

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2007-030

December 19, 2007

EDMONTON POLICE SERVICE

Case File Number 3607

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

Summary: The Applicant made an access request to the Edmonton Police Service under the *Freedom of Information and Protection of Privacy Act* for information on the PROBE and CPIC systems that pertained to the Applicant.

The Edmonton Police Service responded to the request providing the Applicant with information regarding the searches that were performed on these two systems.

The Applicant requested this Office review whether the Edmonton Police Service's use of the Applicant's personal information in conducting these searches contravened Part 2 of the *Freedom of Information and Protection of Privacy Act*.

The Adjudicator found that, pursuant to section 39(1)(b), the Edmonton Police Service had the Applicant's consent to use the Applicant's personal information to conduct some of the searches. In addition, the Adjudicator found that the Edmonton Police Service had the authority, pursuant to section 39(1)(a), read in conjunction with sections 33(b) and 33(c), to use the Applicant's personal information to conduct the remaining searches.

Legislation Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 12(2), 33(b), 33(c), 39(1)(a), 39(1)(b), 39(1)(c), 72; *Freedom of Information and Protection of Privacy Regulation* A/R 200/95, ss.6(2), 6(4); *Peace Officer (Ministerial) Regulation* A/R 312/2006, s.15.

Cases Cited: *R. v. Cunningham* [2006] A.J. No. 1448 (ABCA).

Orders Cited: AB Orders: F2006-029

I. BACKGROUND

[para 1] On November 21, 2005, the Applicant made a request under the *Freedom of Information and Protection of Privacy Act* (the “Act”) to the Edmonton Police Service (the “EPS”) for the following information:

“All records relating to accessing information about [the Applicant] by Probe and CPIC and relating to investigations or surveillance pertaining to [the Applicant] from January 1, 1999 to present.”

[para 2] The time period of the request was from January 1, 1999 to November 1, 2005.

[para 3] On January 17, 2006, the EPS responded to the request providing the Applicant with a chart which included the dates the Applicant’s name was searched, the time, and the name search parameters.

[para 4] On March 14, 2006, the Applicant requested a review by this Office. The Applicant sought information regarding the purpose of the queries, an explanation of the reason for the queries and information regarding how the information is gathered and used.

[para 5] Mediation was authorized but did not resolve the issue.

[para 6] The Applicant requested that the matter proceed to inquiry. The EPS and the Applicant each submitted an initial and a rebuttal submission. A portion of the Applicant’s rebuttal submission was made in camera.

[para 7] On April 19, 2007, the Information and Privacy Commissioner gave me the delegated authority to conduct an inquiry and issue an order regarding this matter.

[para 8] In response to concerns raised in the Applicant’s submission, on October 16, 2007, the Commissioner’s Office wrote to the EPS on my behalf. In that letter I requested further evidence as to whether the EPS employees who conducted the searches were scheduled to work on the date and at the time the searches were conducted. In response to my letter, the EPS provided an affidavit of its payroll supervisor. Furthermore, in the October 16, 2007 letter, I also questioned why a date within one of the affidavits was amended but not initialed, nor was the amendment reflected in other portions of the affidavit. The EPS responded that the amendment to that affidavit was in error and provided a new affidavit in its place.

[para 9] The Applicant provided me with an additional submission in response to these two additional affidavits by the EPS.

II. ISSUE

[para 10] The issue in this inquiry is: Did the Public Body use the Applicant's personal information in contravention of Part 2 of the Act?

[para 11] In the Applicant's submission, the Applicant raised issues that were not identified within the inquiry notice, including section 12(2). I will not address those issues in this Order as they are not within the scope of this inquiry.

III. DISCUSSION: Did the Public Body use the Applicant's personal information in contravention of Part 2 of the Act?

[para 12] The EPS states that it had the authority, pursuant to sections 39(1)(a), 39(1)(b) and 39(1)(c) to use the Applicant's personal information to conduct the searches on the PROBE and CPIC systems. The EPS states that its members queried those systems on seven different dates: January 30, 2001, February 12, 2001, March 22, 2002, August 27, 2003, January 9, 2004, May 3, 2004, and January 18, 2005.

[para 13] In this order I will address sections 39(1)(b) and 39(1)(a) first, then followed by section 39(1)(c).

A. Section 39(1)(b) - Consent

[para 14] The EPS states that the Applicant consented to the EPS's use of the Applicant's personal information to conduct a PROBE/CPIC search on May 3, 2004 and January 18, 2005. The EPS states that the Applicant signed a security clearance form which requested a personal information check on these dates by the Police Information Check Unit ("PICU). The Applicant also confirms that he requested these personal information checks from the PICU.

[para 15] Section 39(1)(b) reads:

39(1) A public body may use personal information only

...

(b) if the individual the information is about has identified the information and consented, in the prescribed manner, to the use,...

[para 16] Section 6 of the *Freedom of Information and Protection of Privacy Regulation* A/R 200/95 prescribes the requirements for consent under section 39(1)(b). Subsections 6(2) and 6(4) read as follows:

6(2) The consent of an individual to a public body's using or disclosing any of the individual's personal information under section 39(1)(b) or 40(1)(d) of the Act

(a) must meet the requirements of subsection (4), (5) or (6), and

(b) must specify to whom the personal information may be disclosed and how the personal information may be used.

...

(4) For the purposes of this section, a consent in writing is valid if it is signed by the person who is giving the consent.

[para 17] After a review of all of the information before me, I find that the EPS had the authority, pursuant to section 39(1)(b) of the Act and sections 6(2) and 6(4) of the FOIP Regulations, to use the Applicant's personal information to conduct a personal information check on May 3, 2004 and on January 18, 2005. I find that the Applicant consented to this use of his personal information. The security clearance forms were in writing, signed by the Applicant and specified how the Applicant's personal information would be used.

B. Section 39(1)(a) – Purpose for which the information was collected or compiled or a use consistent

[para 18] As I have found that the EPS's use of the Applicant's personal information on May 3, 2004 and January 18, 2005 was authorized by section 39(1)(b) of the Act, I will not address whether the EPS was authorized by section 39(1)(a) to use the Applicant's personal information.

[para 19] The following searches remain at issue: January 30, 2001, February 12, 2001, March 22, 2002, August 27, 2003, and January 9, 2004.

[para 20] Section 39(1)(a) reads:

39(1) A public body may use personal information only

(a) for the purpose for which the information was collected or compiled or for a use consistent with that purpose,

[para 21] Sections 33(b) and 33(c) of the Act state that a public body may collect personal information for the purpose of law enforcement or if the information relates directly to and is necessary for an operating program or activity of the public body:

33 No personal information may be collected by or for a public body unless

...

(b) that information is collected for the purposes of law enforcement, or

(c) that information relates directly to and is necessary for an operating program or activity of the public body.

1. Searches conducted on January 30, 2001 and February 12, 2001

[para 22] The EPS states that the searches on January 30, 2001 and February 12, 2001 were conducted by the PICU. The audit log shows that the PICU conducted a PROBE and a CPIC search on both of these dates.

[para 23] After a review of all of the information before me, I find that the PICU employees had the authority, pursuant to section 39(1)(a), to conduct the searches.

[para 24] The EPS collected and used the Applicant's name in conducting the searches. I find that this information is the Applicant's personal information.

[para 25] I also find that the personal information that the EPS collected and subsequently used, related directly to and was necessary for an operating program of the EPS. The PICU conducts PROBE and CPIC searches in order to conduct personal information checks which are requested by or consented to by members of the public. The searches are most often requested in order to provide employers or volunteer organizations with background information on the individual. I find that the personal information checks conducted by the PICU is an operating program of the EPS and the information collected and subsequently used is necessary for the operation of this program (see Order F2006-029).

[para 26] The EPS states that prior to January 2006, the PICU did not keep copies of security clearance forms that were submitted to the unit other than for vulnerable sector searches that related to security checks for individuals such as health care personnel, firefighters, chauffeurs and foster parents. The EPS also states that there are no case files associated with these queries.

[para 27] However, for each of these searches, the EPS provided a sworn affidavit from the EPS employee which stated that the only reason the EPS employee would have conducted a query of the Applicant's name on the date in question would have been to conduct a police information check. The individuals each deposed that it was their routine and invariable practice to only conduct these queries for purposes that are related to job requirements. The EPS referred to a number of court decisions to support its position that evidence of an officer's or, in regard to these two searches, an EPS employee's evidence of standard practice is sufficient to meet the burden of proof, including the Alberta Court of Appeal decision of *R. v. Cunningham* [2006] A.J. No. 1448 (ABCA).

[para 28] In addition, the EPS employees each deposed that they do not personally know anyone by the Applicant's name nor recall having any specific dealings with anyone with that or a similar name.

[para 29] Further to my query, the EPS also provided me with an additional affidavit by its payroll supervisor that states that the employees who conducted the searches were scheduled to work on the day of the searches. I accept the evidence provided by the EPS.

[para 30] Further to my query, the EPS also provided evidence regarding the shift that each employee is recorded as having worked. In her affidavit, the EPS payroll supervisor states that the shift identified in the EPS records is the shift the employee worked the majority of his/her hours for that day. I also accept this evidence. Although it would have been preferable if the EPS had provided evidence as to the specific time each employee began and finished their workday, I find that the evidence provided is nevertheless persuasive.

[para 31] I find that the EPS employees had the authority, pursuant to section 39(1)(a), to use the Applicant's personal information to conduct these searches.

2. Searches conducted on March 22, 2002, August 27, 2003 and January 9, 2004

[para 32] The EPS states that the searches on March 22, 2002, August 27, 2003, and January 9, 2004 were conducted by three different officers. The audit logs show that two of the officers conducted a search on CPIC and PROBE, while one of the officers conducted a search on CPIC but not on PROBE.

[para 33] After a review of all of the information before me, I find that the officers had the authority, pursuant to section 39(1)(a), to conduct the searches.

[para 34] The EPS collected and used the Applicant's name in conducting the searches. I find that this information is the Applicant's personal information.

[para 35] I also find that the personal information was collected and subsequently used for law enforcement purposes or related directly to and was necessary for an operating program of the EPS. The EPS states that the officers were unable to locate documentation regarding the search. However, each officer provided a sworn affidavit in regard to the specific search they conducted. Each affidavit stated that it was the officers' routine and invariable practice to only conduct queries on CPIC and/or PROBE for reasons that are specifically related to official duties. The officers also deposed that at the time of the relevant query each officer was aware that they were only authorized to conduct queries for purposes that were related to the performance of official duties as a sworn member of the EPS. The officers each depose that they would only have conducted the relevant query on CPIC and/or PROBE in relation to their official duties. As previously mentioned, the EPS referred to a number of court decisions to support its position that an officer's evidence of standard practice is sufficient to meet the burden of

proof, including the Alberta Court of Appeal decision of *R. v. Cunningham* [2006] A.J. No. 1448 (ABCA).

[para 36] Furthermore, each officer deposed that at the time of the relevant search, each officer was working either in the traffic section or as a patrol officer. The duties of these officers included attending at motor vehicle collisions and investigating and enforcing violations of the *Traffic Safety Act*. This suggests how these officers may have come into contact with the Applicant or how they may have obtained the Applicant's name which was used to perform the searches.

[para 37] I note that in coming to my decision, I also took into account that each officer deposed that they do not personally know anyone by the Applicant's name and do not recall having any specific dealings with anyone with that or a similar name. There is also nothing to suggest that these officers did, or would have any motive to, conduct these checks for any purpose other than a law enforcement purpose or a purpose necessary for an EPS operating program or activity.

[para 38] Further to my query, the EPS provided me with an additional affidavit by its payroll supervisor that the officers who conducted these searches were scheduled to work on the day of the searches. I accept the evidence provided by the EPS.

[para 39] Further to my query, the EPS also provided information regarding the shift that each officer is recorded as having worked. In her affidavit, the EPS payroll supervisor states that the shift identified in its records is the shift the officer worked the majority of his/her hours for that day. I also accept this evidence.

[para 40] The Applicant raised a concern regarding the CPIC and PROBE searches that were conducted on January 9, 2004. The Applicant states that that the officer that conducted the searches on that day conducted those searches prior to the beginning of his shift.

[para 41] After a review of the information provided by the EPS, I do not find that the inconsistency suggested by the Applicant exists on the facts of this case. The affidavit of the EPS payroll supervisor stated that this officer worked the majority of his hours during the third shift. However, the affidavit also stated that he worked a total of 10 hours that day. Given the foregoing, the officer could have begun work prior to the time of the searches and still worked the majority of his hours during the third shift.

[para 42] The Applicant also questioned whether the officer that performed the query on August 27, 2003 was performing his official duties at the time of the query. The Applicant states that he was at work on the day of the query and as such, he suggests that it would not have been possible for the officer to gain access to his personal information. The Applicant did not, however, provide sworn evidence to support his assertion. Although the Applicant provided this office with a photocopy of a handwritten chart that appears to be a timesheet, there is no evidence before me as to whether this is a copy of the employer's official timesheet or whether the information written on the chart

is correct. In fact, there is no information as to the name of the employer or who was responsible for recording the hours on the chart. The chart lists the first names of a number of individuals and what appears to be the number of hours each individual worked that day. However, the chart does not confirm what time the Applicant began and finished work nor whether the Applicant took any breaks from work for lunch or otherwise.

[para 43] The Applicant also suggests that if the officers conducted the queries for legitimate reasons, they should possess some further written documentation regarding the queries. In support of his position, the Applicant referred to a portion of what appears to be a police training manual and a copy of a news article. The Applicant states that these two materials show that all police officers are trained to keep notes and fill out reports on all occurrences and investigations that take place throughout their daily work routines. In support of his position, the Applicant also referred to section 15 of the *Peace Officer (Ministerial) Regulation A/R 312/2006*. The Applicant suggests that this section requires a police officer to document every CPIC or PROBE search.

[para 44] I have reviewed the excerpt of the police training manual as well as the news article. The police training manual states that a police officer is trained to keep notes of an investigation and states that those notes are the official document used by prosecutors in court. It does not, however, suggest that a police officer must document every CPIC or PROBE search. The news article similarly does not specifically state that a police officer must document every CPIC or PROBE search. I have also reviewed the section of the regulation referred to by the Applicant. I find that the section does not require an EPS officer to document every CPIC and PROBE search.

[para 45] I note that even if a training manual or a piece of legislation required an EPS officer to document every search it would not, in and of itself, be determinative of the issue before me. The issue before me is whether the EPS had the authority to conduct the searches on the CPIC and/or PROBE systems. The issue is not whether the EPS officers were required to document these types of searches. If a training manual or legislation required the EPS to document every CPIC or PROBE search, a failure by an EPS officer to do so would put the officer in breach of that requirement. While it may cast doubt on the reason for the search, generally, it may not, in and of itself, be sufficient to conclude that the search completed by that officer was done for reasons outside of a law enforcement purpose or outside an operating program or activity of the EPS.

[para 46] Lastly, the Applicant states that, on a number of occasions, he came into contact with a police officer either for a traffic violation or a traffic collision. The Applicant states that the PROBE/CPIC log shows that on each of these occasions, the EPS officers did not run a PROBE and/or a CPIC search. The Applicant states that failure of the EPS officers to do so proves that it is not the “routine and invariable practice” of the EPS to run a PROBE and/or a CPIC inquiry in regard to these types of incidents.

[para 47] The issue in this inquiry is whether the EPS had the authority under the Act to use the Applicant's personal information to conduct several PROBE and CPIC searches. Although the failure of the EPS to run a PROBE or a CPIC search on other occasions suggests that officers are given discretion as to when they conduct such searches, this, in and of itself, is not sufficient for me to conclude that the EPS was not authorized to conduct the searches that are at issue in this inquiry.

C. Section 39(1)(c) – Purpose for which the information may be disclosed

[para 48] As I have found that the EPS's use of the Applicant's personal information in regard to the searches were authorized by sections 39(1)(b) and 39(1)(a) of the Act, I will not address whether those searches were also authorized by section 39(1)(c).

D. Conclusion

[para 49] I find that the EPS was authorized by section 39(1)(a) of the Act to use the Applicant's personal information to conduct the PROBE and/or CPIC searches on January 30, 2001, February 12, 2001, March 22, 2002, August 27, 2003 and January 9, 2004.

[para 50] However, I note that in making this determination, I am troubled that the EPS would run an individual's name through the CPIC and PROBE systems on five different occasions and not possess any supporting documentation regarding the reason for, or the circumstances that prompted the searches. Running a name through CPIC or PROBE should not be a casual occurrence or treated lightly. In coming to my decision in this inquiry, I accorded substantial weight to the sworn affidavits of the EPS employees and officers regarding their standard practice. Nevertheless, in my view, the failure of the EPS to document the reason for, or circumstances surrounding, these searches is clearly not the best practice and does not engender public confidence in the police service. It also understandably raises a concern by individuals who are or, who may be, subject to these searches. I note that the EPS indicates that the PICU has recently changed its practice and it appears that they now retain copies of all security clearance consent forms that are submitted to that unit. It would be prudent for the EPS to similarly change its practice and document the reasons for and /or the circumstances surrounding all CPIC and PROBE searches conducted by its officers.

IV. ORDER

[para 51] I make the following Order under section 72 of the Act.

[para 52] I find that the EPS was authorized by section 39(1)(b) of the Act to use the Applicant's personal information to conduct the PROBE and/or CPIC searches on May 3, 2004 and January 18, 2005.

[para 53] I find that the EPS was authorized by section 39(1)(a) of the Act to use the Applicant's personal information to conduct the PROBE and/or CPIC searches on January 30, 2001, February 12, 2001, March 22, 2002, August 27, 2003 and January 9, 2004.

Lisa McAmmond
Adjudicator