will almost always outweigh any competing interests in information that is subject to this privilege. As a result, exercising discretion to withhold information that is subject to solicitor-client privilege does not require balancing interests on a case-by-case basis.

(Order F2014-38 [94][97-98], F2014-50/F2014-D-03 [77], F2014-51/ F2014-D-04 [77], F2014-52/ F2014-D-05 [74]).

*Imperial Oil Limited v Alberta (Information and Privacy Commissioner)*,

the Commissioner expressed the view that the law of settlement privilege as it applies to private disputes might not be appropriate when applied to disputes that have a public interest component.

# By the Court

….settlement privilege allows parties to discuss frankly and openly their respective strengths and weaknesses, and to disclose the basis upon which they would be prepared to resolve the dispute, without fear that anything said would be used against them in the future. Those consequences of the settlement privilege are held to be fundamental to the recognized advantages of settlement, and they apply equally to public and private disputes…

Section 27(2) of the *FOIPP Act* is in mandatory terms, and does not give the Commissioner any authority to override the settlement privilege by consideration of broader aspects of public policy, such as any perceived "public policy of openness".

*Imperial Oil Limited v Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231 [62-64]

*Imperial Oil Limited v Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231

The Commissioner argued that since "privilege" is specifically mentioned in s. 27 of the *FOIPP Act* it falls within his mandate, and deference should be accorded to his interpretation.

The court said:

Privilege is a legal concept with constitutional dimensions, and its interpretation is of central importance to the legal system as a whole:

Where the legislature uses words with a well established legal meaning, it must be presumed that it intended them to be applied in accordance with that meaning

the statute refers to “any type of legal privilege”, which is clearly a reference to the common law meaning.

The law of privilege must be the same whenever it is applied, and the chambers judge was correct in concluding that the standard of review on this issue is correctness.

*Imperial Oil Limited v Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231 [35-37]

## Section 30(1) -- The public body must give notice

third parties need not be invited to participate in the inquiry in the following circumstances: where the exception to access clearly applies to information in the records at issue, such that the information will not be disclosed to the applicant under the FOIP Act, or where it is clear that the exception to access does not apply to the information in the records at issue such that it must be disclosed.

Where it is unclear whether section 16 applies and where evidence from the third party could provide insight into the application of the exception, the third party ought to be invited to participate.

Order F2014-49 [20]

Section 34 -- manner of collection

Previous Orders have concluded that video surveillance is a direct collection

Order F2014-37 [23]

## Section 56 Powers of Commissioner in conducting investigations or inquiries

56**(1)** In conducting an investigation or an inquiry the Commissioner has all the powers, privileges and immunities of a commissioner under the *Public Inquiries Act*

Two powers found in the Act are relevant:

- summoning any persons as witnesses and of requiring them to give evidence on oath, orally or in writing, and to produce any documents, papers and things that
- the same power to enforce the attendance of persons as witnesses and to compel them to give evidence and to produce documents as a judge of the Court of Queen's Bench.

Orders F2014-50/F2014-D-03 [53-54], F2014-51/ F2014-D-04 [54-55], F2014-52/ F2014-D-05 [51-52]

In Orders F2014-50/F2014-D-03, F2014-51/ F2014-D-04 and F2014-52/ F2014-D-05 a Public Body submitted in its initial submissions an Opinion Letter as evidence in support of their claim that s. 27(1) of the Act applies to the records that were at issue.

An External Adjudicator exercised her discretion to find the Opinion Letter inadmissible:

- the Public Body may have waived privilege.
- the Opinion Letter attempts to answer the ultimate question in the Inquiry
- the Opinion Letter did not meet the rules for the admissibility of expert evidence
- The Opinion Letter did not constitute evidence from an expert
- it would be impossible for the Applicants to rebut the evidence

She ordered the Public Body to comply with its duty under the Act under s. 56(3) and 72(3)(a) to produce and to make available for examination the original or a copy of the records her under s. 56(2) of the Act

Orders F2014-50/F2014-D-03 [169-171], F2014-51/ F2014-D-04 [177-179], F2014-52/ F2014-D-05 [174-176]

56**(3)** Despite any other enactment or any privilege of the law of evidence, a public body must produce to the Commissioner within 10 days any record or a copy of any record required under subsection (1) or (2).

….the rule of strict construction demands of statutory language the highest degree of clarity, explicitness and specificity in order to support a conclusion that it was intended to authorize infringements of solicitor-client privilege.

That is, it requires language which is absolutely clear, such that the underlying legislative intent is completely explicit. This requires specific reference to solicitor-client privilege.

University of Calgary v JR, 2015 ABCA 118 [48]

**Section 72(3)(a)** allows the Commissioner to order the performance of a duty imposed by the Act.

*Imperial Oil Limited v Alberta (Information and Privacy Commissioner)*, 2014 ABCA 23

- in analyzing the exceptions the Commissioner had occasion to express opinions on statutes and procedures over which he has no expertise, e.g. the *Environmental Protection and Enhancement Act*,
- The Commissioner had argued that the presumptive standard of reasonableness applies not only to his interpretation of the Act but also to any related statutes.
- That may be so with respect to other statutes that deal with the disclosure of public information
- It does not apply to all public statutes just because a disclosure issue is raised with respect to them.

- The Commissioner has no expertise in the interpretation and application of environmental statutes and policies. The tribunals and public officials responsible for those statutes are in a better position to decide how they best operate, and the extent to which disclosure of sensitive information will undermine their regulatory regime.
- The Commissioner's expertise in disclosure issues calls for deference, but only so far as the Commissioner extends deference to the expertise of the environmental administrators where their expertise is engaged.

- It follows that a reviewing court should extend limited deference to the Commissioner's interpretation of legislation over which he has no expertise.
- Rather, the reviewing court should extend deference to, and should favour the interpretation of that collateral legislation which has been adopted by the specialized tribunals that routinely administer it.
- *Imperial Oil Limited v Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231 [38-43]

75 Adjudicator to investigate complaints and review decisions

75**(1)** The Lieutenant Governor in Council may designate a judge of the Court of Queen's Bench of Alberta to act as an adjudicator

In a JR the Commissioner delegated inquiry powers to what, at the hearing of this appeal, she called an "Adjudicator" – although this term, so used, is misleading and as such improper.

"Adjudicator" is a defined term……., referring to a judge of the Court of Queen's Bench designated under section 75

The person who received the inquiry powers here was not an "Adjudicator" but rather a delegate, appointed under section 61, of the Commissioner's duties, powers and functions.

University of Calgary v JR, 2015 ABCA 118 [4]

Thank You for your kind attention!

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