ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2010-010

November 10, 2010

EDMONTON POLICE SERVICE

Case File Number F4990

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Summary: The Applicant requested investigation records about an alleged theft by a specific EPS member that allegedly led to the EPS member's arrest and resignation or retirement. The Public Body refused to confirm or deny the existence of any responsive records, citing section 12(2) of the *Freedom of Information and Protection of Privacy Act*.

The Adjudicator found that confirming the existence of responsive records, if they do exist, would unreasonably invade the personal privacy of the EPS member by revealing information about the member's employment history and any criminal investigation related thereto. The Adjudicator found that section 17(5)(h) of the Act weighed in favour of withholding the information and that the public's interest in scrutinizing the actions of the Public Body, if there was such an interest, did not outweigh the presumption that disclosing the existence of information would be an unreasonable invasion of the EPS member's personal privacy.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(n), 12(2), 17, 32, 59(3), 72; **BC:** *Freedom of Information and Protection of Privacy Act* R.S.O. 1990, c. F-31. **CAN:** *Canadian Charter of Rights and Freedoms*, ss. 2(b).

Authorities Cited: AB: Order 98-009.

Cases Cited: *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23; and *Calgary Police Service v. Alberta (Information and Privacy Commissioner)*, 2010 ABQB 82 [presently under appeal].

I. BACKGROUND

[para 1] On April 1, 2009, pursuant to the *Freedom of Information and Protection of Privacy Act* ("the Act"), the Applicant asked that the Edmonton Police Service ("the Public Body") provide, "…copies of all records relating to the investigation into an allegation of theft by [a named EPS member] which resulted in his arrest and resignation/retirement from the EPS…".

[para 2] On May 15, 2009, the Public Body responded to the Applicant's request stating that it would neither confirm nor deny the existence of responsive records. The Public Body relied on section 12(2) of the Act.

[para 3] On June 10, 2009, the Applicant wrote to the Office of the Information and Privacy Commissioner ("this office") and requested a review of the Public Body's response, stating that the Public Body failed to consider section 17(5)(a) of the Act, as the information requested related to a matter of public interest.

[para 4] An investigation was authorized by the Information and Privacy Commissioner to attempt to resolve the issues between the parties; however, this was unsuccessful and this matter was referred for an inquiry.

[para 5] The Public Body submitted both open and *in camera* initial submissions. Given that the Public Body applied section 12(2) of the Act, I accepted its initial, *in camera* submissions. The Applicant also provided initial submissions and both parties submitted rebuttal arguments.

II. INFORMATION AT ISSUE

[para 6] The information at issue is whether the records requested by the Applicant exist or not.

III. ISSUES

[para 7] The Notice of Inquiry dated May 19, 2010 stated the issue for this inquiry as follows:

> Did the Public Body properly refuse to confirm or deny the existence of a record, as authorized by section 12(2) of the Act?

IV. DISCUSSION OF ISSUES

A. Preliminary Issue:

[para 8] Pursuant to section 12(2) of the Act, in its response to the Applicant, the Public Body refused to confirm or deny the existence of any responsive records. Section 12(2) of the Act states:

> *12(2) Despite subsection (1)(c)(i), the head of a public body may, in a response, refuse to confirm or deny the existence of*
>
> > *(a) a record containing information described in section 18 or 20, or*
> >
> > *(b) a record containing personal information about a third party if disclosing the existence of the information would be an unreasonable invasion of the third party's personal privacy.*

[para 9] As the Public Body has refused to confirm or deny the existence of responsive records pursuant to section 12(2) of the Act, I am bound by section 59(3) of the Act which states:

> *59(3) In conducting an investigation or inquiry under this Act and in a report under this Act, the Commissioner and anyone acting for or under the direction of the Commissioner must take every reasonable precaution to avoid disclosing and must not disclose*
>
> > *(a) any information the head of a public body would be required or authorized to refuse to disclose if it were contained in a record requested under section 7(1), or*
> >
> > *(b) whether information exists, if the head of a public body in refusing to provide access does not indicate whether the information exists.*

[para 10] In this Order, I must ensure that I do not reveal if there are responsive records or not, as this was the very information the Public Body was seeking to withhold by its reliance on section 12(2) of the Act.

B. Did the Public Body properly refuse to confirm or deny the existence of a record, as authorized by section 12(2) of the Act?

[para 11] The Applicant requested records relating to a specific EPS member (who the Applicant names in its request) who the Applicant believes was discovered stealing money from the EPS headquarters building and was subsequently arrested ("EPS

member"). The Applicant also states that the EPS member was never prosecuted but, instead, was allowed to retire or resign. Although it is not clear how the Applicant became aware of the details of the alleged theft by the EPS member, it did provide a transcript from a cross-examination on affidavit of a former EPS Police Chief, wherein the former Police Chief was asked questions relating to the alleged theft and consequences thereof for the EPS member.

[para 12] The Public Body argues that revealing if records exist that are responsive to the Applicant's request would reveal personal information about an individual that would be an unreasonable invasion of that individual's personal privacy.

[para 13] The Applicant argues that how the Public Body addresses wrongdoing by its members is a matter of public interest and the public interest is paramount to the EPS member's personal privacy.

[para 14] For section 12(2) of the Act to apply in this case, the Public Body must show that:

1. confirming the existence of the responsive records, if any, will reveal personal information about the EPS member; and
2. revealing that personal information (that the records exist) would be an unreasonable invasion of the EPS member's personal privacy.

1. If the records exist, would confirming the existence of responsive records reveal personal information about the EPS member?

[para 15] Personal information is defined in section 1(n) of the Act as follows:

> *1(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,*
> >
> > *(ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,*
> >
> > *(iii) the individual's age, sex, marital status or family status,*
> >
> > *(iv) an identifying number, symbol or other particular assigned to the individual,*
> >
> > *(v) the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,*

(vi) information about the individual's health and health care history, including information about a physical or mental disability,

(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, and

(ix) the individual's personal views or opinions, except if they are about someone else;

[para 16] The Public Body argues that, if the records do exist, they would contain the EPS member's name, address, date of birth, telephone number, education and employment history, health information, and registration number, as well as views and opinions regarding the member, and personal views or facts and events involving the member.

[para 17] While this may be true, the test is not whether information that would be contained in responsive records, if they exist, would be personal information but whether personal information about the EPS member would be revealed simply by confirming the existence of the records, if records do exist.

[para 18] The Applicant requested "…copies of all records relating to the investigation into an allegation of theft by [the EPS member] which resulted in his arrest and resignation/retirement from the EPS…". If there were records that were responsive to the Applicant's request, this would confirm that there had been an EPS investigation into a theft by the EPS member that led to the EPS member's arrest, and retirement or resignation. Revealing that there are responsive records would reveal information about the EPS member's employment history (including any criminal aspect relating thereto) and, therefore, would reveal personal information about the EPS member.

2. Would revealing the existence of EPS member's personal information be an unreasonable invasion of that EPS member's personal privacy.

[para 19] Section 17 of the Act provides the criteria for deciding whether disclosing a third party's personal information would be an unreasonable invasion of that third party's personal privacy. In Order 98-009 the former Commissioner stated that these criteria can be used to provide guidance as to whether the disclosure of whether records exist is an unreasonable invasion of privacy. The Commissioner stated:

> I agree with the Public Body's use of section 16 [now section 17] to provide guidance for determining whether the disclosure constitutes an unreasonable invasion of a third party's personal privacy. However, the focus of the analysis must be on whether the disclosure of the existence [my emphasis] of the information, rather than whether the disclosure of the information itself, would constitute an unreasonable invasion of a third party's personal privacy.
>
> (Order 98-009 at para 15)

[para 20] Therefore, it is appropriate to use section 17 of the Act to determine if confirming the existence of records, if they do exist, would disclose personal information of the EPS member that would be an unreasonable invasion of the EPS member's personal privacy.

[para 21] Section 17(1) of the Act states:

> *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 22] Section 17(2) of the Act sets out instances when the disclosure of personal information is not an unreasonable invasion of personal privacy. The Applicant did not argue, nor do I find, that section 17(2) of the Act applies to the information sought.

[para 23] Section 17(4) of the Act lists circumstances under which the disclosure of an individual's personal information is presumed to be an unreasonable invasion of the individual's personal privacy. Section 17(4) of the Act states:

> *17(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*
>
> > *(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,*
> >
> > *(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,*
> >
> > *(c) the personal information relates to eligibility for income assistance or social service benefits or to the determination of benefit levels,*
> >
> > *(d) the personal information relates to employment or educational history,*

(e) the personal information was collected on a tax return or gathered for the purpose of collecting a tax,

(e.1) the personal information consists of an individual's bank account information or credit card information,

(f) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations,

(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,

or

(h) the personal information indicates the third party's racial or ethnic origin or religious or political beliefs or associations.

[para 24] The Public Body submits that sections 17(4)(b), (d), and (g) apply to the information sought. The Public Body focuses its arguments on the information that would likely be in the records that are responsive to the Applicant's request, if those records do exist. However, section 12(2) of the Act requires the disclosure of the existence of the records to be an unreasonable invasion of the EPS member's personal privacy, not the disclosure of the actual content of the records, if they exist.

[para 25] As already noted, given the Applicant's request, if records that are responsive to the Applicant's request did exist and the Applicant was informed of this, this would reveal that there was an investigation regarding allegations of theft by the EPS member. It would also reveal that the EPS member was the subject of a police investigation that led to his arrest, and resignation or retirement. Therefore, given that the EPS member was named in the Applicant's access request, it would disclose some information about the EPS member's criminal history, and the EPS member's employment history, along with the EPS member's name. Pursuant to section 17(4)(g)(i) of the Act, there is a presumption that revealing the existence of records that are responsive to the Applicant's request, if any do exist, would be an unreasonable invasion of the EPS member's personal privacy.

[para 26] As well, confirming the existence of records, if any, that were responsive to the Applicant's request would disclose information relating to the EPS member's employment history (that the EPS member retired or resigned following an investigation

into an allegation of theft). Pursuant to section 17(4)(d) of the Act, there is a presumption that confirming the existence of the records requested by the Applicant if any exist, would be an unreasonable invasion of the EPS member's personal privacy.

[para 27] Although these presumptions (that confirming the existence of records that are responsive to the Applicant's request would be an unreasonable invasion of the EPS member's personal privacy) would arise, the presumptions can be overridden by factors set out in section 17(5) of the Act. Section 17(5) of the Act states:

> *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*
>
> > *(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,*
> >
> > *(b) the disclosure is likely to promote public health and safety or the protection of the environment,*
> >
> > *(c) the personal information is relevant to a fair determination of the applicant's rights,*
> >
> > *(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,*
> >
> > *(e) the third party will be exposed unfairly to financial or other harm,*
> >
> > *(f) the personal information has been supplied in confidence,*
> >
> > *(g) the personal information is likely to be inaccurate or unreliable,*
> >
> > *(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and*
> >
> > *(i) the personal information was originally provided by the applicant.*

[para 28] The Applicant submits that section 17(5)(a) of the Act applies to the information requested since how the Public Body deals with alleged theft by an EPS member speaks to if there is a double standard when dealing with EPS members accused

of crimes. The Applicant argues that "[t]he issue of how this matter was handled raises very important public interest issues engaging section 17(5)(a) of the Act."

[para 29] In support of its position, the Applicant provides an excerpt from the recent Supreme Court of Canada decision, *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* ("CLA") and then states:

> The case is important because the [Applicant] needs the information in order to meaningfully exercise its right to express itself on a matter of public and political interest and the [Public Body] has failed to give adequate reasons for its decisions.

[para 30] The Applicant gives no further argument or explanation on the applicability of the CLA decision.

[para 31] In the CLA decision, the Supreme Court was asked to determine if the Ontario *Freedom of Information and Protection of Privacy Act* ("FIPPA") violated section 2(b) of the *Charter of Rights and Freedoms* ("*Charter*") because the public interest override provision did not apply to the provisions (sections 14 and 19) that provide exemptions from FIPPA for solicitor-client privilege and law enforcement records. The Court held that the *Charter* was not violated despite the fact that the override did not extend to these provisions because the exceptions, properly interpreted, already incorporate considerations of public interest, and because the head of a public body, in deciding whether to apply them, must take the public interest in disclosure into account.

[para 32] In its rebuttal submissions, the Applicant also states (without explanation) that the CLA case overrules a recent Alberta Court of Queen's Bench decision, *Calgary Police Service v. Alberta (Information and Privacy Commissioner)* 2010 ABQB 82 [presently under appeal] ("CPS") in which the Alberta Court of Queen's Bench determined that public interest did not override police officers' personal privacy interests in police disciplinary investigations that did not result in criminal charges.

[para 33] I do not think that the CLA decision is, for the most part, applicable to this inquiry. Unlike the Ontario legislation, the Alberta statute does not restrict the application of its public interest override provision (section 32 of the Act).

[para 34] In my view, however, for this very reason, the Applicant does not need to rely on the CLA decision to make the point that the public interest is to be taken into account in deciding whether the discretionary exceptions (of which section 12(2) is one) should be applied in a given case. Furthermore, inasmuch as the factors under section 17 (which requires public bodies to withhold information if its disclosure would unreasonably invade personal privacy) are to be considered in deciding whether to apply section 12(2), section 17(5)(a) of the Act – the desirability of disclosure for the purpose of scrutinizing the activities of a public body – is a factor which the Public Body is to take into account.

[para 35] In my view, due to the interplay of section 12(2) of the Act and section 17 of the Act, and the facts and arguments before me, I am required to consider if section 17(5)(a) of the Act is applicable. If it is, I must then decide if the need for public scrutiny outweighs the other relevant factors in section 17(5) of the Act, and overrides the presumptions that disclosure of the existence of the information would be an unreasonable invasion of a third party's personal privacy.

[para 36] The Applicant argues that the public interest in this matter – dealing with how the Public Body investigates and disciplines its own members – is paramount over any claim to third party personal privacy. The Public Body argues that any public interest in this matter is not sufficient to override the privacy interests applicable in this inquiry. It states:

> An expressed "concern" regarding the laying or not laying of criminal charges in a particular matter that the Applicant alleges is not sufficient to show a public interest that overcomes a privacy interest in any responsive records. The concern does not rise to the level of public interest required for section 17(5)(a) to overcome the application of all of the other relevant elements in section 17(5).

[para 37] As noted above, the Applicant has said that the EPS officer in question had been investigated, arrested, and resigned or retired as the result of these incidents. The Applicant has also presented some evidence which may, possibly, be taken as suggesting that these things happened. Leaving aside for the moment whether the evidence presented by the Applicant is sufficient to establish that these things happened in fact, I will consider the position if, hypothetically, such events did happen and there are records relating to them, is public scrutiny called for?

[para 38] In cases involving improper or illegal behaviour by police officers or allegations thereof, public scrutiny may be a relevant factor both because the public needs to know how the Public Body deals with the behaviour or alleged behaviour, as well as, in some cases, because the public needs to know which individual police officers have engaged in wrongful behaviour.

[para 39] The decisions of this office have held that, for disciplinary matters, scrutiny of the disciplinary process can be achieved without naming individual officers. As well, information relating to the officers themselves is to be disclosed where they have been found to have engaged in certain kinds of wrongful conduct. In the CPS decision mentioned above, the court reviewed a decision of this office and decided that the public membership of the Law Enforcement Review Board ("LERB"), the Calgary Police Commission, and potential scrutiny by the Minister of Justice in relation to any provincial or federal offences, provides adequate scrutiny, and that limited individual officer's information is to be disclosed only in circumstances where the member's actions may constitute a federal or provincial offence.

[para 40] The cases before this office and the CPS decision do not deal specifically with the scenario described by the Applicant, which involved an investigation, but no formal disciplinary process or prosecution.

[para 41] The holding in the CPS decision that the disciplinary process receives adequate scrutiny by way of the public membership of the LERB or the Police Commission is inapplicable to the scenario under discussion as there is no reference in it to any formal disciplinary process. As well, the Applicant's description of the events does not contain any mention of a referral for prosecution, which would make inapplicable the aspect of the decision of the court in CPS to the effect that the involvement of Minister of Justice ensures appropriate scrutiny of the Public Body's decision making. Thus, if public scrutiny of the hypothetical situation under consideration were called for, the means of scrutiny which the Court has concluded would be adequate would not be present.

[para 42] However, the fact that in the earlier cases the matters had proceeded beyond investigation, to the institution and conclusion of disciplinary processes, whereas in the fact scenario under consideration there is an investigation, but no disciplinary or criminal process, is also an important distinction in another way. In my view, the fact that an investigation has been held – even one culminating in steps and outcomes such as those described by the Applicant – does not necessarily mean that scrutiny of the process is called for. As many earlier orders of this office have stated, before the need for public scrutiny can outweigh personal privacy interests, an activity of a public body must have been called into question.

[para 43] "Calling into question" is not necessarily met where an applicant points to facts which might, depending on what happened which is unknown, be consistent with impropriety in something done by a public body. Rather, to demonstrate the need for scrutiny, an applicant must provide at least some facts which are reasonably regarded as more consistent with impropriety than with any other possible explanation. The very fact that a Public Body member was investigated for theft, or even arrested, and that that person subsequently resigned without any formal disciplinary or criminal proceeding having been brought, would not, in my view, necessarily even suggest, much less establish, that the public body had acted improperly. There may be any number of explanations for this sequence of events. The idea that the Public Body was differentially treating one of its own (which I take to be what the Applicant is suggesting) is, in my view, no more likely than any number of other explanations.

[para 44] Furthermore, even where an activity of a public body had been called into question, in a situation in which other evidence was available to an adjudicator that established the absence of any impropriety in a public body's actions, the weight of the need for public scrutiny might be significantly diminished. This is not to say that it is never important for a public body whose actions have been called into question to provide information to show that it has acted properly. However, if what it has done is wrong in fact, the importance of the public's knowing this may be greater than if the converse is the case.

[para 45] On the basis of the foregoing considerations, I find that if the facts were as the Applicant has described them, section 17(5)(a) of the Act would not outweigh the factors under section 17, discussed at para 25 and 26 above, that would weigh in favour

of withholding records, if any existed, that consisted of the personal information of the officer that were responsive to the Applicant's request.

[para 46] I note as well that the Applicant is possibly of the view, based on the transcript evidence he provided in his submission, that events happened which would likely have been recorded in some fashion. The Applicant provided the transcript of his examination of an affidavit of the former Police Chief, in which the former Police Chief stated that certain of the events which the Applicant described in its access request happened in fact. This evidence might be taken as suggesting that records relating to these events must exist. Thus, the Applicant may be of the view that since it already knows records exist, it would not be an unreasonable invasion of privacy, if records exist which are responsive to the request, to confirm that they exist.

[para 47] However, in my view it does not follow, from the fact that the Applicant presented evidence that described certain events as having taken place, that it may be concluded, based on this evidence alone, that these events happened in the manner described, nor that records exist which are responsive in the sense that they relate to events as described by the Applicant in his request.

[para 48] The transcript provided by the Applicant appears to relate to an affidavit sworn in relation to a matter other than the matter which forms the basis of the access request. There is no information as to how the former Police Chief was involved in the latter matter, whether he derived the information he gave in response to the Applicant's questions from his own experience or from what he was told by others, how much time had elapsed between the happening of the events and the date of the examination, or whether the former Police Chief had had an opportunity to refresh his memory before the questions were asked. As well, the former Police Chief's answers were in relation to leading questions. Thus, while this transcript is, in my view, some evidence that some of the events described in the Applicant's access request happened, and supports the idea that there may be some related records, it is not conclusive evidence that records relating to the events as described by the Applicant in its access request exist. Consequently it cannot be concluded, based on this evidence, that the Public Body should confirm that the records exist because the Applicant already knows this.

[para 49] I turn finally to the timing of the Public Body's exercise of discretion in this case. In its open, initial submissions, the Public Body provided an affidavit from a Disclosure Analyst employed by the Public Body at the time of the Applicant's access request but who did not process and respond to the Applicant's access request. The Disclosure Analyst did not give evidence that the person who responded to the Applicant's access request took into account all relevant interests or any section 17(5) factors, but did state that in preparing for this inquiry, she did. While, ideally it would be the person who responded on behalf of the Public Body who gives evidence of what was considered at the time of the response, given the evidence I do have, nothing would be gained at this point by my sending the matter back to the Public Body so that it may take into account the public interest and respond to the Applicant again. The Disclosure Analyst has already considered these factors and determined that it was appropriate to neither confirm nor deny the existence of any records responsive to the Applicant's

request. Therefore, I find that the Public Body did consider all relevant interests, including the public interest in disclosure, and still decided that it would exercise its discretion to use section 12(2) of the Act and not confirm or deny the existence of any responsive records.

[para 50] Weighing all of the relevant section 17(5) factors, I find that the EPS properly exercised its discretion in applying section 12(2) of the Act to neither confirm nor deny the existence of records that are responsive to the Applicant's request.

V. ORDER

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

[para 52] I confirm that the Public Body properly applied section 12(2) of the Act to neither confirm nor deny the existence of records responsive to the Applicant's request.

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Keri H. Ridley
Adjudicator