ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2005-013

April 7, 2006

CITY OF ST. ALBERT

Review Number 3168

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

Summary: The Applicant made an access request to the City of St. Albert (the Public Body) for a copy of an Inspector's Direction issued by Environment Canada relating to the discharge of a substance from a former landfill site in the City of St. Albert. The Public Body denied the Applicant's request under section 20 of the FOIP Act (law enforcement). The Adjudicator agreed that the record fit the definition of law enforcement, but found that the Public Body did not adequately demonstrate the specific harm required to properly apply section 20 to the record. The Adjudicator ordered the release of the record to the Applicant.

Statutes Cited: *Freedom of Information and Protection of Privacy Act,* R.S.A. 2000 c. F-25, s. 1(h), 20, 20(1), 20(1)(a), 20(1)(c), 20(1)(f), 20(1)(g), 32, 72; *Criminal Code of Canada* s. 507. *Fisheries Act,* R.S.C. 1985, c. F-14 s. 38(6), *Access to Information Act*, R.S.C. 1980-81-82-83, c. 111

Cases Cited: *Southam et al. v. Coulter et al.* (1990), 60 C.C.C. (3d) 267 (OCA)

Orders Cited: BC: Orders 00-02 and 04-13: **Alberta**: Orders 96-003, 2001-011, 2001-030, and 2001-031

I. BACKGROUND

[para 1] The Applicant was involved in reporting a discharge of a substance from a former landfill site in the City of St. Albert (the "Public Body") to Environment Canada. A Fisheries Officer/Inspector investigated the matter and issued an Inspector's Direction (the "record") to the Public Body under the authority of the *Fisheries Act* R.S.C. 1985, c.

F-14, s. 38(6) (the *Fisheries Act)*. The Applicant made a formal request for access to this report under the *Freedom of Information and Protection of Privacy Act* R.S.A. 2000 c. F-25 (the "FOIP Act") to the Public Body. The request was denied, on the basis of law enforcement exceptions to disclosure.

[para 2] The Applicant requested a review by the Commissioner of the decision by the Public Body to deny her access to the document. Mediation was authorized, but was not successful. The matter was set down for a written inquiry. Three Affected Parties were identified, one of which was Environment Canada. The other two Affected Parties were individuals who had also made access requests to the Public Body for a copy of the record. Initial submissions and rebuttals were received from all of the parties.

II. RECORD AT ISSUE

[para 3] The record at issue is the Inspector's Direction which was prepared by Environment Canada and directed to the Public Body.

III. ISSUE

[para 4] There was one issue set out in the Notice of Inquiry:

> Did the Public Body properly apply section 20 of the FOIP Act (law enforcement) to the records/information?

IV. DISCUSSION OF THE ISSUE

Preliminary Issue

[para 5] In its submission, the Public Body raised the issue of whether the Applicant's request for information best fell under the federal *Access to Information Act*. The Public Body suggested that, because an Environment Canada representative authored the document, the application for access ought to be heard under that legislation.

[para 6] On the face of it, the Applicant has a right to request access to the record from either the Public Body or Environment Canada under the appropriate legislation. Neither piece of legislation contains a provision that would restrict a request for access under other legislation. In other words, having a right to request access under the federal *Access to Information Act* from Environment Canada would not preclude the Applicant from making a similar request to the Public Body under the *Freedom of Information and Protection of Privacy Act.*

[para 7] In order for me to have jurisdiction to decide whether the Applicant is entitled to access under the FOIP Act, I must be satisfied that the record at issue is subject

to the FOIP Act. Section 4 states that the Act applies to all records in the custody or under the control of a public body. It is clear from the Public Body's own submissions that it is has custody of the record. Section 4 then sets out classes of records which are excluded from the FOIP Act. The record does not, on its face, fall within the exclusions from the FOIP Act in section 4, and none of the parties argued that it did. Therefore, I conclude that I have jurisdiction to decide this matter.

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

[para 8] The Public Body argued that all of subsections 20(1)(a)(c)(f) and (g) applied to the record. The relevant portions of section 20(1) state:

> 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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> > (a) harm a law enforcement matter,
> >
> > (c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement,
> >
> > (f) interfere with or harm an ongoing or unsolved law enforcement investigation, including a police investigation,
> >
> > (g) reveal any information relating to or used in the exercise of prosecutorial discretion,
> > …

[para 9] I note that, from its first response to the Applicant's request for access, through its first submission in this inquiry, the Public Body raised many of the subsections of section 20, related to law enforcement. However, the Public Body was not specific in arguments or evidence about which of the subsections it was relying on to withhold the record from disclosure. In its rebuttal submission, the Public Body more clearly identified which of the subsections it thought applied. This approach is not particularly helpful to applicants. Nonetheless, in this case, the submissions of the parties were sufficiently wide ranging that I am satisfied they have had adequate opportunity to put before me their views on the relevant issues.

[para 10] Likewise, the submissions of Environment Canada were not particularly helpful in determining the applicability of the FOIP Act to the record at issue. Environment Canada's submissions centered on the applicability of the *Access to Information Act* and why it had recommended that the Applicant not be granted access under the law enforcement provisions of that legislation (section16). While its submission provided helpful information about the characterization of the record as law enforcement, it did not contain specific evidence or argument relating to the range of subsections used by the Public Body.

Does the record relate to law enforcement?

[para 11] In order for any of the exceptions under section 20 of the FOIP Act to apply, the Public Body must first demonstrate that the record falls within the definition of law enforcement, as defined by section 1(h) of the FOIP Act, which states:

> 1. In this Act
>
> (h)"law enforcement" means
>
> (i) policing, including criminal intelligence operations,
>
> (ii) a police, security or administrative investigation, including the complaint giving rise to the investigation, that leads or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the investigation or by another body to which the results of the investigation are referred, or
>
> (iii) proceedings that lead or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the proceedings or by another body to which the results of the proceedings are referred;

[para 12] I agree with the Public Body that the record arises out of law enforcement. Environment Canada, under the authority of the *Fisheries Act* section 38(6), investigated the discharge from a landfill site and issued an Inspector's Direction. Environment Canada's investigation falls within the definition of "law enforcement" under section 1(h)(ii) as an administrative investigation. It is also clear under the provisions of the *Fisheries Act*, that the investigation could lead to a penalty, as set out in section 1(h)(iii) of the FOIP Act. I also accept that when a record is in the hands of a Public Body, who is the subject of a law enforcement investigation, as opposed to being the enforcer of a law, the law enforcement exception may still be applied to the record.

[para 13] The Public Body must then show that the conditions exist for a specific exception under section 20(1) to apply. It must show a reasonable expectation of harm as required for section 20(1) (a) and (c), and either an expectation of harm, or interference, for section 20(1)(f). The Commissioner has issued a number of Orders (96-003 and numerous cases following its principles), and Practice Notes #1 and #10, that guide public bodies' understanding of their task in showing harm. Bare assertions that harm would occur, and arguments unsubstantiated by evidence, are not enough.

Should the record be withheld because of a pre-inquiry under section 507 of the Criminal Code?

[para 14] At the time the Public Body denied the Applicant access to the record, there was a pre-inquiry pending under section 507 of the *Criminal Code of Canada* to determine if criminal process should issue against the Public Body. The Public Body was concerned that that proceeding would be affected by the negative publicity and public pressure that it anticipated would result from the release of the record. The Public Body did not specify to which subsection of section 20 this issue specifically relates.

[para 15] The Public Body argued that the principles in the case of *Southam et al. v. Coulter et al.* (1990), 60 C.C.C. (3d) 267 (OCA) apply to these circumstances. As the party who is the potential accused in the pre-inquiry under the *Criminal Code*, the Public Body wants the advantage of the *in camera* nature of that type of hearing, including all information that is brought to that hearing. The purpose of privacy in a pre-inquiry, as set out in the Southam case, is to prevent publicity of potentially harmful information about a person who is not present to defend themselves and, if charges are not laid, who will never have the opportunity to defend themselves against the allegations in a public court proceeding. A justice can hear enough information to decide whether to issue criminal process, without exposing to harm someone who is innocent. The innocent are protected and the administration of justice is not frustrated. The Ontario Court of Appeal found that privacy of that legal process is a justified infringement on the freedom of expression guaranteed by the *Canadian Charter of Rights and Freedoms.*

[para 16] In this case, the record arose, not directly out of or for the pre-inquiry under the *Criminal Code*, but out of a law enforcement investigation by another government body. It was the Applicant who, after the Environment Canada investigation was underway, took the first steps towards a private prosecution. The Attorney General of Canada eventually took conduct of that proceeding. The record may be raised in the pre-inquiry under the *Criminal Code* – I would be surprised if it was not. But once a provincial public body has custody or control of the record, as enforcer or accused, its privacy interests regarding that record are delineated by the FOIP Act The record's inclusion in an *in camera* pre-inquiry, albeit with the seriousness of potential criminal charges, does not change that.

[para 17] I see no evidence that the public officials involved would be improperly influenced by publicity about the issue. The public interest is a legally recognized factor in making a decision to prosecute. I cannot assume that the officials concerned would not measure that factor properly, just because there was publicity and public interest in the case. Therefore, I find the existence of the pre-inquiry would not bring about one of the "harms" contemplated by section 20 of the FOIP Act.

Does section 20(1)(a) or (f) apply to the record?

[para 18] I accept the evidence from the Public Body and Environment Canada that the latter's investigation is a law enforcement matter and was ongoing at the time the Applicant made her request. Environment Canada would not release the record, under the authority of the *Access to Information Act* section 16, on the basis of a general argument that it was part of an ongoing law enforcement matter. It did not tell me what harm to, or interference with, that ongoing investigation could reasonably be anticipated if the record was released. Environment Canada may have authority to withhold the record under its governing statute – that is not for me to adjudicate.

[para 19] The Public Body must comply with the provincial FOIP Act. The exceptions to disclosure are limited and specific. Their conditions must be met on the

standard of a balance of probabilities. The Public Body argued that if released to the Applicant, the record was sure to be made public and public interest and pressure might:

- interfere with the Environment Canada inspector's further investigation
- make it hard for him to change his already recorded conclusions
- affect his impartiality in future
- cause Environment Canada to do further investigations which it would otherwise not have done
- damage the Public Body's reputation and erode public confidence in it
- deprive the Public Body of the right to an impartial adjudication

[para 20] Apart from the harm alleged around publicity, there is no evidence before me, including the content of the record, which indicates how the ongoing investigation would be harmed or even interfered with by release of the record. If public attention is reasonably expected to harm or interfere with law enforcement, the parties must explain to me how that would occur. As to the assertion that public pressure will adversely affect the way Environment Canada officials will perform their duties, this is a very unlikely conclusion to reach in the absence of specific evidence.

[para 21] The Public Body did not argue that the record should be withheld to ensure the integrity of the enforcement action taken against it. Nor did it provide any substantive evidence that withholding the record was necessary for it to properly defend itself, or be assured a fair trial. To the contrary, it argued that withholding the record may help to prevent further law enforcement action being taken against it, under both the *Criminal Code* and the *Fisheries Act.* It does not want to deal with the public pressure and embarrassment that it expects will occur if the information is made public.

[para 22] The purpose of the law enforcement exception is to ensure that legitimate law enforcement activities are not compromised. It is not to protect public bodies from public opinion and pressure when law enforcement is directed at them. Any anticipated harm must relate to the law enforcement matter and not to the Public Body. There may be a case where the exception legitimately applies to ensure that a public body can make full answer and defence to a charge, and have an impartial adjudication. However there is no evidence to support that position in this case.

[para 23] There is insufficient evidence before me to make out a reasonable expectation that the problems the Public Body foresees would occur or, more importantly, that they could be reasonably expected to harm the law enforcement matter set out in the record. Therefore, I find that sections 20(1)(a) and (f) do not apply to the record.

Does section 20(1)(c) apply to the record?

[para 24] Neither the Public Body nor Environment Canada gave specific evidence or argument to show how release of the record could harm the effectiveness of the investigative techniques used. There is nothing on the face of the record that would cause

me to reach the conclusion that any investigative technique would be harmed. Therefore, I find that section 20(1)(c) of the FOIP Act does not apply to the record.

Does section 20(1)(g) apply to the record?

[para 25] This exception was not mentioned by the government agency enforcing the law, Environment Canada. It confined itself to a general argument that the law enforcement exception under federal legislation authorized its decision to withhold the record under the *Access to Information Act.* It did not specify, and neither does the federal legislation, how the exercise of prosecutorial discretion might bear on the matter.

[para 26] The Public Body included this exception in the list of section 20 subsections that it gave the Applicant in its initial letter denying her access to the record. The Applicant argued against it in her initial submission. In rebuttal, one of the individual Affected Parties argued against it, saying there was no evidence to support the application of the exception. In its rebuttal the Public Body states that prosecutorial discretion exists while the investigation is ongoing, and I agree that can be so.

[para 27] The record was produced in the course of the *Fisheries Act* investigation. At the time of its decision to withhold the record the Public Body was not charged with an offence, but a pre-inquiry was scheduled. Although there is no evidence on the point before me, it is reasonable to assume that prosecutors would look at the record, at least to consider what the Public Body's defences to a charge under the *Fisheries Act* might be. That far I can go.

[para 28] I will not make the argument for the Public Body or the enforcing agency and attempt to deduce from what evidence is before me whether or not the exception ought to be or was properly applied. From my review of other cases from the Commissioners in Alberta and British Columbia (BC Orders 00-02 and 04-13, and Alberta Orders 2001-011, 2001-030, and 2001-031) where that exception applied, I note two factors that are not present in this case:

1. there is no specific evidence that the document was used in the exercise of prosecutorial discretion, and
2. the record does not contain sensitive third party information.

[para 29] In the absence of specific evidence that the record was used in the exercise of prosecutorial discretion, I find that section 20(1)(g) does not apply to the record. Having found that the Public Body did not properly apply section 20 of the FOIP Act to the record, I intend to order the Public Body to disclose the record to the Applicant and the two individuals identified as Affected Parties, who, by virtue of having made access requests for the record, are "applicants" as defined by section 1(b) of the FOIP Act.

Application of section 32

[para 30] The Applicant and the two individual Affected Parties argued that the record should be released under the authority of section 32 of the FOIP Act, relating to public interest where there is a risk of significant harm. This issue was not identified in the Notice of Inquiry. Having already decided to order the Public Body to disclose the record to the Applicant and the two individuals identified as Affected Parties, I do not need to consider the applicability of section 32 to the record.

V. ORDER

[para 31] I make this Order under section 72 of the FOIP Act.

[para 32] I find that the Public Body did not properly apply section 20 of the FOIP Act to the record. I order the Public Body to disclose the record to the Applicant and the two individuals identified as Affected Parties.

[para 33] I further order the Public Body to notify me, in writing, within 50 days of being given a copy of this Order that the Public Body has complied with this Order.

Dave Bell
Adjudicator