

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2008-002

January 31, 2008

ALBERTA JUSTICE AND ATTORNEY GENERAL

Case File Number 3740

Office URL: www.oipc.ab.ca

Summary: The Applicant requested that Alberta Justice and Attorney General (the Public Body) provide copies of records relating to a decision of a crown prosecutor about pressing charges against Edmonton Police Service officers.

The Public Body withheld the requested records on the basis that they were related to the exercise of prosecutorial discretion, were subject to legal privilege, and contained personal information.

The Adjudicator confirmed the decision of the Public Body to withhold the records as the Adjudicator found that all the information in the records related to the exercise of prosecutorial discretion.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 17, 29, 27

Authorities Cited: **AB:** Orders 2001-011, F2004-026, F2006-005

Cases Cited: *Krieger v. Law Society of Alberta* [2002] 3 S.C.R. 372

I. BACKGROUND

[para 1] The Applicant requested review by this office of a decision made by the Public Body to deny access to copies of all records relating to the decision of a crown prosecutor about pressing charges against Edmonton Police Service officers.

[para 2] Mediation was authorized but did not resolve the issue and so the matter was scheduled for a written inquiry.

[para 3] The Public Body provided written submissions. Although the Applicant requested and received an extension for providing written submissions, the Applicant did not provide any submissions.

II. RECORDS AT ISSUE

[para 4] At issue are records relating to the decision of a crown prosecutor to press charges against one or more Edmonton Police Service officers.

III. ISSUES

Issue A: Did the Public Body properly apply section 20(1)(g) of the Act (reveal information relating to the exercise of prosecutorial discretion) to the records/information?

Issue B: Does section 17 of the Act (personal information) apply to the records/information?

Issue C: Does section 27(1)(b) and (c) of the Act (privileged information) apply to the records/information?

IV. DISCUSSION OF ISSUES

Issue A: Did the Public Body properly apply section 20(1)(g) of the Act (reveal information relating to the exercise of prosecutorial discretion) to the records/information?

[para 5] Section 20 (1)(g) is a discretionary exception to disclosure. It states:

20(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

(g) reveal any information relating to or used in the exercise of prosecutorial discretion,

[para 6] The Public Body argues that section 20(1)(g) applies to the records at issue as they are records from a prosecutor's file and relate to the exercise of prosecutorial discretion.

[para 7] As noted above, the Applicant provided no formal written submissions. However, in his request for review, counsel for the Applicant argued that the provisions of section 20 are discretionary and that the Public Body should not exercise its discretion to withhold records in this case. The Applicant provided no reasons or evidence in support of his assertion that the Public Body should not exercise its discretion in this way.

[para 8] The meaning of the phrase "exercise of prosecutorial discretion" was determined to be a legal term of art by the Supreme Court of Canada in *Krieger v. Law Society of Alberta* [2002] 3 S.C.R. 372. The Court determined that the exercise of prosecutorial discretion includes:

Without being exhaustive, we believe the core elements of prosecutorial discretion encompass the following: (a) the discretion whether to bring the prosecution of a charge laid by police; (b) the discretion to enter a stay of proceedings in either a private or public prosecution, as codified in the *Criminal Code*, R.S.C. 1985, c. C-46, ss. 579 and 579.1 ; (c) the discretion to accept a guilty plea to a lesser charge; (d) the discretion to withdraw from criminal proceedings altogether: *R. v. Osborne* (1975), 25 C.C.C. (2d) 405 (N.B.C.A.); and (e) the discretion to take control of a private prosecution: *R. v. Osioy* (1989), 50 C.C.C. (3d) 189 (Sask. C.A.). While there are other discretionary decisions, these are the core of the delegated sovereign authority peculiar to the office of the Attorney General.

Significantly, what is common to the various elements of prosecutorial discretion is that they involve the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for. Put differently, prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it. (emphasis in the original)

[para 9] As I noted in Order F2006-005, "exercise of prosecutorial discretion" is not defined in the Act. Ruth Sullivan notes on page 47 of *Sullivan and Driedger on the Construction of Statutes* 4th Edition (Markham: Butterworths, 2002) that where a legislative instrument uses a legal term of art, it is generally presumed that the term is used in its correct legal sense.

[para 10] I have reviewed the records to determine whether providing the information contained in the records at issue would reveal information relating to or used in the making of decisions as to the nature and extent of the prosecution and the Attorney General's participation in it, in accordance with the Supreme Court of Canada's decision in *Krieger*.

[para 11] I find that all the information contained in the records at issue would reveal information relating to the decisions as to the nature and the extent of prosecution and the Attorney General's participation. As section 20(1)(g) is a discretionary exception, I must therefore consider whether the Public Body properly applied its discretion to withhold the records.

[para 12] In Order F2004-026, the Commissioner revised the conditions for applying discretionary exceptions set out in Order 2001-011:

In my view a Public Body exercising its discretion relative to a particular provision of the Act should do more than consider the Act's very broad and general purposes; it should consider the purpose of the particular provisions on which it is relying, and whether withholding the records would meet those purposes in the circumstances of the particular case.

In other words, a Public Body must consider the purpose of a particular exception and consider its application to the records and information it is seeking to withhold. The Public Body must also provide evidence of the factors it considered when applying the exception, as required by Order 2001-011 (*supra*).

[para 13] The employee of the Public Body who made the decision to withhold the records explained that discretion was applied to withhold the records for the following reason:

It is imperative that prosecutors are able to make informed decisions. Deliberations leading to these decisions must be unfettered by the threat of disclosure and the decision-makers themselves must be protected from external influences by the general principle of independence.

[para 14] I find that the Public Body properly applied its discretion to withhold the records. The employee of the Public Body who made the decision to withhold the records provided his rationale and explained how he considered the purpose of the provision and how withholding the records met that purpose of the provision in this particular case.

[para 15] For these reasons, I find that the Public Body properly applied section 20(1)(g) to the records and information.

Issue B: Does section 17 of the Act (personal information) apply to the records/information?

[para 16] As I have found that the Public Body properly withheld the records under section 20(1)(g) of the Act, it is unnecessary to consider whether section 17 also applies.

Issue C: Does section 27(1)(b) and (c) of the Act (privileged information) apply to the records/information?

[para 17] As I have found that the Public Body properly withheld the records under section 20(1)(g) of the Act, it is unnecessary to consider whether section 27 also applies.

V. ORDER

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

[para 19] I confirm the decision of the Public Body to withhold the records and information under section 20(1)(g).

Teresa Cunningham
Adjudicator