

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2009-013

September 14, 2009

LETHBRIDGE REGIONAL POLICE SERVICE

Case File Number F4492

Office URL: www.oipc.ab.ca

Summary: The Applicant made a request to the Lethbridge Regional Police Service (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for records relating to an altercation that had resulted in criminal charges taking place in March 2008. He requested all witness statements, the information, the promise to appear, and any similar documents, police officers' notes, and the prosecutor's information summary.

The Adjudicator found that the FOIP Act did not apply to the records at issue because the records related to a prosecution that was ongoing. The FOIP Act exempts records relating to ongoing prosecutions from its scope.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 4, 17, 20, 72 **BC:** *Freedom of Information and Protection of Privacy Act* RSBC 1996 c.165, s. 3

Authorities Cited: **BC:** Order 202-1997

I. BACKGROUND

[para 1] On April 28, 2008, the Applicant made a request to the Public Body under the FOIP Act for records relating to an altercation that had taken place in March 2008 and had resulted in criminal charges being laid. The Applicant requested all witness

statements, the information, the promise to appear, and any similar documents, police officers' notes, and the prosecutor's information summary.

[para 2] The Public Body refused to grant access to the requested records on April 30, 2008. It stated:

I am replying to your request of April 28, 2008, for access to the Lethbridge Regional Police Service file...

Unfortunately, the proceedings for this file are still before the court; access to all the information which you requested is denied under section 20(1)(h) of the Freedom of Information and Protection of Privacy Act...

20(1)(h) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to deprive a person of the right to a fair trial or impartial adjudication.

If you wish to reactivate your request after the court proceedings, up to April 2009, you may do so using the Reference number...

[para 3] On May 7, 2008, the Applicant requested review of this decision by the Commissioner. The Commissioner authorized mediation to resolve the dispute. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

[para 4] In its initial submissions, the Public Body raised the issue of whether sections 4(1)(a) (records in a court file), 17 (personal information), and additional provisions of section 20 (information harmful to law enforcement) applied to the records. While it did not explain which records and information it believed sections 4(1)(a) and 20 (1)(a), (c), (f), and (g) applied to, it explained that it believed section 17 applied to the witness statements, the information, the promise to appear, the police officers' notes and the prosecutor's information summary. On reviewing the records at issue and the Public Body's submissions, I decided that it was necessary to address the issue of whether section 4(1)(k) (records relating to an ongoing prosecution) applied to the records at issue and an amended notice of inquiry was sent to the parties reflecting this additional issue. The Applicant provided initial submissions and rebuttal submissions, while the Public Body provided initial submissions only.

II. RECORDS AT ISSUE

[para 5] The records at issue include witness statements, the information, the promise to appear, and similar documents, police officers' notes, and a prosecutor's information summary.

III. ISSUES

Issue A: Does section 4(1)(k) of the FOIP Act (records relating to an ongoing prosecution) apply to the records?

Issue B: Does section 4(1)(a) of the FOIP Act (records from a court file) apply to the records?

Issue C: Does section 17 of the FOIP Act (disclosure harmful to personal privacy) apply to the information in the records?

Issue D: Did the Public Body properly apply section 20 of the FOIP Act (disclosure harmful to law enforcement) to the information in the records.

IV. DISCUSSION OF ISSUES

Issue A: Does section 4(1)(k) of the FOIP Act (records relating to an ongoing prosecution) apply to the records?

[para 6] An exhibit provided by the Public Body indicates that the criminal trial to which the records at issue relate has not yet taken place and is scheduled for November 2009. Section 4(1)(k) exempts records from the FOIP Act if they relate to an ongoing prosecution. It states:

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;

An access request under the FOIP Act for records relating to a prosecution when the proceedings have not yet been completed cannot succeed. This is because the FOIP Act does not apply to those records. Rather, existing procedures for obtaining these records must be followed.

[para 7] In Order 202-1997, the former Privacy Commissioner of British Columbia considered the purpose of section 3(1)(h), an equivalent provision in British Columbia's *Freedom of Information and Protection of Privacy Act*. He stated:

It is my view that this section only applies to records directly associated with a prosecution that is officially underway, which normally means that a charge has been laid. At that point, the legislature intended to insulate Crown Counsel from requests for access under this Act until a prosecution is completed.

I agree with this reasoning. In my view, section 4(1)(k) is intended to protect prosecutions from interference.

[para 8] The Public Body did not make any arguments in relation to the application of section 4(1)(k). However, I note that it states the following in its exchangeable submissions in relation to its application of section 17 and 20:

These sections were used to protect the ongoing investigation and court procedure and the confidentiality of the process. We feel that the release of these documents could deprive the

accused of the right to a fair [trial]. The outcome of the civil matter could influence the outcome of the criminal [trial].

[para 9] The Applicant made the following argument:

If the information being withheld does relate to a finished Criminal Court proceeding, or to Court records, then the Act does not apply. However, if the matter is still ongoing, then the Act will still apply.

[para 10] In my view, the Applicant's analysis is a misreading of sections 4 and 20. Records relating to an ongoing prosecution and records contained in a court file are exempt from the application of the FOIP Act. Records relating to prosecutions where all proceedings have finished are subject to the FOIP Act. However, the information in those records may be subject to exceptions to disclosure such as sections 17 and 20.

[para 11] I find that all the records at issue relate to a prosecution and that all proceedings in relation to that prosecution have not yet been completed. I therefore find that section 4(1)(k) applies to all the records at issue.

Issue B: Does section 4(1)(a) of the FOIP Act (records from a court file) apply to the records?

[para 12] As I have found that section 4(1)(k) applies to all the records at issue, I need not consider whether section 4(1)(a) also applies to the records at issue.

Issue C: Does section 17 of the FOIP Act (disclosure harmful to personal privacy) apply to the information in the records?

[para 13] As I have found that the Act does not apply to the records at issue, it follows that I find that section 17 does not apply to the information they contain.

Issue D: Did the Public Body properly apply section 20 of the FOIP Act (disclosure harmful to law enforcement) to the information in the records.

[para 14] As I have found that the Act does not apply to the records at issue, it follows that I find that section 20 does not apply to the information they contain.

V. ORDER

[para 15] I make this Order under section 72 of the Act.

[para 16] I confirm that the FOIP Act does not apply to the records at issue.

Teresa Cunningham
Adjudicator