

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2010-032

May 27, 2011

EDMONTON POLICE COMMISSION

Case File Number F5264

Office URL: www.oipc.ab.ca

Summary: Pursuant to the *Freedom of Information and Protection of Privacy Act* (“the Act”), the Applicant requested records from the Edmonton Police Commission (“the Public Body”) relating to the discussions between the Edmonton Police Service (“EPS”) and the Public Body regarding “strike letters”.

The Public Body located documents that contained information that was responsive to the Applicant’s request and information that was not responsive. It responded to the Applicant, withholding information that was not responsive and applying sections 17 (disclosure harmful to personal privacy), 23(1)(b) (local public body confidence), and 24(1)(a) and (b) (advice from officials) of the Act, to sever a limited amount of information from the responsive records.

The Applicant requested a review of the Public Body’s response but did not provide argument specifically relating to the issues in this inquiry. Thus, the Public Body also did not provide argument relating to the issues in this inquiry.

The Adjudicator found that the information in the records that was withheld because the information was not responsive to the Applicant’s request was properly withheld.

The Adjudicator also found that it was possible that the Public Body may have improperly applied section 17 of the Act to the information that was severed from the responsive records; however, she could not decide this given the lack of argument or

evidence provided by the Public Body. Therefore, she ordered the Public Body to determine whether the information severed pursuant to section 17 of the Act was business contact information of a person acting in his or her formal capacity. If it determined that it was business contact information, the Adjudicator ordered that this information be disclosed to the Applicant.

The Adjudicator also found that the Public Body properly applied section 24 of the Act.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(n), 17, 23, 24, and 72.

Authorities Cited: **AB:** Orders 96-006, F2005-012, and F2009-038.

I. BACKGROUND

[para 1] On November 10, 2009, the Applicant wrote to the Edmonton Police Commission (“the Public Body”) and stated:

This is a FOIPP Act application for copies of all records relating to discussions between the Edmonton Police Service and the Edmonton Police Commission in relation to the meaning and purpose of the strike letters and the strategy to be employed when the Complainant does not submit to an interview after the third strike letter.

[para 2] The Public Body responded to the Applicant’s access request on January 27, 2010 enclosing records it found to be responsive to the Applicant’s request. The Public Body noted that there were portions of the documents that were “non-responsive”, and these portions were not disclosed. As well, the Public Body informed the Applicant that it had severed responsive information from the records pursuant to sections 17 (disclosure harmful to personal privacy), 23(1)(b) (local public body confidences), and 24(1)(a) and (b) (advice from officials).

[para 3] On February 8, 2010, the Applicant wrote to the Office of the Information and Privacy Commissioner (“this office”) and requested a review of the Public Body’s response to its access request. In its request for review the Applicant stated that the Public Body had failed to apply section 17(5)(a) of the Act (disclosure desirable for subjecting a public body to public scrutiny), failed to articulate any reason why it exercised discretion to refuse to disclose the information, and that the Public Body may have failed to apply discretion. The Applicant went on to quote a portion of the record consisting of a statement, and said that it was very interested in any withheld information that relates to that statement and the basis for making the statement. There was no specific mention of sections 23 and 24 of the Act in the Applicant’s request for review.

[para 4] The Commissioner assigned a portfolio officer to investigate and attempt to resolve the issues between the parties but this was not successful and the Applicant requested an inquiry on May 24, 2010.

[para 5] Although the request for an inquiry referred to the Public Body and the correct inquiry number, the request included attachments related to another matter the Applicant had before this office. A Notice of Inquiry was issued relating to the propriety of the Public Body's use of sections 17, 23, and 24 and whether it had properly severed non-responsive records.

[para 6] Given the Applicant's request, I decided to name the Edmonton Police Service ("EPS") as an affected party. The Applicant provided initial submissions which dealt specifically with the other matter he had before this office. The Public Body also provided submissions, stating that the Applicant had not argued anything relating to this inquiry in its initial submissions. It presented no argument relating to its use of sections 17, 23, and 24 of the Act. The EPS also provided initial submissions asking that this inquiry not proceed given the Applicant's lack of argument on the issues stated in the Notice of Inquiry. The Applicant did not provide a rebuttal and, as a result, no rebuttals were requested from the Public Body or the EPS.

II. RECORDS AT ISSUE

[para 7] The records at issue are the severed portions of 63 pages of responsive or partially responsive records provided to the Applicant by the Public Body.

III. ISSUES

[para 8] The Notice of Inquiry dated October 27, 2010 lists the issues in this inquiry as follows:

Issue A:

Are the records/information, currently being withheld as "non-responsive" to the Applicant's request, in fact responsive to the Applicant's request?

Issue B:

Does section 17 of the Act (disclosure harmful to personal privacy) apply to the records/information?

Issue C:

Did the Public Body properly apply section 23 of the Act (local public body confidences) to the records/information?

Issue D:

Did the Public Body properly apply section 24 of the Act (advice etc.) to the records/information?

[para 9] As the EPS has asked that I not conduct this inquiry on account of the Applicant's lack of argument on the relevant issues in this inquiry, I will also address this as a preliminary issue.

IV. DISCUSSION OF ISSUES

Preliminary Issue:

[para 10] As I mentioned in the background section of this Order, the Applicant's request for inquiry attached a letter sent to this office regarding another matter. As well, the Applicant's submissions do not specifically reference the issues in this inquiry and also seem to be focused on the other matter.

[para 11] In its submission, the EPS stated that it attempted to get clarification from the solicitor for the Applicant, but was simply told that the Applicant's submissions do address the issues in this inquiry.

[para 12] I have reviewed the Applicant's submissions. Those submissions quote another access request, made to the EPS. As well, the arguments focus primarily on one statement found in the responsive records. The Applicant would like to know the basis of this statement as well as the author of the report in which the statement was found. The Applicant also states that section 17(5)(a) of the Act was not considered by the Public Body. Section 17(5)(a) 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,

...

[para 13] The rest of the Applicant's submission relates to the argument that the public interest is engaged in this matter. Given the Applicant's submissions, I assume that the matter to which the Applicant makes reference is the other access request made to the EPS. The Applicant also asserts that the EPS was "publically proclaiming falsehoods", pointing to a particular statement found in the report. He says that the authors of the report need to be identified in order to hold the EPS responsible for these statements, which might be taken as a component of the Applicant's argument in favour of public scrutiny.

[para 14] While it appears that in his submissions the Applicant was presenting arguments, in part, related to another matter and not to this inquiry, his arguments

regarding section 17(5)(a) of the Act could be applicable to this inquiry, as section 17 was used by the Public Body to sever some limited information. As well, the Applicant's arguments regarding the Public Body's use of discretion could relate to the Public Body's use of section 24 of the Act. In addition, the Applicant's request for review (which is before me) can be considered as part of his submission, as it outlines the Applicant's concerns about the Public Body's response.

[para 15] Given this, I will proceed to examine the issues set out in the Notice of Inquiry for this inquiry, and I will take into account the Applicant's argument regarding section 17(5)(a) of the Act.

A: Are the records/information, currently being withheld as “non-responsive” to the Applicant’s request, in fact responsive to the Applicant’s request?

[para 16] The Applicant's request was specific. It asks for:

...copies of all records relating to discussions between the Edmonton Police Service and the [Public Body] in relation to the meaning and purpose of the strike letters and the strategy to be employed when the Complainant does not submit to an interview after the third strike letter.

[para 17] The information provided by the Public Body was in relation to the “strike letters”. I have reviewed the information contained in the records that was withheld as non-responsive. This non-responsive information was found in the same records as responsive information but, it appears to relate to other matters, not specifically to the “strike letters”.

[para 18] Although the Applicant's request for review explains the reason it is interested in the information it requested, and may possibly be seen to expand the scope of the request beyond what was initially asked for, the Public Body determined what records or information were responsive to the Applicant's request by reference to the initial request, which was the only request before it.

[para 19] Therefore, given the scope of the Applicant's original request, I find that the Public Body properly withheld portions of the records on which responsive information was found because they were not responsive to the Applicant's request.

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

[para 20] The Public Body applied section 17 of the Act to sever information on page 9 of the responsive records. The information consists of a handwritten name and phone number on the top of the page. The definition of personal information found in section 1(n) of the Act states:

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;

I find that the name and phone number that were severed are a third party’s personal information.

[para 21] Section 17 of the Act is a mandatory provision that 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 circumstances where the disclosure of a third party’s personal information will not be an unreasonable invasion of the third party’s personal privacy. None of these provisions apply to the information severed by the Public Body under section 17.

[para 23] Section 17(4) of the Act lists circumstances where the disclosure of a third party's personal information will be presumed to be an unreasonable invasion of the third party's personal privacy. The relevant portion of this section (which the Public Body applied) is section 17(4)(g) which states:

17(4)(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,

[para 24] Although section 17(4)(g) of the Act creates a presumption that the disclosure of the third party's personal information would be an unreasonable invasion of his or her personal privacy, the Public Body must consider the factors listed in section 17(5) of the Act and all other relevant factors to determine if the disclosure of a third party's personal information would be an unreasonable invasion of his or her personal privacy. In its submissions, the Public Body did not state what section 17(5) factors, if any, it considered in making its determination to withhold this information. The Applicant appears to argue that section 17(5)(a) of the Act applies. Section 17(5)(a) 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,

....

[para 25] The Public Body applied section 17 to a very limited amount of information – consisting of a short handwritten note of someone's name, and contact information. I fail to see how the disclosure of the information severed by the Public Body pursuant to section 17 of the Act would subject the Public Body's activities to public scrutiny. Therefore, I do not believe that this factor applies.

[para 26] However, one factor that is not enumerated but has been found in previous orders of this office to be a relevant consideration under section 17(5) of the Act, which weighs in favour of disclosure, is whether the information is personal information relating to individuals acting in a formal representative capacity, such as names, titles, and business contact information (see Order F2009-038 at para 46).

[para 27] Based on the context in which the information is found, it appears likely that the information severed by the Public Body pursuant to section 17 is information of a person acting in their formal representative capacity and is his or her business contact information. However, I do not know this for certain. The Public Body made no argument in this regard. If the information severed on page 9 is information about a person acting in his or her representative capacity and is his or her work phone number, this information ought to be released to the Applicant. However, if it is not, there are no section 17(5) factors that weigh in favour of disclosure of the information, and it was proper for the Public Body to sever the information.

C: Did the Public Body properly apply section 23 of the Act (local public body confidences) to the records/information?

D: Did the Public Body properly apply section 24 of the Act (advice etc.) to the records/information?

[para 28] The Public Body applied both sections 23 and 24 of the Act to the information it withheld on page 3 of the responsive records. For the reasons I will discuss below, I find that the information severed by the Public Body on page 3 was likely properly severed pursuant to section 24(1)(a) of the Act. Therefore, I will not discuss or make findings on the Public Body's application of section 23 of the Act.

[para 29] Section 24(1)(a) of the Act states:

24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal

(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,

...

[para 30] As many previous Orders from this office have stated, under section 24 of the Act, advice must be:

1. be sought or expected, or be part of the responsibility of a person by virtue of that person's position,
2. be directed toward taking an action,
3. be made to someone who can take or implement the action.

(Order 96-006)

[para 31] According to the EPS, page 3 of the records is a memorandum from the Public Complaints Director of the Public Body to the members of the Public Body. Given the contents of this record I find that the memorandum was written by a person who would be expected to give such advice by virtue of his position with the Public Body, it is directed towards the Public Body's taking an action, and it is the Public Body who could take the action. Therefore, all three criteria are satisfied.

[para 32] However, section 24 of the Act is a discretionary exemption. Therefore, it is also necessary for the Public Body to have exercised its discretion appropriately, taking into consideration the access provisions of the Act (Order F2005-012 at para 12). As the Public Body did not provide any argument on the issues in this inquiry on account of the Applicant's lack of argument, I do not know what factors the Public Body took into consideration when exercising its discretion to sever the information under section 24 of the Act. That being said, I have considered the content of the records severed pursuant to section 24 of the Act. It appears self-evident to me that the purpose of section 24 of the Act would be met by withholding the records under this provision. Thus, no useful purpose would be served by sending this matter back to the Public Body and requiring it to provide an explanation. I find, on a balance of probabilities, in these circumstances, that it properly exercised its discretion.

V. ORDER

[para 33] I make this Order under section 72 of the Act.

[para 34] I confirm that the Public Body properly withheld the information it found to be not responsive to the Applicant's access request.

[para 35] I order the Public Body to disclose to the Applicant the information withheld on page 9, pursuant to section 17 of the Act, unless the Public Body determines that the information on page 9 is not business contact information of an individual acting in his or her representative capacity. If the Public Body determines that this information is not business contact information about an individual acting in his or her representative capacity, I order the Public Body to advise the Applicant and this office of this determination.

[para 36] I confirm that the Public Body properly severed information in the records pursuant to section 24 of the Act.

[para 37] I further order the head of the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that the Public Body has complied with the Order.

Keri H. Ridley
Adjudicator