ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2005-028

July 3, 2007

MEDICINE HAT POLICE SERVICE

Case File Number 3203

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Summary: The Applicant requested access under the *Freedom of Information and Protection of Privacy Act* (the "Act" or the "FOIP Act") from the Medicine Hat Police Service (the "Medicine Hat Police Service" or the "Public Body") to records concerning police investigations of two incidents involving the Applicant's family. The Public Body denied access to some of the information in the records on the basis of sections 17(1) and 17(4)(b) (personal information) of the FOIP Act. The Applicant requested a review of the Public Body's decision. The Commissioner's Office identified a preliminary issue concerning whether disclosure of the records would be an offence under an Act of Canada within the terms of section 20(4) of the FOIP Act, as some of the records appeared to involve young persons who are governed by the provisions of the federal *Youth Criminal Justice Act* ("YCJA").

The Commissioner found that most of the information was contained in a law enforcement record, that disclosure of most of the information in the records would be an offence under section 138(1) of the YCJA, and therefore the Public Body was required by section 20(4) of the FOIP Act to refuse to disclose that information. The Commissioner also found that he did not have jurisdiction over those records and returned them to the Public Body. As to the information to which section 20(4) did not apply, and which the Public Body had severed and withheld under section 17, the Commissioner said that he would request additional submissions from the parties on the applicability of section 17 to that information, and the applicability of other issues the Applicant raised for the inquiry.

Statutes Cited: *Criminal Code*, R.S.C. 1985, c. C-46; *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(h), 10(1), 17, 17(1), 17(4)(b), 20(4), 32, 72; *Youth Criminal Justice Act*, S.C. 2002, c. 1, ss. 2(1), 4, 5, 6(1), 115(1), 118(1), 119(1), 119(1)(d), 119(1)(k), 119(4)-(6), 138(1); *Young Offenders Act*, R.S.C. 1985, c. Y-1, s. 2(1).

Cases Cited: *L. (S.) v. B. (N.)* (2005), 195 C.C.C. (3d) 481 (Ont. C.A.); *Quebec (Minister of Justice) v. Canada (Minister of Justice)* (2003), 175 C.C.C. (3d) 321 (Que. C.A.); *R. v. B.J.C.*, [2006] A.J.. No. 1381 (Alta. Prov. Ct.).

I. BACKGROUND

[para 1] On November 15, 2004, the Applicant applied to the Medicine Hat Police Service (the "Medicine Hat Police Service" or the "Public Body") under the *Freedom of Information and Protection of Privacy Act* (the "Act" or the "FOIP Act"), requesting access to records concerning two incidents involving the Applicant's family. The Public Body categorized the request for records as Requests A, B, C and D, as described below.

[para 2] The Public Body granted partial access to records concerning Requests A and B, but severed and withheld some personal information contained in those records, relying on section 17(1) and section 17(4)(b) of the FOIP Act. The Public Body granted full access to records concerning Request C. The Public Body stated it did not have any records concerning Request D.

[para 3] The Applicant requested that my Office review the Public Body's decision. Mediation did not resolve the matters, which proceeded to inquiry.

[para 4] The Applicant had raised a number of issues for the inquiry, including the adequacy of the Public Body's search for responsive records (section 10(1) of the FOIP Act), the applicability of section 17 of the FOIP Act to sever and withhold personal information from the records) and disclosure in the public interest (section 32 of the FOIP Act).

[para 5] My Office identified a preliminary issue for the inquiry, namely, whether disclosure of the information contained in the records would be an offence under an Act of Canada, within the terms of section 20(4) of the FOIP Act. The "Act of Canada" for the purposes of section 20(4) was the *Youth Criminal Justice Act*, S.C. 2002, c. 1 (the "YCJA"), which came into force on April 1, 2003. The YCJA repealed and replaced the *Young Offenders Act*, R.S.C. 1985, c. Y-1 (the "YOA"). If section 20(4) of the FOIP Act applied to the information contained in the records, the Public Body would be required to refuse to disclose that information to the Applicant.

[para 6] The Public Body provided the records at issue for the inquiry, but did not otherwise provide a written submission for the inquiry. The Applicant provided a written submission, which did not specifically address the issue of the applicability of section

20(4) of the FOIP Act. The Applicant's submission cited sections in the YCJA with respect to victims' access to information.

II. RECORDS AT ISSUE

[para 7] In the Public Body's November 24, 2004 response to the Applicant's access request, the Public Body categorized the records at issue as follows:

- All records and information relating to a complaint the Applicant laid against a named official of the school attended by the Applicant's minor daughter, in relation to an alleged confinement and abuse of the Applicant's daughter occurring on April 12, 2001 ("Request A").
- All records and information relating to the complaint of vandalism to the Applicant's residence on December 30, 2003 ("Request B").
- All records relating to a summary of events that was provided to the mayor of the City of Medicine Hat by an Inspector of the Medicine Hat Police Service, on or after October 8, 2004, as it relates to Requests A and B ("Request C").
- All records and information relating to information provided to a named Staff Sergeant of the Medicine Hat Police Service concerning Requests A-C, and the name of the person who provided information to that Staff Sergeant ("Request D").

[para 8] In response to these requests, the Public Body properly informed the Applicant that the FOIP Act required only that the Public Body produce any records it had concerning the Applicant's requests. The FOIP Act did not require that the Public Body provide individuals' recollections of conversations. Therefore, the information provided represented only recorded information that the Public Body had in its possession.

[para 9] I will address the records according to how the Public Body has categorized them in terms of Requests A, B, C and D.

III. ISSUE

[para 10] The Notice of Inquiry set out the following preliminary issue:

- Does section 20(4) of the Act (disclosure of information is an offence under an Act of Canada) apply to the records/information?

IV. DISCUSSION OF THE ISSUE

[para 11] Section 20(4) of the FOIP Act reads:

20(4) The head of a public body must refuse to disclose information to an applicant if the information is in a law enforcement record and the disclosure would be an offence under an Act of Canada.

[para 12] Section 20(4) requires that information be in a law enforcement record and that disclosure of the information be an offence under an Act of Canada.

A. Law enforcement record

[para 13] "Law enforcement" is defined in section 1(h) of the FOIP Act as follows:

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,

(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 14] In the case of Request A, I understand that one of the alleged offences that the police are investigating is "wrongful confinement". Given the information contained in the records, it appears that the police may simultaneously be investigating another alleged offence, but the records do not clearly state what that alleged offence may be. Nevertheless, there is a police investigation of alleged offences that, if proven in court, could lead to a penalty or sanction being imposed by the court under the *Criminal Code*.

[para 15] In the case of Request B, the alleged offence that the police are investigating is "mischief damages under $5,000", which, if proven in court, could lead to a penalty or sanction being imposed by the court under the *Criminal Code*.

[para 16] The information concerning the police investigations is recorded. Therefore, the information in the records for Requests A and B is information in a law enforcement record for the purposes of section 20(4) of the FOIP Act.

[para 17] One of the records for Request C is correspondence of a person who has knowledge of the police investigation concerning Request B and who is referring in a general way to that police investigation. The other record for Request C does not

mention any police investigation. Although the information in the two records for Request C is recorded, in my view the records do not concern a police investigation as contemplated by section 1(h) of the FOIP Act.

[para 18] Therefore, the information in the records for Request C is not in a law enforcement record for the purposes of section 20(4) of the FOIP Act. Consequently, section 20(4) of the FOIP Act does not apply to the information in the records for Request C. The Public Body is not required to refuse to disclose the information in those records, and has disclosed to the Applicant all the information in the records for Request C.

[para 19] There are no records to be considered under section 20(4) of the FOIP Act for Request D.

[para 20] The next matter to be considered is whether the disclosure of the information in the records for Requests A and B would be an offence under an Act of Canada.

B. Offence under an Act of Canada – Request A

[para 21] Request A concerns a police investigation of an official of the school attended by the Applicant's minor daughter. The investigation concerns the official's alleged wrongful confinement and abuse of the Applicant's daughter occurring on April 12, 2001.

[para 22] In Request A, the Medicine Hat Police Service provided the Applicant with the investigating officer's notes, which consist of two pages. The Medicine Hat Police Service fully disclosed the first page to the Applicant. Under section 17 of the FOIP Act, the Medicine Hat Police Service severed personal information on the second page, and disclosed to the Applicant the remaining information on that page. The Medicine Hat Police Service also provided the Applicant with two other unsevered pages of records.

[para 23] The information severed from the second page of the investigating officer's notes is the personal information of two individuals, consisting of their names and other personal information.

[para 24] The first name appears under the heading "Acc", which I take to mean "accused". The name is followed by what appears to be the number eleven and the notation "YOA.". "YOA" could mean the *Young Offenders Act*, which was in force in April 2001, or it could mean "years of age".

[para 25] My review of the investigating officer's notes, the records as a whole and the Applicant's submissions leads me to conclude that the name is that of a student at the school attended by the Applicant's daughter. I understand that the alleged mischief

perpetrated by this student on the Applicant's daughter led to the incident involving the alleged wrongful confinement of the Applicant's daughter by the school official.

[para 26] Would it be an offence under an Act of Canada to disclose the name and other personal information of this student?

[para 27] The YOA was an Act of Canada, but it has been repealed and substituted by the YCJA. The YCJA is an Act of Canada. Section 138(1) of the YCJA makes it an offence to disclose information that was prohibited from disclosure under the YOA. Section 138(1) of the YCJA reads:

> *138. (1) Every person who contravenes subsection 110(1) (identity of offender not to be published), 111(1) (identity of victim or witness not to be published), 118(1) (no access to records unless authorized) or 128(3) (disposal of R.C.M.P. records) or section 129 (no subsequent disclosure) of this Act, or subsection 38(1) (identity not to be published), (1.12) (no subsequent disclosure), (1.14) (no subsequent disclosure by school) or (1.15) (information to be kept separate), 45(2) (destruction of records) or 46(1) (prohibition against disclosure) of the Young Offenders Act, chapter Y-1 of the Revised Statutes of Canada, 1985,*
>
> > *(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or*
> >
> > *(b) is guilty of an offence punishable on summary conviction.*

[para 28] However, the YOA applied only to a "young person", defined in section 2(1) of the YOA as a person twelve years of age or more, but under eighteen years of age. It appears from the investigating officer's notes that the student was eleven years of age at the time of the police investigation. It is conceivable that this was so, as the records give the birth date of the Applicant's daughter, who was twelve years of age at the time of the police investigation. Furthermore, I presume that the investigating officer would have known that the YOA did not apply to anyone under twelve years of age. I therefore conclude that the notation "YOA" in this record must mean "years of age".

[para 29] As the student was under twelve years of age, the YOA and therefore the YCJA does not apply to the name and other personal information of the student. Since the YOA and the YCJA do not apply, it is not an offence under an Act of Canada to disclose the name and other personal information of the student. Therefore, section 20(4) of the FOIP Act does not apply.

[para 30] The Public Body severed and withheld this personal information under section 17 of the FOIP Act. Consequently, the disclosure of this personal information remains to be considered under section 17. I will be requesting further submissions from the Public Body and the Applicant on the applicability of section 17 to this personal information, and the applicability of other issues the Applicant raised for the inquiry.

[para 31] In that same record, the Public Body also severed the personal information of an adult, pursuant to section 17(1) of the FOIP Act, before disclosing the remainder of the record to the Applicant. The personal information of the adult concerns the police investigation of the alleged wrongful confinement of the Applicant's daughter.

[para 32] There is no evidence before me that disclosure of the adult's personal information would be an offence under an Act of Canada. Therefore, section 20(4) of the FOIP Act does not apply.

[para 33] The Public Body severed and withheld this personal information under section 17 of the FOIP Act. Consequently, the disclosure of this personal information remains to be considered under section 17. I will also be requesting submissions from the Public Body and the Applicant on the applicability of section 17 to this personal information, and the applicability of other issues the Applicant raised for the inquiry.

C. Offence under an Act of Canada – Request B

[para 34] The information in the records for Request B concerns a police investigation into an alleged offence of "mischief damages under $5,000". The incident involved the "egging" of the Applicant's residence that occurred on December 30, 2003.

[para 35] The records for Request B include an 11-page general police report, 12 pages of police officer notes, and the Applicant's written 7-page witness/victim/complainant statement made to the police.

[para 36] Under section 17 of the FOIP Act, the Public Body severed and withheld the names and other personal information of the individuals who were suspects in the police investigation. The Public Body also severed and withheld the names and other personal information of other individuals questioned by the police. The Public Body disclosed to the Applicant the remaining information in the records for Request B, including the Applicant's written witness/victim/complainant statement.

[para 37] The records give the birthdates of the individuals who were suspects in the investigation. Those individuals were seventeen years of age at the time of the incident. The records refer to the suspects as "YO-SUSPECT".

[para 38] At the time of the incident, the YCJA was in force. It applies to a "young person", defined in section 2(1) as a person who is twelve years old or older, but less than eighteen years old, and includes any person who is charged under the YCJA with having committed an offence while he or she was a young person or who is found guilty of an offence under the YCJA.

[para 39] Since the individual suspects were seventeen years of age at the time of the incident, the reference to "YO-SUSPECT" in the records must refer to a young person, who is characterized in the records as a "young offender" suspect for the

purposes of the YCJA. It appears that the term "young offender" is still alive and well under the YCJA, despite the definition of "young person": see, for example, *R. v. B.J.C.*, [2006] A.J. No. 1381 (Alta. Prov. Ct.), in which the Court refers at paragraph 27 to a "young offender" under the YCJA.

[para 40] Consequently, I must consider whether it is an offence under the YCJA to disclose any of the information contained in the records for Request B, including the personal information that the Public Body severed and withheld under section 17 of the FOIP Act.

[para 41] In this case, I need to consider the following provisions of the CYJA:

> *2. (1) The definitions in this subsection apply in this Act.*
>
> *"extrajudicial measures" means measures other than judicial proceedings under this Act used to deal with a young person alleged to have committed an offence and includes extrajudicial sanctions.*
>
> *"extrajudicial sanction" means a sanction that is part of a program referred to in section 10.*
>
> *"record" includes any thing containing information, regardless of its physical form or characteristics, including microform, sound recording, videotape, machine-readable record, and any copy of any of those things, that is created or kept for the purposes of this Act or for the investigation of an offence that is or could be prosecuted under this Act.*
>
> *4. The following principles apply in this Part in addition to the principles set out in section 3:*
>
> *(a) extrajudicial measures are often the most appropriate and effective way to address youth crime;*
>
> *(b) extrajudicial measures allow for effective and timely interventions focused on correcting offending behaviour;*
>
> *(c) extrajudicial measures are presumed to be adequate to hold a young person accountable for his or her offending behaviour if the young person has committed a non-violent offence and has not previously been found guilty of an offence; and*
>
> *(d) extrajudicial measures should be used if they are adequate to hold a young person accountable for his or her offending behaviour and, if the use of extrajudicial measures is consistent with the principles set out in this section, nothing in this Act precludes their use in respect of a young person who*

(i) has previously been dealt with by the use of extrajudicial measures, or

(ii) has previously been found guilty of an offence.

5. Extrajudicial measures should be designed to

(a) provide an effective and timely response to offending behaviour outside the bounds of judicial measures;

(b) encourage young persons to acknowledge and repair the harm caused to the victim and the community;

(c) encourage families of young person – including extended families where appropriate – and the community to become involved in the design and implementation of those measures;

(d) provide an opportunity for victims to participate in decisions related to the measures selected and to receive reparation, and

(e) respect the rights and freedoms of young persons and be proportionate to the seriousness of the offence.

6. (1) A police officer shall, before starting judicial proceedings or taking any other measures under this Act against a young person alleged to have committed an offence, consider whether it would be sufficient, having regard to the principles set out in section 4, to take no further action, warn the young person, administer a caution, if a program has been established under section 7, or, with the consent of the young person, refer the young person to a program or agency in the community that may assist the young person not to commit offences.

115. (1) A record relating to any offence alleged to have been committed by a young person, including the original or a copy of any fingerprints or photographs of the young person, may be kept by any police force responsible for or participating in the investigation of the offence.

118(1) Except as authorized or required by this Act, no person shall be given access to a record kept under sections 114 to 116, and no information contained in it may be given to any person, where to do so would identify the young person to whom it relates as a young person dealt with under this Act.

119. (1) Subject to subsection (4) to (6), from the date that a record is created until the end of the applicable period set out in subsection (2), the following

persons, on request, shall be given access to a record kept under section 114, and may be given access to a record kept under sections 115 and 116:

…

(d) the victim of the offence or alleged offence to which the record relates;

…

(k) a person acting as ombudsman, privacy commissioner or information commissioner, whatever his or her official designation might be, who in the course of his or her duties under an Act of Parliament or the legislature of a province is investigating a complaint to which the record relates;…

(4) Access to a record kept under sections 115 or 116 in respect of extrajudicial measures, other than extrajudicial sanctions, used in respect of a young person shall be given only to the following persons for the following purposes;

(a) a peace officer or the Attorney General, in order to make a decision whether to again use extrajudicial measures in respect of the young person;

(b) a person participating in a conference, in order to decide on the appropriate extrajudicial measure;

(c) a peace officer, the Attorney General or a person participating in a conference, if access is required for the administration of the case to which the record relates; and

(d) a peace officer for the purpose of investigating an offence.

138. (1) Every person who contravenes subsection 110(1) (identity of offender not to be published), 111(1) (identity of victim or witness not to be published), 118(1) (no access to records unless authorized) or 128(3) (disposal of R.C.M.P. records) or section 129 (no subsequent disclosure) of this Act, or subsection 38(1) (identity not to be published), (1.12) (no subsequent disclosure), (1.14) (no subsequent disclosure by school) or (1.15) (information to be kept separate), 45(2) (destruction of records) or 46(1) (prohibition against disclosure) of the Young Offenders Act, chapter Y-1 of the Revised Statutes of Canada, 1985,

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or

(b) is guilty of an offence punishable on summary conviction.

[para 42] The starting point for this discussion is section 118(1) of the YCJA. In *L. (S.) v. B. (N.)* (2005), 195 C.C.C. (3d) 481 (Ont. C.A.), the Court said at paragraph

44 that section 118(1) is central to the statutory scheme controlling access to records set up in the YCJA. At paragraph 45, the Court said:

> Section 118 announces an unequivocal and unqualified prohibition against access to records kept by the court, police or Crown except as required or authorized under the Act. This prohibition is made all the more emphatic by s. 138 which makes is an offence to violate s. 118.

[para 43] As provided by section 115(1) of the YCJA, there is no doubt that the records relate to an offence alleged to have been committed by young persons, and that the records have been kept by a police force responsible for or who has participated in the investigation of the offence. Furthermore, all the records included in Request B fall within the definition of "record" contained in section 2(1) of the YCJA.

[para 44] The next matter to decide is whether the records meet the requirements of section 118(1).

[para 45] As required by section 118(1), the records are kept under section 115(1). The Applicant has made an access request for the records, so there is no issue about the Applicant wanting merely information contained in the records.

[para 46] The records must also identify the young persons to whom the records relate as young persons dealt with under the YCJA. It is clear from the records that the young persons have been dealt with under section 6 of the YCJA, which is referred to as the "extrajudicial measures" provision. In *Quebec (Minister of Justice) v. Canada (Minister of Justice)* (2003), 175 C.C.C. (3d) 321 (Que. C.A.), the Court said at paragraphs 22 and 70 that section 6 of the YCJA gives police officers the discretionary power to use extrajudicial measures and thereby avoid judicial intervention. The Court also said that section 4 and 5 of the YCJA clearly demonstrate the preventive nature of the measures provided for in section 6.

[para 47] The records clearly state that the investigating officer decided to take no action, which is an extrajudicial measure contemplated by section 6. The investigating officer decided not to pursue formal charges as the young persons acknowledged the harm caused to the Applicant and wrote apology letters. The young persons repaired the harm by paying the Applicant for the damage they caused. The Applicant questions the sufficiency of the payment, but that does not negate this being an extrajudicial measure.

[para 48] I find that disclosure of all the records for Request B would identify the young persons to whom the records relate as being young persons dealt with by way of an extrajudicial measure under the YCJA, as provided by section 118(1) of the YCJA. Consequently, the Applicant is prohibited from getting access to these records, and disclosure to the Applicant would be an offence under section 138(1) of the YCJA, unless an exception applies.

[para 49] Section 119(1) of the YCJA contains the only exceptions that may be relevant in this case. Under section 119(1)(d) of the YCJA, the Applicant, as a victim,

may, upon request, be given access to the records kept under section 115(1), subject to section 119(4)-(6). As provided by section 119(1)(k) of the YCJA, I also may, upon request, be given access to the records kept under section 115, subject to section 119(4)-(6).

[para 50] I find that section 119(4) takes away the Applicant's ability and my ability to get access to the records in this case, for the following reasons.

[para 51] Section 119(1) is subject to section 119(4), which severely restricts access to records in respect of extrajudicial measures used in respect of a young person. Only certain persons can get access to those records, and only for certain purposes. The Applicant and I are not included in the list of persons who can get access to records concerning the extrajudicial measure used in respect of the young persons in this case. Consequently, there is no exception in this case to the prohibition on access contained in section 118(1). Disclosure of those records would be an offence, as provided by section 138(1) of the YCJA.

[para 52] I find that disclosure of the records for Request B and consequently disclosure of the information in those records would be an offence under an Act of Canada, within the terms of section 20(4) of the FOIP Act. Consequently, section 17 of the FOIP Act has no applicability to the personal information that the Public Body severed and withheld from the records for Request B.

[para 53] Pursuant to section 20(4), the Public Body must refuse to disclose the information contained in the records for Request B. The result is that the Applicant cannot get access to the records for Request B under the FOIP Act.

[para 54] Under section 119(4) of the YCJA, I do not have jurisdiction to get access to the records for Request B. Therefore, I do not have jurisdiction to consider any other issues under the FOIP Act in relation to those records. Consequently, along with this Order, I am returning those records to the Public Body.

V. ORDER

[para 55] I make the following Order under section 72 of the FOIP Act.

[para 56] I find that section 20(4) of the FOIP Act does not apply to information contained in the records for Requests A and C. However, as all the information in the records for Request C has been disclosed to the Applicant, only the information in the records for Request A remains to be considered under section 17 of the FOIP Act. When the judicial review period for this Order has passed, my Office will request further submissions from the parties on the applicability of section 17 to the records for Request A and the applicability of other issues the Applicant raised for the inquiry.

[para 57] I find that section 20(4) of the FOIP Act does not apply to Request D as there are no records to consider.

[para 58] I find that section 20(4) of the FOIP Act applies to the information contained in the records for Request B. As provided by section 20(4), the Public Body must refuse to disclose to the Applicant the information contained in the records for Request B. Section 17 of the FOIP Act has no applicability to those records.

[para 59] Furthermore, I have no jurisdiction over the records for Request B. I therefore do not have jurisdiction to consider any other issues in relation to those records. Along with this Order, I am returning those records to the Public Body.

Frank Work, Q.C.
Information and Privacy Commissioner