

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER 2001-040

December 21, 2001

EDMONTON POLICE COMMISSION

Review Number 1894

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Summary: The Applicant applied under the *Freedom of Information and Protection of Privacy Act* (the “Act”) to the Edmonton Police Commission (the “EPC”), seeking access to materials compiled by the EPC in relation to him, particularly his suspension without pay from the Edmonton Police Service. At issue for the inquiry were the minutes of three closed meetings of the EPC, to which the EPC refused access under section 22 of the Act (local public body confidences). The Acting Commissioner found that the EPC did not exercise its discretion properly in refusing access under section 22, and ordered the head to reconsider that decision.

Statutes Cited: AB: *City of Edmonton Bylaw No. 9304*, s. 7(b); *Freedom of Information and Protection of Privacy Act*, S.A. 1994, c. F-18.5, ss. 1(1)(i)(xvi)(A), 1(1)(j)(iii), 1(1)(n)(vii), 1(1)(n)(viii), 1(1)(n)(ix), 1(1)(p)(vi), 22, 22(1), 22(1)(a), 22(1)(b), 22(2), 23, 26, 68, 68(2)(b); *Freedom of Information and Protection of Privacy Regulation*, Alta. Reg. 200/95, ss. 18, 18(1), 18(1)(b), 18(2); *Interpretation Act*, R.S.A. 1980, c. I-7, ss. 1(1)(c), 25(1)(a), 25(1)(e); *Police Act*, R.S.A. 1980, c. P-12.01, ss. 1(c), 25, 28.

I. BACKGROUND

[para 1] On December 14, 1999, the Applicant applied under the *Freedom of Information and Protection of Privacy Act* (the “Act”) to the Edmonton Police Commission (the “EPC”), seeking access to materials compiled by the EPC in relation to him, particularly his suspension without pay from the Edmonton Police Service. The EPC provided access to numerous records, but refused access to some records under section 26 (legal privilege).

[para 2] On April 28, 2000, the Applicant applied to this office for a review of the decision of the EPC. Mediation was authorized. Subsequently, the EPC found additional records that were responsive to the Applicant’s access request. The EPC provided access to some of those records, but refused access to the minutes of closed meetings of the EPC, citing section 22 of the Act (local public body confidences) and section 23 of the Act (“advice”). Mediation was not successful regarding the EPC’s refusal to provide access to the minutes, and that matter was set down for a written inquiry. Section 26 was not an issue for the inquiry.

[para 3] Both the EPC and the Applicant provided initial written submissions for the inquiry. Only the Applicant provided a rebuttal submission.

II. RECORDS AT ISSUE

[para 4] During the inquiry, the Commissioner’s office clarified with the EPC that one record provided for the inquiry was no longer at issue because the EPC had given the Applicant access to that record on August 13, 2001.

[para 5] Consequently, the records at issue in this inquiry consist of the minutes of three closed meetings of the EPC. In this Order, I will refer to those records as “the minutes” or “the records”.

III. ISSUES

[para 6] There are two issues in this inquiry:

A. Did the Public Body properly apply section 22 of the Act (local public body confidences) to the records/information?

B. Did the Public Body properly apply section 23 of the Act (“advice”) to the records/information?

[para 7] In his rebuttal submission, the Applicant appears to raise a further issue of adequacy of the search. As that matter was not raised as an issue for the inquiry, I do not intend to consider it at this late date.

IV. DISCUSSION OF THE ISSUES

ISSUE A: Did the Public Body properly apply section 22 of the Act (local public body confidences) to the records/information?

1. Application of section 22

a. General

[para 8] Section 22(1) reads:

22(1) The head of a local public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal

(a) a draft of a resolution, by-law or other legal instrument by which the local public body acts, or

(b) the substance of deliberations of a meeting of its elected officials or of its governing body or a committee of its governing body, if an Act or a regulation under this Act authorizes the holding of that meeting in the absence of the public.

[para 9] Section 22(1)(a) is not applicable. Under section 22(1)(b), I must consider the following:

- (i) Is there a meeting of elected officials, a governing body or a committee of a governing body of a local public body?
- (ii) Could disclosure of the information reasonably be expected to reveal the substance of deliberations of a meeting of elected officials, a governing body or a committee of a governing body of a local public body?
- (iii) Does an Act authorize the holding of that meeting in the absence of the public?
- (iv) If an Act does not so authorize, does a regulation under this Act authorize the holding of that meeting in the absence of the public?

(i) Is there a meeting of elected officials, a governing body or a committee of a governing body of a local public body?

[para 10] Section 1(1)(p)(vi) of the Act defines “public body” to mean a local public body which, in turn, is defined in section 1(1)(j)(iii) to mean a local government body. “Local government body” is defined in section 1(1)(i)(xvi)(A) to mean a commission as defined in the *Police Act*. Section 1(c) of the *Police Act*, R.S.A. 1980, c. P-12.01 defines “commission” to mean a police commission established under section 25 or 28. The EPC

says that it is a municipal police commission established under section 28 of the *Police Act*. Therefore, the EPC is a local public body for the purposes of section 22 of the Act.

[para 11] The records are labelled as the minutes of closed meetings of the EPC. It is evident from the records that these are meetings of the “governing body” of the EPC. Names of members of the governing body are either listed at the beginning of the minutes or appear throughout the minutes.

(ii) Could disclosure of the information reasonably be expected to reveal the substance of deliberations of a meeting of elected officials, a governing body or a committee of a governing body of a local public body?

[para 12] The minutes of the meetings outline the deliberations of the governing body of the EPC. The deliberations concern whether the EPC will continue the suspension of the Applicant without pay. Therefore, disclosure of the information could reasonably be expected to reveal the substance of deliberations of meetings of the governing body of the EPC, a local public body.

(iii) Does an Act authorize the holding of that meeting in the absence of the public?

[para 13] The EPC says that section 7(b) of Bylaw No. 9304 of the Municipal Council of the City of Edmonton authorizes the holding of that meeting in the absence of the public, as follows:

7(b) Meetings of the Commission shall be open to the public, but matters relating to discipline, personnel administration, contract negotiations, security of police operations, or any matter considered by a majority vote of the Commission to be strictly confidential, may be held in camera.

[para 14] Black’s Law Dictionary defines “in camera” to mean in private. An “in camera” meeting is not open to the public.

[para 15] Section 22(1)(b) says that “an Act” must authorize the meeting in the absence of the public. “Act” is defined in section 25(1)(a) of the *Interpretation Act*, R.S.A. 1980, c. I-7, to mean an Act of the Legislature. This is different from “enactment”, which is defined in section 25(1)(e) to mean an Act or a regulation or any portion of an Act or regulation.

[para 16] “Regulation” is defined in section 1(1)(c) of the *Interpretation Act*, as follows:

1(1) In this Act,

(c) “regulation” means a regulation, order, rule, form, tariff of costs or fees, proclamation, by-law [emphasis added] or resolution enacted

(i) in the execution of a power conferred by or under the authority of an Act, or

(ii) by or under the authority of the Lieutenant Governor in Council,

but does not include an order of a court made in the course of an action or an order made by a public officer or administrative tribunal in a dispute between 2 or more persons.

[para 17] A bylaw is a “regulation”, not “an Act”. Therefore, for the purposes of section 22(1)(b), Bylaw 9304 is not “an Act” that authorizes the holding of that meeting in the absence of the public.

(iv) If an Act does not so authorize, does a regulation under this Act authorize the holding of that meeting in the absence of the public?

[para 18] In section 22(1)(b), the words “this Act” mean the *Freedom of Information and Protection of Privacy Act*.

[para 19] The *Freedom of Information and Protection of Privacy Regulation*, Alta. Reg. 200/95 (the “Regulation”), is made under the *Freedom of Information and Protection of Privacy Act*. Section 18 of the Regulation authorizes the holding of that meeting in the absence of the public, as follows:

18(1) A meeting of a local public body’s elected officials, governing body or committee of its governing body may be held in the absence of the public only if the subject matter being considered in the absence of the public concerns

(a) the security or the property of the local public body,

(b) the personal information of an individual, including an employee of a public body,

(c) a proposed or pending acquisition or disposition of property by or for a public body,

(d) labour relations or employee negotiations,

(e) a law enforcement matter, litigation or potential litigation, including matters before administrative tribunals affecting the local public body, or

(f) the consideration of a request for access for information under the Freedom of Information and Protection of Privacy Act if the governing body or committee of the governing body is itself designated as the head of the local public body for the purposes of the Freedom of Information and Protection of Privacy Act,

and no other subject matter is considered in the absence of the public.

(2) Subsection (1) does not apply to a local public body if another Act

(a) expressly authorizes the local public body to hold meetings in the absence of the public, and

(b) specifies the matters that may be discussed at those meetings.

[para 20] The subject matter being considered at meetings in the absence of the public concerns primarily the personal information of two individuals, namely, the Applicant and a former chief of police: section 18(1)(b). At the time of the meetings, both were employees of a public body. The personal information of the Applicant includes the Applicant's employment history and opinions about the Applicant (section 1(1)(n)(vii) and section 1(1)(n)(viii) of the Act). The personal information of the former chief of police includes that individual's personal views or opinions (section 1(1)(n)(ix) of the Act). No other subject matter is considered in the absence of the public. Therefore, section 18(1) applies.

[para 21] Section 18(2) is not applicable because there is not "another Act".

b. Finding as to the application of section 22

[para 22] I find that all of the criteria under section 22(1)(b) have been met. Therefore, section 22(1) applies to the records/information.

[para 23] Section 22(2), which contains exceptions to section 22(1), is not applicable.

2. Exercise of discretion under section 22(1)

[para 24] Section 22(1) is a discretionary (“may”) provision. Even though section 22(1) may apply, thereby authorizing the EPC to refuse access to the records/information, the EPC nevertheless may exercise its discretion to give access to the records/information.

[para 25] To exercise its discretion properly, the EPC must show that it considered the objects and purposes of the Act, and did not exercise its discretion for an irrelevant or improper purpose.

[para 26] The EPC withheld the records in their entirety from the Applicant. The EPC says that the substance of the information the Applicant is seeking was given to the Applicant verbally in a July 4, 2001 meeting with the Applicant. In that meeting, the Executive Director reviewed the minutes of the closed meetings and answered the Applicant’s questions in a general way, based on the minutes. The EPC maintains that it has already provided the Applicant with all the information the Applicant requires, according to the information the Applicant wanted to know.

[para 27] The EPC also had this to say in its written submission:

Information was contained in the minutes which was not immediately pertinent to [the Applicant’s] situation. It was felt that even if this information was severed, he would still be of the opinion that something was being withheld from him and an inquiry would result. It was felt that confidential information regarding the Edmonton Police Service could not be disclosed and for this reason he was not given copies of the minutes, even in a severed form.

[para 28] I am struck by the EPC’s statement that it did not attempt to sever the information because it believes the Applicant would have been dissatisfied and would have requested an inquiry anyway. Whether the Applicant would be satisfied with the information is an irrelevant consideration, which is not a proper exercise of discretion.

[para 29] Consequently, although the EPC has shown that the criteria of section 22(1)(b) have been met and therefore it is authorized to refuse access to the records/information, I find that the EPC did not exercise its discretion properly in refusing access. I intend to order the head of the EPC to reconsider the decision to refuse access to the records/information under section 22.

ISSUE B: Did the Public Body properly apply section 23 of the Act (“advice”) to the records/information?

[para 30] Since I have found that the criteria of section 22(1)(b) have been met for the records/information, I do not find it necessary to decide whether the criteria of section 23 of the Act (“advice”) have also been met for the same records/information.

[para 31] In any event, if I had to decide the matter, I would find that the criteria of section 23 have not been met. The EPC did not put any evidence or argument before me as to the how the records/information meet the criteria of section 23, nor is there anything on the face of the records that would assist the EPC.

V. ORDER

[para 32] I make the following Order under section 68 of the Act.

[para 33] Although the EPC has shown that the criteria of section 22(1)(b) have been met and therefore it is authorized to refuse access to the records/information, I find that the EPC did not exercise its discretion properly in refusing access. Consequently, under section 68(2)(b) of the Act, I order the head of the EPC to reconsider the decision to refuse access to the records/information under section 22.

[para 34] Since I have found that the criteria of section 22(1)(b) have been met for the records/information, I do not find it necessary to decide whether the criteria of section 23 of the Act (“advice”) have also been met for the same records/information.

[para 35] Within 50 days of being given a copy of this Order, I order the EPC to notify me and the Applicant, in writing, as to what decision the EPC has reached on reconsideration.

[para 36] The result of my Order is that the EPC has to reconsider whether it will give the Applicant access to any part of the records/information. The EPC’s decision about whether to give the Applicant access is not a matter that the Applicant can ask me to review further.

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