ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 2000-016

October 31, 2000

EDMONTON POLICE SERVICE

Review Numbers 1845, 1846, 1870

Office URL: http://www.oipc.ab.ca

Summary: The Applicant sent three access requests under the *Freedom of Information and Protection of Privacy Act* to the Edmonton Police Service. The requests asked for access to all records of communication received by, or written by, the Chief of the Edmonton Police Service regarding three named police officers. The Edmonton Police Service refused to confirm or deny the existence of the records pursuant to section 11(2). The Commissioner found that the requirements of section 11(2) were met and, therefore, he upheld the Edmonton Police Service's decision to refuse to confirm or deny the existence of a record.

Statutes Considered: AB: *Freedom of Information and Protection of Privacy Act,* S.A. 1994, c.F-18.5, ss. 11, 16, 17, 19, 57(3), 66(3), 66(5), 68. **Canada:** *Access to Information Act,* R.S.C. 1985, c.A-1, ss. 47(1), 63(1), 64.

Authorities Considered: AB: Order 97-009, Order 98-006, Order 98-009, Order 99-028, Order 2000-004. **ON:** Order 207 (1990).

I. BACKGROUND

[para 1.] On February 11, 2000, the Applicant sent three access requests, numbered 1845, 1846 and 1870, under the *Freedom of Information and Protection of Privacy Act*

(the “Act”) to the Edmonton Police Service (the “Public Body”). The Public Body received these requests on February 15, 2000. The requests asked for access to all records of communication received by, or written by, the Chief of the Edmonton Police Service regarding three named police officers.

[para 2.] On February 22, 2000, the Applicant faxed the Public Body a letter which further clarified the nature of requests 1845 and 1846. In that letter, the Applicant stated that requests 1845 and 1846 should not focus on any particular topic or subject, but rather should focus on all records of communication regarding the two police officers named in these requests.

[para 3.] On March 7, 2000, the Public Body sent two letters to the Applicant stating that, pursuant to section 11(2)(a), it was refusing to confirm or deny the existence of the records requested in regard to requests 1845 and 1846. On March 8, 2000, the Public Body sent a letter to the Applicant stating that, pursuant to section 11(2), it was refusing to confirm or deny the existence of the records requested in regard to request 1870.

[para 4.] On March 9, 2000, the Applicant requested a review of the Public Body’s decision in regard to requests 1845 and 1846. On March 20, 2000, the Applicant requested a review of the Public Body’s decision in regard to request 1870.

[para 5.] Requests 1845, 1846 and 1870 were set down as one written inquiry.

[para 6.] On May 2, 2000, the Public Body provided my Office with two submissions: a submission that could be provided to the Applicant (the “open initial submission”) and an *in camera* submission that could not be provided to the Applicant. The Applicant provided my Office with an initial submission on May 11, 2000. The Public Body did not submit a rebuttal; however, it did submit two supplementary *in camera* affidavits on May 26, 2000. The Applicant submitted a rebuttal on May 26, 2000.

[para 7.] The Public Body’s open initial submission and the Applicant’s initial submission were exchanged on May 16, 2000. The Applicant’s rebuttal was sent to the Public Body on June 1, 2000.

[para 8.] In addition, on June 29, 2000, I granted the Applicant the opportunity to make a supplementary submission regarding whether the Public Body correctly applied section 11(2)(b) to requests 1845 and 1846. In response, the Applicant sent my Office a supplementary submission on July 18, 2000.

[para 9.] This Order proceeds on the basis of the Act as written after the amendments to the Act came into force on May 19, 1999.

II. ISSUES

[para 10.] There are five issues in this inquiry:

(A) Is the Public Body entitled to submit an *in camera* submission?

(B) Is the Applicant's lawyer entitled to access to information regarding the existence and/or content of the records?

(C) Is the Public Body required to specify, to the Applicant, what portions of sections 16, 17 and 19 it is relying on under section 11(2) and to itemize, to the Applicant, the probable injury under section 17?

(D) Is the Public Body entitled to claim, at the inquiry stage, an additional section as authority to refuse to confirm or deny the existence of a record?

(E) Did the Public Body correctly apply section 11(2) of the Act (refusal to confirm or deny the existence of a record)?

III. DISCUSSION

(A) Is the Public Body entitled to submit an *in camera* submission?

[para 11.] The Public Body submitted a portion of its initial submission *in camera*. The Applicant objected to the Public Body's *in camera* submission. The Applicant argued that the Public Body's entire submission should be disclosed to the Applicant.

[para 12.] In determining whether to allow the Public Body to submit an *in camera* submission, I had to determine whether allowing this submission would breach the principles of procedural fairness. In my view, it did not. In Orders 97-009, 98-006 and 99-028, I stated that in order to determine whether something is procedurally fair, I must consider three things: the statutory provisions under the Act, the nature of the matter to be decided and the circumstances of the case.

[para 13.] One of the main principles of procedural fairness is that a person must be given an adequate opportunity to be heard or, in other words, the person must know the case that is being made against him or her and be given the opportunity to answer to it. However, the provisions of the Act also make it clear that the standard of procedural fairness required under the Act is less than is required of other decision makers.

[para 14.] Particularly relevant to this inquiry is section 66(3). While this section provides the parties with an opportunity to make representations to the Commissioner, it specifically limits the right of the parties to be present during, to have access to, or to comment on another person's representations made to the Commissioner. Section 66(3) reads:

66(3) The person who asked for the review, the head of the public body concerned and any other person given a copy of the request for the review must be given the opportunity to make representations to the Commissioner during the inquiry, but no one is entitled to be present during, to have access to or to comment on representations made to the Commissioner by another person.

[para 15.] I also note that section 57(3) of the Act is relevant to this issue. In particular, section 57(3)(b) states that in conducting an investigation or inquiry under this Act, if the head of a public body does not indicate whether the information exists, I must take every reasonable precaution to avoid disclosing and must not disclose whether the information exists. Section 57(3) reads:

57(3) In conducting an investigation or inquiry under this Act and in a report under this Act, the Commissioner and anyone acting for or under the direction of the Commissioner must take every reasonable precaution to avoid disclosing and must not disclose

(a) any information the head of a public body would be required or authorized to refuse to disclose if it were contained in a record requested under section 7(1), or

(b) whether information exists, if the head of a public body in refusing to provide access does not indicate whether the information exists.

[para 16.] The reason for section 57(3)(b) is clear. If I disclosed the Public Body's *in camera* submission regarding the Public Body's reasons for refusing to confirm or deny the existence of the records requested, I would, in the process, disclose whether the records exist. This would defeat the purpose of the inquiry.

[para 17.] The issue before me is whether the Public Body correctly applied section 11(2) of the Act in refusing to confirm or deny the existence of the records requested by the Applicant. Due to the statutory provisions in the Act, the nature of the matter to be decided and the circumstances of the case before me, I decided to allow the Public Body to submit a portion of its submission *in camera.* In my view, this was the only way to allow the Public Body to make full and complete arguments without disclosing whether the records exist.

(B) Is the Applicant's lawyer entitled to access to information regarding the existence and/or content of the records?

[para 18.] The Applicant, in its written submission, requested that I provide its lawyer with information regarding the existence and/or content of any records. The Applicant stated that if I provided its lawyer with this information, its lawyer would undertake not to reveal this information to the Applicant. The Applicant argued that its lawyer needed this information in order to prepare an intelligent and responsive

submission. In addition, the Applicant argued that this is the procedure undertaken by the Federal Court of Appeal when it conducts a hearing in regard to the federal *Access to Information Act* (the "Federal Act"). The Applicant stated that the Federal Court of Appeal uses this procedure even though section 64 of the Federal Act prohibits the Federal Commissioner from disclosing whether the information exists. In essence, the Applicant is arguing that because the Federal Court of Appeal discloses this type of information, I should also disclose this type of information notwithstanding a similar prohibition under section 57(3) of the Alberta Act.

[para 19.] After a careful review of the arguments, the Act and the Federal Act, I have decided not to give the Applicant's lawyer access to information regarding the content and/or existence of the records. In my view, the principle of procedural fairness does not compel this disclosure, for three reasons.

[para 20.] First, section 57(2) of the Alberta Act states that the Commissioner has the discretion to disclose, or may authorize anyone acting for or under the direction of the Commissioner to disclose information that is necessary to conduct an investigation or inquiry under the Alberta Act. However, as I stated earlier in this Order, section 57(3)(b) of the Alberta Act clearly states that, if the head of a public body does not indicate whether certain information exists, in conducting an investigation or inquiry, the Commissioner and anyone acting for or under the direction of the Commissioner must take every reasonable precaution to avoid disclosing and must not disclose whether information exists.

[para 21.] The Federal Act contains similar provisions. Sections 47(1), 63(1) and 64 of the Federal Act read as follows:

> *47(1) In any proceedings before the Court arising from an application under section 41, 42 or 44, the Court shall take every reasonable precaution, including, when appropriate, receiving representations ex parte and conducting hearings in camera, to avoid the disclosure by the Court or any person of*
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> > *(a) any information or other material on the basis of which the head of a government institution would be authorized to refuse to disclose a part of a record requested under this Act; or*
> >
> > *(b) any information as to whether a record exists where the head of a government institution in refusing to disclose the record under this Act, does not indicate whether it exists.*
>
> *63(1) The Information Commissioner may disclose or may authorize any person acting on behalf or under the direction of the Commissioner to disclose information*
>
> > *(a) that, in the opinion of the Commissioner, is necessary to*

(i) carry out an investigation under this Act, or

(ii) establish the grounds for findings and recommendations contained in any report under this Act; or

(b) in the course of a prosecution for an offence under this Act, a prosecution for an offence under section 131 of the Criminal Code (perjury) in respect of a statement made under this Act, a review before the Court under this Act or an appeal therefrom.

64 In carrying out an investigation under this Act and in any report made to Parliament under section 38 or 39, the Information Commissioner and any person acting on behalf or under the direction of the Information Commissioner shall take every reasonable precaution to avoid the disclosure of, and shall not disclose,

(a) any information or other material on the basis of which the head of a government institution would be authorized to refuse to disclose a part of a record requested under this Act; or

(b) any information as to whether a record exists where the head of a government institution, in refusing to give access to the record under this Act, does not indicate whether it exists.

[para 22.] Section 47(1) of the Federal Act refers to a "Court", which is defined in section 3 as the Federal Court – Trial Division. Sections 63(1) and 64 of the Federal Act refer to the Federal Commissioner. Under the Federal Act, the Federal Court – Trial Division reviews the Federal Commissioner's decisions. The Federal Court – Trial Division serves a review function similar to my review of public bodies' decisions under the Alberta Act.

[para 23.] As these sections do not refer to the Federal Court of Appeal, the Federal Court of Appeal would not be bound by these sections, and, therefore, these sections are not relevant when considering the procedure of the Federal Court of Appeal. I find that the procedure undertaken by the Federal Court of Appeal would not apply in this inquiry any more than it would apply to a review by the Federal Court -Trial Division under the Federal Act.

[para 24.] Second, I note that as an administrative tribunal, I am given the power to develop a set of procedures and the power to control the inquiry process. I am not bound by procedures of other courts or tribunals. In Order 98-006, I cited a quotation from Ontario Order 207 (1990) wherein the Ontario Commissioner emphasized the ability of an administrative tribunal to be the master over its own procedure:

> In my view, the Commissioner or his/her delegate has the fundamental power to control the inquiry process. In Re Cedarvale Tree Services Ltd. and Labourers' Int'l Union of North

America, Local 183, (1971) 3 O.R. 832 (Ontario Court of Appeal), Mr. Justice Arnup, at page 841, stated as follows:

> [T]he Board [Ontario Labour Relations Board] is a master of its own house not only as to all questions of fact and law falling within the jurisdiction conferred upon it by the Act, but with respect to all questions of procedure when acting within that jurisdiction. In my view, the only rule which should be stated by the Court (if it be a rule at all) is that the Board should, when its jurisdiction is questioned, adopt such procedure as appears to be just and convenient in the particular circumstances of the case before it.

[para 25.] Third, it appears that the Federal Court of Appeal provides an Applicant's lawyer with this information because it acknowledges that lawyers, by the nature of their profession, can be bound by an undertaking of confidentiality. A lawyer's undertaking is any promise made by a lawyer that is relied upon in some manner. An undertaking is a matter of utmost good faith and must be personally fulfilled by the lawyer giving it, whether or not the recipient of the undertaking is another lawyer. There are serious professional consequences for a lawyer who breaches an undertaking.

[para 26.] However, notwithstanding the nature of a lawyer's undertaking, it is my view that if I gave the Applicant's lawyer information regarding the existence of the records and/or provided the Applicant's lawyer with a copy of the records, it would, in essence, set a precedent and force all future applicants to hire a lawyer if they wanted to gain access to this type of information to prepare their submission. This would render useless section 66(5) which gives applicants, among others, the choice whether to be represented by a lawyer or an agent. Applicants who did not hire a lawyer or could not afford a lawyer, would not gain the same access and would not be able to use this information. I do not think it is appropriate to create this type of inequity between applicants.

[para 27.] In summary, I find that due to the statutory provisions in the Act, the nature of the matter to be decided and the circumstances of the case before me, the Applicant's lawyer is not entitled to access to information regarding the existence and/or content of the records. In my view, procedural fairness under the Act does not require this type of disclosure.

(C) Is the Public Body required to specify, to the Applicant, the portions of sections 16, 17 and 19 it is relying on under section 11(2) and to itemize, to the Applicant, the probable injury under section 17?

[para 28.] The Applicant argues that the Public Body should specify, to the Applicant, what portions of sections 16, 17 and 19 it is relying on under section 11(2). The Applicant also states that if the records exist, the Public Body should, in regard to section 17, itemize to the Applicant the probable injury that would occur from the disclosure of each of the records. I disagree.

[para 29.] If the Public Body had to disclose what portions of sections 16, 17 and 19 it is relying on, or the probable harm that may occur under section 17, the Public Body

would also inadvertently disclose whether the records exist. This, in turn, would defeat the purpose behind section 11(2).

(D) Is the Public Body entitled to claim, at the inquiry stage, an additional section as authority to refuse to confirm or deny the existence of a record?

[para 30.] On March 7, 2000, the Public Body sent two letters to the Applicant stating that, pursuant to section 11(2)(a), it was refusing to confirm or deny the existence of the information specified in requests 1845 and 1846. However, in the Public Body's initial submission, the Public Body cited both sections 11(2)(a) and 11(2)(b) as its authority to refuse to confirm or deny the existence of this information. In its submission, the Applicant argued that the Public Body should not be permitted to claim section 11(2)(b) at the inquiry stage. In essence, the Applicant argued that it would be prejudiced as it would not have reasonable notice that the Public Body was claiming an additional section.

[para 31.] In Order 97-009, I discussed the rules of natural justice and stated that, under the strict rules of natural justice, a person must be given adequate notice of the case to be met and the substance of the matter. This includes pre-hearing disclosure of the arguments to be met, among other things.

[para 32.] After a review of the arguments of the parties and a review of the procedure undertaken in this inquiry, I find that the Applicant was given adequate notice of the issues to be met and the substance of the matter, and was given adequate opportunity to comment on those matters. The Public Body provided my Office with an initial submission on May 2, 2000. In that submission, the Public Body clearly stated that it was relying on both sections 11(2)(a) and 11(2)(b) for requests 1845 and 1846. This submission was sent to the Applicant on May 16, 2000. The Applicant's rebuttal submission was due on May 26, 2000. The Applicant therefore had 10 days to submit a rebuttal submission in regard to both sections 11(2)(a) and 11(2)(b). In addition, on June 29, 2000, I granted the Applicant the opportunity to provide a supplementary submission regarding the application of section 11(2)(b) to requests 1845 and 1846. In response, the Applicant sent supplementary submission to my Office on July 18, 2000.

[para 33.] Consequently, I find that the Public Body is entitled to claim section 11(2)(b) in regard to requests 1845 and 1846. In my view, the Applicant was given adequate notice that the Public Body would be claiming section 11(2)(b) for requests 1845 and 1846 and was given an adequate opportunity to comment on that matter. I find that the requirements for procedural fairness have been met in the circumstances of this case.

(E) Did the Public Body correctly apply section 11(2) of the Act (refusal to confirm or deny the existence of a record)?

[para 34.] Section 11 reads:

11(1) In a response under section 10, the applicant must be told

(a) whether access to the record or part of it is granted or refused,

(b) if access to the record or part of it is granted, where, when and how access will be given, and

(c) if access to the record or to part of it is refused,

(i) the reasons for the refusal and the provision of this Act on which the refusal is based,

(ii) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and

(iii) that the applicant may ask for a review of that decision by the Commissioner or an adjudicator, as the case may be.

(2) Despite subsection (1)(c)(i), the head of a public body may, in a response, refuse to confirm or deny the existence of

(a) a record containing information described in section 17 or 19, or

(b) a record containing personal information about a third party if disclosing the existence of the information would be an unreasonable invasion of the third party's personal privacy.

[para 35.] In Orders 98-009 and 2000-004, I stated that, in order for a Public Body to correctly apply section 11(2)(b), the Public Body must fulfill certain principles. These same principles also apply to section 11(2)(a). These principles are:

a. Appropriate process – The Public Body must search for the records, review the records to determine whether responsive records exist and provide any such records to the Commissioner for review;

b. Correct application of section 11(2) – The Public Body must determine whether the required circumstances exist; that is determine under:

(i) Section 11(2)(a) – whether the records, if they exist, contain the information described in section 17 and 19.

(ii) Section 11(2)(b) – whether the disclosure of the existence of the information would be an unreasonable invasion of a third party's personal privacy. This determination involves applying the provisions of section 16 for guidance.

c. Proper exercise of discretion under section 11(2) – The Public Body must consider the objects and purpose of the Act and provide evidence of what was considered.

[para 36.] The Public Body states in its submission that it used the proper process, correctly applied the section and properly exercised its discretion by considering the objects and purpose of the Act.

[para 37.] In its submission, the Public Body states that when applying section 11(2) the same analysis should be used in regard to section 11(2)(a) as is used for section 11(2)(b). In this inquiry, the Public Body argued that section 11(2)(a) will only apply if the record contains information described in section 17 or section 19 and the disclosure of the existence of the information would reveal information described in section 17 or section 19.

[para 38.] I do not agree with the Public Body's analysis of section 11(2)(a). The Public Body appears to have imposed a more stringent test than was necessary to fulfill this section. Under section 11(2)(a), a public body may refuse to confirm or deny the existence of a record if the record contains information described in section 17 or 19. It is only under section 11(2)(b) that a public body must go one step further. Under section 11(2)(b), a public body may refuse to confirm or deny the existence of a record if it contains personal information about a third party and if disclosing the existence of the information would be an unreasonable invasion of a third party's personal privacy. Section 11(2)(b) will only apply if both of these criteria are fulfilled.

[para 39.] I have reviewed section 11(2) and agree that it applies to the access requests at issue. I find that, notwithstanding the Public Body's overly stringent application of section 11(2)(a), the requirements of section 11(2) have been met in this inquiry. I find that the Public Body used the correct process, properly claimed section 11(2) as its authority to refuse to confirm or deny the existence of a record, and properly exercised its discretion in this regard.

IV. ORDER

[para 40.] I make the following Order under section 68 of the Act.

Issue A: Is the Public Body entitled to submit an *in camera* submission?

[para 41.] I find that the Public Body is entitled to submit an *in camera* submission. After a review of the relevant statutory provisions, the nature of the matter to be decided and the circumstances of the case, I find that allowing the Public Body to submit a portion of its submission *in camera* would not breach the principle of procedural fairness.

Issue B: Is the Applicant's lawyer entitled to access to information regarding the existence and/or content of the records?

[para 42.] I find that the Applicant's lawyer is not entitled to access to information regarding the existence and/or content of the records. After reviewing the relevant statutory provisions, the nature of the matter to be decided and the circumstances of the case, I find that the principle of procedural fairness does not compel this disclosure.

Issue C: Is the Public Body required to specify, to the Applicant, the portions of sections 16, 17 and 19 it is relying on under section 11(2) and to itemize, to the Applicant, the probable injury under section 17?

[para 43.] I find that the Public Body is not required to specify, to the Applicant, what portions of sections 16, 17 and 19 it is relying on under section 11(2) nor is the Public Body required to itemize to the Applicant the probable injury under section 17. After reviewing the relevant statutory provisions of the Act, the nature of the matter to be decided and the circumstances of the case, I find that the principle of procedural fairness does not compel this disclosure.

Issue D: Is the Public Body entitled to claim, at the inquiry stage, an additional section as authority to refuse to confirm or deny the existence of a record?

[para 44.] I find that the Public Body is entitled to claim section 11(2)(b) in regard to requests 1845 and 1846. I find that the requirements for procedural fairness have been met in the circumstances of this case as the Applicant was given adequate notice that the Public Body would be claiming section 11(2)(b) for requests 1845 and 1846 and was given an adequate opportunity to comment on that matter.

Issue E: Did the Public Body correctly apply section 11(2) of the Act (refusal to confirm or deny the existence of a record)?

[para 45.] I find that the requirements of section 11(2) of the Act are met in this inquiry. Therefore, I uphold the Public Body's decision to refuse to confirm or deny the existence of a record.

Robert C. Clark
Information and Privacy Commissioner