

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2005-026

December 22, 2005

ALBERTA HUMAN RESOURCES AND EMPLOYMENT

Review Numbers 3179 and 3184

Office URL: www.oipc.ab.ca

Summary: The Applicant made a request under the *Freedom of Information and Protection of Privacy Act* (the “Act”), to Alberta Human Resources and Employment (the “Public Body”), for statements he made to an occupational health and safety officer who was conducting an investigation into a workplace accident. The Public Body refused to provide the statements, relying on section 20 of the act (harm to law enforcement).

The Applicant asked for a review of this decision. He also complained the Public Body had improperly disclosed his personal information under Part 2, had failed in its duty to ensure his information was accurate when making a decision affecting him (section 35), and had improperly refused to correct his personal information (section 36).

The Adjudicator found the Public Body had properly withheld the records under section 20(1)(f) of the Act (interference with an investigation). He also held that the Public Body had not improperly disclosed the Applicant’s personal information, nor had it failed to discharge its duties under sections 35 and 36 of the Act.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(h), 10(1), 20, 20(1)(a), 20(1)(f), 20(1)(g), 35(a), 36, 40(1), 40(1)(c), 40(1)(e), 40(1)(f), 40(4), 72; *Occupational Health and Safety Act*, R.S.A. 2000 c. O-2, ss. 19, 19(1), 41.

Authorities Cited: **AB:** Order 96-003, F2004-030.

Works Cited: OIPC *Practice Note 1*, April 25, 1996.

I. BACKGROUND

[para 1] On May 28, 2004, a serious workplace accident occurred at a construction site. On the same date, the Applicant, the foreman at the site, gave an oral statement to an occupational health and safety officer (an employee of Alberta Human Resources and Employment, the “Public Body”) about the accident and related events. The statement was taped and later transcribed. On June 1, 2004, the Applicant also provided a further written statement.

[para 2] There is, to some degree, a factual dispute about whether the Public Body disclosed the Applicant’s personal information (about his involvement in the incident, as described by him in his statements) when interviewing other witnesses. However, the Public Body’s rebuttal argument seems to concede this did happen.

[para 3] By letter dated November 12, 2004, the Applicant, represented by his legal counsel, made a request for the statements to the Public Body under the *Freedom of Information and Protection of Privacy Act*. By letter dated December 17, 2004, the Public Body refused to provide the statements.

[para 4] On December 23, 2004, the Applicant requested a review of the Public Body’s decision. He also asked for ruling on a number of additional issues. Mediation was unsuccessful, and the matter proceeded to inquiry.

[para 5] Subsequently, the Public Body provided an investigation report to a Department of Justice prosecutor, in order that a determination could be made as to whether to institute a prosecution for contravention of the *Occupational Health and Safety Act*. This Act makes it an offence to knowingly make a false statement in an occupational health and safety investigation.

1. RECORDS AT ISSUE

[para 6] The records are the two statements, consisting of one tape cassette and its transcriptions (seven pages) and one written statement (three pages).

III. ISSUES

[para 7] The Notice of Inquiry sets out the following issues:

Issue A: Did the Public Body properly apply section 20(1)(a) of the Act (harm a law enforcement matter) to the records/information?

Issue B: Did the Public Body properly apply section 20(1)(f) of the Act (interfere with a law enforcement investigation) to the records/information?

Issue C: Did the Public Body properly apply section 20(1)(g) of the Act (prosecutorial discretion) to the records/information?

Issue D: Did the Public Body disclose the Applicant’s personal information in contravention of Part 2 of the Act?

Issue E: Did the Public Body meet its duty to the Applicant, as provided by section 10(1) of the Act?

Issue F: Does the Commissioner have jurisdiction in this inquiry to decide issues relating to the Applicant under sections 35(a) and 36 of the Act? If the answer is “yes”, then

1. Did the Public Body make every reasonable effort to ensure that the Applicant’s personal information was accurate and complete, as required by section 35(a) of the Act?
2. Did the Public Body properly refuse to correct the Applicant’s personal information, as authorized by section 36 of the Act?

IV. DISCUSSION OF THE ISSUES

Issue A: Did the Public Body properly apply section 20(1)(a) of the Act (harm a law enforcement matter) to the records/information?

[para 8] I do not need to decide this question because I resolve the issue of whether the documents may be withheld under Issue B below.

Issue B: Did the Public Body properly apply section 20(1)(f) of the Act (interfere with a law enforcement investigation) to the records/information?

[para 9] The Public Body submits that the accident investigation in this case was a law enforcement investigation. Section 1(h) of the Act defines “law enforcement” as follows:

1(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 10] The Public Body says the investigation at issue was authorized under section 19 of the *Occupational Health and Safety Act*, and that offences arising out of an investigation can result in penalties or sanctions under section 41 of that act. It also says the investigation was ongoing at the time of the request.

[para 11] The Applicant does not dispute that the investigation was a law enforcement matter.

[para 12] At the time of the request, the investigation report to Alberta Justice had not yet been conveyed, nor had the decision whether to institute a prosecution been made. Therefore I accept that the investigation at issue was an “ongoing law enforcement investigation” within the terms of section 20(1)(f).

[para 13] The Public Body says that the release of records “could potentially harm the integrity of the investigation and prosecutorial discretion”. It says that it determined, after consultation with Workplace Health and Safety and with Alberta Justice, “that harm could occur if the records at issue were released in advance of a decision to prosecute. The harm could include changes in witness statements and submissions, and influencing of other potential witnesses if a prosecution proceeded.”

[para 14] In its *in camera* submission the Public Body makes assertions about contradictions in the statements made by the Applicant.

[para 15] In the parts of his brief pertaining to section 20(1)(a), the Applicant, citing Order 96-003 and OIPC *Practice Note 1*, April 25, 1996, says that the harm test requires answers to three questions, which he says have not been answered. These are:

- (a) What is the connection between disclosure and the anticipated harm?
- (b) Does the harm constitute “damage” or “detriment” to the matter?
- (c) Is there a reasonable expectation that harm will occur?

[para 16] The Applicant says the same test applies under section 20(1)(f).

[para 17] The Applicant also says that he seeks copies of the statements in order to verify the accuracy of the information held by the Public Body. He says he has reason to believe that some of the information he provided is inaccurate, noting that he was in shock and suffering at the time he made his statements, and that he found the interview to be intimidating. The Applicant says his purpose is to provide a supplementary statement if the existing ones are inaccurate, and there is no other purpose such as interfering with or hindering the investigation. He says the Public Body failed to exercise its discretion properly by not taking this into account.

[para 18] I must decide whether disclosure of the documents could reasonably be expected to interfere with or harm the ongoing investigation in this case. The Public Body's main concerns are, first, that the Applicant will use the information to 'change' his statement. Presumably it is concerned he will come up with a self-exonerating explanation of any internal contradictions in the statements or some innocent version of the events described in the statements. Second, the Public Body suggests there is a possibility of tampering with witnesses. The concern is that the information would be used to influence the evidence the witnesses would give in further statements or in a prosecution, presumably so as to conform with the Applicant's statements or with some innocent explanation of them or of contradictions within them.

[para 19] I accept it is likely the Applicant would use the statements for a self-serving purpose. It does not necessarily follow that his use of them would be improper in the sense of helping him or other witnesses to fabricate evidence. It is possible they would help him provide a true explanation consistent with innocence.

[para 20] At the same time, however, the possibility exists that disclosing the statements would help the Applicant generate false evidence. I must add to this the fact that the Applicant himself concedes there may be inaccuracies in his existing statements. I note as well that the investigation of this incident resulted in a transfer of the investigation report to Alberta Justice for a determination of whether a prosecution is warranted. I do not need to be convinced that the Applicant would improperly interfere in the matter - only there is a reasonable likelihood that he would do so. The facts just noted lead me to conclude that this threshold has been met in this case. In my view, disclosure of the records could reasonably be expected to interfere with or harm an ongoing law enforcement investigation, within the terms of section 20(1)(f).

[para 21] I turn to whether the Public Body properly exercised its discretion to withhold records in this case.

[para 22] I do not agree with the Applicant that the Public Body failed to take into account his reasons for asking for the records. The Public Body does appear to have considered this. It makes the point that the Act is not an avenue for a person to recant statements made during an investigation. It also points out that the Applicant did not take other opportunities to try to 'correct' his statements - such as asking for a review with the investigating officer. Thus I conclude that it understood and took into account the stated purpose of the Applicant when it exercised its discretion whether to disclose the documents, but that it regarded other considerations as more important.

[para 23] The fact the Public Body forwarded a report to Alberta Justice for a determination of whether a charge was warranted shows that the Public Body was persuaded the evidence it had about the Applicant's existing statements potentially warranted a charge. This lends support to the idea the Public Body was concerned about the potential harm to the investigation related to the potential for changing statements. I conclude, therefore, that the Public Body properly exercised the discretion to withhold the records in this case.

Issue C: Did the Public Body properly apply section 20(1)(g) of the Act (prosecutorial discretion) to the records/information?

[para 24] I do not need to decide this question because I resolved the issue of whether the documents were properly withheld under Issue B above.

Issue D: Did the Public Body disclose the Applicant's personal information in contravention of Part 2 of the Act?

[para 25] This Applicant argues that the Public Body's disclosure of his statements or parts of his statements, in conjunction with his name, to other company employees during the investigation, contravened Part 2 of the Act.

[para 26] As noted earlier, there is, to some degree, a factual dispute about whether the Public Body disclosed the Applicant's personal information (about his involvement in the incident, as described by him in his statements) when interviewing other witnesses. The Applicant provides his own affidavit evidence, and that of other witnesses, that this happened. The Public Body provides affidavit evidence in its initial submission that information collected from the Applicant by a particular individual was not directly disclosed to anyone, and it says in its initial submission that information collected directly from the Applicant was not disclosed to anyone. However, the Public Body's rebuttal argument seems to be based on the idea that this did happen. For the purpose of this discussion, I will assume it did happen.

[para 27] The Applicant concedes that there may be disclosure of personal information, under section 40(1) of the Act,

- for the purpose for which the information was collected or a consistent purpose (section 40(1)(c)),
- for the purpose of complying with an enactment of Alberta (section 40(1)(e)), or
- for any purpose in accordance with an enactment of Alberta that authorizes or requires the disclosure (section 40(1)(f)).

[para 28] However, he says the disclosure must, according to section 40(4), be done only to the extent necessary to carry out these purposes in a reasonable manner. The Applicant argues that manner was not reasonable, in that the interviews of other witnesses for the purposes of the investigation could have been done without mentioning his name or the fact that he had made certain statements. He says it would have been enough to ask whether they knew anything about particular events that had occurred.

[para 29] The Public Body argues in reply that the information that was provided by the Applicant – relating to the company's safety and investigation processes, and to the facts about what happened - was not his 'personal information'. I do not accept this argument. The Applicant's statements were not just about what processes were to be

applied, but also about his involvement in the events and how he applied the processes. This is his personal information.

[para 30] The Public Body also says that releasing the information was necessary to determine the authenticity of the information.

[para 31] The *Occupational Health and Safety Act*, section 19(1), provides

19(1) If an accident occurs at a work site, an [occupational health and safety] officer may attend at the scene of the accident and may make any inquiries that the officer considers necessary to determine the cause of the accident and the circumstances relating to the accident.

[para 32] In my view, the provision that an occupational health and safety officer may conduct an investigation into the accident *and into the circumstances relating to the accident* is broad enough to authorize both investigations into the cause of an accident and investigations to determine if witnesses are being truthful. Thus I find the disclosure of the information was authorized under sections 40(1)(c) and 40(1)(f) of the Act.

[para 33] With respect to whether the disclosure was only to the extent necessary to carry out the purpose in a reasonable manner, in my view it is reasonable when interviewing other witnesses to name a person for the purpose of testing the veracity of his statements, and in many circumstances, it may also be reasonable to do so for the more general purpose of discovering what happened. In a circumstance such as the present, this may be especially so where the person whose information is at issue was a person of some authority.

[para 34] I note that the affidavit evidence of the Applicant and other witnesses, provided by the Applicant, suggests that the information put to other witnesses may not have been an accurate recounting of what the Applicant actually said in his statements. It does not follow, however, that even if this was so, this was an unreasonable use of the Applicant's personal information.

[para 35] I conclude that the Public Body's disclosure of the Applicant's personal information was necessary to carry out its investigative purposes in a reasonable manner, and that the Public Body did not disclose information in contravention of the Act.

Issue E: Did the Public Body meet its duty to the Applicant, as provided by section 10(1) of the Act?

[para 36] The Applicant argues that in making its decision whether to disclose, the Public Body did not take into account the proper considerations, including openness, fairness and transparency. He also complains that the Public Body, by simply naming the sections of the Act, did not give sufficiently specific "considerations or criteria" that it took into account for withholding the records. Also, the Applicant says the Public Body did not identify if it conducted a search, or what records it found.

[para 37] The substantive considerations in terms of the way the Public Body exercised its discretion have already been dealt with under section 20(1)(f) above.

[para 38] With respect to the sufficiency of the reasons given by the Public Body, I have reviewed the Public Body's letter of refusal. This letter contains, in addition to the relevant provisions of the Act, references to other considerations the Public Body took into account in reaching its decision, including the Workplace Health and Safety Policy, and the fact that the investigation was still ongoing and the decision whether to prosecute was still pending. I find this was an adequate summary of the considerations it took into account in reaching its decision.

[para 39] I do not accept the point about the adequacy of the search, as there does not seem to be, nor was there ever, any dispute about which records are at issue.

[para 40] The Applicant also suggests there is some relationship between the duty to assist under section 10 and the responsibilities of public bodies under sections 35 and 36. I will deal with the Applicant's points under the latter sections below.

Issue F: Does the Commissioner have jurisdiction in this inquiry to decide issues relating to the Applicant under sections 35(a) and 36 of the Act? If the answer is "yes", then

- **Did the Public body make every reasonable effort to ensure that the Applicant's personal information was accurate and complete, as required by section 35(a) of the Act?**
- **Did the Public Body properly refuse to correct the Applicant's personal information, as authorized by section 36 of the Act?**

[para 41] The relevant parts of sections 35 and 36 of the Act provide:

35 If an individual's personal information will be used by a public body to make a decision that directly affects the individual, the public body must

(a) make every reasonable effort to ensure that the information is accurate and complete,

36(1) An individual who believes there is an error or omission in the individual's personal information may request the head of the public body that has the information in its custody or under its control to correct the information.

[para 42] The Applicant argues that section 35 applies (that is, that there is jurisdiction) because the Public Body was using his personal information to make a decision about him: it was using his statements (his personal information) to decide whether to present a report to Justice regarding a potential prosecution. The Public Body

does not seem to contest this point. I accept that I have jurisdiction to decide this question.

[para 43] With respect to ensuring the completeness of his information, the Applicant says that the Public Body is preventing him from providing complete information, rather than ensuring it is complete.

[para 44] As for ensuring accuracy, the Applicant says that by refusing him the ability to check his statements for accuracy, it is breaching its duty to him, by thwarting his ability to exercise his rights under the section.

[para 45] The Public Body replies that “it is not reasonable to expect that law enforcement agencies take witness statements and then allow a witness to change their statement at any time or use the FOIP Act to correct it”. It says this is not the intent of the FOIP Act.

[para 46] With respect to the section 35 question, the Public Body says that the Applicant did not at any time, from when the witness statements were taken until the access request was made, ever contact the Public Body to review his statement or offer additional information or changes. This suggests there has been nothing to prevent him from putting forward his more current recollection of the events. I do not accept the Applicant’s contention that it was impossible for him to do this without seeing the earlier statements, and whatever errors these contained. It is also not logical to conclude that refusal by the Public body to release records that may be properly withheld under Part 1 of the Act would constitute a breach of the Public Body’s duties under Part 2. Thus I do not accept that the Public Body failed to meet its duty to the Applicant under section 35.

[para 47] With respect to the section 36 (correction) issue, in my view, I do not have jurisdiction to decide this issue because no correction request has been made.

V. ORDER

[para 48] I make this Order under section 72 of the Act.

[para 49] I find that the Public Body properly applied section 20(1)(f) of the Act to the records.

[para 50] I find that the Public Body did not disclose the Applicant’s personal information in contravention of Part 2 of the Act.

[para 51] I find that the Public Body met its duty to the Applicant, as provided by section 10(1) of the Act.

[para 52] I find that the Public Body made every reasonable effort to ensure that the Applicant’s personal information was accurate and complete, as required by section 35(a) of the Act.

[para 53] I find that I do not have jurisdiction to consider the issue of correction under section 36 of the Act because no correction request was made by the Applicant to the Public Body.

Dave Bell
Adjudicator