

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2007-007

April 18, 2007

EDMONTON POLICE SERVICE

Case File Number 3525

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

Summary: The Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* to the Edmonton Police Service for copies of records relating to complaints made by the Edmonton Police Service to the Law Society of Alberta. The Applicant also requested access to records relating to complaints by the Edmonton Police Service to the Canadian Judicial Council or the Alberta Judicial Council regarding Judges and to the Provincial Court regarding Justices of the Peace. The Edmonton Police Service denied the Applicant's request.

The Adjudicator held that a portion of the records were excluded from the *Freedom of Information and Protection of Privacy Act* under section 4(1)(a). The Adjudicator also found that section 17 applied to the personal information in the remaining records.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(h), 1(n), 4(1), 6(2), 10(1), 17(1), 17(4)(b), 17(4)(g), 17(5)(f), 17(5)(h), 19, 20(1)(a), 21(1)(b), 24(1)(b), 27(1)(a), 27(2), 67(1), 69(3), 71(2), 72; *Judicature Act*, R.S.A. 2000, c. J- 2, ss. 34(1), 34(2); *Legal Profession Act*, R.S.A. 2000, c. L-8, ss. 49-82.

Orders Cited: AB: 96-019, 96-022, 97-002, 97-009, 98-003, 98-007, 2000-019, 2000-023, F2004-030

Decisions Cited: AB: *Alberta (Attorney General) v. Krushell*, 2003 ABQB 252

I. BACKGROUND

[para 1] On October 7, 2005, the Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the “FOIP Act”) to the Edmonton Police Service (the “EPS”). The Applicant requested access to the following:

“all copies of records within the definition of the Freedom of Information and Privacy Act relating to complaints made by Edmonton Police Service Personnel against any lawyers to the Law Society of Alberta or against Judges to the Canadian Judicial Council or the Alberta Judicial Council or against Justices of the Peace to the Provincial Court Judges responsible for supervising those Justices since January 1, 2000...”

[para 2] The Applicant stated that he did not want access to records relating to complaints about himself. The Applicant also requested that the access request be limited to the time period of January 1, 2000 to October 1, 2005.

[para 3] On December 28, 2005, the EPS denied access to the records.

[para 4] On December 29, 2005 the Applicant requested a review of the EPS’s decision. The matter was set down for a written inquiry.

[para 5] In preparation for the inquiry, I asked the EPS to provide a copy of the responsive records to this Office. In response, the EPS informed me that there were a number of difficulties in collecting all of the responsive records and that it would have to expend a significant amount of time and resources to collect those records. As such, the EPS requested that the inquiry proceed only in regard to a set of sample records obtained from its Legal Advisors’ offices. Alternatively, the EPS requested that I grant a time extension to the EPS.

[para 6] In response to the EPS’s request, I wrote to the EPS granting the EPS a time extension. In that letter I also informed the EPS that I would add section 10(1), adequate search for records, as an issue in the inquiry. Subsequent to my letter, I received notice from the EPS and the Applicant stating that the Applicant had agreed to narrow the scope of his access request to those records retrieved from the EPS Legal Advisors’ offices.

[para 7] The EPS and the Applicant each submitted an initial submission. The EPS also submitted a rebuttal. One of the Affected Parties, the Law Society of Alberta (“ Law Society ”), submitted an initial submission and a rebuttal as well as an in camera submission. The other Affected Parties did not make a submission.

II. INFORMATION/ RECORDS AT ISSUE

[para 8] There are 542 pages of records at issue in this inquiry. The first set of records consist of correspondence and memoranda regarding EPS complaints to the Law Society of Alberta. I have numbered those records from 1 to 288.

[para 9] The second set of records consist of correspondence and memoranda regarding EPS complaints about several Justices of the Peace. I have numbered those records from 289 to 542.

III. PRELIMINARY ISSUES

A. Identification of Affected Parties

[para 10] During the inquiry, this Office received a letter from the Assistant Chief Judge of the Provincial Court of Alberta. In that letter, the Assistant Chief Judge expressed his concern regarding my decision to identify three Justices of the Peace as Affected Parties in this inquiry. The Assistant Chief Judge stated that the Justices of the Peace are excluded from application of the FOIP Act and therefore cannot be identified as Affected Parties in this inquiry. The Assistant Chief Judge referred to section 4 of the FOIP Act.

[para 11] In response, I wrote to the Assistant Chief Judge advising him that the Justices of the Peace would remain Affected Parties in this inquiry. In that letter I explained that section 4(1) states that the FOIP Act applies to all records in the custody or under the control of a public body. The EPS is a public body under the FOIP Act and the records at issue contain the personal information of several individuals including the three Justices of the Peace. Section 67(1)(a)(ii) of the FOIP Act requires that I give these individuals, as affected parties, a copy of the request for review and section 69(3) states that these individuals must be given the opportunity to object to the disclosure of their information. In my letter I also stated that I would consider the possible application of section 4 of the FOIP Act. Section 4 is jurisdictional so it must be applied whether the parties raise the issue or not.

B. Should sections 20(1)(a) and 24(1)(b) be added as issues in this inquiry?

[para 12] In their initial submissions, the EPS and the Law Society each raised new discretionary provisions which were not identified as issues in the inquiry notice. The EPS raised section 24(1)(b) while the Law Society raised section 20(1)(a).¹ After a review of the submissions, I have decided not to add either section as an issue in this inquiry.

¹ Although the Law Society referred to section “20(1)(b)” in its submission, it quoted section 20(1)(a). As such, it appears that the Law Society intended to refer to section 20(1)(a).

[para 13] Section 24(1)(b) is a discretionary exception. In Order 2000-023, the former Commissioner said that he would not allow parties to raise new issues at inquiry where the effect would be to allow a broad after-the-fact justification for an earlier exercise of discretion. In this inquiry, the EPS had ample time to review its application of the Act and did not object to the Notice of Inquiry which listed the issues. If I allow the EPS to raise a new discretionary exception at the inquiry stage, I would, in effect, be giving the EPS the opportunity to apply a new exception in order to justify its earlier decision to withhold the records.

[para 14] Section 20(1)(a) is also a discretionary provision. The EPS did not apply this section to the records at issue when it processed the request. Furthermore, none of the parties objected to the formulation of issues when the Notice of Inquiry was sent out. By raising this section at the inquiry stage, the Law Society is arguing that I ought to unilaterally apply a discretionary exception at the urging of an affected party. In effect, the Law Society is arguing that I ought to disregard the EPS's exercise of its discretionary authority under the Act and exercise the EPS's discretion on its behalf to apply that section to the records. As the EPS did not apply this section 20(1)(a) to the records when it processed the request and did not raise this issue after the Notice of Inquiry was issued, the issue will not be added to the inquiry.

IV. ISSUES

[para 15] The issues in this inquiry are as follows:

- A. Did the Public Body meet its duty to the Applicant, as provided by section 10(1) of the FOIP Act (adequate search for responsive records)?
- B. Are the records/information excluded from the application of the FOIP Act by section 4?
- C. Does section 17 of the FOIP Act (personal information) apply to the records/information?
- D. Did the Public Body properly apply section 19 of the FOIP Act (confidential evaluations) to the records/information?
- E. Did the Public Body properly apply section 21(1)(b) of the FOIP Act (intergovernmental relations) to the records/information?
- F. Did the Public Body properly apply section 27(1)(a) of the FOIP Act (privileged information) to the records/information?
- G. Does section 27(2) of the FOIP Act (privileged information of person other than Public Body) apply to the records/information?

V. DISCUSSION:

A. Did the Public Body meet its duty to the Applicant, as provided by section 10(1) of the FOIP Act (adequate search for responsive records)?

[para 16] Section 10(1) reads:

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

[para 17] In Order 96-022, the former Commissioner said that a public body has the burden of proving that it has fulfilled its duty under section 10(1). The former Commissioner said that a public body must show that it has conducted an adequate search. The public body must show that: (a) it made every reasonable effort to search for the records requested; and (b) that it informed the applicant in a timely fashion about what has been done.

[para 18] In Order 98-003, the former Commissioner said that a decision concerning an adequate search must be based on the facts relating to how a public body conducted a search in a particular case. There is no specific test for the adequacy of the search, as this is a question of fact to be determined in every case. The standard for the search is not perfection but rather what is “reasonable” in the circumstances.

[para 19] As previously mentioned, this issue arose after I requested that the EPS provide me with a copy of all responsive records. I required a copy of those records in order to identify the affected parties for this inquiry. In response to my request, the EPS informed me that there were a number of difficulties in collecting all of the responsive records and stated that to do so it would have to expend a significant amount of time and resources. As such, the EPS requested that the inquiry proceed only in regard to a set of sample records obtained from the Legal Advisors’ offices. In the alternative, the EPS requested that I grant the EPS a time extension.

[para 20] It is clear from the EPS’s response to my request for responsive records that it had not conducted an adequate search for the responsive records. In its response, the EPS stated that it needed more time to complete the search. However, this search should have been completed prior to its response to the Applicant on December 28, 2005 denying access. It is clear that, at the time of its response to the Applicant, the EPS had made a decision to withhold records subject to certain exceptions without first reviewing a complete set of records. There is also no evidence before me that the Applicant was aware that only a partial search had been completed when he received a response from the EPS.

[para 21] Although the Applicant subsequently agreed to narrow the scope of his access request to only a portion of the records, this does not change the fact that the EPS breached its duty under section 10. I find that the EPS did not conduct an adequate search for responsive records and thereby did not meet its duty to assist the Applicant. I

also find that the EPS did not respond to the Applicant openly, accurately and completely as required by section 10(1) of the FOIP Act.

B. Are the records/information excluded from the application of the FOIP Act by section 4?

[para 22] Section 4(1)(a) is relevant in this inquiry:

4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

(a) information in a court file, a record of a judge of the Court of Appeal of Alberta, the Court of Queen's Bench of Alberta or The Provincial Court of Alberta, a record of a master of the Court of Queen's Bench of Alberta, a record of a sitting justice of the peace or a presiding justice of the peace under the Justice of the Peace Act, a judicial administration record or a record relating to support services provided to the judges of any of the courts referred to in this clause;

[para 23] Section 4(1)(a) applies to “ information in a court file ”.

[para 24] In *Alberta (Attorney General) v. Krushell*, 2003 ABQB 252, the court held that information within criminal dockets fell within section 4(1)(a) because this information originated from court files. The Justice held that:

“ the mere fact it is extracted from those files and appears in a different format does not change the purpose of the legislation, which is to exclude the information contained in those materials from the ambit of the Act. The purpose of the Legislature was to exclude the information, not merely the paper format in which some of it originally appears. Whether it is contained in a physical paper file, or is removed from that file to another format it is excluded from production under the Act. ”

[para 25] In Order F2004-030, the Commissioner held that records, in the custody of a public body, that were taken from or copied from a court file are “ information in a court file ” and fulfill the requirements of section 4(1)(a). However, those records that emanated from the public body itself would not fall within section 4(1)(a). This was the case even though those records may contain the same information as a court file. For example, records that the public body filed in court would not fall within section 4(1)(a).

[para 26] In this inquiry, I find that records 301, 302, 303, 391, 392, 393, 394, 449, 450, 451, 452, 460, 532, 533, 534 consist of information in a court file and are thereby excluded from the application of the FOIP Act.

[para 27] Section 4(1)(a) also refers to “ a record of a judge of ... The Provincial Court of Alberta ”. I find that the records 290, 292, 309, 310, 311, 317, 347, 362, 410,

415, 425 are authored by a Provincial Court Judge and thereby fulfill section 4(1)(a). These records are also excluded from the application of the FOIP Act.

[para 28] Lastly, section 4(1)(a) also refers to “ a record of a sitting justice of the peace or a presiding justice of the peace under the Justice of the Peace Act ”. I find that records 363, 364, 411 and 412 fulfill section 4(1)(a) and are also excluded from the application of the FOIP Act.

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

[para 29] Section 17 is a mandatory (“ must ”) section of the Act. If section 17 applies, a public body must refuse to disclose the information. There are two criteria under section 17:

- (a) the information must be “personal information” of a third party; and
- (b) the disclosure of the personal information must be an unreasonable invasion of a third party’s personal privacy.

[para 30] As I have found that records 290, 292, 301, 302, 303, 309, 310, 311, 317, 347, 362, 363, 364, 391, 392, 393, 394, 410, 411, 412, 415, 425, 449, 450, 451, 452, 460, 532, 533 and 534 are excluded from the application of the FOIP Act, I will not address whether section 17 applies to those records.

1. Is the information “personal information” of a third party?

[para 31] Personal information is defined in section 1(n). Sections 1(n)(i), (vii) and (viii) are relevant in this inquiry. These sections read as follows:

I In this Act,

...

(n) “personal information” means recorded information about an identifiable individual, including

(i) the individual’s name, home or business address or home or business telephone number,

...

(vii) information about the individual’s educational, financial, employment or criminal history, including criminal records where a pardon has been given,

(viii) anyone else’s opinions about the individual,

[para 32] The EPS states that the records contain personal information. The EPS states that the records contain third party names, business addresses and telephone

numbers as well as information regarding individuals' employment history, including employment activities that led to complaints. In addition, the EPS states that the records contain individuals' opinions about a third party's actions, including opinions on whether a complaint should be lodged. Furthermore, some criminal activities of other individuals are noted on the records.

[para 33] I find that the records at issue consist of personal information, including the information outlined above by the EPS.

2. Would the disclosure of the personal information be an unreasonable invasion of a third party's personal privacy as provided in sections 17(1) and 17(4)?

[para 34] Section 17(1) reads:

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.

[para 35] Section 17(4) lists a number of circumstances where a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy. I find that sections 17(4)(b) and 17(4)(g) are relevant in this inquiry.

Section 17(4)(b) – Law enforcement

[para 36] Section 17(4)(b) reads:

17(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

[para 37] Section 1(h) defines the term "law enforcement":

1 In this Act,

...

(h) "law enforcement" means

(i) policing, including criminal intelligence operations,

(ii) a police, security or administrative investigation, including the complaint giving rise to the investigation, that leads or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the investigation or by another body to which the results of the investigation are referred, or

(iii) proceedings that lead or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the proceedings or by another body to which the results of the proceedings are referred;

[para 38] In Order 96-019, the former Commissioner defined an “ investigation ” as “ to follow up step by step by patient inquiry or observation; to trace or track; to examine and inquire into with care and accuracy; to find out by careful inquisition; examination; the taking of evidence; a legal inquiry ”. In Order 2000-019, the former Commissioner held that “ law enforcement ” should encompass the notion of a violation of “ law ”, that is a statute or regulation.

[para 39] I find that section 17(4)(b) applies to the records that remain at issue. The personal information in those records is part of a law enforcement record. Pursuant to section 1(h)(ii), the records relate to an administrative investigation that led, or could have led, to a penalty or sanction under either the *Legal Profession Act* R.S.A. 2000, c.L-8 or the *Judicature Act* R.S.A. 2000, c. J-2. In this inquiry, the Law Society conducted its investigations into the EPS complaints under the authority of sections 49-82 of the *Legal Profession Act*. The Law Society imposed, or had the authority to impose, sanctions under sections 72 and 73 of the *Legal Profession Act*. Similarly, the Chief Judge of the Provincial Court investigated the EPS complaints under the authority of section 34(1) of the *Judicature Act*. Section 34(2) of the *Judicature Act* gave the Chief Judge the ability to impose sanctions.

Section 17(4)(g)- Third party’s name

[para 40] Section 17(4)(g) reads:

17(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party’s personal privacy if

...

(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 41] I find that section 17(4)(g) applies to the records. I find that, pursuant to section 17(4)(g)(i), the personal information in the records consists of third parties’ names and other personal information about those individuals. In addition, I find that, pursuant to section 17(4)(g)(ii), disclosing those names in the records would reveal personal information about several individuals, including the fact that a complaint was made against these individuals.

Section 17(5)

[para 42] In determining whether the disclosure of personal information would constitute an unreasonable invasion under section 17(1) and section 17(4), a public body must consider the relevant circumstances under section 17(5).

Section 17(5)(f) – Personal information supplied in confidence

[para 43] The Law Society states that section 17(5)(f) is a relevant circumstance in this inquiry. Section 17(5)(f) reads:

17(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 of the relevant circumstances, including whether

...

(f) the personal information has been supplied in confidence

[para 44] In Order 98-007, the former Commissioner stated that the primary concern of section 17(5)(f) is to honour promises of confidentiality made to individuals providing personal information and to protect their privacy and the privacy of others to whom the information relates. The Commissioner found that the context in which information is recorded and the sensitivity of the events recorded are indicators of confidentiality under this section.

[para 45] I find that section 17(5)(f) is a relevant circumstance that weighs against disclosure of the personal information in the records at issue. Some of the records are labeled as confidential. In addition, the nature of the personal information in the records clearly suggests that the personal information was intended to be confidential.

Section 17(5)(h) – Unfair damage to the reputation of a person

[para 46] The EPS states that section 17(5)(h) is a relevant circumstance in this inquiry. Section 17(5)(h) reads:

17(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

...

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant...

[para 47] In Order 97-002, the former Commissioner held that the focus of section 17(5)(h) is unfair damage to a person's reputation. Consequently, the application of this section is not dependent on whether the damage or harm envisioned by the section is

present or foreseeable, but whether this damage or harm would be unfair to the individual involved.

[para 48] I find that section 17(5)(h) is a relevant circumstance in this inquiry that weighs against disclosure of the personal information. I find that the disclosure of the personal information in the records would unfairly damage the reputation of the individuals who were the subject of the complaints. This is particularly so given that only one of the complaints against the lawyers resulted in an individual being found guilty of conduct deserving sanction. In addition, the EPS states that none of the complaints against the Justices of the Peace resulted in a sanction.

Section 17(5) – Need for personal information

[para 49] The EPS suggests that whether the Applicant has a pressing need for the third party personal information is also a relevant circumstance (Order 2000-023).

[para 50] In this inquiry, I find that this factor is irrelevant to a decision under section 17. There is no evidence as to whether the Applicant has a pressing need for the personal information.

Section 17(5) – Public nature of the parties

[para 51] The Applicant states that the disclosure of the information would not be an unreasonable invasion of personal privacy because of the public nature of the parties. The Applicant states that the complaints were made by individuals in their capacities as employees of the EPS. Furthermore, the complaints were made against public officials.

[para 52] I find that the fact that the complaints were made by EPS employees is a relevant circumstance in this inquiry. In addition, the fact that some of the complaints were made against several Justices of the Peace, who are public officials, is also a relevant circumstance. However, I do not find that these factors outweigh the presumptions against disclosure that have been established under section 17(4) nor the relevant circumstances that weigh against disclosure.

3. Did the Applicant meet the burden of proof?

[para 53] Section 71(2) of the FOIP Act states that an applicant bears the burden of proving that disclosure of third party personal information would not be an unreasonable invasion of privacy under the FOIP Act. Although the Applicant referred to the public nature of the parties as a relevant circumstance, this circumstance does not outweigh the presumptions against disclosure that have been established under section 17(4) nor the relevant circumstances that weigh against disclosure. I find that the Applicant has not met the burden of proof under section 71(2).

4. Conclusion under section 17

[para 54] I find that section 17 applies to the personal information in the records that remain at issue. Disclosure of this information would be an unreasonable invasion of personal privacy as provided by section 17(1) and must not be disclosed. As such, I intend to order the EPS not to disclose this information to the Applicant.

[para 55] Section 6(2) of the FOIP Act provides that if information can be reasonably severed from a record, an applicant has a right of access to the remainder of the record. I have carefully reviewed the records to see whether information could have been provided to the Applicant. I find that the information that remains consists of information that is either so intertwined with the personal information that the information cannot be severed without revealing the personal information or the information that would be left after severing is so minimal that it would provide meaningless information to the Applicant (Order 96-019). Consequently, I find that the EPS reasonably withheld that information and I do not intend to order the EPS to disclose that information.

C. Did the Public Body properly apply section 19 of the FOIP Act (confidential evaluations) to the records/information?

[para 56] The EPS states that it is no longer relying on section 19 of the FOIP Act. As such, section 19 is no longer an issue in this inquiry.

D. Did the Public Body properly apply section 21(1)(b) of the FOIP Act (intergovernmental relations) to the records/information?

[para 57] As I have found that all of the records at issue are excluded from the application of the FOIP Act pursuant to section 4(1)(a) or that section 17 applies, I do not find it necessary to address whether the EPS properly applied section 21(1)(b) to those records.

E. Did the Public Body properly apply section 27(1)(a) of the FOIP Act (privileged information) to the records/information?

[para 58] As I have found that all of the records are excluded from the application of the Act pursuant to section 4(1)(a) or that section 17 applies, I do not find it necessary to address whether the EPS properly applied section 27(1)(a) to those records.

F. Does section 27(2) of the FOIP Act (privileged information of person other than Public Body) apply to the records/information?

[para 59] As I have found that all of the records are excluded from the application of the FOIP Act pursuant to section 4(1)(a) or that section 17 applies, I do not find it necessary to address whether section 27(2) applies to those records.

VI. ORDER

[para 60] I make the following Order under section 72 of the FOIP Act.

[para 61] I find that the EPS did not conduct an adequate search for responsive records and thereby did not meet its duty to assist the Applicant under section 10(1). I also find that the EPS did not respond to the Applicant openly, accurately and completely as required by section 10(1) of the FOIP Act. Because the Applicant has agreed to narrow the scope of his request to the records located by the EPS, I will not order the EPS to conduct a further search for the records.

[para 62] I find that records 290, 292, 301, 302, 303, 309, 310, 311, 317, 347, 362, 363, 364, 391, 392, 393, 394, 410, 411, 412, 415, 425, 449, 450, 451, 452, 460, 532, 533 and 534 are excluded from the FOIP Act by section 4(1)(a). Consequently, I have no jurisdiction over those pages of records. The Applicant cannot get access to those records under the FOIP Act.

[para 63] I find that section 17 applies to the personal information in the records that remain at issue. Disclosure of this information would be an unreasonable invasion of personal privacy as provided by section 17(1) and must not be disclosed. In addition, I find that the remainder of the information within the records is either intertwined with the personal information so that it cannot be severed or severing of the personal information would leave minimal information that would be meaningless. As such, I order the EPS to withhold all of the remaining records from the Applicant.

Dave Bell
Adjudicator