ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER 2001-030

January 25, 2002

ALBERTA JUSTICE

Review Number 2134

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

Summary: The Applicant made a request under the *Freedom of Information and Protection of Privacy Act* to Alberta Justice for access to a copy of the Crown prosecutor's analysis regarding the Applicant's complaint against a former business partner. The Applicant also requested a copy of a second analysis, which was requested by the Minister.

The Commissioner found that Alberta Justice properly applied section 20(1)(g) [previously section 19(1)(d.3)] of the Act (prosecutorial discretion) to the information. Therefore, the Commissioner upheld Alberta Justice's decision not to disclose the records.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act,* R S.A. 2000, c.F-25, ss. 20(1)(g) [previously section 19(1)(d.3)], 24(1)(a) [previously section 23(1)(a)], 27(1)(a), (b) and (c) [previously section 26(1)(a), (b), and (c)], 72 [previously section 68]; *Interpretation Act*, R.S.A. 2000, c. I-8, s. 12(2)(b).

Authorities Cited: AB: Order 2001-011

Cases Cited: *Krieger* v. *Law Society of Alberta* [2000] A.J. No.1129 (ABCA); *Nelles* v. *R. et al*. [1989] 49 C.C.L.T. 217 (SCC)

I. BACKGROUND

[para 1] On February 6, 2001, the Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the "Act") to Alberta Justice (the "Public Body") for a copy of the Crown prosecutor's analysis regarding the Applicant's complaint against a former business partner. The Applicant also requested a copy of a second analysis regarding the complaint, which was requested by the Minister.

[para 2] On March 2, 2001, the Public Body denied the Applicant's access request. The Public Body cited sections 20(1)(g) [previously section 19(1)(d.3)], 24(1)(a) [previously section 23(1)(a)], 27(1)(a),(b) and (c) [previously section 26(1)(a), (b) and (c)], as its authority to withhold the records.

[para 3] On March 15, 2001, the Applicant requested a review of the Public Body's decision to withhold the records. Mediation was not successful. The matter was set down for a written inquiry.

[para 4] The Public Body submitted an initial submission and a rebuttal to this Office. The Applicant submitted an initial submission but did not submit a rebuttal.

[para 5] I have reviewed and considered all of the submissions and arguments before me. I note that much of the Applicant's brief contains the Applicant's argument regarding why the outcome of a prior civil trial against his former business partner and the seizure of his property was unfair, why the Crown should prosecute his former business partner and his former business partner's lawyer, and allegations that the Crown was biased when it made its decision not to prosecute. The Applicant also raised some concerns about whether the Minister conducted or should have conducted an independent review of the Crown's decision not to prosecute.

[para 6] In this inquiry, my jurisdiction is limited to determining whether the Public Body properly applied the Act in refusing to provide the Applicant with access to the records. I do not have jurisdiction to address whether the outcome of the civil trial or the seizure of his property was fair. In addition, I do not have the jurisdiction to determine whether the Crown should prosecute, nor whether the Crown was biased in its decision not to prosecute. Lastly, I do not have the jurisdiction to decide whether the Minister conducted or should have conducted an independent review.

II. RECORDS AT ISSUE

[para 7] There are 10 pages of records at issue. Pages one to seven consist of a status report, while pages eight to 10 consist of a briefing note. These records outline the Applicant's allegations against the former business partner and the former business partner's lawyer. These records also outline reasons why the Crown did not and should not prosecute these two individuals.

III. ISSUES

[para 8] The inquiry notice which was sent to the parties outlined the following issues:

1. Did the Public Body properly apply section 19(1)(d.3) of the Act (prosecutorial discretion) to the records/information?

2. Did the Public Body properly apply section 23(1)(a) of the Act ("advice") to the records/information?

3. Did the Public Body properly apply section 26(1)(a), (b) or (c) of the Act (privileged information) to the records/information?

[para 9] However, on January 1, 2002, the Revised Statutes of Alberta 2000 came into force. Although this did not result in substantive changes to the *Freedom of Information and Protection of Privacy Act,* various sections of that Act have been renumbered. As such, for ease of reference, in this Order I will refer to both the new and old section numbers. I have also rephrased the issues to reflect this change:

1. Did the Public Body properly apply section 20(1)(g) [previously section 19(1)(d.3)] of the Act (prosecutorial discretion) to the records/information?

2. Did the Public Body properly apply section 24(1)(a) [previously section 23(1)(a)] of the Act ("advice") to the records/information?

3. Did the Public Body properly apply section 27(1)(a), (b) or (c) [previously section 26(1)(a), (b) or (c)] of the Act (privileged information) to the records/information?

IV. DISCUSSION

A. Did the Public Body properly apply section 20(1)(g) [previously section 19(1)(d.3)] of the Act (prosecutorial discretion) to the records/ information?

[para 10] Section 20(1)(g) [previously section 19(1)(d.3)] states:

> *20(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*
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> ...

> *(g) reveal any information relating to or used in the exercise of prosecutorial discretion*

[para 11] The Public Body argues that the information falls within section 20(1)(g) [previously section 19(1)(d.3)]. The Public Body states that the records reveal information that relates to or was used in the exercise of prosecutorial discretion. The Public Body also states that it properly exercised its discretion to withhold the information. The Public Body states that disclosing this information would impair its ability to properly discharge its responsibilities. The Public Body states that there was a frank accounting by the Public Body and that its officials met with the Applicant numerous times. The Public Body states that during these contacts, the Applicant was thoroughly informed of the reasons why the Crown decided not to prosecute. The Public Body also emphasized that decisions to withhold this type of information are made on a case by case basis having regard to the purpose of the Act, the individual history of the record and the communications with the Applicant.

[para 12] The Applicant states that section 20(1)(g) [previously section 19(1)(d.3)] does not apply to the information at issue. The Applicant states that the marginal note beside section 19 [previously section 20] which reads "Disclosure Harmful to Law Enforcement" implies that section 20(1)(g) [previously section 19(1)(d.3)] contains a harms test.

[para 13] The meaning of the phrase "exercise of prosecutorial discretion" was addressed in Order 2001-011. That Order referred to the Alberta Court of Appeal decision of *Krieger* v. *Law Society of Alberta* [2000] A.J. No.1129, where the court discussed the issue of disclosure in relation to a 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:*
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> > *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 14] After a review of the records and the arguments of all the parties, I find that these records reveal information related to or used in the exercise of prosecutorial

discretion. The records in this inquiry consist of a status report and a briefing note which outline the Applicant's allegations against two individuals. These records also outline reasons why the Crown did not and should not prosecute these two individuals. I find that the Public Body properly applied section 20(1)(g) [previously section 19(1)(d.3)] and properly exercised its discretion to withhold the information under that section.

[para 15] I also do not find that the marginal notes corresponding to section 20(1)(g) [previously section 19(1)] assist the Applicant's argument. Section 12(2)(b) of the Alberta *Interpretation Act* R.S.A. 2000 c. I-8 states that, in an enactment, marginal notes are "not part of the enactment, but are inserted for convenience of reference only". Furthermore, *Driedger on the Construction of Statutes,* 3rd ed. (Toronto: Butterworths, 1994) at pages 273 to 275 states that although there is a current movement to greater use of marginal notes in statutory interpretation, traditionally, these notes have not been used in interpretation, and where they were used, they have not been given much weight. Driedger states on page 275:

> *In preparing marginal notes, the drafter tries to highlight in a word or two the primary matter dealt with in the section. The purpose is to facilitate efficient and easy movement through the legislation, not deep or full understanding. To accomplish this purpose, drafters often rely on conventional labels or highlight particular aspects of a section without attempting to be accurate or comprehensive.*

[para 16] Even if I did use marginal notes as an interpretative aid, given the weight that has historically been given to marginal notes, I would not infer a "harm's test" into section 20(1)(g) [previously section 19(1)(d.3)] on the basis of a marginal note alone.

B. Did the Public Body properly apply section 24(1)(a) [previously section 23(1)(a)] of the Act ("advice") to the records/ information?

[para 17] I have found that the Public Body properly applied section 20(1)(g) [previously section 19(1)(d.3)] to the information in the records at issue. As such, I do not find it necessary to decide whether the Public Body properly applied section 24(1)(a) [previously section 23(1)(a)] to the same information.

C. Did the Public Body properly apply section 27(1)(a), (b) or (c) [previously section 26(1)(a),(b) or (c)] of the Act (privileged information) to the records/ information?

[para 18] I have found that the Public Body properly applied section 20(1)(g) [previously section 19(1)(d.3)] to the information in the records at issue. As such, I do not find it necessary to decide whether the Public Body properly applied section 27(1)(a), (b), or (c) [previously section 26(1)(a), (b) or (c)] to the same information.

V. ORDER

[para 19] I make the following Order under section 72 [previously section 68] of the Act.

[para 20] The Public Body properly applied section 20(1)(g) [previously section 19(1)(d.3)] to the information in the records. As such, I uphold the Public Body's decision not to disclose this information to the Applicant.

[para 21] In addition, as I have found that the Public Body properly applied section 20(1)(g) [previously section 19(1)(d.3)] to the information, I do not find it necessary to decide whether the Public Body properly applied section 24(1)(a) [previously section 23(1)(a)] or section 27(1)(a), (b), and (c) [previously section 26(1)(a), (b) and (c)] to that same information.

Frank J. Work, Q.C.
Acting Information and Privacy Commissioner