ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 2001-011

March 15, 2001

ALBERTA JUSTICE

Review Number 1992

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

Summary: The Applicant asked Alberta Justice for any correspondence or information related to him or his company. Alberta Justice refused to disclose the records to the Applicant on the grounds that the information was related to and used in the exercise of prosecutorial discretion (section 19(1)(d.3) of the FOIP Act). The Assistant Commissioner upheld Alberta Justice's decision to withhold the information.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, S.A. 1994, c. F-18.5, ss.19(1)(a), 19(1)(d.2)(d.3), 23(1)(a), 26(1)(a)(b)(c),68. **B.C**.:*Freedom of Information and Protection of Privacy* Act, R.S.B.C., c. 165, s. 15(1)(g).

Cases Cited: *Krieger v. Law Society of Alberta* [2000] A.J. No. 1129; *Beare Regina v. Higgins* (1988), 45 C.C.C. (3d) 57 at 76.

I. BACKGROUND

[para. 1.] The Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the "Act") on June 9, 2000 to Alberta Justice, Criminal Justice Division. He requested:

> …please provide me with any and all correspondence that relates or states my name […] or […Inc.]…Also any written information or further correspondence referring to my name, or […Inc.], by an individual to Alberta Justice or the Alberta Gaming and Liquor Commission would be appreciated.

[para. 2.] By letter dated June 20, 2000, Alberta Justice refused the Applicant's request on the basis of sections 19(1)(a) and 19(1)(d.2).

[para. 3.] On August 16, 2000, the Applicant made a request to the Commissioner to review Alberta Justice's decision. He stated that there is no real basis for denying the information since Alberta Justice's request for an investigation "are lacking any substance or credible reason for an investigation. We believe the information provided which initiated the investigation is of no consequence nor has it any basis and may be libelous and slander."

[para. 4.] On November 17, 2000, Alberta Justice wrote to the Applicant and advised him that the investigation had been concluded. His access request had again been reviewed and it was concluded that the four records responsive to his request would be denied on the basis of sections 19(1)(d.3) (information related to and used in the exercise of Crown discretion, 23(1)(a) (advice from officials), and 26(1)(a),(b) and (c) (privileged information).

[para. 5.] Mediation was not successful, and the matter was set down for a written inquiry on March 15, 2001. Alberta Justice submitted a written submission and the records. The Applicant did not submit a written submission.

II. RECORDS AT ISSUE

[para. 6.] There are three records at issue in this inquiry:

1. Letter - three pages-This record was authored by an Alberta Justice lawyer. It recites a number of facts and then comes to a conclusion respecting prosecution.
2. Briefing Note - three pages-This record was also authored by an Alberta Justice lawyer. The author examined and gave an opinion and advice regarding information Alberta Justice possessed.
3. Series of e-mails-This two-page record contains a series of e-mails between officials of Alberta Justice and contains information used by Alberta Justice in making its decision. It also contains legal advice.

[para. 7.] There are two non-responsive records included in the records submitted to my Office. I agree with Alberta Justice that the memorandum is not responsive to the Applicant's request. In addition, there is a one-page record that appears to be a system search regarding an individual. I also find that it is non-responsive.

III. ISSUES

[para. 8.] There are three issues in this inquiry:

Issue A: Did Alberta Justice properly apply section 19(1)(d.3) (information related to and used in the exercise of prosecutorial discretion) to the records?

Issue B: Did Alberta Justice properly apply section 23(1)(a) (advice from officials) to the records?

Issue C: Did Alberta Justice properly apply section 26(1)(a), (b), (c) (privileged information) to the records?

IV. DISCUSSION

Issue A. Did Alberta Justice properly apply section 19(1)(d.3) (information related to and used in the exercise of prosecutorial discretion) to the records?

(i) General

[para. 9.] Section 19(1)(d.3) reads:

> *19(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*
>
> > *(d.3) reveal any information relating to or used in the exercise of prosecutorial discretion,*

[para. 10.] The Commissioner has never considered this exception as it was added to the Act as part of the May 1, 1999 amendments.

[para. 11.] In order to apply this exception to the records, it is necessary to determine what "in the exercise of prosecutorial discretion" means.

[para. 12.] Alberta Justice stated in its submission:

> Crown counsel have a wide horizon of discretion. Areas of discretion can be traced from the pre-charge advice given to the police, the decision to charge, the conduct of the case, the position on sentence, appeal considerations, to post-conviction or post-sentence consultation with probation and parole authorities. A Crown Counsel's decision to charge a person with an offence is the point in time from which the accused faces the risk of formal criminal sanctions. In addition, the Crown has authority to direct that investigations be conducted and to continually give advice during the course of an investigation.

[para. 13.] The Alberta FOIP legislation does not define exercise of prosecutorial discretion. However, section 15(1)(g) of the B.C. legislation has this same exception.

[para. 13.] Unlike the Alberta legislation, the B.C. legislation included a definition in Schedule 1 of the Act of what the "exercise of prosecutorial discretion" means. It says:

> …the exercise by Crown counsel, or by a special prosecutor, of a duty or power under the *Crown Counsel Act,* including the duty or power
>
> (a) to approve or not to approve a prosecution,
> (b) to stay a proceeding,
> (c) to prepare for a hearing or trial,
> (d) to conduct a hearing or trial,
> (e) to take a position on sentence, and
> (f) to initiate an appeal.

[para. 14.] Case law also sheds light on what "exercise of prosecutorial discretion" means.

[para. 15.] In the decision *Krieger v. Law Society of Alberta* [2000] A.J. No. 1129, the Court of Appeal discussed the issue of disclosure in relation to the prosecutor's discretion. Mr. Justice Sulatycky stated:

> The prosecutor's discretion arises from the Attorney General on whose behalf Crown prosecutors act. The Attorney General is a member of the executive and is charged with the responsibility to represent the interest of the community in seeing that justice is done. The Crown prosecutor's role in this process was discussed by Lamer J. (as he then was) in Nelles v. R. et al. (1989), 49 C.C.L.T. 217 (S.C.C.)…Lamer J. at p. 237 reviewed the powers of Crown prosecutors and discussed the historical reasons for prosecutorial discretion:
>
> > Among the many powers of a prosecutor are the following: the power to detain in custody, the power to prosecute, the power to negotiate a plea, the power to charge multiple offences, the power of disclosure/non-disclosure of evidence before trial, the power to prefer an indictment, the power to proceed summarily or by indictment, the power to withdraw charges, and the power to appeal.

[para. 16.] Even though the concept of "exercise of prosecutorial discretion" is vague, the Supreme Court of Canada has recognized that it is critically important to the justice system. In the decision *Beare Regina v. Higgins* (1988), 45 C.C.C. (3d) 57 at 76, the Supreme Court of Canada said that although the Criminal Code provides no guidelines for the exercise of prosecutorial discretion, the day-to-day operation of law enforcement and the criminal justice system clearly depends upon the exercise of such discretion.

[para. 17.] In my view, the information contained in the records qualifies as information that relates to the exercise of prosecutorial discretion.

(ii) Did Alberta Justice exercise its discretion properly under section 19(1)(d.3)?

[para. 18.] Section 19(1) is a discretionary exception because it authorizes a public body to refuse access to information, but does not require a public body to do so. In Order 96-017, the Commissioner discussed the two-step decision-making process a public body must do when claiming a discretionary exception.

[para. 19.] In an inquiry, a public body must provide evidence on how a particular exception applies; and secondly, on how the public body exercised its discretion. A public body must show that it took into consideration all the relevant factors when deciding to withhold access to information. Consequently, Alberta Justice must show that it considered the purposes of the Act, one of which includes allowing access to information.

[para. 20.] Alberta Justice did not provide any direct evidence by way of affidavit or otherwise, to show how the head exercised its discretion. Often, this evidence can be given by the public body's FOIP coordinator or the person responsible for reviewing the records.

[para. 21.] Nonetheless, I note that Alberta Justice did a second review of the Applicant's request for access in November 2000. It again concluded that the records not be disclosed. Therefore, I find from a review of the records and the submissions, that it appeared that Alberta Justice exercised its discretion properly under section 19(1)(d.3).

(iii) Application of section 19(1)(1.1)

[para. 22.] Section 19(1)(1.1) reads:

> *(1.1) Subsection (1)(d.3) does not apply to information that has been in existence for 10 years or more.*

[para. 23.] A review of the records show that this information has not been in existence for 10 years or more. Therefore, this section does not apply.

(iv) Conclusion

[para. 24.] Based on my review of the records, I am satisfied that these records were created by Alberta Justice for prosecutorial purposes. I am also satisfied that, though the criminal investigation is concluded (as stated in Alberta Justice's letter to the Applicant), the disclosure of these records to the Applicant could reasonably be expected to reveal information related to the exercise of prosecutorial discretion by Alberta Justice.

Issue B: Did Alberta Justice properly apply section 23(1)(a) (advice from officials) to the records?

[para. 25.] Having found that Alberta Justice correctly applied section 19(1)(d.3) to the records, I do not find it necessary to also consider whether Alberta Justice correctly applied section 23(1)(a) to those same records.

Issue C: Did Alberta Justice properly apply section 26(1)(a), (b), (c) (privileged information) to the records?

[para. 26.] Having found that Alberta Justice correctly applied section 19(1)(d.3) to the records, I do not find it necessary to also consider whether Alberta Justice correctly applied section 26(1)(a), (b), (c) to those same records.

V. ORDER

[para. 27.] Under section 68 of the Act, I make the following Order:

1. Alberta Justice correctly applied section 19(1)(d.3) to the records.
2. Having reached this decision, I do not find it necessary to decide whether Alberta Justice correctly applied section 23(1)(a) and section 26(1)(a), (b), (c) to those same records.
3. Consequently, I uphold Alberta Justice's decision to refuse access to the records requested.

Frank Work, Q.C.
Assistant Information & Privacy Commissioner