ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2006-012

October 10, 2006

EDMONTON POLICE SERVICE

Case File Number 3418

Office URL: www.oipc.ab.ca

Summary: The Applicant, a member of the media, submitted an access request under the *Freedom of Information and Protection of Privacy Act* to the Edmonton Police Service (the "Public Body") for records relating to queries about him, on the PROBE and CPIC databases, for the prior 10 years, including the names of persons conducting the queries.

The Public Body provided the requested information about a number of queries, and, relying on section 12(2) of the Act, it refused to either confirm or deny whether there were any additional responsive records.

The Commissioner did not accept that the Public Body properly relied on section 12(2) in the circumstances of this case. He ordered the Public Body to respond to the Applicant's request without relying on the provision.

The Commissioner provided an Addendum to this decision to the Public Body. This Addendum contains a discussion which must be confidential by reference to his duty under section 59(3)(b) of the Act to not disclose whether there were responsive records.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 12(2), 12(2)(a) 12(2)(b), 18, 20, 20(1)(a), 20(1)(d), 20(1)(e), 20(1)(f), 20(1)(k), 59(3)(b), 72; **ONT**: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, ss.14(1), 14(2), 14(3).

Authorities Cited: AB: Order 96-013; **ONT:** Orders P-344, MO-1578, MO-1780.

Cases Cited: *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner),* [2004] O.J. No. 4813**.**

I. BACKGROUND

[para 1] By letter dated July 21, 2005, the Applicant, a member of the media, submitted an access request under the *Freedom of Information and Protection of Privacy Act* (the "Act") to the Edmonton Police Service (the "Public Body") for records relating to queries about himself, on the PROBE and CPIC databases[1], for the prior 10 years, including the names of persons conducting the queries.

[para 2] The Public Body responded on August 17, 2005. It provided the requested information about a number of queries, and, relying on section 12(2) of the Act, it refused to either confirm or deny whether there were any additional responsive records.

[para 3] On September 8, 2005, the Applicant asked my Office to review the response. A mediator was assigned to try to resolve the matter, but use of section 12(2) was not resolved, and this issue was set for inquiry. A Notice of Inquiry was issued January 12, 2006.

[para 4] On February14, 2006, the Public Body provided information about an additional query that it had overlooked earlier.

II. RECORDS AT ISSUE

[para 5] The issue in this inquiry is whether the Public Body may refuse to confirm or deny the existence of a record. Therefore there are no records at issue, whether or not there were additional records responsive to the Applicant's request.

III. ISSUE

The issue in this inquiry is:

Did the Public Body properly refuse to confirm or deny the existence of a record, as authorized by section 12(2) of the Act?

IV. DISCUSSION OF THE ISSUE

Legislation

[para 6] Section 12 provides:

> *12(1) In a response under section 11, the applicant must be told*
>
> *(a) whether access to the record or part of it is granted or refused, …*
>
> *(c) if access to the record or to part of it is refused,*

[1] CPIC queries access the Canadian Police Information Centre database operated by the RCMP. PROBE refers to the local Edmonton database.

> *(i) the reasons for the refusal and the provision of this Act on which the refusal is* based, … .
>
> *(2) Despite subsection (1)(c)(i), the head of a public body may, in a response, refuse to confirm or deny the existence of*
>
> *(a) a record containing information described in section 18 or 20, or*
>
> *(b) a record containing personal information about a third party if disclosing the existence of the information would be an unreasonable invasion of the third party's personal privacy.*

[para 7] Section 18 is not relevant to the facts of this case. Section 20 says a public body may refuse to disclose information if disclosure could reasonably be expected to cause any of the harms or consequences enumerated in subsections (a) to (n).[2]

Form of decision

[para 8] This case presents me with a problem that arises periodically in cases involving requests for access to records. Part of the Public Body's submissions were made *in camera*; indeed, the theory on which the Public Body's use of section 12(2) in this case is based is contained largely in its *in camera* submissions. In dealing with these submissions in my decision, I should not disclose the *in camera* information. In addition, because this case involves the use of section 12(2), section 59(3)(b) of the Act applies. This section contains a specific prohibition for section 12(2) cases - against disclosing whether the requested information exists.[3] This prohibition applies to the writing of this decision. I cannot openly state the entirety of my reasons for decision without offending section 59(3)(b). As well, an open discussion of the Public Body's rationale for using section 12(2) would, if the decision were made publicly available, in itself highlight a practice which its use of section 12(2) in this case was meant to keep confidential.

[para 9] At the same time, providing my conclusion about the merits of the Public Body's theory without providing reasons might be inadequate to satisfy the Public Body

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[2] The specific subsections relied on by the Public Body are: (a) harm a law enforcement matter; (d) reveal the identity of a confidential source of law enforcement information; (e) reveal criminal intelligence that has a reasonable connection with the detection, prevention or suppression of organized criminal activities or of serious and repetitive criminal activities; (f) interfere with or harm an ongoing or unsolved law enforcement investigation, including a police investigation; and (k) facilitate the commission of an unlawful act or hamper the control of crime.

[3] Section 59(3)(b) provides:

> *59(3) In conducting an investigation or inquiry under this Act and in a report under this Act, the Commissioner and anyone acting for or under the direction of the Commissioner must take every reasonable precaution to avoid disclosing and must not disclose …*
>
> *(b) whether information exists, if the head of the public body in refusing to provide access does not indicate whether the information exists.*

that I had thoroughly considered its submissions. As well, in the event of a judicial review, it would leave the reviewing court without a complete explanation of my reasons.

[para 10] I will therefore include a discussion of that part of the Public Body's rationale that I cannot disclose, and my conclusions about it, in an Addendum to this decision, which I will provide to the Public Body alone. Because I do not uphold its use of section 12(2), the Public Body may wish to take this decision to judicial review. In the event it does so, I will provide in my return to the court both the Order containing the open part of my reasons for decision, and the Addendum, and will request that the Addendum be sealed. The court may then make any orders it regards as necessary with respect to further dissemination of these reasons for the purpose of the review. I will not provide the Addendum to the Applicant, or publish it, whether or not the decision is taken to judicial review, because the discussion it contains could conceivably, in some circumstances, cause some harm.

Public Body's general submissions

[para 11] I will begin by describing the Public Body's open submissions. I will then make comments relating to these parts, as well as comments relating to the closed parts of the submission that I may make openly, and state my conclusions. I will describe the detailed *in camera* arguments of the Public Body in the Addendum, and provide my reasons and conclusions relative to those parts therein. (There is no reference herein to submissions by the Applicant, as he did not provide any.)

[para 12] The Public Body's argument (in both the open and closed submissions) is that release of the information about whether queries were conducted or not would result in harm to law enforcement. In its opening discussion about section 12(2) (open submission, paragraph 12), the Public Body adverts to "the very real need to prevent access to information requests from jeopardizing law enforcement matters", in particular, covert investigations.

[para 13] The Public Body in its open submission describes its primary purpose in refusing to confirm or deny the existence of the records pursuant to section 12(2). It says this is to "ensure that an individual is not inadvertently made aware that he or she is under surveillance by the Public Body" (open submission, paragraph 19). An acknowledgement of the existence of responsive records would allow a person about whom a query was made to know they are being investigated, thus enabling the investigated person to destroy evidence or change behaviour to avoid detection. The Public Body says that therefore it does not disclose the fact there are responsive records in circumstances where a person is under investigation, does not know it, and the success of the investigation depends on their remaining unaware of it.

[para 14] As well, the Public Body says it sometimes relies on section 12(2) when no responsive information is being withheld or when there is no responsive information, and argues it should be permitted to do so, when "disclosing the fact there is no responsive information, or no further responsive information, could, in itself, harm a law

enforcement matter". The basis for this contention is addressed in detail in the Public Body's *in camera* submission. Again, the Public Body's argument relies on an assertion that revealing whether records exist could in itself harm a law enforcement matter.

[para 15] The Public Body does not say in its open submissions which, if any, of these practices it applied relative to this Applicant, but it does so in its closed submission.

[para 16] The Public Body also asserts that, although it has not done this so far, in some circumstances it should be allowed to withhold responsive records without identifying section 12(2). It gives as an example cases in which there are some queries from earlier investigations, and others from current investigations. It says it should be permitted to disclose the former without commenting on the latter, in order to obscure the fact of a current investigation. Finally, it says that if it is not allowed to use section 12(2) where there are no responsive records, it must be permitted to use the provision without mentioning it expressly in circumstances where there are records, as otherwise, anytime the provision was cited, an applicant would know there were responsive records. Since the Public Body cited section 12(2) in this case expressly, I do not need to decide if the Public Body may do this. However, if the Public Body adopts such a practice, it may not come to light, nor come before me on another occasion. Therefore, I will comment on this idea both in this Order and in the Addendum.

Conditions for relying on section 12(2)

[para 17] Except for the requirement that the records requested contain information described in section 18 and 20, section 12(2) does not provide guidance as to when it should be used. Sections 18 and 20 address situations in which records may be withheld, but when these sections (only) are applied, the applicant is told that records exist. Section 12(2)(a) provides the Public Body with an additional tool that it may not only withhold these particular classes of records, but also whether they exist. This absence of guidance as to when the provision should be used is in contrast to section 12(2)(b). The latter permits withholding whether records about a third party exist, but only if disclosure of the existence of this information would itself be an unreasonable invasion of the privacy of the third party. There is, therefore, a question of whether a similar restriction should be imposed for the use of section 12(2)(a), such that it is to be relied on only when its use would protect the same interest as non-disclosure of the records would protect.

[para 18] Earlier orders of this Office have said that section 12(2) is to be used having regard to the objects of the Act, including access principles. In my view, in order to rely on section 12(2)(a) to refuse to say whether information exists that falls into a particular subsection of section 18 or 20, the Public Body should first consider what interest would be protected by withholding such information under the particular subsection of section 18 or 20, and then ask whether refusing to say if such information exists would, in the particular case, promote or protect the same interest. A line of Ontario decisions, which includes a decision of the Ontario Court of Appeal, support this interpretation. These cases interpret similar Ontario legislation that restricts the use of the "refuse to confirm or deny" provision to situations where the refusal to say if the

information exists protects the same interest as refusal to disclose the information. The Ontario legislation does not impose such a restriction expressly.[4] However, the Office of the Information and Privacy Commissioner has, on many occasions, read in such a restriction, relative to both a provision that permits refusal to confirm or deny whether records exist that would, if disclosed, be an unjustified invasion of personal privacy, as well as in relation to provisions that permit refusal to confirm or deny records the disclosure of which would harm law enforcement matters. For example, in Order P-344, the Assistant Commissioner, in interpreting section 14(3) of the Ontario *Freedom of Information and Protection of Privacy Act* (which permits refusal to confirm or deny a record where disclosure of the record could cause specified consequences very similar to those listed in section 20 of the Alberta Act), said:

> A requester in a section 14(3) situation is in a very different position than other requesters who have been denied access under the Act. By invoking section 14(3), the institution is denying the requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power which I feel should be exercised only in rare cases.
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> In my view, an institution relying on section 14(3) must do more than merely indicate that records of the nature requested, if they exist, would qualify for exemption under sections 14(1) or (2). An institution must provide *detailed and convincing evidence* that disclosure of the mere existence of the requested records would convey information to the requester which could compromise the effectiveness of a law enforcement activity. [emphasis added]

[para 19] The Ontario Court of Appeal recently approved this interpretation (dealing with a refusal to confirm or deny the existence of a report pursuant to the provision relating to unjustified invasion of privacy)[5], and leave to appeal to the Supreme Court of Canada has been denied. The majority said:

> The Commissioner's reading … requires that in order to exercise his discretion to refuse to confirm or deny the report's existence, the Minister must be able to show that disclosure of its mere existence would itself be an unjustified invasion of personal privacy. The scheme of the Act is designed both to advance public access to information and protection of individual privacy and also to provide the necessary balancing of these purposes. … [T]he Act itself uses the concept of an unjustified invasion of privacy to strike the balance between access and privacy with respect to personal information contained in a report. The Commissioner's reading … uses the same concept for the same purpose where the information is the fact of the existence of a report rather than its contents. … The Commissioner reads the discretion given

[4] The Ontario Act permits refusal to confirm or deny both where refusal to disclose is permitted in situations relating to law enforcement, and where disclosure would be an unjustified invasion of privacy. In neither case does the legislation say expressly that the there can be a refusal to confirm or deny only where this would protect the same interest as refusing to disclose would protect.

[5] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 4813. Many subsequent orders in Ontario have relied on this decision.

> by the subsection to be constrained in this way in reflection of the Act's fundamental purposes and the balance required to be struck between them. In my view this is a reasonable interpretation … .

[para 20] This analysis applies equally to section 12(2)(a): whether a specified harm to law enforcement will be caused is the "concept" used to strike the balance between access rights and the goals of law enforcement. This is the approach that has been taken by the Ontario Privacy Commissioner's Office, and I agree with it.

[[para 21] As noted earlier, the Alberta legislation differs somewhat from that in Ontario, in that our section 12(2)(b) (unreasonable invasion of privacy) expressly contains the restriction just discussed, but 12(2)(a) (which refers to information described in sections 18 and 20) does not. Arguably, this could be taken to mean that such a restriction should be applied only to the former and not the latter. However, the result would be that section 12(2)(a) may be relied on only in situations where information is described by the subsections, yet a decision to use it may be made for some completely unknown, unrelated purpose. This is not a sensible result. The sensible purpose for both provisions is that it is to prevent requestors from obtaining information from a request indirectly that they cannot obtain directly. Requestors are denied access to information if access would cause harm to law enforcement, or unreasonable invasion of privacy. They should be denied information as to whether a record exists for the same reason, but not otherwise. Despite the difference in wording between sections 12(2)(a) and 12(2)(b), this restriction makes the same sense for both sections; therefore, in my view, it was intended for both, and I interpret section 20(1)(a) as implicitly containing it. The discretion to refuse to confirm or deny is available only if the condition is met that it is being used to protect the same interest as non-disclosure of information.[6] This interpretation is also in accordance with the general principle in the Act of permitting access subject only to limited and specific exceptions.[7]

[para 22] The Public Body's key argument about why it should be permitted to rely on section 12(2) in this case is that disclosing whether the records exist would harm a law enforcement matter. It directs most of its efforts at demonstrating this is so. My decision is based in part on whether I agree that this condition for exercise of the discretion was met in the present circumstances.

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[6] An alternative , closely related, analysis is as follows: the discretion may be exercised whenever the information, if it existed, would fall within one of the subsections; however, the discretion should be exercised having regard to the purposes of the statute, including the purposes of the provision relied on; thus, whether the contemplated harm would ensue is a relevant factor that must be considered in determining the way the discretion should be exercised in a given case. Use of the provision in this case is improper whichever of these analyses is applied. This is because the conclusion that harm would ensue under the present circumstances is based on a theory that is unsound. Thus reliance on this theory to determine if harm would ensue for the purpose of exercising the discretion involves importing an irrelevant consideration into the exercise of that discretion.

[7] In coming to this conclusion, I recognize that the former Commissioner made an *obiter* comment to the opposite effect in an earlier decision. (See Order 2000- 016.) However, this comment was made before the more recent court considerations of this issue, cited above.

Public Body's specific submissions

[para 23] In addition to its general explanation of how it uses section 12(2) in relation to access requests for information about CPIC and PROBE queries, the Public Body cites a number of specific subsections of section 20 which it regards as relevant to its use of section 12(2) in this case. The specific subsections cited are 20(1)(a), 20(1)(d), 20(1)(e), 20(1)(f) and 20(1)(k).[8] In its *in camera* submissions, the Public Body makes some further comments about these provisions.

[para 24] It is not clear to me why the Public Body cites subsections 20(1)(d) (disclosure of confidential sources of law enforcement information), and 20(1)(e) (disclosure of criminal intelligence that has a reasonable connection to certain kinds of crime) in this case. I do not see how in these circumstances, reference to these provisions lends credence to the Public Body's central argument. This is the more so if the interpretation of section 12(2)(a) described in paragraph 18 above is correct. If (as I have concluded) it is, then to rely on these provisions in combination with section 12(2), the Public Body must demonstrate that disclosure, in the present circumstances, of whether records or information exist would itself have one of the negative consequences described in the provisions. The Public Body has not tried to do this relative to the facts of this case.

[para 25] I turn to sections 20(1)(a) (harm a law enforcement matter) and 20(1)(f) (interfere with an investigation). The latter subsection relates more precisely to the Public Body's central argument than the former but the idea is the same for both. The two provisions are rendered more similar by the fact that 20(1)(a), which refers to harming "a law enforcement matter", has been interpreted to apply to specific, ongoing matters, in Alberta, (and to equivalent provisions in Ontario and British Columbia privacy decisions) rather than to law enforcement generally.[9] Again, this is not contentious in this case because the Public Body concedes this point in its open submission (paragraph 24) and in its *in camera* argument (paragraph 8), and suggests how in its view the terms of the sections are met in this case. I will discuss these sections further, as well as the Public Body's reference to section 20(1)(k), in the Addendum.

Conclusions

[para 26] I do not accept the Public Body's justifications for refusing to confirm or deny whether records exist in this case, either those in its open submission, or in the closed one.[10] Without revealing the specifics of the closed portion of the argument, I may say I reject it because the theory on which it is based is logically unsound. As well, it is highly speculative, in terms of the factual consequences of not using the provision

[8] These were quoted in note 2, above.
[9] See Alberta Order 96-013, at paragraph 21; Ontario Orders MO-1578, at paragraph 17, MO-1780 at paragraph 34. (The Ontario orders are under the municipal freedom of information legislation.)
[10] I have rejected only the rationale for use of the provision offered by the Public Body in this case. Other reasons for relying on it, whether or not records exist, will have to be considered as they arise.

that it says would likely flow. With respect to the particular factual consequences the Public Body raises, even if they were to ensue, they would not, in my view, cause harm to law enforcement, even seen at a general level, of any significant degree. Furthermore, the Public Body has not, in my view, demonstrated a likelihood of harm for any specific law enforcement matter. I do not regard the Public Body's theory as sound in terms of the consequences to law enforcement that are posited by it.

[para 27] As well, in the circumstances of this case, I do not think the language of section 12(2)(a) in combination with the provisions of section 20 that were cited by the Public Body, apply to the Applicant.

[para 28] For the foregoing reasons, which are further explained in the Addendum to this Order, I conclude the Public Body was not entitled to include in its response to the Applicant in this case a refusal to confirm or deny the existence of responsive records.

[para 29] I turn finally to the Public Body's claim that in some circumstances it may refuse to confirm or deny the existence of responsive records without identifying section 12(2). My conclusions in this case are related to the circumstances of this case, and as in the present circumstances I have not approved the use of section 12(2), it follows I would not approve if the section were used in these circumstances without citing it. It is not necessary for me to decide whether in some other type of circumstance, for example, where risk of harm to an individual is likely, it might be justifiable to rely on section 12(2) without citing it. That is a decision better left for a case involving such a circumstance. I will comment further in the Addendum on the matter of non-express reliance on the provision.

[para 30] I note, finally, that the Public Body's open submission states at paragraph 7 that the Portfolio Officer approved the Public Body's practice in this case. The results of mediation should not be included in the submissions. The Notices of Inquiry now issued by this Office contain a directive to this effect.

V. ORDER

[para 31] I make this Order under section 72 of the Act.

[para 32] I order the Public Body to respond to the Applicant's request without relying on section 12(2) of the Act.

Frank Work, Q.C.
Information and Privacy Commissioner