ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2006-013

October 10, 2006

EDMONTON POLICE SERVICE

Review Number 3439

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Summary: The Applicant, a barrister and solicitor, submitted an access request under the *Freedom of Information and Protection of Privacy Act* to the Edmonton Police Service (the "Public Body") for all records relating to queries about himself on the PROBE and CPIC databases, and all records relating to the queries.

Relying on section 12(2) of the Act, the Public Body responded by refusing to either confirm or deny that there were any 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 the Commissioner's 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 (Information and Privacy Commissioner),* [2004] O.J. No. 4813.

I. BACKGROUND

[para 1] By letter dated July 13, 2005, the Applicant, a barrister and solicitor, 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 all records relating to queries about himself on the PROBE and CPIC databases[1], and all records relating to the queries.

[para 2] The Public Body responded on August 12, 2005. Relying on section 12(2)(a) of the Act , it refused to either confirm or deny that there were any responsive records.

[para 3] On August 6, 2005, the Applicant asked my Office to review the response.

[para 4] A mediator was assigned to try to resolve the matter, but this was not successful, and the matter was set for inquiry.

II. RECORDS AT ISSUE

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

III. ISSUE

[para 6] 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 7] 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,*

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

> *(b) if access to the record or part of it is granted, where, when and how access will be given, and*
>
> *(c) if access to the record or to part of it is refused,*
>
> *(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.*

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) is based is contained largely in its *in camera* submissions. In dealing with these submissions in my decision, I must avoid disclosing 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.[2] This prohibition applies to the writing of this decision. I may not openly state the entirety of my reasons for my decision without offending this provision. As well in this case, an open discussion of the Public Body's rationale for using section 12(2) could, 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 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 the reasons for my conclusions.

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[2] 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.*

[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 the 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 Applicant with the Addendum, 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. (This decision does not rely to any great degree on the Applicant's submissions. He made them without knowledge of whether there were responsive records about him. Neither did he have access to the Public Body's closed submission, which contains the key points of their arguments. Thus he was not in a position to be helpful on these key points.)

[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) (paragraph 12 open submission), 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" (paragraph 18, open submission). Under this theory, 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 the Applicant in this case, but it does do this 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 permitted to withhold responsive records without identifying section 12(2). It gives as an example cases in which there are some records disclosable 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. It seems to interpret section 12(2) as permitting this. 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 doing so 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 in the Addendum.

Discretion under section 12(2)

[para 17] At this point I will make some general observations about section 12(2)(a). First, beyond the requirement that the records requested contain information described in section 18 and 20, this provision does not provide guidance as to when it ought to be used. Sections 18 and 20 address situations in which records may be withheld, but when these sections are applied and records are withheld, the applicant is, in the usual application of these sections, 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. The absence of any further guidance in this provision as to when it ought to be used is in contrast to section 12(2)(b). The latter permits withholding information as to 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 read into section 12(2)(a), such that it should be used 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) may be used where it is reasonable to do so in the circumstances, having regard to the objects of the Act, including access principles. In my view, a Public Body exercising its discretion relative to a particular provision of the Act should also consider the purpose of the particular provisions on which it is relying, and whether withholding the records would

meet those purposes in the circumstances of the particular case. This suggests that in order to rely on section 12(2)(a) to withhold information that falls into a particular subsection of section 18 or 20, the Public Body should first consider what interest would be protected by withholding the record under section 18 or 20, and then ask whether refusing to say if such information exists would promote or protect the same interest. A line of Ontario decisions provides support for such an interpretation. These decisions, which include a decision of the Ontario Court of Appeal, approve an interpretation, of similar Ontario legislation, that restricts the use of the "refusal 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 any such a restriction on the exercise of discretion expressly.[3] However, the Ontario 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 unreasonable 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 the following:

> 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.

The Ontario Court of Appeal has very recently approved this interpretation (for a situation in which the refusal to confirm or deny was in relation to a record that could, if disclosed, constitute an unjustifiable invasion of privacy[4]), and leave to appeal to the Supreme Court of Canada has been denied.

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

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

[para 19] As noted earlier, the Alberta legislation differs somewhat from that in Ontario, in that our section 12(2)(b) (unreasonable invasion) expressly contains the restriction just discussed, but 12(2)(a) (which refers to 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, without using the specific subsections of sections 18 and 20 as reference points, it is hard to imagine how the Public Body could determine what purpose was intended for permitting the use of section 12(2) relative to any particular one of these subsections, other than the purpose of the subsection itself. The rationale for the Ontario decisions upholding an interpretation that reads in the restriction although it is not there expressly supports this idea. In the words of the Court of Appeal, (dealing with a provision permitting refusal to confirm or deny the existence of a record if its disclosure would be an unjustified invasion of privacy):

> The Commissioner reads the discretion given by the subsection to be constrained in this way [i.e. to be exercised only where the information conveyed by knowing whether the record exists itself conveys information that would be an unjustified invasion of privacy] *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 particularly given that the Act itself uses the same concept to define the threshold for disclosure of personal information … . [emphasis added]

[para 20] The Act does not typically confer a discretion without providing some reference point for discerning its purpose. I do not see that section 12(2) should be taken to restrict exercise of the discretion to situations where information that is described by these subsections, yet to permit it to be exercised for some unknown, unrelated purpose.

[para 21] While I find the foregoing analysis persuasive, I do not need to decide whether the Ontario interpretation should be adopted in Alberta for section 12(2)(a) in this case. This is because the Public Body's only 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. As the Public Body has clearly stated that it exercised its discretion to rely on section 12(2) in this case because to reveal if records existed would harm a law enforcement matter, and offers no other factors that it considered, I may decide this case on the basis of whether I agree that this was a reasonable basis for exercise of the discretion in the circumstances.

Public Body's specific submissions

[para 22] I return now to the Public Body's argument. 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 sets out a number of specific subsections of section 20 which it regards as relevant to its use of section 12(2). It appears that in its view, these are the provisions that, in the circumstances of such a request, describe or might describe the related information. The specific subsections cited are 20(1)(a), 20(1)(d), 20(1)(e), 20(1)(f) and 20(1)(k). In its *in camera* submissions, the Public Body makes some further comments about these provisions.

[para 23] With respect to this aspect of the Public Body's arguments, it is not clear to me why it 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 it is, then in order to rely on these provisions in combination with section 12(2), the Public Body must demonstrate that disclosure 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.

[para 24] With respect to section 20(1)(f) (interference with an investigation), this subsection relates more closely to the Public Body's argument than 20(1)(a), 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 "harm to a law enforcement matter", has been interpreted to apply to specific, ongoing matters, in Alberta, Ontario, and British Columbia privacy decisions[5] rather than to law enforcement generally. Again, this is not contentious in this case because the Public Body concedes this point in its open submission and in its *in camera* argument[6], and suggests how in its view the terms of the section are met in this case.[7]

Conclusions

[para 25] I do not accept the Public Body's justifications for its use of section 12(2) in this case, either those it makes in its open submission, or in the closed submission. Without setting out the specifics relative to the closed part of the argument, I may say that I reject it because it is highly speculative both in terms of the actions on the part of the Applicant or others that the Public Body anticipates, and the factual consequences 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 26] 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 cited by the Public Body, apply to the Applicant.

[para 27] For the foregoing reasons, which are further explained in the Addendum to this Order, I conclude the Public Body was not entitled to respond to the Applicant in this case by refusing to confirm or deny the existence of responsive records.

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[5] 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.)
[6] See open submission paragraph 23; closed submission paragraph 8.
[7] I will discuss the Public Body's reference to section 20(1)(k) in the Addendum.

[para 28] 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 29] I note, finally, that the open submission states at paragraph 7 that the Portfolio Officer approved the Public Body's practice in this case. The results of mediations should not be included in the submissions. There is now a directive in the Notices of Inquiry to this effect.

V. ORDER

[para 30] I make this Order under section 72 of the Act.

[para 31] 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