ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2006-014

November 19, 2007

EDMONTON POLICE SERVICE

Case File Number 3426

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Summary: The Applicant made a request under the *Freedom of Information and Protection of Privacy Act* (the "Act") to the Edmonton Police Service (the "Public Body") for access to records relating to the arrest and detention of his son. The Public Body provided certain records to the Applicant but severed the personal information of his son and other third parties. The Applicant requested a review of that decision, also submitting that the Public Body failed to provide additional records that the Applicant believed to exist. The Public Body provided some of those additional records during the inquiry.

Section 10(1) of the Act requires a public body to make every reasonable effort to conduct an adequate search for responsive records in order to respond to an applicant openly, accurately and completely. The Adjudicator found that, in failing to initially provide all of the responsive records, the Public Body did not fulfill its duty. However, he found that the Public Body subsequently fulfilled its duty when it provided the additional records.

Section 17 of the Act requires a public body to refuse to disclose personal information if it would be an unreasonable invasion of a third party's privacy. The Adjudicator found that the information that was severed from the records given to the Applicant was an identifiable part of a law enforcement record, and that disclosure was therefore presumed to be an unreasonable invasion of the personal privacy of third parties. As the Applicant did not successfully rebut the presumption, the Adjudicator concluded that the Public

Body properly applied section 17 of the Act and confirmed the decision to withhold the personal information.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(h)(i), 1(n), 1(n)(i), 1(n)(iii), 1(n)(vi), 3(c), 10(1), 17(1), 17(4)(b), 17(4)(g), 17(5), 71(1), 71(2), 72, 72(2)(b) and 84(1)(a). **ON:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, s. 2(1).

Authorities Cited: AB: Orders 96-021, 96-022, 97-003, 99-017, 99-027, 98-002, 98-003, 99-033, 2000-021, 2000-027, F2003-001, F2003-009 and H2006-003. **ON:** Orders MO-2128 and MO-2199.

I. BACKGROUND

[para 1] In a request to access information dated February 18, 2005 and subsequently clarified, the Applicant requested from the Edmonton Police Service (the "Public Body") any records, including control tactic reports, electronic communications and taser data port information, in relation to the arrest and detention of his son. His son is now deceased.

[para 2] By letter dated September 8, 2005, the Public Body provided to the Applicant a complete and unedited copy of an audio recording and copies of eight pages of records. It severed information from the eight pages on the basis that disclosure would be an unreasonable invasion of the personal privacy of third parties under section 17 of the *Freedom of Information and Protection of Privacy Act* (the "Act"). The Public Body indicated in its letter that no control tactic reports or taser data port information existed in relation to the Applicant's request.

[para 3] By letter dated September 23, 2005, the Applicant requested that this Office review the Public Body's decision to sever information from the eight pages of records. Mediation was authorized but was not successful. The matter was therefore set down for a written inquiry.

[para 4] In his brief to this Office, the Applicant submitted that the Public Body failed to provide him with records that should normally have been in existence but were not disclosed. With its rebuttal submissions, the Public Body included four additional pages of records, also severing the personal information of third parties.

II. RECORDS AT ISSUE

[para 5] The records at issue, from which the personal information of third parties has been severed, consist of seven pages of arrest booking details, one page from a police officer's notebook, one page from an arrest processing unit daily log, two pages from an "inmates in the back" report and one page from a prisoner property report.

[para 6] As the audio recording was provided in its entirety, it is not at issue.

III. ISSUES

[para 7] Although the Notice of Inquiry, dated February 21, 2006, set out only one issue, the Applicant and Public Body have raised and addressed two issues:

A. Did the Public Body conduct an adequate search for responsive records and make every reasonable effort to assist the Applicant and to respond to the Applicant openly, accurately and completely, as required by section 10(1) of the Act?

B. In severing information from the records at issue, did the Public Body properly apply section 17 of the Act (unreasonable invasion of a third party's personal privacy)?

[para 8] While only the second issue above was set out in the Notice of Inquiry, the Notice does not limit my ability to consider other issues (Order 99-033 at para. 44). Because the Public Body has the burden of proof with respect to the additional issue that I identified, I requested and obtained additional written submissions from the Public Body on that issue.

IV. DISCUSSION OF ISSUES

A. Did the Public Body conduct an adequate search for responsive records and make every reasonable effort to assist the Applicant and to respond to the Applicant openly, accurately and completely, as required by section 10(1) of the Act?

[para 9] Section 10(1) of the Act reads:

> *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.*

[para 10] The Applicant alleges a failure on the part of the Public Body to provide all of the records believed by the Applicant to exist in relation to the arrest and detention of his son. He submits that the Public Body failed to provide him with unit histories, an event chronology, temporary holding facility records, taser data port records, arrest processing unit (APU) videotape, arrest approval reports, cell block records and a prisoner property report.

[para 11] Part of a public body's duty to assist an applicant under section 10(1) of the Act includes the obligation to conduct an adequate search, which means that the public body must show that it made every reasonable effort to search for the records requested (Order 96-022 at para. 14). The decision concerning an adequate search must be based on the facts relating to how a public body conducted a search in the particular case (Order 98-003 at para. 37).

[para 12] In its rebuttal submissions dated May 15, 2006, the Public Body states that it reviewed its initial search and conducted a further search for responsive records. The Public Body submits that this review and second search confirmed that no unit histories, event chronology or temporary holding facility records exist in relation to the Applicant's request for information.

[para 13] The Public Body states that it remains unable to ascertain which deployments of the conducted energy device (i.e., taser) set out in the data port records relate to the Applicant's request and therefore is unable to provide information responsive to that part of the request. I note that, in the context of an internal investigation, the Public Body found that the responsible police officer did not submit the required control tactics form, as indicated in a disposition letter of November 22, 2005.

[para 14] In order to improve record keeping and reporting regarding the use of conducted energy devices, the Public Body states that it issued a new service directive dated February 28, 2006. The directive requires a member of the Public Body who uses a conducted energy device to immediately notify his or her supervisor, who must ensure the submission of all required reports. Further, copies of the control tactics report, download report and member's report must be forwarded to both an officer safety unit and a central registry unit.

[para 15] With respect to any APU videotape, the Public Body indicates that the tape was destroyed, in accordance with the Public Body's records retention policies, six months after the arrest in question and therefore prior to the Applicant's access request.

[para 16] With respect to any arrest approval reports, which would normally form part of the APU records, the Public Body states that none exist in relation to the Applicant's request, but that the information that would have been written there is contained in electronic arrest booking details that form part of the eight pages of records originally provided to the Applicant. I note that, in its disposition letter of November 22, 2005, the Public Body found that the responsible police officer did not submit the necessary paperwork at the APU.

[para 17] In its rebuttal submissions, the Public Body indicates that, subsequent to its original response to the Applicant, it located an APU daily log, an APU report regarding "inmates in the back" and a prisoner property report relating to the Applicant's request. It attached copies of these records to its submissions but severed the personal information of third parties under section 17 of the Act, on the same basis that it severed information from the eight pages of records originally provided to the Applicant. These three additional records, totaling four pages, were made available to the Applicant when the Public Body's submissions were provided to him by this Office.

[para 18] As the Public Body has the burden of proving that it conducted an adequate search (Order 97-003 at para. 25) and this issue was not expressly set out in the Notice of Inquiry, I requested and obtained additional submissions from the Public Body. In particular, I asked for an explanation as to why, when responding in September 2005

to the Applicant's request for information, the Public Body did not provide the records that were later included with its rebuttal submissions in May 2006.

[para 19] In its response, the Public Body states that the fact that the search was not as broad as the Applicant sought was an oversight or misunderstanding of the request. It submits, however, that an adequate search does not require a standard of perfection (Order 2000-021 at para. 68), and that failing to find certain records during an initial search does not preclude a finding that a public body made every reasonable effort (Order F2003-001 at para. 40). It further submits that although applicants are not legally required to assist public bodies by suggesting where to search, it makes sense for them to do so when they can (Order F2003-009 at para. 30), and that the knowledge and sophistication of the applicant is a factor to consider (Order 2000-021 at para. 68).

[para 20] The Applicant's information request was for any records relating to the arrest and detention of his son, including types of records that he specifically named. However, when conducting the initial search, the Public Body searched only for the specifically named records, any audio recording and any records held by the two arresting officers. The arrest processing unit was not contacted or searched, even though records located there would clearly relate to the arrest and detention of the Applicant's son.

[para 21] The two APU reports and prisoner property report were routine records and have dates closely corresponding to the date of the arrest and detention in question. I therefore believe that they should have been easily located at the time of the initial search. I also believe that the Applicant's amended request was sufficiently clear and narrow in scope so that it was not incumbent upon him to tell the Public Body where to search, or make further inquiries about the existence of other records. The possible locations of responsive records should have been readily apparent to the Public Body.

[para 22] I accept that the failure to find all responsive records during the initial search was the result of an oversight or misunderstanding on the part of the Public Body. However, I must still determine whether the Public Body made every reasonable effort to assist the applicant, reasonable being what was suitable in the circumstances (Order 98-002 at para. 89). Although a public body does not necessarily fail to conduct an adequate search if records are overlooked, I must consider the efforts made, including the thoroughness of the search (Order H2006-003 at para. 95).

[para 23] Based on the facts of this particular case, I find that the Public Body did not initially conduct an adequate search for responsive records. It therefore failed to fulfill its duty to assist the Applicant and to respond to the Applicant openly, accurately and completely under section 10(1) of the Act.

[para 24] Despite the foregoing, the Public Body has now conducted searches on two separate occasions and provided adequate explanations for its inability to locate any of the other records that the Applicant believes to exist. I am accordingly satisfied that the Public Body has now conducted an adequate search for responsive records and made

every reasonable effort to respond to the Applicant's request openly, accurately and completely under section 10(1) of the Act.

B. In severing information from the records at issue, did the Public Body properly apply section 17 of the Act (unreasonable invasion of a third party's personal privacy)?

[para 25] Section 17 of the Act requires a public body to withhold personal information if disclosure would be an unreasonable invasion of a third party's personal privacy. The provisions of section 17, on which the Public Body relied to sever information from the records at issue, are the following:

> *17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy. …*
>
> *(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if…*
>
> *(b) the personal information is an identifiable part of a law enforcement record, except to the extent that the disclosure is necessary to dispose of the law enforcement matter or to continue an investigation…*
>
> *(g) the personal information consists of the third party's name when*
>
> *(i) it appears with other personal information about the third party, or*
>
> *(ii) the disclosure of the name itself would reveal personal information about the third party…*

[para 26] Under section 71(1) of the Act, the Public Body has the burden of proving that the Applicant has no right of access to the severed information. In the context of section 17, this means that the Public Body must first establish that the severed information is the personal information of a third party and then establish that disclosure would be, or is presumed to be, an unreasonable invasion of the third party's personal privacy. Despite this burden, section 71(2) states that if the severed record contains personal information about a third party, it is up to the Applicant to prove that disclosure would not be an unreasonable invasion of the third party's personal privacy.

1. Do the severed records contain personal information of a third party?

[para 27] Information unrelated to the arrest and detention of the Applicant's son has been severed from certain records at issue because it does not respond to the Applicant's request. This severed information is therefore not at issue. The information that has been severed, but that relates to the Applicant's request, consists of the name,

signature, address, phone number and/or birth date of certain individuals, a second initial of an individual, and a description of an individual.

[para 28] Under section 1(n) of the Act, "personal information" means "recorded information about an identifiable individual" and includes, under section (1)(n)(i), an individual's "name, home or business address or home or business telephone number." As the names, signature, addresses and phone numbers that were severed from the records at issue would identify third parties, they constitute personal information. As "personal information" also includes an individual's "age" under section 1(n)(iii), the severed years of birth are also personal information.

[para 29] Although the month and day in an individual's date of birth are not expressly included in the definition of "personal information" set out in the Act, the list is not exhaustive. In an Ontario Order, "personal information" was held to include an entire date of birth, even though the legislation includes a reference to age only (Ontario Order MO-2128 at paras. 16 and 17, interpreting "personal information" as defined in section 2(1) of the Ontario *Municipal Freedom of Information and Protection of Privacy Act*). I agree that month and day of birth can be personal information if it is recorded about an identifiable individual, and find that to be the case here.

[para 30] It is also possible for a third party's initials to be recorded information about an identifiable individual and therefore fall within the definition of "personal information" set out in section 1(n) of the Act (Order 99-017 at para. 60). Because one of the third parties is identifiable through the presence of a first initial and last name, the additional initial is recorded information about an identifiable individual. I therefore find the initial to be personal information.

[para 31] Finally, I find the description of a particular individual to be personal information. The description contains information about the individual's health and physical condition, health information being expressly included within the meaning of "personal information" under section 1(n)(vi) of the Act. The information also pertains to an individual who is identifiable, whether using information that has not been severed from the records at issue (such as a date and location) or information otherwise known to the Applicant or others. In an Ontario Order, it was stated that when determining whether information is about an identifiable individual, one must look at the information in the context of the record as a whole and that, furthermore, information without personal identifiers (as here, given that the name of the individual has also been severed) may not be truly non-identifiable if it can be combined with other information from other sources to render it identifiable (Ontario Order MO-2199 at para. 23).

[para 32] For the foregoing reasons, I find that all of the information severed from the records at issue is the personal information of third parties that is subject to section 17 of the Act.

2. Would disclosure be an unreasonable invasion of a third party's personal privacy?

[para 33] On a preliminary point, I must address whether, in making the access request, the Applicant was acting in the place of his deceased son or whether the son remains a third party vis-à-vis the Applicant. Section 84(1)(a) of the Act states that any right conferred on a deceased individual by the Act may be exercised by his or her personal representative if the exercise of the right relates to the administration of the individual's estate. However, the Applicant did not provide any evidence or arguments to the Public Body or this Office suggesting that section 84 applies to him. I must therefore treat the son as a third party vis-à-vis the Applicant.

[para 34] The Public Body states that it disclosed to the Applicant most of the information in the records at issue on the basis that it would not be an unreasonable invasion of his son's personal privacy. In reaching its decision, the Public Body states that it considered relevant circumstances [as required by section 17(5) of the Act], namely that the Applicant was already aware of the arrest and detention of his son and had made allegations of wrongdoing against members of the Public Body.

[para 35] The Public Body submits that it withheld the name, birth date, address and phone number of the Applicant's son because the Applicant already knew this information and because the Public Body wanted to protect the son's privacy in the event of a subsequent disclosure of the records by the Applicant, inadvertent or otherwise. I do not agree that an applicant's prior knowledge of a third party's personal information is a relevant consideration in providing or refusing access (Order 99-027 at para. 175). However, the risk of further disclosure has been found to be a relevant circumstance in considering whether initial disclosure would be an unreasonable invasion of a third party's personal privacy, as once information is released to an applicant, it is in the public domain and there is no requirement that an applicant maintain the confidentiality of that personal information (Order 96-021 at para. 171).

[para 36] The Public Body further submits that it withheld the personal information of the Applicant's son – along with the personal information of the other third parties – under section 17(4)(b) of the Act because the personal information is an identifiable part of a law enforcement record (and disclosure is not necessary to dispose of the law enforcement matter or continue an investigation). Additionally, the Public Body submits that it withheld the names of third parties under section 17(4)(g) because they appear with other personal information about the third parties or the disclosure of the names themselves would reveal personal information about the third parties (i.e., their involvement in a law enforcement matter). If either section 17(4)(b) or (g) apply, the Act states that disclosure of the information is presumed to be an unreasonable invasion of a third party's personal privacy.

[para 37] The records at issue consist of portions of arrest booking details, a police officer's notebook, two reports from an arrest processing unit and a prisoner property report. Under section 1(h)(i) of the Act, "law enforcement" means, among other things,

"policing". "Policing", in turn, has been held to mean those activities carried out, under the authority of a statute, regarding the maintenance of public order, detection and prevention of crime, or the enforcement of law (Order 2000-027 at para. 16).

[para 38] Here, the records at issue arise out of the Public Body's statutorily authorized activities relating to public order, crime detection and law enforcement, whether in the context of the arrest and detention in question or in the context of prior incidents. I therefore find that the records at issue relate to policing and are law enforcement records within the meaning of the Act. Accordingly, disclosure of the information that has been severed from the records at issue is presumed to be an unreasonable invasion of a third party's personal privacy under section 17(4)(b).

[para 39] As I have determined that subsection 17(4)(b) of the Act (law enforcement record) applies to the records at issue, I do not need to determine whether subsection 17(4)(g) (name plus personal information) applies.

[para 40] In accordance with section 71(2) of the Act, it is up to the Applicant to prove that disclosure of the withheld information would not be an unreasonable invasion of the third parties' personal privacy, so that it may be released. To rebut the presumption against disclosure, the Applicant argues that, when his son was arrested and detained, the police were exercising a public duty, not a private one. In my view, this does not demonstrate that the severed information may be released. The Act is intended to protect the privacy of individuals in the course of public duties and activities carried out by public bodies.

[para 41] The Public Body indicated that its reason for withholding from the Applicant certain information about the Applicant's son was to prevent further disclosure to others, and therefore to prevent what it considered an unreasonable invasion of the son's privacy. The Applicant did not respond to this submission, nor provide any arguments as to why the personal information of the other third parties could be disclosed without unreasonably invading their personal privacy.

[para 42] Given the foregoing, I find that the Applicant has not proven that disclosure of the information severed from the records at issue would not be an unreasonable invasion of the personal privacy of his son or the other third parties.

V. ORDER

[para 43] I make this Order under section 72 of the Act.

[para 44] First, I find that the Public Body did not initially conduct an adequate search for responsive records and make every reasonable effort to assist the Applicant and to respond to the Applicant openly, accurately and completely, as required by section 10(1) of the Act. However, as I have found that the Public Body subsequently met its duty under section 10(1), I do not find it necessary to order the Public Body to comply.

[para 45] Second, I find that the Public Body properly applied section 17 of the Act when it concluded that disclosure of the personal information of third parties would be an unreasonable invasion of their personal privacy, and therefore severed the information from the records provided to the Applicant. I confirm the Public Body's decision to refuse access.

Wade Riordan Raaflaub
Adjudicator