ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2006-002

August 2, 2007

EDMONTON POLICE SERVICE

Case File Number 3285

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Summary: The Complainant complained that the Edmonton Police Service (the "Public Body") collected his personal information before commencing a threat assessment concerning him. Consequently, the Complainant submitted that the collection of the Complainant's personal information was not authorized under the law enforcement provision contained in section 33(b) of the *Freedom of Information and Protection of Privacy Act* (the "Act"). The Commissioner found that the Public Body's collection of the Complainant's personal information was authorized under the law enforcement provisions contained in section 33(b) and section 34(1)(g) of the Act.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(h), 1(h)(i), 1(n), 1(n)(i), 1(q), 2, 5, 33, 33(b), 33(c), 34, 34(1)(g), 34(1)(n), 72; *Police Act*, R.S.A. 2000, c. P-17.

Orders Cited: AB: Orders 2000-027, F2002-020.

I. BACKGROUND

[para 1] The Complainant received records from the Edmonton Police Service (the "Public Body" or "EPS") as a result of an access request under the *Freedom of Information and Protection of Privacy Act* (the "Act"). After reviewing the records, the

Complainant complained to my Office that the Public Body had collected his personal information in contravention of the Act.

[para 2] The Complainant, a member of the Public Body, alleged that the Public Body collected his personal information before commencing a threat assessment on June 26, 2003, concerning him. Particularly at issue was whether there was a collection of the Complainant's personal information during a hallway conversation between a Superintendent of the Public Body and an individual, who had approached the Superintendent to advise that a member of the EPS feared for his or her personal safety, relative to the Complainant.

[para 3] The Public Body claimed that it did not collect the Complainant's personal information prior to commencing the threat assessment, and that the collection at that time was authorized under section 33(b) (law enforcement) and section 33(c) (operating program or activity) of the Act. The Public Body also claimed that it was authorized to collect the Complainant's personal information from sources other than the Complainant, as provided by section 34(1)(g) (law enforcement) and section 34(1)(n) (managing or administering personnel) of the Act. The Complainant submitted that the collection of the Complainant's personal information was not authorized under the law enforcement provision contained in section 33(b) of the Act, and was not otherwise authorized under the Act.

[para 4] Mediation by my Office did not resolve the matter, which proceeded to a written inquiry under the Act.

II. RECORDS AT ISSUE

[para 5] As this case involves the authority to collect personal information under the Act, there are no records directly at issue.

III. ISSUES

[para 6] The Notice of Inquiry set out the following issue for the inquiry:

> Did the Public Body have the authority to collect the Complainant's personal information, as provided by section 33 and section 34 of the Act?

IV. DISCUSSION OF THE ISSUE

A. "Collection" of personal information

[para 7] As evidence for the inquiry, the Public Body provided an affidavit from the Superintendent in charge of the Special Investigations Division of the Public Body

(the "Superintendent"), who authorized the threat assessment concerning the Complainant. The following is the relevant evidence contained in the Superintendent's affidavit:

> 5. At some point prior to June 26, 2003, as I was walking down a hallway in a police facility, an individual approached me to advise that a member of the EPS feared for their [sic] personal safety relative to [the Complainant].
>
> 6. I advised that individual that concerns relative to [the Complainant], or any other EPS member, would need to be submitted in writing before an investigation by the Threat Assessment Unit would be considered.
>
> 7. Aside from the conversation with the above individual, I did not collect any further information prior to June 26, 2005 [sic] for the purpose of the threat assessment related to [the Complainant].
>
> 8. Prior to June 26, 2003 but subsequent to the above conversation, I advised [named EPS member], Organization Security Section, that I might be receiving documentation outlining concern for a members [sic] safety in relation to [the Complainant].
>
> 9. On June 25, 2003 I received an e-mail from an EPS member advising that a number of EPS members had concerns for their personal safety relative to [the Complainant].
>
> 10. At 1602 hours on June 25, 2003, I forwarded an e-mail to [named EPS member] with the direction to activate the Threats Against Members protocol relative to [the Complainant].
>
> 11. As a result of my e-mail, [named EPS member] initiated the Threats Against Members protocol and commenced the Threat Assessment File [file number] investigation relative to [the Complainant] on June 26, 2003.

[para 8] The Public Body says that the Act defines personal information to be "recorded" information, as follows:

> *1 In this Act,*
>
> …
>
> *(n) "personal information" means recorded information about an identifiable individual,…*

[para 9] The Public Body says that the Act further defines "record", as follows:

> *1 In this Act,*
>
> …
>
> *(q) "record" means a record of information in any form, and includes notes, images, audiovisual recordings, x-rays, books, documents, maps, drawings, photographs, letters, vouchers and papers and any other information that is written, photographed, recorded or stored in any manner, but does not include software or any mechanism that produces records;…*

[para 10] The Public Body argues that a hallway conversation is not a "record" for the purposes of the Act. Without a "record", the definition of "personal information" is not met. Consequently, the Public Body argues that there is no collection of personal information prior to the June 25, 2003 email from an EPS member to the Superintendent.

[para 11] The Act clearly states that personal information must be recorded, that is, it must be contained in a record. In my view, the Legislature appears to have decided that personal information must be recorded in order to fulfill the purposes set out under section 2 of the Act, which include rights of access and correction, and obligations of public bodies concerning the manner of collecting personal information.

[para 12] Consequently, I agree with the Public Body's argument. Merely hearing an individual's personal information as a result of a conversation does not amount to a collection of that personal information under the Act, because there is no ability under the Act to access that personal information, or to correct it, or to control the manner in which it is collected.

[para 13] The Complainant has raised the issue that the hallway conversation must have been documented, that is, his personal information must have been recorded and therefore collected. The Complainant believes that the documentation exists in some form that predates the June 25, 2003 email to the Superintendent. The Affidavit evidence of the Superintendent is that he did not collect any further information prior to initiating the threat assessment. Furthermore, the Complainant's submission includes a letter from the Acting Chief of the Public Body regarding the Public Body's own review of the threat assessment investigation. The letter concludes that no documentation was generated prior to the June 25, 2003 email.

[para 14] In Order F2002-020, I followed previous Orders of my Office that put the burden of proof on a complainant in circumstances in which the complainant raised an issue and was in the best position to meet the burden of proof. As the Complainant has raised the issue that his personal information was collected (recorded) prior to June 25, 2003, and is in the best position to speak to the reasons as to why he believes his personal information was collected (recorded) prior to that date, the burden of proof is on the Complainant.

[para 15] The Complainant provides a number of reasons for why he thinks his personal information was collected prior to June 25, 2003. He says that an EPS member told him that the start date of the threat assessment was well before June 25, 2003. The Complainant also submits that the Superintendent did in fact make a record of the conversation, as for him not to have documented this in some form would most certainly come under the heading of a "neglect of duty" due to the seriousness of the allegations brought to his attention.

[para 16] The Complainant says that there is no onus on an EPS member under EPS policy and procedure to submit a written memorandum concerning a threat, and thus there is no written requirement before commencing a threat assessment. He believes that

documentation of the hallway conversation must exist because "…there is too much at stake for all parties to have this threat assessment rest with a member who may or may not complain." The Complainant also points me to paragraph 7 of the Superintendent's affidavit. He says that it needs to be read carefully, as the Superintendent "…is careful to identify information collected for the purpose of a threat assessment as opposed to using "further information" for any purpose." The Complainant states his belief that his personal information was collected and placed on another file.

[para 17] Because there are severe consequences for swearing a false affidavit in an inquiry, I give greater weight to affidavit evidence, in preference to unsworn statements and speculation, which are not evidence.

[para 18] Consequently, I prefer the EPS's affidavit evidence that there was no information collected prior to June 25, 2003, over the Complainant's statements and speculation that there was a collection. I have also accorded some minimal weight to the EPS's letter, supplied by the Complainant. I find that the Complainant has not met the burden of proving that his personal information was collected (recorded) prior to June 25, 2003.

[para 19] Even if I had found that the Public Body had collected (recorded) the Complainant's personal information from the hallway conversation and before the email was received on June 25, 2003, I would have found that the collection was authorized under the Act, for the reasons set out below in the discussion under section 33 of the Act.

[para 20] I do not have the June 25, 2003 email before me. However, based on the affidavit evidence, the June 25, 2003 email contained at least the Complainant's name. The name is "recorded" information about the Complainant for the purposes of section 1(n)(i) of the Act. I find that the Public Body collected the Complainant's personal information (his name) by email on June 25, 2003. Consequently, I will consider the Public Body's authorization for the collection of the Complainant's personal information on June 25, 2003.

B. Application of section 33 of the Act

[para 21] The Public Body submits that the collection of the Complainant's personal information was authorized by section 33(b) and section 33(c) of the Act, which read:

> *33 No personal information may be collected by or for a public body unless*
>
> …
>
> *(b) that information is collected for the purposes of law enforcement,*
>
> *(c) that information relates directly to and is necessary for an operating program or activity of the public body.*

[para 22] "Law enforcement" is defined in section 1(h) of the 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, 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 23] The Public Body says that the purpose of a threat assessment is to determine the level of threat and secure the safety of all individuals involved. According to the Public Body, threat assessments are conducted under the authority of the *Police Act* and the common law.

[para 24] Concerning the application of section 1(h)(i) to threat assessments, the Public Body says that in Order 2000-027, the former Commissioner recognized that information supplied for the purposes of a threat assessment and the threat assessment itself fell within the definition of "policing" and thus "law enforcement", as contained in the Act. The former Commissioner defined "policing" as "those activities carried out, under the authority of a statute, regarding the maintenance of public order, detection and prevention of crime, or enforcement of the law".

[para 25] Following Order 2000-027, the Public Body argues that the information relayed to the Superintendent was "policing" information, supplied for a law enforcement purpose, being the maintenance of public order, the detection and prevention of crime, the enforcement of the law and, overall, the protection of life. The Public Body concludes that a threat assessment investigation clearly falls squarely within the definition of policing and law enforcement.

[para 26] The Complainant argues that the Act does not apply to any collection of his personal information. He says that collection must occur according to the *Police Act* or the collective agreement. He says there is no provision in the Act for dealing with conflict between the Act and other legislation, such as the *Police Act*. He concludes that the Public Body "…should not be protected by sections of the Act when it collected personal information improperly outside the Act."

[para 27] Section 5 of the Act sets out the rule that the Act prevails over a provision of another enactment with which it is in conflict. The Applicant has not provided any

evidence that the exception to the rule under section 5 applies. Therefore, the Act applies to the collection of his personal information, even if there is a conflict with another enactment. Whether the collection did or did not occur specifically as provided by the *Police Act* or a collective agreement is irrelevant for the purposes of section 33(b), which I will now consider, beginning with the definition of law enforcement in section 1(h)(i) (policing).

[para 28] It seems to me that if a member of the EPS (or anyone else) "fears for their safety" and expresses that to a peace/police officer, section 33(b) of the Act is engaged, as the matter involves "policing" and therefore law enforcement. Regardless of whether the officer refers the matter to a more appropriate authority, that officer is allowed to collect personal information because "fears for safety" and threats are generally law enforcement matters. It must be assumed so.

[para 29] For example, if someone is chasing me and I run up to a police officer and tell that person, the police officer can ask "Who?", "Why?", etc., and collect the personal information. The officer does not have to do anything more to trigger the investigation. Even if the officer decides my fear is groundless or there is no breach of any law, the officer can collect personal information in order to make that determination.

[para 30] I cannot see inside police officers' heads to try to figure out if they bona fide believed there was a law enforcement matter at hand. There are other protections for wrongful prosecution (trial, Charter, civilian complaints).

[para 31] There is a point when there is no longer justification under section 33(b) to collect personal information. That point is reached when the officer knows or should know that there is no longer a law enforcement issue: no threat, no crime, no law broken. I cannot think of any prescriptive test to decide when that point is reached. This will not be very satisfying to some people. Peace/police officers must be free to act quickly, often instantaneously, to assess threats. At the particular moment, the public can only rely on the officer's training, judgment and professionalism to tell the officer when to stop. The officer is still accountable, but only after the fact. Internal discipline processes, peer review, civilian complaint review boards this Office, the courts, and the Charter remedies, all provide mechanisms to hold peace/police officers accountable for the misuse of their ability to collect personal information for the purposes of law enforcement. These mechanisms must be applied vigorously.

[para 32] In this case, an individual advised the Superintendent that an EPS member feared for his or her personal safety. From that moment there was a law enforcement matter, and the Superintendent was enabled to collect the personal information necessary to assess the threat or to have another officer assess it. That is what happened in this case. Only when the threat is assessed and dealt with is the officer no longer able to collect.

[para 33] Consequently, I find that the Superintendent's collection of the Complainant's personal information in an email from an EPS member was authorized as

being "policing" and therefore law enforcement for the purposes of section 33(b) of the Act.

[para 34] Having made this finding under section 33(b), I do not find it necessary to consider whether the requirements of section 33(c) have also been met.

C. Application of section 34 of the Act

[para 35] The Public Body submits that the collection of the Complainant's personal information from sources other than the Complainant was authorized by section 34(1)(g) and section 34(1)(n) of the Act, which read:

> *34 A public body must collect personal information directly from the individual the information is about unless*
>
> …
>
> *(g) the information is collected for the purpose of law enforcement,*
>
> …
>
> *(n) the information is collected for the purpose of managing or administering personnel of the Government of Alberta or the public body,…*

[para 36] I have found that the requirements of section 33(b) of the Act have been met. Therefore, I find that the corresponding requirements of section 34(1)(g) of the Act are also met. Therefore, the Public Body was authorized under section 34(1)(g) to collect the Complainant's personal information from sources other than the Complainant, as the information was collected for the purpose of law enforcement.

[para 37] Having made this finding under section 34(1)(g), I do not find it necessary to consider whether the requirements of section 34(1)(n) have also been met.

D. Other matters

[para 38] The Complainant raised numerous other issues in this inquiry. The Complainant also acknowledges in his rebuttal submission that a number of issues have been identified that are obviously outside the jurisdiction of the Privacy Commissioner's mandate. I agree with the Complainant that I have no jurisdiction over the other issues that he raises.

[para 39] The Public Body was concerned that the Complainant provided one of its internal policy and procedure documents to me, without authority. The Public Body asks that I not disclose that document to any individual, until the Public Body has had the opportunity to make representations about appropriate exceptions to disclosure that are authorized under the Act.

[para 40] Even when an inquiry concerns an access request, I do not disclose documents that a public body has the authority to withhold under the Act. If I find that

the public body does not have authority to withhold the document, I will order the public body to disclose the document. As this inquiry does not concern an access request, I will not be ordering the Public Body to disclose the document to anyone. I will not otherwise disclose the document, unless required to do so by law or by the court. In those circumstances, I will give notice to the Public Body.

V. ORDER

[para 41] I make this Order under section 72 of the Act.

[para 42] I find that the Public Body had the authority to collect the Complainant's personal information, as provided by section 33(b) and section 34(1)(g) of the Act.

Frank Work, Q.C.
Information and Privacy Commissioner