

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2007-009

September 24, 2007

EDMONTON POLICE SERVICE

Case File Number 3676

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

Summary: The Applicant made a request under the *Freedom of Information and Protection of Privacy Act* to the Edmonton Police Service for materials relating to the investigation of the Applicant by the EPS.

The EPS denied the Applicant access to the records. The EPS stated that the records were excluded from the provisions of the *Freedom of Information and Protection of Privacy Act* by section 4(1)(k). The EPS stated that the records related to a prosecution and that all the proceedings in regard to the prosecution had not been completed. The EPS maintained that the prosecution was not “completed” for the purposes of section 4(1)(k) until the expiry of the one year stay period.

The Adjudicator held that, at the date of inquiry, the one year stay period had expired. As such, whether section 4(1)(k) applied to the records was a moot issue. The Adjudicator declined to exercise her authority to decide the moot issue.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 4(1)(k), 72; *Criminal Code*, R.S.C., 1985, c. C-46, s. 579.

Cases Cited: *Borowski v. Canada (Attorney General)* (1989), 57 D.L.R. (4th) 231 (SCC)

Orders Cited: **AB:** Order 99-005.

I. BACKGROUND

[para 1] On March 13, 2006, the Applicant made a request under the *Freedom of Information and Protection of Privacy Act* (the “FOIP Act”) to the Edmonton Police Service (the “EPS”) for materials relating to the investigation of the Applicant by the EPS.

[para 2] On March 15, 2006, the EPS responded to the request denying the Applicant access to the records. The EPS withheld the records pursuant to section 4(1)(k) of the FOIP Act. The EPS stated that the records related to a prosecution and that all the proceedings in regard to the prosecution had not been completed. The Crown had entered a stay of proceedings, pursuant to section 579 of the *Criminal Code*, on February 28, 2006 in regard to two charges against the Applicant. The EPS maintained that the prosecution was not “completed” for the purposes of section 4(1)(k) until the one year stay period had expired.

[para 3] On May 9, 2006, the Applicant requested a review of the EPS’s decision.

[para 4] Mediation was authorized but did not resolve the issue.

[para 5] On March 1, 2007, the EPS wrote to the Applicant informing the Applicant that the one year stay period had expired. As such, the EPS invited the Applicant to reinitiate the access request.

[para 6] On March 23, 2007, this Office wrote to the Applicant requesting that the Applicant advise whether the Applicant wished to continue with the inquiry process now that the stay period had expired.

[para 7] On March 23, 2007, the Applicant wrote to this Office requesting that the matter proceed to inquiry. The matter was set down for a written inquiry. The EPS submitted an initial and a rebuttal submission. The Applicant submitted an initial submission but did not submit a rebuttal.

[para 8] On April 19, 2007, the Information and Privacy Commissioner gave me the delegated authority to conduct an inquiry and issue an order in this matter.

[para 9] The issue set down for inquiry was whether the records are excluded from the application of the FOIP Act by section 4(1)(k). However, at the date of inquiry, the one year stay period had expired. As such, I will consider whether the issue regarding section 4(1)(k) is moot and, if so, whether I will exercise my discretion to decide the moot issue.

II. RECORDS AT ISSUE

[para 10] There are 373 pages of records at issue in this inquiry. The records relate to charges which were laid against the Applicant pursuant to sections 151 and 271 of the *Criminal Code* which were subsequently stayed.

III. ISSUES

[para 11] The issues in this inquiry are:

- A. Is the issue regarding section 4(1)(k) moot? If so, should I exercise my discretion to decide a moot issue?
- B. Are the records excluded from the application of the FOIP Act by section 4(1)(k)?

IV. DISCUSSION

A. Is the issue regarding section 4(1)(k) moot? If so, should I exercise my discretion to decide a moot issue?

[para 12] In Order 99-005, the former Commissioner held that an issue is “moot” if no present live controversy exists which affects the rights of the parties.

[para 13] The EPS applied section 4(1)(k) to the records at issue. The EPS maintained that section 4(1)(k) applied to the records during the one year stay period as the prosecution is not “completed” during that period. Section 4(1)(k) reads:

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:

...

(k) a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed;

[para 14] After a review of the information before me, I find that the issue of whether section 4(1)(k) applies to the records at issue is moot. In the EPS’s submission, the EPS stated that it would proceed to process the Applicant’s request once the stay period had expired on March 1, 2007. As such, section 4(1)(k) is no longer a live issue that affects the rights of the Applicant in regard to the records at issue.

[para 15] In Order 95-005 the former Commissioner determined that the issue of whether he could 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. (4th) 231 (SCC). The Supreme Court of Canada in *Borowski* set out three guidelines to consider when deciding whether to exercise the discretion to decide a moot issue:

1. *Adversarial Context*: The issue must exist within an adversarial context, the adversarial relationship must 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 the case before me, there is no current live controversy between the parties about disclosing the information withheld under section 4(1)(k). The EPS has stated that it would proceed to process the Applicant's request once the stay period had expired on March 1, 2007. There is no evidence before me of collateral consequences if I decide to exercise my discretion not to decide the issue.

2. *Judicial Economy*: The special circumstances of the case must justify applying scarce resources to decide the issue. It must be considered whether the decision will have some practical effect on the rights of the parties, whether there is a recurring issue and whether there is a public interest such as the social cost of continued uncertainty in the law in leaving the matter undecided. In this case, there is no practical effect on the rights of the parties. In the EPS's submission, it stated that, after the expiry of the stay period, it would proceed to process the Applicant's request. My decision regarding whether the EPS properly applied section 4(1)(k) would have no effect on the parties as of the date of this Order. In coming to my determination, I also took into account whether there are special circumstances in this case that justify applying the scarce resources of this Office to decide this issue. I do not find that that is the case. Although theoretically, it is possible that the same section 4(1)(k) issue may recur between the parties in the future, I am not prepared to find that this, in and of itself, justifies the application of scarce resources to decide this issue in this inquiry. There is also no evidence of a social cost of the uncertainty of the law if I do not decide this issue.

3. *Role of the legislative branch*: It must be considered whether exercising discretion would be an intrusion into the role of the legislative branch. This guideline has no application in the present circumstances.

[para 16] Having considered the criteria set out in *Borowski* and the particular circumstances of this case, I decline to exercise my discretion to decide the moot issue under section 4(1)(k).

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

[para 17] For the reasons previously given, I find that the issue of whether the records are excluded from the application of the FOIP Act by section 4(1)(k) is moot. I decline to exercise my discretion to decide the moot issue.

V. ORDER

[para 18] I make the following Order under section 72 of the FOIP Act.

[para 19] I find that the issue of whether the records are excluded from the application of the FOIP Act by section 4(1)(k) is moot. I decline to exercise my discretion to decide that moot issue.

Lisa McAmmond
Adjudicator