

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2014-27

July 3, 2014

EDMONTON POLICE SERVICE

Case File Number F7277

Office URL: www.oipc.ab.ca

Summary: The Criminal Trial Lawyers' Association (the Applicant) made a request to the Edmonton Police Service (the Public Body) for access to records under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act). The Applicant stated that a police officer, whom it named, had raped a police officer from an RCMP detachment. The Applicant also stated that a complaint had been made to the RCMP and the RCMP began an investigation, which was subsequently discontinued. The Applicant stated that the criminal investigation was discontinued as a result of a cover up. The Applicant also made allegations that the Public Body had begun and then discontinued an internal investigation into the matter, and that this discontinuation was the result of the same cover up, or "code of silence".

The Public Body relied on section 12(2) of the FOIP Act and stated that it would neither confirm nor deny the existence of responsive records on the basis that it would be an unreasonable invasion of a third party's personal privacy to do so.

The Adjudicator found that the Applicant's allegations were unsubstantiated. She found that it would be an unreasonable invasion of a third party's personal privacy to confirm or deny the existence of responsive records, and confirmed the decision of the Public Body to rely on section 12(2).

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 12, 17, 18, 20, 72

Authorities Cited: AB: Order F2014-16

Cases Cited: *University of Alberta v. Pylypiuk*, 2002 ABQB 22

I. BACKGROUND

[para 1] On May 2, 2013, the Applicant made a request to the Public Body for access to records under the FOIP Act. In its access request, the Applicant's representative stated:

I have been advised that in or around May or June 2003, [a named police officer] was in [a city in Alberta], where he was drinking and raped a female RCMP officer from [an RCMP detachment in Alberta]. The female officer made a complaint to the RCMP and a criminal investigation commenced. In the course of the criminal investigation, the Edmonton Police Service was advised and an Internal Affairs Investigation commenced.

Later, some pressure was brought upon the female officer by other police officers that things would get ugly [...] As a result, the female officer withdrew her complaint. The result of this was that the criminal investigation and the Internal Affairs investigation were terminated.

I have also been advised that [the named police officer] was transferred from [one EPS division] to [another EPS division] because of this complaint and other problems, such as his untrustworthy reputation among [the officers of one EPS division].

Please provide me with all records as defined by s. 1(q) relating to these particular issues.

[para 2] The Public Body responded to the Applicant's access request on June 4, 2013. The Public Body informed the Applicant that it was relying on section 12(2) of the FOIP Act to neither confirm nor deny the existence of responsive records.

[para 3] The Applicant requested review by the Commissioner of the Public Body's response to its access request.

[para 4] The Commissioner authorized mediation to resolve the dispute. As mediation was unsuccessful, the matter was set down for a written inquiry.

[para 5] The parties exchanged initial submissions and rebuttal submissions. Both parties submitted *in camera* submissions, which I accepted.

II. ISSUE

[para 6] Section 12 of the FOIP Act sets out the kinds of information a public body's response to an applicant must contain. This provision states:

12(1) In a response under section 11, the applicant must be told

(a) whether access to the record or part of it is granted or refused,

(b) if access to the record or part of it is granted, where, when and how access will be given, and

(c) if access to the record or to part of it is refused,

(i) the reasons for the refusal and the provision of this Act on which the refusal is based,

(ii) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and

(iii) that the applicant may ask for a review of that decision by the Commissioner or an adjudicator, as the case may be.

(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 7] Section 12(2) creates an exception to the requirement created by section 12(1)(c)(i) that a public body provide reasons for refusing to disclose information and to cite the provision on which a refusal is based. Section 12(2)(a) may be applied when the record contains information described in sections 18 or 20. Section 12(2)(b) may be applied when the requested record contains personal information and disclosing the existence of the information would in itself be an unreasonable invasion of personal privacy.

[para 8] As noted in the background above, the Public Body argues that section 12(2)(b) applies in this case. I turn now to the question of whether section 12(2)(b) authorizes the Public Body to refuse to confirm or deny the existence of responsive records.

Would confirming the existence of responsive records disclose the personal information of a third party?

[para 9] If the Public Body were to confirm the existence of responsive records, then the Public Body would possibly be confirming one or more of the following statements:

- A named police officer raped a police officer from [another city]

- The police officer from another city made a complaint to the RCMP about the named police officer and a criminal investigation was launched
- The Edmonton Police Service was informed of the complaint about the named police officer and an internal investigation was opened.
- Neither the RCMP nor the Edmonton Police Service completed the investigations regarding the named police officer that they had begun.
- The named police officer transferred to another division because of the complaint and because his colleagues did not trust him.

[para 10] Section 1(n) of the FOIP Act defines personal information. This provision states:

I In this Act,

(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 [...]*

Personal information within the terms of the FOIP Act is information about an identifiable individual.

[para 11] Confirming the existence of responsive records (if there are such records) would confirm the facts alleged by the Applicant about a named police officer. Confirming the existence of any such alleged facts would reveal personal information of the named police officer who is the subject of the Applicant’s allegations. I make this finding because confirming the existence of responsive records would confirm the statements I have set out above. Confirming these statements would constitute personal

information about the police member who is the subject of the Applicant's allegations as an identifiable individual.

[para 12] As discussed above, section 12(2)(b) may be applied only when it would be an unreasonable invasion of a third party's privacy to disclose the existence of personal information. It is therefore necessary to consider section 17 of the FOIP Act, which sets out the circumstances when it is, and when it is not, an invasion of a third party's personal privacy to disclose a third party's personal information.

Would it be an unreasonable invasion of a third party's personal privacy to disclose the existence of responsive records, if such exist?

[para 13] Section 17 of the FOIP Act states, in part:

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.

[...]

(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

[...]

(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,

[...]

(d) the personal information relates to employment or educational history,

[...]

(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[...]

(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 14] Section 17 does not say that a public body is *never* allowed to disclose third party personal information. It is only when the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy that a public body must refuse to disclose the information to an applicant under section 17(1). Section 17(2) establishes that disclosing certain kinds of personal information is not an unreasonable invasion of personal privacy.

[para 15] When the specific types of personal information set out in section 17(4) are involved, disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. To determine whether disclosure of personal information would be an unreasonable invasion of the personal privacy of a third party, a public body must consider and weigh all relevant circumstances under section 17(5), (unless section 17(3), which is restricted in its application, applies). Section 17(5) is not an exhaustive list and any other relevant circumstances must be considered.

[para 16] In *University of Alberta v. Pylypiuk*, 2002 ABQB 22, the Court commented on the interpretation of what is now section 17. The Court said:

In interpreting how these sections work together, the Commissioner noted that s. 16(4) lists a set of circumstances where disclosure of a third party's personal information is presumed to be an unreasonable invasion of a third party's personal privacy. Then, according to the Commissioner,

the relevant circumstances listed in s. 16(5) and any other relevant factors, are factors that must be weighed either in favour of or against disclosure of personal information once it has been determined that the information comes within s. 16(1) and (4).

In my opinion, that is a reasonable and correct interpretation of those provisions in s. 16. Once it is determined that the criteria in s. 16(4) is [*sic*] met, the presumption is that disclosure will be an unreasonable invasion of personal privacy, subject to the other factors to be considered in s. 16(5). The factors in s. 16(5) must then be weighed against the presumption in s. 16(4). [my emphasis]

Section 17(1) requires a public body to withhold information only once the head has weighed all relevant interests in disclosing and withholding the information under section 17(5) and, having engaged in this process, the head concludes that it would be an unreasonable invasion of the personal privacy of a third party to disclose his or her personal information.

[para 17] In a case where section 12(2)(b) is applied, the question is whether, once all relevant interests weighing for or against disclosure are considered, disclosing the existence of the records would be an unreasonable invasion of personal privacy.

Section 17(4)

[para 18] As discussed above, the information that would be disclosed by confirming the existence of responsive records would be the following:

- A named police officer raped a police officer from [another city]
- The police officer from another city made a complaint to the RCMP about the named police officer and a criminal investigation was launched
- The Edmonton Police Service was informed of the complaint about the named police officer and an internal investigation was opened.
- Neither the RCMP nor the Edmonton Police Service completed the investigations regarding the named police officer that they had begun.
- The named police officer transferred to another division because of the complaint and because his colleagues did not trust him.

[para 19] The Public Body argues that the presumptions set out under section 17(4)(b), (d), and (g) would be engaged by the subject matter of the Applicant's access request, should there be responsive records. I agree with the Public Body that any personal information responsive to the access request as it is written would relate to employment history. I agree that most of the information, with the exception of any responsive information regarding an employment transfer¹, would also be an identifiable part of a law enforcement record, within the terms of section 17(4)(b). I also agree with the Public Body that the presumption set out in section 17(4)(g) would apply, as the Applicant's access request contains the name of the police officer in the context of

¹ On the facts alleged by the Applicant, it does not appear that the transfer took place for disciplinary reasons. As I do not see any connection between law enforcement proceedings and the transfer in the Applicant's allegations, I am unable to say that information confirming that a transfer took place would be subject to section 17(4)(b).

allegations made about him, which any responsive information, should it exist, must necessarily contain to be responsive. As a result, presumptions arise through the operation of sections 17(4)(b), (d), and (g), that it would be an unreasonable invasion of a third party's personal privacy to disclose the existence of responsive records. It is therefore necessary to weigh relevant considerations under section 17(5) in order to determine whether the presumption is rebutted.

Section 17(5)

[para 20] The Applicant argues that section 17(5)(a) applies and weighs in favor of disclosing whether there are responsive records or not. It states:

The Applicant submits that confirming or denying the existence of the information is in the public interests under s. 17(5)(a), and therefore would not be an unreasonable invasion of [the named police officer's] or the victim's personal privacy.

[...]

When determining whether s. 17(5)(a) applies, it must be considered whether disclosure of the information would serve a public interest, notably, whether it would promote public fairness or accountability, and not simply private interests.

Given the seriousness of the criminal allegation, disclosure of the records is in the public interest under s. 17(5)(a), and therefore the EPS's response to the allegation must be transparent to the public.

[...]

The factors that must be considered in determining whether disclosure of information is desirable under s. 17(5)(a) are:

1. Seriousness of the allegations;
2. The credible possibility that the allegations were not properly resolved; and
3. The presence of a public component, for example, "the views of the Criminal Trial Lawyers' Association in comparable matters and a desirability for the Public Body to be publicly accountable in its resolution of cases involving allegations of serious police wrongdoing".

In the case at hand, the allegations against [the named police officer] are very serious. The rape and subsequent cover-up, if true, involves criminal conduct, and a perpetuation of the "Code of Silence" within the EPS through corruption within and surround the investigation process. It also extends from one police service, the EPS, to a police officer within the RCMP.

Because of the seriousness of the allegations, it is submitted that it is in the public interest to know whether the allegations were properly resolved. According to the information provided to the Applicant, the allegations were not properly resolved. This is as the complaint was apparently withdrawn due to pressure put on the Victim by EPS members.

It is also submitted that a public component is present in this case. It is desirable that the EPS be held publicly accountable in resolving serious allegations of misconduct against its members, such as rape and corruption.

Because of the above, the Applicant submits that disclosure must be made in order to allow the public to determine whether justice has been done regarding [the named police officer's] alleged actions, and to also scrutinize the EPS' investigation process surrounding these allegations.

In addition, the CTLA intends to use the information to influence the Government of Alberta to make changes to the *Police Act* and PSR designed to prevent cover ups.

[...]

[para 21] The Applicant states in its submissions:

Around September of 2003, the Applicant received information from a confidential, reliable, and privileged source ("the Informant"). That information was described in the Applicant's [access request].

[para 22] The Applicant submitted *in camera* evidence to support its statement that it had received information from a confidential, reliable, and privileged source.

[para 23] The Public Body disagrees that section 17(5) applies and weighs in favor of disclosing whether there are responsive records. The Public Body argues that the Applicant has not provided sufficient evidence, including the *in camera* evidence, to support its allegations. The Public Body argues:

The Applicant alleges that the matters referenced in its Access Request "were not properly resolved". The Applicant has not provided sufficient evidence on this point which would permit the EPS to respond. The EPS has been provided only with speculation and unexplained allegations regarding some sort of cover up. Merely because the Applicant asserts this to be the case, or even assuming that some further information is provided *in camera* to refer to such unproven allegations, there is nothing credible offered to the EPS that would permit it to respond to this allegation. The Applicant has apparently not provided any credible evidence that would suggest that section 17(5)(a) should be applied and should prevail despite the privacy interests of other individuals and despite the application of section 12.

[para 24] In Order F2014-16, the Director of Adjudication commented on the evidence an applicant should produce to support its position that the activities of a police service should be subjected to public scrutiny. She said:

In this case, the Applicant submits that the matter being investigated involved the commission of a crime, a fact which the Applicant says was conveyed to it by a confidential source. It further submits the EPS engaged in a cover-up and this cover-up was orchestrated by the then-Chief of the EPS. The Applicant provides newspaper articles relating to the incident and asserts that there were false statements in the newspaper reports, and that the media was misled.

The Applicant also provides statements made by individuals that are contained in documents (a statement of claim and a statement of defence) filed in court proceedings. Some of these statements are made by another EPS member, and are to the effect that the same Chief of EPS discontinued an investigation into substantiated allegations of criminal behaviour against police officers, in an unrelated matter. For these reasons, the Applicant takes the position the matter warrants public scrutiny.

I accept that the proper functioning of a police department can be a matter calling for scrutiny where there is credible evidence calling it into question.

With respect to the “confidential source”, it was open to the Applicant (as I believe it is aware given its familiarity with this office’s procedures) to provide more detailed in camera evidence about this question, including, if it were available, an in camera affidavit from the source of this information, indicating what he or she knows and how they know it, or at a minimum some further explanation or description of verifiable events that would make the allegation believable. I cannot take into account assertions and speculations that are not based on concrete evidence. [my emphasis]

It is not enough that an applicant state that a confidential source provided the applicant with information, the applicant must provide evidence, such as an affidavit from the source of the information, establishing the evidence to be credible.

[para 25] From my review of the evidence and argument of the parties, I find that the Applicant’s allegations against the named police officer and its allegations of a cover up are unsubstantiated. The evidence submitted by the Applicant is not from the individual the Applicant refers to as a confidential source of information, but is hearsay. The evidence fails to establish what the confidential source knows, or how the confidential source knows it. The *in camera* evidence supplied by the Applicant, despite being presented as an affidavit, amounts to unsubstantiated assertions and speculations.

[para 26] I agree with the Public Body that section 17(5)(a) has not been established as applying in this case and does not require it to confirm or deny the existence of any responsive records, should such exist. While I agree with the Public Body arguments generally about section 17(5), I also find that section 17(5) has not been established as applying based on all the submissions before me, including that evidence to which the Public Body did not have access in the inquiry. I find that the Applicant’s *in camera* affidavit does not support confirming or denying the existence of records responsive to the Applicant’s access request. As there is no evidence to found the Applicant’s allegations, I am unable to say that the public interest is engaged by them.

[para 27] Moreover, I note that the Applicant’s access request indicates that it was the RCMP that began to investigate the complaint of rape which the Applicant alleges took place. As the RCMP is a separate agency from the Public Body, it is unclear why the deficiencies the Applicant alleges in relation to the RCMP investigation would necessitate scrutiny of the *Public Body’s* activities for the purposes of section 17(5)(a).

[para 28] The Applicant does not argue that any other factors weighing in favor of confirming or denying the existence of responsive records apply. The Public Body argues that there are no factors weighing in favor of doing so, and I agree.

[para 29] I find that it would be an unreasonable invasion of a third party’s personal privacy to confirm or deny whether responsive records exist. I will therefore confirm the decision of the Public Body to neither confirm nor deny the existence of responsive records.

IV. ORDER

[para 30] I make this Order under section 72 of the Act.

[para 31] I confirm the decision of the head of the Public Body neither to confirm nor deny the existence of responsive records.

Teresa Cunningham
Adjudicator