

# ALBERTA

## OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

### ORDER F2006-004

February 28, 2008

#### EDMONTON POLICE SERVICE

Case File Numbers 3290 and 3291

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

**Summary:** The Law Enforcement Review Board held a hearing into a complaint against two Edmonton Police Service police officers. In preparation for the hearing, the Edmonton Police Service ran a CPIC search and obtained the criminal conviction history of the complainant and a witness to the proceeding. The Edmonton Police Service subsequently used the CPIC information to challenge the credibility of these two individuals at the Law Enforcement Review Board hearing.

The two individuals alleged that the Edmonton Police Service did not have the authority under the *Freedom of Information and Protection of Privacy Act* to collect their personal information from CPIC or to use and disclose that information at the Law Enforcement Review Board hearing.

The Information and Privacy Commissioner held that the Edmonton Police Service was authorized by sections 33(b) and 34(1)(g) of the *Freedom of Information and Protection of Privacy Act* to collect the personal information of these two individuals. The Information and Privacy Commissioner also held that the Edmonton Police Service was authorized by section 39(1)(a) of the *Freedom of Information and Protection of Privacy Act* to use the personal information and by section 40(1)(v) to disclose the personal information.

**Legislation Cited: AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(h), 1(i)(x)(B), 1(j)(iii), 1(n), 1(p)(vii), 3(c), 33(a), 33(b), 34(1)(g),

39(1)(a), 39(1)(c), 40(1)(b), 40(1)(c), 40(1)(f), 40(1)(q), 40(1)(r), 40(1)(v), 72; *Alberta Evidence Act* R.S.A. 2000, c. A-18, ss. 1(a), 1(b), 2, 24(1); *Police Act*, R.S.A. 2000, c.P-17, ss. 20(1)(h), 20(1.1), 20(2); *Canada Evidence Act* R.S.C. 1970, c.E-10, s.12.

**Cases Cited:** *Corbett v. The Queen* (1988), 41 C.C.C. (3d) 385 SCC; *Minister of National Revenue v. Coopers & Lybrand* (1978) 92 D.L.R. (3d) 1 SCC;

**Orders Cited: AB Orders:** 99-025, 2000-002.

## I. BACKGROUND

[para 1] On April 27, 2005, the Law Enforcement Review Board (“LERB”) held a hearing into a complaint against two Edmonton Police Service (“EPS”) police officers.

[para 2] Prior to the hearing, the EPS ran a CPIC search and obtained the criminal conviction history information for both the individual who filed the complaint and a witness. During that hearing, the EPS used this information to challenge the credibility of these two individuals (the “Complainants”).

[para 3] On April 28, 2005, the Complainants requested a review by this Office. The Complainants alleged that the EPS did not have the authority under Part 2 of the *Freedom of Information and Protection of Privacy Act* (the “FOIP Act”) to collect, use and disclose the Complainants’ personal information.

[para 4] Mediation was authorized but did not resolve the issue.

[para 5] The Complainants requested that the matter proceed to inquiry. The EPS and the Complainants each submitted an initial and a rebuttal submission.

[para 6] I note that during the LERB hearing, the EPS arrested the two Complainants on outstanding warrants. The EPS’s authority to use the outstanding warrant information to arrest the Complainants is not an issue in this inquiry. Although both parties refer to the outstanding warrants in their submission, both parties focused their arguments on whether the EPS had the authority to collect, use and disclose the Complainants’ personal information for the purposes of assessing the Complainants’ credibility during the LERB hearing.

## II. ISSUES

[para 7] There are three issues in this inquiry:

- A. Did the Public Body have the authority to collect the Complainants’ personal information, as provided by section 33 and section 34 of the FOIP Act?

- B. Did the Public Body have the authority to use the Complainants' personal information as provided by section 39 of the FOIP Act?
- C. Did the Public Body have the authority to disclose the Complainants' personal information as provided by section 40 of the FOIP Act?

### **III. DISCUSSION**

#### **A. Did the Public Body have the authority to collect the Complainants' personal information, as provided by section 33 and section 34 of the FOIP Act?**

##### **1. Did the EPS collect the personal information?**

[para 8] Personal information is defined in section 1(n) of the FOIP Act to mean recorded information about an identifiable individual. I find that the Complainants' criminal conviction history consists of the Complainants' personal information, as provided by section 1(n)(vii) of the FOIP Act.

[para 9] There are two types of personal information at issue in this inquiry:

- (a) the Complainants' personal information that was entered into CPIC by the EPS; and
- (b) the Complainants' personal information that was entered into CPIC by another agency.

[para 10] The EPS agrees that it "collected" that portion of the Complainants' personal information that was entered into CPIC by another agency. However, the EPS states that it did not collect that portion of the Complainants' personal information that the EPS itself had previously entered into CPIC. The EPS states that, in the latter case, it merely retrieved the information during the CPIC search.

[para 11] In Order 2000-002, the former Commissioner addressed the issue of collection versus access under section 32 (now section 33) of the FOIP Act. The former Commissioner held:

*"Collection" and "access" are not synonymous. "Collection" must refer to a public body's having obtained the personal information in the first instance. "Access" in this context must refer to the internal retrieval of that information".*

*Each "access" of personal information within a public body is not a new "collection" for the purposes of section 32 [now section 33] of the FOIP Act. Nor is there a new collection within programs of a public body that share the personal information, as here.*

[para 12] I find that the principles of Order 2000-002 apply in this inquiry. I find that the EPS “collected” that portion of the Complainants’ criminal conviction history that had been entered into CPIC by another agency. However, I find that the EPS did not collect that portion of the Complainants’ personal information that the EPS itself had entered into CPIC. In the latter circumstance, I find that the EPS merely used that personal information.

**2. Did the EPS have the authority to collect the personal information pursuant to section 33 of the FOIP Act?**

[para 13] As I have found that the EPS did not, as a result of the CPIC search, “collect” the Complainant’s personal information that the EPS itself had entered into CPIC, I will not address whether the EPS had the authority to collect that information. The only information at issue under section 33 of the FOIP Act is the personal information that was entered into CPIC by another agency outside of the EPS.

[para 14] The EPS states that it had the authority to collect the personal information under sections 33(a) and 33(b) of the FOIP Act.

**a. Section 33(a) of the FOIP Act**

[para 15] Section 33(a) reads:

*33 No personal information may be collected by or for a public body unless*

*(a) the collection of that information is expressly authorized by an enactment of Alberta or Canada*

[para 16] The EPS states that it was expressly authorized by section 24(1) of the *Alberta Evidence Act* R.S.A. 2000, c. A-18 to collect the personal information.

[para 17] I find that the *Alberta Evidence Act* applied to the Law Enforcement Review Board hearing. Section 2 of the *Alberta Evidence Act* states the Act applies to evidence offered or taken by a “court” in an “action”. It reads:

*2 This Act extends and applies to evidence offered or taken*

*(a) orally,*  
*(b) by interrogatories,*  
*(c) by affidavits,*  
*(d) by the production of documents or things, or*  
*(e) otherwise,*

*by or before a court in an action.*

[para 18] Section 1 of the *Alberta Evidence Act* further defines the term “action” and “court” as follows:

*1 In this Act,*

*(a) “action” includes*

*(i) an issue, matter, arbitration, reference, investigation or inquiry,*

*(ii) a prosecution for an offence committed against an Act of the Legislature or in force in Alberta, or against a bylaw or regulation made under the authority of any such Act, and*

*(iii) any other proceeding authorized or permitted to be tried, heard, had or taken by or before a court under the law of Alberta;*

*(b) “court” includes a judge, arbitrator, umpire, commissioner, provincial judge, justice of the peace or other officer or person having by law or by the consent of parties authority to hear, receive and examine evidence;*

[para 19] I find that the LERB was a “court” within the meaning of section 1(b) of the *Alberta Evidence Act*. I also find that the proceeding before the LERB was an “action” within the meaning of section 1(a) of the *Alberta Evidence Act*.

[para 20] However, I find that section 24(1) of that *Alberta Evidence Act* did not expressly authorize the EPS to collect the Complainants’ personal information in preparation for that hearing.

[para 21] Section 24(1) of the *Alberta Evidence Act* reads:

*24(1) A witness may be asked whether the witness has been convicted of a crime and, on being so asked, if the witness either denies the fact or refuses to answer, the conviction may be proved.*

[para 22] Section 33(a) of the FOIP Act gives a public body the authority to collect personal information if it is expressly authorized by an enactment to do so. It is not sufficient for an enactment to merely imply or suggest that a public body has this authority. While section 24(1) of the *Alberta Evidence Act* permitted the EPS to cross-examine the Complainants’ about their criminal conviction history, it did not expressly authorize the EPS to collect information regarding the Complainants’ criminal conviction history in the first place. I find that the EPS did not have the authority under section 33(a) of the FOIP Act, read in conjunction with section 24(1) of the *Alberta Evidence Act*, to collect the Complainants’ personal information.

b. Section 33(b) of the FOIP Act

[para 23] Section 33(b) of the FOIP Act reads:

*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...*

[para 24] Section 1(h) of the FOIP Act defines “law enforcement” as follows:

*I 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 penalty or sanction imposed by the body conducting the proceedings or by another body to which the results of the proceedings are referred;*

[para 25] I find that the EPS had the authority under section 33(b) of the FOIP Act to collect the Complainants’ personal information. I find that the EPS collected the personal information for the purposes of law enforcement as defined in section 1(h)(iii). The EPS collected the personal information for the purpose of presenting the personal information before a LERB proceeding which could lead to a penalty or sanction by the LERB.

[para 26] The LERB’s authority to impose a penalty or sanction following an appeal is found within section 20(2) of the *Police Act*, R.S.A. 2000, c.P-17. Section 20(2) of the *Police Act* reads:

*20(2) Where the Board concludes an appeal*

*(a) in the case of an appeal commenced under section 48 from a matter in respect of which a hearing was held, the Board may*

*(i) allow the appeal,*

*(ii) dismiss the appeal,*

(iii) vary the decision being appealed,

(iv) direct that the matter, subject to any directions that the Board may give, be reheard under section 45 or 46, as the case may be,

(v) affirm or vary the punishment imposed, or

(vi) take any other action that the Board considers proper in the circumstances,...

[para 27] It seems counterintuitive that section 33(b) should operate to allow the collection of personal information about people who are not subject to the penalties or sanctions that can result from the “proceedings”. This personal information was about witnesses.

[para 28] However, section 33(b), taken with section 1(h)(iii), does not distinguish the kind of personal information involved. It does not specify that parties to such proceedings may only collect information about certain people. What it says is that if you are involved in proceedings that could lead to a penalty or sanction (part of the definition of law enforcement), you get to collect personal information. This may be because of the social value placed on law enforcement. It may be because these kinds of proceedings attract the rules of procedural fairness, requiring evidence and testimony to be dealt with according to the rules of evidence and natural justice. Support for this may be found in section 3(c), which informs the interpretation of the Act, which says that the FOIP Act does not limit the information otherwise available by law to a party to legal proceedings.

[para 29] Were it not for the “expressly authorized” requirement in section 33(a) of the FOIP Act, the *Alberta Evidence Act*, section 24, would allow the EPS to collect personal information about any witness (accused or otherwise), ask whether the witness has been convicted of a crime and if the witness denies the fact or refuses to answer, the EPS may use the personal information to prove the conviction. Rules of procedure, evidence and the Charter would apply to the collection of this personal information within the “proceeding”.

[para 30] In *Corbett v. The Queen* (1988), 41 C.C.C. (3d) 385 at 395-396, the Supreme Court of Canada addressed section 12 of the *Canada Evidence Act* R.S.C. 1970, c.E-10 which is similar to section 24 of the *Alberta Evidence Act*. The Court explained the rationale behind allowing cross-examination on conviction history and held that a prior criminal record is a factor in determining the credibility of a witness:

*What lies behind section 12 is a legislative judgment that prior convictions do bear upon the credibility of a witness. In deciding whether or not to believe someone who takes the stand, the jury will quite naturally take a variety of factors into account. They will observe the demeanour of the witness as he or she testifies, the witness's appearance, tone of voice and general manner. Similarly, the jury will*

*take into account any information it has relating to the witness's habit or mode of life. There can surely be little argument that a prior criminal record is a fact which, to some extent at least, bears upon the credibility of a witness. Of course, the mere fact that a witness was previously convicted of an offence does not mean that he or she necessarily should not be believed, but it is a fact which a jury might take into account in assessing credibility.*

*The rationale for s. 12 has been explicit in the case-law: see, e.g., R. v. Stratton at p.461, C.C.C., p.433 D.L.R. per Martin J.A.: Unquestionably, the theory upon which prior convictions are admitted in relation to credibility is that the character of the witness, as evidenced by the prior conviction or convictions, is a relevant fact in assessing the testimonial reliability of the witness.”*

[para 31] As stated, the *Alberta Evidence Act* does not expressly allow this collection. Therefore section 33(a) of the FOIP Act does not apply. However, the EPS is involved in a “law enforcement proceeding”, as defined, before the LERB. Therefore, the EPS may collect the personal information (section 33(b)) and may collect it indirectly (section 34(1)(g)).

[para 32] The Complainants allege that the CPIC search for the Complainants’ personal information was not related to crime prevention or crime fighting purposes mentioned in the RCMP Privacy Impact Assessment of CPIC. The Complainants also suggest that the CPIC search may have been conducted contrary to the guidelines set out in the CPIC Reference Manual.

[para 33] I do not find that the Complainants’ arguments are a relevant consideration under section 33(b) of the FOIP Act. Section 33(b) gives the EPS the authority to collect personal information for the purposes of law enforcement. The term “law enforcement” is defined in section 1(h) of the FOIP Act and includes proceedings that lead or could lead to a penalty or sanction. Whether the collection is contrary to a purpose set out in the RCMP Privacy Impact Assessment or the CPIC Reference Manual or whether those resources define the term “law enforcement” in a different manner is irrelevant to my decision under section 33(b).

[para 34] I find that the EPS had the authority, pursuant to section 33(b) of the FOIP Act to collect the Complainants’ personal information for the purpose of the LERB hearing.

### **3. Did the Public Body have the authority to indirectly collect the information pursuant to section 34 of the FOIP Act?**

[para 35] Section 34 of the FOIP Act outlines the circumstances under which a public body may indirectly collect personal information about an individual. In particular, section 34(1)(g) is relevant in this inquiry. Section 34(1)(g) reads:



*34(1) 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,...*

[para 36] In this inquiry I found that the EPS collected the Complainants' personal information for the purposes of law enforcement. As such, I find that the EPS had the authority, pursuant to section 34(1)(g), to indirectly collect the Complainants' personal information.

**B. Did the Public Body have the authority to use the Complainants' personal information as provided by section 39 of the FOIP Act?**

[para 37] The personal information at issue under section 39 of the FOIP Act is the Complainants' criminal conviction history that was used by the EPS in order to assess the Complainants' credibility at the LERB hearing. The personal information at issue consists of the criminal conviction information that was entered into CPIC by both the EPS and by another agency.

[para 38] The EPS states that it had the authority, pursuant to sections 39(1)(a) and 39(1)(c) of the FOIP Act to use the Complainant's personal information at the LERB hearing.

**1. Section 39(1)(a) – Purpose for which the information was collected or compiled or a use consistent**

[para 39] Section 39(1)(a) reads:

*39(1) A public body may use personal information only*

*(a) for the purpose for which the information was collected or compiled or for a use consistent with that purpose...*

[para 40] In this order I found that the EPS collected the personal information, which was entered into CPIC by another agency, for the purposes of law enforcement as defined in section 1(h) of the FOIP Act. The EPS collected that personal information in order to challenge the Complainants' credibility at the LERB hearing. The information before me shows that the EPS similarly compiled the remaining personal information, information that was entered into CPIC by the EPS, for those same purposes.

[para 41] After a review of the information before me, I find that the EPS used the Complainants' personal information for the purpose for which it was collected or compiled. I find that the EPS used the Complainants' personal information in order to challenge the Complainants' credibility at the LERB hearing.

[para 42] I find that the EPS was authorized by section 39(1)(a) to use the Complainants' personal information.

## **2. Section 39(1)(c) – Purpose for which the information may be disclosed**

[para 43] As I have found that the EPS had the authority under section 39(1)(a) of the FOIP Act to use the Complainants' personal information, I do not find it necessary to address whether the EPS also had the authority under section 39(1)(c) of the FOIP Act, to use the Complainants' personal information.

### **C. Did the Public Body have the authority to disclose the Complainants' personal information as provided by section 40 of the FOIP Act?**

[para 44] The personal information at issue under section 40 of the FOIP Act consists of the Complainants' criminal conviction history that was disclosed by the EPS for the purpose of the LERB hearing. The personal information at issue includes the criminal conviction history information that was entered into CPIC by both the EPS and by another agency.

[para 45] The EPS states that it was authorized by sections 40(1)(b), 40(1)(c), 40(1)(f), 40(1)(q), 40(1)(r), and 40(1)(v) of the FOIP Act to disclose the Complainants' personal information at the LERB hearing.

#### **1. Section 40(1)(v) of the FOIP Act**

[para 46] Section 40(1)(v) of the FOIP Act reads:

*40(1) A public body may disclose personal information only*

...

*(v) for use in a proceeding before a court or quasi-judicial body to which the Government of Alberta or a public body is a party...*

[para 47] In order to fulfill the requirements of section 40(1)(v), three criteria must be fulfilled:

- (i) there must be a proceeding before a court or quasi-judicial body;
- (ii) the Government of Alberta or a public body must be a party to that proceeding; and
- (iii) the personal information must be used in that proceeding.

a) Was the LERB hearing a proceeding before a court or a quasi-judicial body?

[para 48] In Order 99-025, the former Commissioner addressed the relevant factors that should be weighed in determining whether a body is acting as a judicial or quasi-judicial capacity. The former Commissioner referred to the Supreme Court of Canada decision of *Minister of National Revenue v. Coopers & Lybrand* (1978) 92 D.L.R. (3d) 1 SCC where the court referred to the following non-exhaustive list of factors:

- (1) Is there anything in the language in which the function is conferred or in the general context in which it is exercised which suggests that a hearing is contemplated before a decision is reached?
- (2) Does the decision or order directly or indirectly affect the rights and obligations of persons?
- (3) Is the adversary process involved?
- (4) Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense?

[para 49] I find that these criteria are fulfilled. First, the wording of section 20 of the *Police Act* suggests that the LERB will conduct a hearing for the majority of appeals and inquiries. Only in limited circumstances will the LERB proceed without a hearing (section 20(1.1) of the *Police Act*).

[para 50] Second, I find that the LERB's decision directly affected the rights of a person. In Order 99-025, the former Commissioner referred to the *Canadian Oxford Dictionary* which defined a "right" as "a thing one may legally or morally claim; the state of being entitled to a privilege or immunity or authority to act". The former Commissioner also referred to *Black's Law Dictionary* which defined a "right" as "a power, privilege, or immunity guaranteed under a constitution, statutes or decisional laws, or claimed as a result of long usage." As previously mentioned, section 20(2) of the *Police Act* gave the LERB the authority to allow, dismiss or vary a decision being appealed or direct that a decision be reheard. In addition, the LERB had the authority to affirm or vary a punishment imposed or take another action the LERB considered proper in the circumstances.

[para 51] Third, I find that the LERB hearing was an adversary process or proceeding. In Order 99-025, the former Commissioner referred to *Blacks Law Dictionary* and defined an "adversary proceeding" as "one having opposing parties, contested, as distinguished from an ex parte hearing or proceeding". The Complainants and the EPS were opposing parties at the LERB hearing. The two Complainants were the Appellants while the EPS Chief of Police and the two EPS police officers were the Respondents at the hearing.

[para 52] Fourth, the LERB had an obligation to apply substantive rules to the case before them. As stated in Order 99-025, substantive rules are that part of the law that create, define and regulate rights and duties of the parties. At the time of the hearing, section 20(1)(h) of the *Police Act* stated that the rules of evidence applicable to judicial proceedings applied to LERB appeals and inquiries. Furthermore, it is clear that at the LERB hearing, the LERB's role was to review the complaints made in regard to two police officers. Its role was not to implement a social or economic policy.

[para 53] For the foregoing reasons I find that the LERB was a quasi-judicial body for the purposes of section 40(1)(v) of the FOIP Act.

b) Was the Government of Alberta or a public body a party to that proceeding?

[para 54] The EPS was a party to the proceeding. The EPS is also a public body for the purposes of section 1(p)(vii) read in conjunction with sections 1(j)(iii) and 1(i)(x)(B) of the FOIP Act. I find that this criterion is fulfilled.

c) Was personal information used in the proceeding?

[para 55] I find that the EPS used the Complainants' personal information for the purpose of the LERB hearing. I find that the EPS used the personal information in order to assess the credibility of the Complainants.

d) Conclusion

[para 56] For the foregoing reasons, I find that the section 40(1)(v) criteria are fulfilled. I find that the EPS had the authority under section 40(1)(v) of the FOIP Act to disclose the Complainants' personal information at the LERB hearing.

**2. Sections 40(1)(b), 40(1)(c), 40(1)(f), 40(1)(q) and 40(1)(r) of the FOIP Act**

[para 57] As I have found that the EPS had the authority under section 40(1)(v) of the FOIP Act to disclose the Complainants' personal information, I do not find it necessary to address whether the EPS also had the authority to disclose the Complainants' personal information under sections 40(1)(b), 40(1)(c), 40(1)(f), 40(1)(q) and 40(1)(r) of the FOIP Act.

**IV. ORDER**

[para 58] I make the following Order under section 72 of the FOIP Act.

[para 59] I find that the EPS was authorized by section 33(b) of the FOIP Act to collect the Complainants' personal information. I find that the EPS was authorized by section 34(1)(g) of the FOIP Act to indirectly collect the Complainants' personal information.

[para 60] I find that the EPS was authorized by section 39(1)(a) of the FOIP Act to use the Complainants' personal information for the purposes of the LERB hearing.

[para 61] I find that the EPS was authorized by section 40(1)(v) of the FOIP Act to disclose the Complainants' personal information at the LERB hearing.

Frank Work, Q.C.  
Information and Privacy Commissioner