

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2006-010

October 3, 2007

EDMONTON POLICE COMMISSION

Case File Number 3328

Office URL: www.oipc.ab.ca

Summary: The Applicant asked the Edmonton Police Commission (the Public Body) to provide a list of chiefs, deputy chiefs and superintendents whose contracts had been bought out or terminated, including their names. The Applicant also requested a list of payouts or severance pay and asked for details as to how many deputy chiefs and superintendent positions the police service would normally employ.

The Public Body provided the names and termination dates of three police chiefs. The Public Body did not provide a list of payouts or severance pay. The Public Body referred the request for details about superintendent positions to the Edmonton Police Service.

The Applicant requested review of the Public Body's decision, arguing that it is in the public interest to release information regarding the severance pay provided to police chiefs whose contracts have been terminated.

The Adjudicator found that the Applicant had not made an access request within the meaning of the *Freedom of Information and Protection of Privacy Act* (the Act) and so the Public Body's decision to withhold information was not reviewable. The Adjudicator found that section 32 does not require a public body to answer questions, only to disclose information in its custody or control that the head of the public body considers in the public interest to disclose.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 6, 7, 17, 32, 65

Authorities Cited: AB: Orders 96-011, F2001-033, F2004-028

I. BACKGROUND

[para 1] On February 22, 2005, the Applicant completed a Request to Access Information form. In response to the question “What records do you want to access?” the Applicant wrote:

Please provide a list of all the Chiefs, deputy chiefs, & superintendents who have had their contracts bought out or terminated (include names). Please list the pay out or severance pay for each position. Please provide details on the number of deputy chiefs and superintendent positions the service would normally employ.

[para 2] The Public Body identified four parties who met the first requirement of the request. The Public Body contacted these individuals to obtain consent to the disclosure of their names and dates of termination, as it planned to create a record containing this information for the Applicant. The Public Body advised the parties that no other information would be provided on the basis of section 17(4)(d) of the *Freedom of Information and Protection of Privacy Act* (the Act). One party objected to the release of the proposed information, one did not reply, and two agreed to the release of information as proposed by the Public Body.

[para 3] On April 21, 2005, the Public Body provided information to the Applicant about three former police chiefs, as it had proposed above, but refused to disclose information about Deputy Chiefs on the basis of sections 17(3) and 17(4)(d) of the Act. The Public Body transferred the aspect of the access request relating to superintendents to the Edmonton Police Service for response.

[para 4] On June 17, 2005, the Applicant requested review by the Commissioner of the Public Body’s decision to withhold severance amounts, on the basis that this information is in the public interest.

[para 5] The Information and Privacy Commissioner authorized mediation to resolve the dispute.

[para 6] On September 28, 2005, the Public Body decided that it would create a record containing the following information about the parties and disclose it to the Applicant:

1. Official title
2. Payout
3. Date of agreement

However, on November 29, 2005, the Public Body decided that it would not provide the proposed information or any records of settlement agreements to the Applicant. The Public Body relies on section 17 and Order 2004-028 to support this position.

[para 7] As mediation was unsuccessful, the matter was set down for a written inquiry. The four third parties whose information is at issue were determined to be affected parties and were given the opportunity to provide submissions.

[para 8] The Public Body, the Applicant, and one affected party (the Third Party) provided both initial submissions and rebuttal submissions. The other three affected parties did not participate in the inquiry.

II. RECORDS AT ISSUE

[para 9] The Public Body seeks to withhold severance agreements concerning three former employees.

III. ISSUES

Issue A: Did the Public Body properly apply section 17 (personal information) of the Act?

Issue B: Does section 32 of the Act require the Public Body to disclose the requested information?

IV. DISCUSSION OF ISSUES

Issue A: Did the Public Body properly apply section 17 (personal information) of the Act?

[para 10] Section 6 of the Act gives an applicant the right to access records in the custody and control of a public body. It states:

6(1) An applicant has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.

(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record.

(3) The right of access to a record is subject to the payment of any fee required by the regulations.

(4) The right of access does not extend

- (a) *to a record created solely for the purpose of briefing a member of the Executive Council in respect of assuming responsibility for a ministry, or*
- (b) *to a record created solely for the purpose of briefing a member of the Executive Council in preparation for a sitting of the Legislative Assembly.*

(5) Subsection (4)(a) does not apply to a record described in that clause if 5 years or more has elapsed since the member of the Executive Council was appointed as the member responsible for the ministry.

(6) Subsection (4)(b) does not apply to a record described in that clause if 5 years or more has elapsed since the beginning of the sitting in respect of which the record was created.

(7) The right of access to a record does not extend to a record relating to an audit by the Chief Internal Auditor of Alberta that is in the custody of the Chief Internal Auditor of Alberta or any person under the administration of the Chief Internal Auditor of Alberta, irrespective of whether the record was created by or for or supplied to the Chief Internal Auditor of Alberta.

- (8) Subsection (7) does not apply to a record described in that subsection*
- (a) if 15 years or more has elapsed since the audit to which the record relates was completed, or*
 - (b) if the audit to which the record relates was discontinued or if no progress has been made on the audit for 15 years or more.*

[para 11] Section 7 explains how access to records in the custody or control of a public body may be obtained. It states:

7(1) To obtain access to a record, a person must make a request to the public body that the person believes has custody or control of the record.

(2) A request must be in writing and must provide enough detail to enable the public body to identify the record.

(3) In a request, the applicant may ask

- (a) for a copy of the record, or*
- (b) to examine the record.*

[para 12] Section 65 explains the circumstances in which an applicant may request review by the Commissioner. It states in part:

65(1) A person who makes a request to the head of a public body for access to a record or for correction of personal information may ask the Commissioner to review any decision, act or failure to act of the head that relates to the request.

[para 13] The Applicant requests that the Public Body answer his question about the amount paid to four former police chiefs to settle any claims these employees may have had against the employer. In his rebuttal submissions, the Applicant confirmed the following:

(The Applicant) has not asked for actual documents containing the amount of the “settlement”. We have only asked for the figure to be provided to us...

(The Applicant) is not asking for documents or the communications that led to the “settlement.” (the Applicant) is simply asking for the final amount agreed to in the “settlement”...

(The Applicant) has never asked for the full documentation listing personal information such as medical records and employment history. (The Applicant) has only asked for the final amount agreed to in the payout.

[para 14] I find that the Applicant’s access request is a request for answers, not a request for records or recorded information within the public body’s custody or under its control. In essence, he requests that the Public Body create records to answer his question. However, the Act gives him only the right to request records in the Public Body’s custody or control, not the right to have the Public Body answer his questions.

[para 15] In Order F2001-033, the Commissioner said:

The Applicant has a right of access to records (section 6(1) of the Act). The Applicant does not have a right to have the Public Body answer questions. Similarly, the Public Body does not have a duty to answer the Applicant’s questions (it may do so if it wishes), but the Public Body does have a duty to respond to the Applicant about whether it has records that will answer the Applicant’s questions.

[para 16] In essence, the Act creates a right of access to records in the public body’s custody or control, subject to specific exceptions. It does not create a duty for a public body to answer questions, only to provide records in accordance with the legislation. As the Commissioner noted, a public body may choose to answer questions, but it is under no obligation under the Act to do so.

[para 17] The Public Body chose to answer some of the Applicant’s questions by creating a record and providing it to the Applicant. After the review process was initiated, the Public Body confirmed that it had records in its possession that contained information relating to severance, but that it was withholding these records on the basis of section 17. While I would normally consider whether the Public Body was right to withhold those records under section 17, the Applicant has confirmed that he is not seeking these records and has never sought them.

[para 18] It may be that the Applicant interprets section 10(2) of the Act as creating an obligation for a public body to create records in answer to questions from the public. Section 10 states:

10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.

(2) The head of a public body must create a record for an applicant if

- (a) the record can be created from a record that is in electronic form and in the custody or under the control of the public body, using its normal computer hardware and software and technical expertise, and*
- (b) creating the record would not unreasonably interfere with the operations of the public body*

Section 10 creates a duty to assist applicant who make access requests within the meaning of the Act and establishes guidelines for the quality of response to an access request.

[para 19] In Order 2001-033, the Commissioner also noted:

It appears that the Applicant believes that section 10(2) (previously section 9(2)) requires the Public Body to create a record to answer the Applicant's questions. Section 10(2) does not require a record to be created in the format requested. Section 10(2) requires only that the Public Body create a record from a record that is in electronic form.

In addition, this duty to create records from electronic records is not engaged until an access request for the record is made.

[para 20] The Applicant argues that the amount of severance pay received by the four former police chiefs should be released to the public as the "contracted salary amount for top level police officers is routinely released to the public."

[para 21] Section 88 of the Act allows the head of a public body to specify records available to the public without an access request. It states:

88(1) The head of a public body may specify categories of records that are in the custody or under the control of the public body and are available to the public without a request for access under this Act.

(2) The head of a public body may require a person who asks for a copy of an available record to pay a fee to the public body, unless such a record can otherwise be accessed without a fee.

(3) Subsection (1) does not limit the discretion of the Government of Alberta or a public body to release records that do not contain personal information.

[para 22] While the head of a public body may determine the categories of records that will be disclosed to the public without an access request, the head of the public body is under no obligation to do so. In addition, if the records that the head of the public body makes available to the public without an access request do not contain the information an applicant seeks, then the statute allows an applicant to make an access request under section 7 to obtain the records that will.

[para 23] Under section 65 of the Act, a person who has made a request for access to a record to the head of a public body may request review of any decisions, acts or failures relating to the request. However, in the present case, the Applicant has clarified that he has not made a request for access to a record. As a result, there is no decision, act or failure by the head of a public body about which he may request review. I therefore make no determination as to whether the Public Body was correct to withhold records and information under section 17.

[para 24] While the Public Body relied on section 17 to withhold records, it is under no obligation to provide the records, as the Applicant has not requested them under section 7 of the Act.

Issue B: Does section 32 of the Act require the Public Body to disclose the requested information?

[para 25] Section 32 requires the head of a public body to disclose information in the public interest, whether or not a member of the public has requested it. It states:

32(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people, to any person or to an applicant

(a) information about a risk of significant harm to the environment or to the health or safety of the public, of the affected group of people, of the person or of the applicant, or

(b) information the disclosure of which is, for any other reason, clearly in the public interest.

(2) Subsection (1) applies despite any other provision of this Act.

(3) Before disclosing information under subsection (1), the head of a public body must, where practicable,

(a) notify any third party to whom the information relates,

(b) give the third party an opportunity to make representations relating to the disclosure, and

(c) notify the Commissioner.

(4) If it is not practicable to comply with subsection (3), the head of the public body must give written notice of the disclosure

- (a) to the third party, and*
- (b) to the Commissioner.*

[para 26] As discussed in the analysis above, the Act does not require the head of the public body to answer questions. Section 32 only requires the head of a public body to disclose information if the head has determined that it is in the public interest to do so.

[para 27] Section 72 explains the Commissioner's powers following an inquiry relating to a public body's decision to disclose or withhold records:

(2) If the inquiry relates to a decision to give or to refuse to give access to all or part of a record, the Commissioner may, by order, do the following:

- (a) require the head to give the applicant access to all or part of the record, if the Commissioner determines that the head is not authorized or required to refuse access;*
- (b) either confirm the decision of the head or require the head to reconsider it, if the Commissioner determines that the head is authorized to refuse access;*
- (c) require the head to refuse access to all or part of the record, if the Commissioner determines that the head is required to refuse access.*

[para 28] I have already found in my discussion of section 17 that the Applicant has not made an access request and that the Public Body has not made a decision in relation to an access request as a result. Consequently, I have no jurisdiction to order the Head of the public Body to disclose a record or to confirm a decision to withhold one under section 72(2).

[para 29] Section 72(3) explains the Commissioner's powers after completing a review when the subject matter of the review is not a decision to give or refuse access to a record, as in the present case. It states:

(3) If the inquiry relates to any other matter, the Commissioner may, by order, do one or more of the following:

- (a) require that a duty imposed by this Act or the regulations be performed;*

- (b) *confirm or reduce the extension of a time limit under section 14;*
- (c) *confirm or reduce a fee or order a refund, in the appropriate circumstances, including if a time limit is not met;*
- (d) *confirm a decision not to correct personal information or specify how personal information is to be corrected;*
- (e) *require a public body to stop collecting, using or disclosing personal information in contravention of Part 2;*
- (f) *require the head of a public body to destroy personal information collected in contravention of this Act.*

If there is a duty to disclose the information at issue under the Act, I have jurisdiction to order the Public Body to fulfill its duty under section 72(3)(a) despite the fact that the Applicant has not made an access request.

[para 30] In order 96-011, the previous Commissioner reviewed his jurisdiction to consider requests for review pursuant to section 32 (then section 31). The Commissioner decided that he did have jurisdiction to review the decisions made by the head of a public body under section 32. In determining the standard of review and the burden of proof in relation to public interest decisions, the Commissioner said:

Once the pre-conditions set out in section 31 are met, a statutory obligation arises for the head of a public body to release information, notwithstanding that other sections of the Act protecting individual privacy may have to be over-riden in releasing that information. The Act cannot be taken to lightly impose this statutory duty on the head of a public body, or to lightly allow an over-riding of individual privacy rights. Thus, in any review of a section 31 decision, I must first consider whether one of the pre-conditions set out in section 31 has occurred. The applicant has the burden of proof at this part of the investigation and it is not a burden that will be easily met. These pre-conditions are: risk of significant harm to the environment risk of significant harm to the health or safety of the public release is clearly in the public interest. The latter of these pre-conditions was considered by Mr. Justice Cairns in *Bosch*. In the portion of the Bosch decision dealing with section 31(1)(b), Mr. Justice Cairns considered what type of information might be “clearly in the public interest”. He made an important distinction between information that “may well be of interest to the public” and information that is “a matter of public interest.” I agree with this point. I cannot conclude that the Legislature intended for section 31 to operate simply because a member of the public asserts “interest” in the information. The pre-condition that the information must be “clearly a matter of public interest” must refer to a matter of compelling public interest. Similarly, I cannot conclude that the Legislature intended for section 31 to operate when a member of the public asserts that there is “risk of significant harm”. There must be some actual risk, and there must be some evidence that the harm in question is significant. I must also note that I am concerned that applications to review section 31 decisions could be used as a way of circumventing the usual review processes (and the cost to the applicant involved in the usual review process). I do not intend to carry out section 31 investigations in a way that would allow such circumvention. Any member of the general public seeking an investigation of a section 31 decision ought to go to the head of the public body first. Only after consideration by the head will I engage my supervisory jurisdiction, and I will only do so in clear and compelling circumstances. My function under the general powers contained in the Act is not to second-guess each and every decision made by the head of a public body. It is clear that the Legislature has placed the duty to assess risk and determine public interest on the head of a public body. The head will often, but not always, be a Minister, an elected official. This person will likely have the advantage of information and support staff to assist and advise in carrying out this duty. Accordingly, I will be concerned with whether the head’s decision is rationally defensible, as opposed to whether I think he decided correctly.

[para 31] As the previous Commissioner explained, an applicant bears the onus of establishing that section 32 applies to the information he seeks disclosed under section 32. In other words, an applicant must establish through evidence that the benefits of disclosure to the public interest will override any of the public and private interests that the Act has created exceptions to preserve. If an applicant successfully establishes that section 32 applies to the information, then the burden shifts to the head of the Public Body, who must then establish that a decision not to disclose the information is rationally defensible.

[para 32] The Applicant argues that taxpayers deserve to know how their money is being spent, “especially if the “settlement” is made due to negligence, inappropriate actions, or poor planning by the Public Body”. The Applicant provided no evidence to support its assertion that the settlements were due to negligence, inappropriate actions, or poor planning on the part of the Public Body. The fact that a public body may have spent money is not in and of itself a matter of public interest sufficient to override the public purpose behind creating exceptions in the Act.

[para 33] For these reasons, I find that the Applicant has not met the burden of establishing that the Public Body has a duty to disclose the requested information under section 32.

V. ORDER

Issue A: Does section 17 of the Act (personal information) apply to the records/information?

[para 34] I make no determination as to whether the Public Body was correct to withhold records and information under section 17, as there is no decision for me to review.

Issue B: Does section 32 of the Act require the Public Body to disclose the requested information?

[para 35] I have no jurisdiction to make an order in relation to this issue.

[para 36] I make this Order under section 72 of the Act.

Teresa Cunningham
Adjudicator