ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2004-030

June 24, 2005

ALBERTA JUSTICE

Review Number 2580

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Summary: The Applicant made a request under the *Freedom of Information and Protection of Privacy Act* to Alberta Justice. The request was for all documents related to the charges, investigation and trial of a former government official who had been convicted of a charge of 'accepting a benefit' contrary to the *Criminal Code*. Alberta Justice refused to disclose most of the contents of the file.

The Commissioner upheld this refusal. He agreed that some of the records were properly withheld on the basis either that they were outside the scope of the Act under section 4(1)(a) (information in a court file), or that they fell under section 29(1) (information available to the public). The Commissioner also agreed that Alberta Justice had properly relied on section 20(1)(g) in refusing to disclose records that had been used in the exercise of prosecutorial discretion. He did not accept that disclosure of the documents was necessitated by section 32 (public interest).

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 4(1)(a), 4(1)(l)(v), 17, 20, 20(1)(g), 20(1)(i), 20(2), 27(1), 27(1)(b), 27(1)(c), 29, 29(1), 32, 72; **Canada:** *Criminal Code*, s. 121.

Authorities Cited: AB: Order 96-011, Order 2001-011, Order F2003-013; **B.C.:** Order No. 234-1998; Order No. 01-27; Order No. 01-51; **ON:** Order P-994.

Cases Cited: *Krieger v. Law Society of Alberta*, [2000] A.J. No. 1129; *Alberta (Attorney General) v. Krushell*, [2003] A.J. No. 358.

I. BACKGROUND

[para 1] On May 4, 2001, a former government official was found guilty of accepting a benefit contrary to section 121 of the Criminal Code. This person appealed his conviction, but on June 3, 2002 he abandoned his appeal.

[para 2] On May 25, 2001, Alberta Justice (the "Public Body") received a request from the Applicant under the *Freedom of Information and Protection of Privacy Act*, for all documents related to the charges, investigation and trial of the convicted person. The request was treated as a continuing request for as long as the matter was still before the courts. After the appeal was abandoned, the Public Body responded to the request (on October 3, 2002). Responsive records were located in the Public Body's prosecution files. The Public Body disclosed 10 records (39 of 1,116 pages) and withheld the rest.

[para 3] On October 15, 2002, the Applicant asked the Commissioner to review the Public Body's decision to withhold records in the prosecution file. The Commissioner initiated mediation, which was not successful. The matter was set down for inquiry. Subsequently the Applicant agreed that 38 of the records could be withheld by the Public Body under sections 4(1)(l)(v) and 29 of the Act, and these records are not in issue.

[para 4] A number of affected parties provided submissions for the inquiry, arguing against the disclosure of their personal information, or requesting their personal information not be released.

II. RECORDS AT ISSUE

[para 5] The records are all from a prosecution file.

[para 6] Some of the documents from the prosecution file are identical to documents that are in a court file. These are referred to within as List A. The remaining documents in the file are referred to as List C.

III. ISSUES

[para 7] The issues are:

Issue A: Are the records/information excluded from the application of the Act by section 4(1)(a)?

Issue B: Did the Public Body properly apply section 29(1) of the Act (information available to the public) to the records/information?

Issue C: Did the Public Body properly apply section 20 of the Act (law enforcement) to the records/information?

Issue D: Did the Public Body properly apply section 27(1) of the Act (privileged information) to the records/information?

Issue E: Does section 17 of the Act (personal information) apply to the records/information?

Issue F: Does section 32 of the Act require the Public Body to disclose information in the public interest?

IV. DISCUSSION OF THE ISSUES

Issue A: Are the records/information excluded from the application of the Act by section 4(1)(a)?

[para 8] Section 4(1)(a) provides:

> *4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:*
>
> *(a) information in a court file, ….*

[para 9] The records in the possession of the Public Body in List A are identical to records that are in a court file.

[para 10] The Public Body says that these records are outside the scope of the Act because they are "information in a court file".

[para 11] The Applicant argues that it is seeking documents in the possession of the Public Body rather than in a court file, and that section 4(1)(a) is thus irrelevant to the access issue. The records in List A are in the possession of the Public Body.

[para 12] I must decide whether the List A documents are properly characterized as 'information in a court file' within the terms of section 4(1)(a).

[para 13] Decisions from other jurisdictions have dealt with records in court files.

[para 14] Three decisions of the office of the British Columbia Information and Privacy Commissioner deal with whether duplicates or copies of records that are in a court file are 'records in a court file'.[1] In these cases the Ministry having possession of such records argued for what they termed a "purposive interpretation" so that

[1] See Order No. 234-1998; Order No. 01-27; Order No. 01-51.

> … regardless of whether an applicant is seeking access directly from a court or from a public body which happens to have a copy of "a record in a court file," the record will not be subject to the Act. Access to court records, other than court administration records, must be subject to supervision of the Court.[2]

[para 15] In each of these decisions the Commissioner rejected this argument on the basis of a plain reading of the words of the legislation, and held that copies of records in court files that exist independently and are in the possession of a Ministry are not 'records in court files'.[3]

[para 16] I note the Alberta legislation is worded differently from that in British Columbia, in that it excludes from the scope of the Act 'information [in contrast to 'records'] in court files'. However, this in itself does not require me to reach the contrary conclusion to that in the British Columbia cases. As with copies of records, it is possible to conceive of 'information' in the possession of a Public Body as having an existence independent from 'information' in a court file, even though the content of the information is the same.

[para 17] In support of its position that the information in List A is excluded from the Act by section 4(1)(a), the Public Body cited a decision of the Alberta Court of Queen's Bench, *Alberta (Attorney General) v. Krushell*, [2003] A.J. No. 358. In that case the court considered whether records (criminal dockets) that were compiled from information taken from court files were excluded from the Act as "information in a court file". The court said:

> The information in the criminal dockets comes from court files. … The mere fact it is extracted from those files and appears in a different format does not change the purpose of the legislation, which is to exclude the information contained in those materials from the ambit of the Act. The purpose of the Legislature was to exclude the information, not merely the paper format in which some of it originally appears. Whether it is contained in a physical paper file, or is removed from that file to another format it is excluded from production under the Act.
>
> … The Legislature must have intended to protect the information in those files in whatever format it might ultimately take, rather than simply the files themselves.

[para 18] This decision related to information that had been "extracted from" court files by the Public Body and compiled in another form for another purpose (court dockets). In my view this decision, and the words of section 4(1)(a), apply only to records that are taken from or copied from a court file. The same information that is in the

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[2] Order No. 234-1998.

[3] The Ontario Privacy Commissioner's office dealt with a related issue in Order P-994 (followed in a number of subsequent decisions). However, the case related to a record that was actually located in a court file (in contrast to an independently-existing copy), and the question was whether the Attorney General's Ministry had custody and control of it. The Ontario legislation is also significantly different.

custody and control of a public body that was not taken or copied from a court file is not excluded from the Act. I do not accept the Public Body's argument that the content of the record is the determinant. This would mean that any information in the possession of a public body having the same content as information contained in a court file, or that the public body had filed in the court, would be excluded from the scope of the Act. That would not be a sensible or practical result.

[para 19] The Public Body says that the records in List A "are all from the prosecution file". By their nature, all or most of them appear to have come into the possession of the Public Body as a function of its employee's (the prosecutor's) participation in the process by which they were created. In a letter to this office the Public Body refers to the records as 'copies of' information in a court file. However, 'copies of' is not necessarily the same as 'copied from'. It is not clear whether the reference in the letter is meant to suggest that the records in the court file were originals and the ones in the prosecution file were 'copies', or whether the reverse could be true for some or all of them, or whether the originals, or some of them, could have come from a third source. The Public Body did not argue that the records in List A were taken or "extracted from" the court file in the way that they were in the fact situation before the court in the case just discussed. I cannot tell without more whether this is so from the face of the records. However, it may be that some or all of the Records in List A were taken or copied from the court file.

[para 20] I find that only those of the records in List A that were taken or copied from a court file are 'information in a court file', and are excluded from the scope of the Act. The remaining records in List A – any that emanated from the Public Body itself or came into its possession from some source other than the court file (though duplicates of them may also exist in the court file) - are within the scope of the Act.

Issue B: Did the Public Body properly apply section 29(1) of the Act (information available to the public) to the records/information?

[para 21] Section 29 provides in part:

> *The head of a public body may refuse to disclose to an applicant information*
>
> *(a) that is readily available to the public,*
>
> *(a.1) that is available for purchase by the public, … .*

[para 22] This provision permits a Public Body to withhold information that is readily available to or available for purchase by the public. The Public Body says the records in List A may be purchased by the public from the court file. I accept that those of the records in List A that are not excluded from the Act under section 4(1)(a) can be withheld by the Public Body under section 29. I also accept the Public Body exercised its discretion to withhold the documents properly, on the basis that in the circumstances of this case they could be accessed by the Applicant through other means.

Issue C: Did the Public Body properly apply section 20 of the Act (law enforcement) to the records/information?

[para 23] The relevant parts of section 20 provide:

> *20(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to …*
>
> > *(g) reveal any information relating to or used in the exercise of prosecutorial discretion, …*
> >
> > *(i) reveal a record that has been confiscated from a person by a peace officer in accordance with a law, … .*
>
> *(2) Subsection (1)(g) does not apply to information that has been in existence for 10 years or more.*
>
> *(3) The head of a public body may refuse to disclose information to an applicant if the information*
>
> > *(a) is in a law enforcement record and the disclosure could reasonably be expected to expose to civil liability the author of the record or an individual who has been quoted or paraphrased in the record, … .*

[para 24] The Public Body argued that section 20(1)(g) applies to all the records in List C on the basis they could reasonably be expected to reveal information relating to or used in the exercise of prosecutorial discretion.

[para 25] 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.
>
> 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 26] In its additional submission, the Public Body provided clear evidence that all of the Records in List C were used by a prosecutor in the exercise of his prosecutorial discretion.

[para 27] The Public Body also explained the basis on which it exercised its discretion to withhold documents so used. It said, relying on an affidavit from the prosecutor, that the records in List C must be protected from disclosure in order to protect and preserve the ability of prosecutors to exercise their discretion to freely make prosecutorial decisions consistent with what the public interest demands, taking into account factors such as strength and admissibility of evidence, position of the accused, type of alleged crime committed, the resources available to prosecute the accused, and the deterrent effect of prosecuting the accused. I accept that disclosure of information used to make such decisions could prejudice the ability of prosecutors to take such factors into account and to act in accordance with the public interest, and I agree that withholding the records in List C was a proper exercise of the Public Body's discretion in the circumstances of this case.

[para 28] The Applicant argued that section 20 is irrelevant because the matter was resolved and is no longer before the courts.

[para 29] I do not accept the Applicant's argument that section 20(1)(g) becomes irrelevant after the case is concluded. The Legislature specifically addressed the matter of timing relative to release of information that would fall within the section: section 20(2) says that section 20(1)(g) does not apply to information that has been in existence for 10 years or more. Had the Legislature intended that the closure of a case was to be a factor against application of the section, it could have said so. In this case, 10 years has not elapsed, so section 20(1)(g) is still applicable.

[para 30] The Public Body also argued that it properly withheld particular records in List C under section 20(1)(i), and section 20(3)(a). I do not need to decide these questions because I have already held that all of the records in List C were properly withheld under section 20(1)(g).

Issue D: Did the Public Body properly apply section 27(1) of the Act (privileged information) to the records/information?

[para 31] The Public Body also relies on subsections 27(1)(b) and 27(1)(c) of the Act as a basis for withholding the records in List C. As I have already decided that all of the records were properly withheld under section 20, I do not need to decide this question.

Issue E: Does section 17 of the Act (personal information) apply to the records/information?

[para 32] The Public Body also relies on section 17 of the Act as a basis for withholding the records in List C. As I have already decided that all of the records were properly withheld under section 20, I do not need to decide this question.

Issue F: Does section 32 of the Act require the Public Body to disclose information in the public interest?

[para 33] Section 32 requires disclosure of information where it is in the public interest to disclose it even if the information could otherwise be properly withheld under other provisions of the Act.

[para 34] In Order 96-011, the former Commissioner's comments with respect to what is now section 32 included the following:

- It imposes a statutory duty on the head of a public body to release information of certain risks under "emergency-like" circumstances (i.e. 'without delay'). The significant override of privacy rights provided by the provision suggests that the definition of what information is "caught" by the provision, and with respect to which a statutory duty of disclosure applies, must be defined narrowly.
- The Act cannot be taken to lightly impose this statutory duty on the head of a public body, or to lightly allow an over-riding of individual privacy rights. The applicant has the burden of proof at this part of the investigation and it is not a burden that will be easily met.
- There is a distinction between a "matter of interest to the public", and a "matter of public interest". In order to fall under the latter, it must "clearly" be a matter that is of "compelling" public interest. A mere assertion of "interest" by a member of the public is not sufficient.

[para 35] In Order F2003-013, the Commissioner concluded that the Applicant had the burden of proof under section 32. Noting that the Applicant had not provided any references to orders, empirical or concrete data, or non-speculative and supportive evidence, to sustain his arguments, the Commissioner found that the evidence and arguments of the Applicant did not establish a compelling "public interest". He held that section 32(1)(b) of the Act did not require the public body to disclose information in the public interest in that case.

[para 36] In this case the Applicant asserts that the release of the requested information is in the public interest because "the full details of this blatant case of government corruption have not been fully brought to light, and that the nature of the case (proven influence peddling and misconduct by a government appointee) makes it a matter of public interest. The Applicant also points out that there was previously intense media coverage of the incident, demonstrating the interest of the public.

[para 37] The Public Body replies that any public interest in the information has been satisfied by the prosecution and finding of guilt by the court of the person who was accused. It says the courtroom was open to the public, and the court file remains available for members of the public to review at the courthouse.

[para 38] The Applicant has not provided any basis for its assertion that all the details of the 'blatant case of government corruption' have not been brought to light. The matter of "proven influence peddling" was dealt with through the legal process, and the person accused was charged and convicted. The related court documents are available for public purchase and review. I have reviewed the withheld records and have found nothing in them that suggests inadequacy in the manner the case was investigated, or dealt with by Alberta Justice. I do not accept the Applicant's argument that the matter to which the request relates is one of compelling public interest.

V. ORDER

[para 39] I make this Order under section 72 of the Act.

[para 40] I do not have jurisdiction to make an order with respect to those documents in List A that were taken or copied from court files.

[para 41] I conclude that the Public Body properly withheld any records in List A that were not taken or copied from court files, and that it properly withheld the records in List C.

Frank Work, Q.C.
Information and Privacy Commissioner