ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2006-020

May 1, 2007

EDMONTON POLICE SERVICE

Case File Number 3477

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

Summary: The Applicant 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 any records relating to him, including any name checks or computer searches and for the names of the Public Body's employees who ran the searches.

The Public Body provided a chart indicating when the Applicant's name was searched, the time and the name search parameters. The names of the Public Body's employees that conducted the searches were not released pursuant to section 17(1) of the Act. The Public Body further advised that it had withheld one search in its entirety pursuant to sections 4(1)(k), 20(1)(a) and 20(1)(h) of the Act. The Public Body would neither confirm nor deny the existence of any additional records responsive to the Applicant's request pursuant to section 12(2) of the Act.

The Adjudicator did not accept that the Public Body had properly relied on section 12(2). He ordered the Public Body to respond to the Applicant's request without relying on the provision.

As the Public Body subsequently released details of the search it had previously withheld, the Adjudicator decided that the issues pertaining to the application of sections 4(1)(k), 20(1)(a) and 20(1)(h) of the Act were rendered moot.

The Adjudicator further found that the employees were acting in their representative capacities and that the Public Body did not demonstrate why release of the names would

constitute an unreasonable invasion of personal privacy. Accordingly, the Adjudicator ordered the release of the names of the employees conducting the searches.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c.F-25, ss. 1(n), 4(1)(k), 12(2), 17, 17(5)(a), 17(5)(h), 20(1)(a), 20(1)(h), 71(2).

Cases Cited: *Borowski v. Canada (Attorney General)* (1989), 57 D.L.R. (4th) 251.

Orders Cited: AB: 95-005**,** 97-002, 2001-013, F2004-22, F2006-012, F2006-13 **B.C.** *71-1995*, 227-1998, 287-1998.

I. BACKGROUND

[para 1] On June 29, 2005 the Applicant made an access request for:

> …any records or reports that confirm or indicate any name checks or other computer queries that may have been done on CPIC or any other EPS computer or device (and in this case) the proper name of any EPS employee, member or agent who may have conducted the query. Because I moved to Edmonton in September of 1985, I would request any records from that date to the present.

[para 2] On September 23, 2005 the Edmonton Police Service (the "Public Body") sent the Applicant a chart indicating when his name was searched, the time and the name search parameters. The names of employees of the Public Body that conducted the queries were not released pursuant to section 17(1) of the *Freedom of Information and Protection of Privacy Act* (the "Act").

[para 3] The Public Body further advised that it had withheld one search in its entirety pursuant to sections 4(1)(k), 20(1)(a) and 20(1)(h) of the Act. The Public Body also would neither confirm nor deny the existence of any additional records responsive to the Applicant's request pursuant to section 12(2) of the Act.

II. RECORDS AT ISSUE

[para 4] The Public Body provided the Applicant with a matrix that listed the date and time of a name query and the name queried. The matrix did not disclose the name of the Public Body employees who ran the name queries.

III. ISSUES

[para 5] To deal with this matter expeditiously, I have re-ordered the issues. I will begin with consideration of Issue A. Issues B, C and D will then be dealt with together. The issues in this inquiry are:

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

B. Are the records excluded from the application of the Act by section 4(1)(k)(records relating to prosecution)?

C. Did the Public Body properly apply section 20(1)(a) of the Act (harm a law enforcement matter) to the records/information? (Originally Issue D)

D. Did the Public Body properly apply section 20(1)(h) of the Act (deprive a person of the right to a fair trial or impartial adjudication) to the records/information? (Originally Issue E)

E. Does section 17 of the Act (personal information) apply to the records/information? (Originally Issue C)

IV. DISCUSSION OF THE ISSUES

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

[para 6] Section 12 states:

> 12(1) In a response under section 11, the applicant must be told
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> (a) whether access to the record or part of it is granted or refused,
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> (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,
>
> (ii) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and
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> (iii) that the applicant may ask for a review of that decision by the Commissioner or an adjudicator, as the case may be.
>
> (2) Despite subsection (1)(c)(i), the head of a public body may, in a response, refuse to confirm or deny the existence of
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> (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] The Commissioner dealt with this issue previously in Orders F2006-012 and F2006-013 in which the Public Body was a party. In examining the open submission

and the *in camera* submission submitted by the Public Body in this inquiry, I can find no significant difference between the case presented by it in those previous inquiries and the case before me. Furthermore, there are no significant factual circumstances that would distinguish this inquiry from the others.

[para 8] Accordingly, for this inquiry I adopt the reasoning in Orders F2006-012 and F2006-013.

[para 9] Therefore, I order the Public Body to respond to the Applicant's request without relying on section 12(2) of the Act.

B. Are the records excluded from the application of the Act by section 4(1)(k) (records relating to prosecution)?

C. Did the Public Body properly apply section 20(1)(a) of the Act (harm a law enforcement matter) to the records/information?

D. Did the Public Body properly apply section 20(1)(h) of the Act (deprive a person of the right to a fair trial or impartial adjudication) to the records/information?

[para 10] As these three issues deal with the Public Body's refusal to release one search result I will deal with those issues together. The Public Body has presented evidence that this search was withheld pending the completion of a disciplinary proceeding. On conclusion of the proceeding this search result was released to the Applicant on December 2, 2005.

[para 11] Since the Public Body has disclosed the personal information in question and claimed no exceptions to disclosure, these issues would appear moot. Order 95-005 determined that the issue of whether the Commissioner can hear a moot issue is a matter of general policy or practice, as set out by the Supreme Court of Canada in *Borowski v. Canada (Attorney General)* (1989), 57 D.L.R. (4^{th}) 251.

[para 12] The Supreme Court of Canada in *Borowski* set out three guidelines to consider when deciding whether to exercise the discretion to hear a moot issue:

1. *The issue must exist within an adversarial context.* That requirement will be satisfied if the adversarial relationship will prevail even though the issue is moot. Consideration must be given whether a party will suffer any collateral consequences if the merits are left unresolved. In this instance, since the record requested by the Applicant has now been released the issue no longer exists within an adversarial context. Additionally, the Applicant will not suffer any collateral consequences if the matter is left unresolved.

2. *Judicial Economy:* Consideration must be given whether the decision will have some practical effect on the rights of parties, whether the case involves a recurring

issue and a consideration of the public interest, namely, the social cost of continued uncertainty in the law. In this case, as the record has been released, there will be no practical effect on the rights of the parties.

3. *Role of the legislative branch:* Consideration should be given to whether exercising discretion would be an intrusion into the role of the legislative branch. This guideline has no application in the present circumstances.

[para 13] I, therefore, rely on the two relevant aforementioned guidelines and decline to exercise my discretion to decide this moot issue.

E. Does section 17 of the Act (personal information) apply to the records/information?

[para 14] The parts of section 17 relevant to this discussion provide:

> 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.
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> (5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
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> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,
>
> (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant…

[para 15] The Public Body provided the Applicant with a chart indicating when his name was searched, the time and the name search parameters. The Public Body withheld the names of its employees who conducted the queries, citing section 17(1) of the Act, which provides that a public body must refuse to disclose personal information if the disclosure would be an unreasonable invasion of a third party's personal privacy.

[para 16] The Applicant concedes that the names of individuals who conducted the searches constitute "personal information" under section 1(n) of the Act. The Applicant submits that if this is correct then in accordance with section 71(2) it will be the Applicant who will bear the burden of proof to demonstrate that disclosure would not be an unreasonable invasion of a third party's privacy.

[para 17] The Applicant submits that as the Public Body's own policy requires employees to be able to "clearly articulate the police-related purpose any time an information system is used" there can be no expectation of confidentiality on their part. Further, the Applicant states that the Public Body has previously disclosed names, badge numbers and similar information with regard to previous access requests.

[para 18] In addition, the Applicant argues that either the employees were properly conducting police business, which should raise no concerns with respect to disclosure or they were violating the Public Body's policies and the Act by conducting searches for personal reasons. The first purpose would not have an expectation of confidentiality, while the latter being an improper purpose, would not be protected by the Act.

[para 19] The Public Body's submission demonstrates that it considered two relevant circumstances under the Act, being sections 17(5)(a) (public scrutiny) and 17(5)(h)(damage to reputation) before deciding to withhold the names of its employees.

[para 20] With regard to section 17(5)(a), the Public Body stated that it has already provided sufficient information to the Applicant in order to achieve the objective of subjecting the activities of the Public Body to public scrutiny. Any further disclosure of the names of employees conducting name searches was unnecessary to achieve this objective.

[para 21] However, I do not believe that this is a relevant circumstance. Neither party has adduced evidence as to whether the Applicant seeks disclosure for private or public use. The Applicant has made no submission that his request for information was for the purpose of public scrutiny, nor can his occupation in itself be determinative in establishing such a purpose. As there is no evidence before me to establish the relevance of section 17(5)(a), I will not consider it.

[para 22] With regard to section 17(5)(h), the Public Body has cited four orders in support of its position that disclosure of employee names would unfairly damage the reputation of those individuals referred to in the record.

[para 23] In Order 97-002 the Commissioner upheld the public body's decision to sever names where a preliminary report contained no findings of fact, but which included rhetorical or inflammatory questions from which certain adverse inferences could be made about identifiable employees of the public body.

[para 24] In B.C. Order 71-1995 the B.C. Commissioner found that the Premier's Office was authorized to refuse access to records where the personal information concerned consisted of the names of third parties who were possible victims of sexual harassment. The records in dispute also contained unsubstantiated allegations against a third party.

[para 25] In B.C. Order 227-1998 the B.C. Commissioner found that the public body was required to withhold third party personal information dealing with a physician

and the number of complaints made against him, whether those complaints had been sustained or not. Finally, B.C. Order 287-1998 dealt with a list of third parties who were required by their professional body to take practice reviews. It was found that the information was supplied in confidence and that members who had been reviewed could be seen by the public as being professionally deficient when in fact they were not. The information was therefore not disclosed.

[para 26] All of these orders can be distinguished from the present inquiry, as in each case personal information consisted of a third party name and other information whether in the guise of inflammatory questions, unsubstantiated allegations and complaints that when linked to a third party could lead to an adverse inference being made against the reputation of the person in question. However, in this inquiry, the undisclosed personal information consists of third party names with no other information other than the date, time and name parameters of the search. This alone cannot support an adverse inference.

[para 27] The basis of the Public Body's argument that disclosure of the names could lead to adverse inferences is that previously it had disclosed the names of employees conducting name searches and as a result of such disclosure a number of newspaper articles were published naming employees who conducted the searches.

[para 28] In particular, the Public Body points to six newspaper articles in its submission, five of which name employees who ran searches. The Public Body alleges that the publication of those names may have unfairly damaged their reputations. I have examined those articles and I find that although the names of the employees came from access requests, any additional information about such employees appears to have been obtained independently by the reporter in question from information in the public domain. As such, the release of the names *per se* does not lead to an inference being made against the reputations of the persons in question.

[para 29] It should be recalled that the individuals conducting the name search were acting in their representative capacities with respect to matters in connection with the Applicant. I agree with the Applicant's submission that there could not have been a reasonable expectation of privacy.

[para 30] The Public Body has failed to demonstrate any reason why release of the names in the content of the records would constitute an unreasonable invasion of the employees' privacy. Therefore I intend to order that the names be disclosed.

VI. ORDER

[para 33] I make the following Order under section 72 of the Act.

[para 34] I order the Public Body to respond to the Applicant's request without relying on section 12(2) of the Act.

[para 35] I find that section 17 of the Act does not apply to the records/information severed by the Public Body. I order the Public Body disclose the names of the individuals who conducted the searches to the Applicant.

[para 36] I further order the Public Body to notify me, in writing, within 50 days of receiving a copy of this Order that it has complied with the Order.

Dave Bell
Adjudicator