ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2015-14

May 13, 2015

EDMONTON POLICE SERVICE

Case File Number F5621

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Summary: The Applicant made an access request to the Edmonton Police Service ("the Public Body") pursuant to the *Freedom of Information and Protection of Privacy Act* ("the Act") for all records relating to complaints mentioned in a disciplinary decision. The Public Body found over 3000 responsive records but withheld them all pursuant to section 17 of the Act. The Public Body also applied sections 4, 20, 21, 24 and 27 of the Act to the records at issue in the alternative.

The Adjudicator found that the Public Body properly applied section 17 of the Act to the records.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 4, 17, 20, 21, 24, 27, and 72, *Police Service Act* R.S.A. 2000, c. P-17 and *Police Service Regulation* Alta. Reg. 356/1990.

Authorities Cited: AB: Orders 97-002, F2004-015, F2006-030, and F2013-01.

Cases Cited: *Calgary Police Service v. Alberta (Information and Privacy Commissioner),* 2010 ABQB 82.

I. BACKGROUND

[para 1] On October 13, 2010, the Applicant made an access request to the Edmonton Police Service ("the Public Body" or "EPS") pursuant to the *Freedom of Information and Protection of Privacy Act* ("the Act") for, "…all records relating to the subject matter of complaints involving the conduct of members of the Downtown Division Squad C-2, which are referred to in the decision of Insp. Redford dated November 13, 2006, concerning the discipline of [a named EPS officer]."

[para 2] The decision of Inspector Redford dated November 13, 2006 makes reference to occurrences involving Squad C2 namely:

1. The filing of a grievance against [a named EPS officer] and other members of Squad C2 by Constable "A", a member of Squad C2 who had been subject of a non-voluntary transfer; the allegations of misconduct were investigated by the EPS Internal Affairs Section (IAS).

2. The filing of a memorandum of complaint against the actions of Constables #1 and #2, members of Squad C2, by Constable "B", a member posted elsewhere in Downtown Division. Those actions were also subject of an investigation by the IAS.

3. The suspension with pay of another member of Squad C2 as a result of allegations in the grievance filed by Constable "A" and other public complaints.

4. The non-voluntary transfer of Constables #1 and #2 as a result of an allegation in the grievance filed by Constable "A", allegations in the memorandum filed by Constable "B", and other public complaints.

(Decision of Inspector Redford, dated November 13, 2006 at page 1)

[para 3] On December 3, 2010, the Public Body responded to the Applicant's request. The Public Body advised the Applicant that there were 3079 pages of records responsive to its request but all were being withheld pursuant to section 17 of the Act. Some records were also withheld pursuant to sections 20(1)(g) and 27(1) of the Act.

[para 4] On December 15, 2010, the Applicant requested that the Office of the Information and Privacy Commissioner ("this Office") review the Public Body's response to its access request. The Commissioner assigned a portfolio officer to investigate and attempt to resolve the issues between the parties. This was not successful and on August 15, 2012 the Applicant requested an inquiry. After I reviewed the records at issue, I invited several third parties to participate as undisclosed affected parties. Two of the individuals responded to this Office's invitation and were added as Affected Parties to the inquiry on November 13, 2013.

[para 5] I received initial and rebuttal submissions from both the Applicant and the Public Body. The Public Body also provided *in camera* submissions as part of its initial submission. I did not receive any submissions from either Affected Party. I also received further submissions from the Applicant and Public Body in response to several questions I asked regarding the records at issue.

II. RECORDS AT ISSUE

[para 6] The records at issue for this inquiry are the 3079 pages of responsive records which were withheld in their entirety by the Public Body.

III. ISSUES

[para 7] The Notice of Inquiry dated November 13, 2013 listed the issues in the inquiry as follows:

> **Issue A: Does section 17(1) of the Act (disclosure harmful to personal privacy) apply to the records at issue?**
>
> **Issue B: Did the Public Body properly apply section 20(1) of the Act (disclosure harmful to law enforcement) to the records at issue.**
>
> **Issue C: Did the Public Body properly apply section 21(1) of the Act (disclosure harmful to intergovernmental relations) to the records at issue?**
>
> **Issue D: Did the Public Body properly apply section 24(1) of the Act (advice, etc. from officials) to the records at issue?**
>
> **Issue E: Did the Public Body properly apply section 27(1) of the Act (privileged information, etc.) to the records at issue?**

IV. DISCUSSION OF ISSUES

Preliminary Issue: Responsive Records:

[para 8] Although not an issue in this inquiry, the Applicant asked that I review all the records which the Public Body indicated were not responsive to its request to ensure that those records were, in fact, not responsive.

[para 9] With the exception of four records, all of the non-responsive records were blank pages. Page 2165 was listed as non-responsive in the index the Public Body provided as part of its initial submissions (page 3). It appears as though this page was mistakenly included in the 'not responsive' section of the Public Body's index. The actual record is responsive and the Public Body has applied section 17 of the Act to it.

[para 10] Pages 2622, 2630, and 2631 of the records at issue were removed from the copy of the records I received from the Public Body. Instead, the Public Body provided affidavit evidence that these pages related to another complaint and were, therefore, not responsive to the Applicant's request. Generally, I would need to review the records to ensure that this is correct and would ask the Public Body to provide me with a copy of those pages. However, given my finding below, this would not be a useful exercise as section 17 of the Act would be properly applied to the records if they were responsive.

[para 11] Therefore, I see nothing in the non-responsive records that ought to be disclosed to the Applicant.

Issue A: Does section 17(1) of the Act (disclosure harmful to personal privacy) apply to the records at issue?

[para 12] Section 17 of the Act prohibits public bodies from disclosing a third party's personal information when the disclosure of that information would be an unreasonable invasion of the third party's personal privacy.

[para 13] Personal information is defined by 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 14] The records contain information about EPS members and other third parties that include their names, identifying numbers, criminal or employment history and opinions about the third parties. As such, I find that the information severed was personal information of third parties.

[para 15] Section 17(2) of the Act lists circumstances in which the disclosure of information would not be an unreasonable invasion of personal privacy. None of those circumstances apply in this inquiry.

[para 16] Section 17(4) of the Act lists circumstances in which the disclosure of a third party's personal information is presumed to be an unreasonable invasion of the third party's personal privacy. The portions of section 17(4) of the Act which are potentially relevant in this inquiry state:

> *17(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,*

[para 17] The Public Body argues that section 17(4)(b) of the Act applies to the records at issue because the records are an identifiable part of a law enforcement record. Section 1(h) of the Act defines "law enforcement" as follows:

> *1(h) "law enforcement" means*
>
> *(i) policing, including criminal intelligence operations,*
>
> *(ii) a police, security or administrative investigation, including the complaint giving rise to the investigation, that leads or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the investigation or by another body to which the results of the investigation are referred, or*

> *(iii) proceedings that lead or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the proceedings or by another body to which the results of the proceedings are referred;*

[para 18] The records are files from the Professional Standards Branch of the EPS. This branch was investigating complaints made against officers that the officers breached the *Police Act* and the *Police Service Regulation*. The breaches could lead to sanctions or penalties pursuant to those pieces of legislation. Therefore, I find that the records at issue are an identifiable part of a law enforcement record pursuant to section 17(4)(b) of the Act.

[para 19] As well, previous orders issued by this office have found that police disciplinary records, including records of disciplinary hearings, contain information that relates to EPS members' employment history (see Order F2013-01 at para 14). Thus there is a presumption that the release of this information would be an unreasonable invasion of a third party's personal privacy pursuant to section 17(4)(d) of the Act.

[para 20] On review of the records at issue, I also find that section 17(4)(g)(i) of the Act applies to the information severed, as names of third parties appear in the records along with other personal information about the third parties such as their employment or criminal history.

[para 21] Although I have found that sections 17(4)(b), 17(4)(d) and 17(4)(g) of the Act create a presumption that disclosing a third party's personal information from the records would be an unreasonable invasion of his or her personal privacy, it is still necessary to examine the factors listed in section 17(5) of the Act to determine if there are any overriding factors weighing in favour of disclosure.

[para 22] 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 23] The Public Body argues that none of the factors in section 17(5) of the Act weigh in favour of disclosure. It states that the disclosure of the records (and specifically that third parties were charged or had behaved in a particular manner) would cause unfair harm and damage to the third parties' reputation. The Public Body also notes that some of the Affected Parties have objected to the release of the information.

a. Public scrutiny:

[para 24] The Applicant argues that section 17(5)(a) of the Act applies and weighs strongly in favour of disclosure, such that the records ought to be released. The Applicant notes that there may be a "code of silence" that exists within the Public Body wherein EPS members are discouraged from complaining about the conduct of another member. The result of this "code of silence" is that alleged crimes committed by members of the EPS cannot be properly investigated and offending officers cannot be properly punished. In support of this theory, the Applicant states that the Law Enforcement Review Board ("LERB") has found that the "code of silence" was present in Squad C2 and the EPS. As well, he quotes a news story in which a former EPS member states that he believes that there was corruption that was being covered up by other members of the EPS.

[para 25] In order for section 17(5)(a) of the Act to apply, an activity of the Public Body must have been called into question, necessitating the disclosure of personal information to subject the activities of the Public Body to scrutiny (Order F2004-015, at para 88). In this case, the Applicant believes that for the reasons just discussed, the Public Body was unable to or unwilling to fully investigate complaints against EPS members made by other EPS members.

[para 26] The following three factors should be considered (although all do not need to be met) in order for section 17(5)(a) to apply:

a) whether more than one person has suggested that public scrutiny is necessary;

b) whether the applicant's concerns are about the actions of more than one person within the public body; and

c) whether the public body has previously disclosed a substantial amount of information or has investigated the matter in issue.

(Order 97-002 at paras 94 and 95 and Order F2004-015 at para 88)

[para 27] In this inquiry, only the Applicant (an organization) has suggested that public scrutiny is necessary. That being said, I do not find this factor determinative of whether section 17(5)(a) of the Act would apply. In Order F2006-030, former Commissioner Work stated that this factor is:

> …less significant where the activity that has been called into question, though arising from a specific event and known only to those immediately involved, is such that it would be of concern to a broader community had its attention been brought to the matter…
>
> (Order F2006-030 at para 23)

[para 28] Further, I believe that there are concerns about the actions of more than one person within the Public Body. As well, to the best of my knowledge, the Public Body has not previously disclosed the records requested by the Applicant. Based on the factors, I find that section 17(5)(a) of the Act is applicable and weighs in favour of disclosure.

[para 29] However, the issue of public scrutiny within the context of police disciplinary decisions was dealt with by the Court of Queen's Bench in *Calgary Police Service v. Alberta (Information and Privacy Commissioner)*, 2010 ABQB 82 ("CPS decision"). In that decision, Justice McMahon found that while public scrutiny may be desirable, that role is adequately fulfilled by the public membership on the Police Commission and the LERB and no further public scrutiny was necessary.

[para 30] The records at issue in the CPS decision were disciplinary decisions and not records of the police investigations that led to the disciplinary decisions, which is the case in this inquiry. However, I believe that the CPS decision is applicable to this inquiry.

[para 31] Arguably (though not the case here, as I will explain), if a police investigation did not lead to a disciplinary hearing, it is possible that there would be no public oversight by a Police Commission or the LERB. In such situations, the CPS decision may be distinguishable. However, that is not the case in this inquiry. I confirmed with the Public Body that all of the matters which were under investigation proceeded to a disciplinary hearing and criminal hearings.

[para 32] In its additional submissions to me, the Public Body clarified the process by which a complaint proceeds through investigation. The Public Body explained that public complaints are dealt with by the Chief of Police with some limited exceptions. The Chief of Police may dismiss frivolous and vexatious complaints or complaints made more than a year after the conduct complained of. Following this initial stage, the Public Body explained that:

> If a complaint regarding the conduct of a police officer is not dismissed at the initial stage, it is investigated by the chief of police pursuant to section 45 [of the *Police Act*]. Where the chief of police is of the opinion that the actions of the police officer constitute a contravention of the regulations governing the discipline or the performance of duty of police officers, the chief, or a police officer designated by the chief, shall conduct a hearing (section 45(3) [of the *Police Act*]). However, if the chief of police is of the opinion that the contravention is not of a serious nature, the chief may dispose of the matter without conducting a hearing (section 45(4) [of the *Police Act*]).
>
> …
>
> Throughout the course of an investigation, the chief of police must advise the complainant in writing at least once every 45 days as to the progress of the investigation (section 45(7) [of the *Police Act*]) and must provide a copy of this document to the Commission (section 45(8) [of the *Police Act*]). The Commission is also empowered to extend the time for the laying of charges and the commencement of a hearing (*Police Services Regulation*, section 7).
>
> Once a matter is dealt with and a disposition letter provided to a public complainant and the police officer, a public complainant or police officer may bring an appeal regarding the matter to the Law Enforcement Review Board ("LERB") (section 48 [of the *Police Act*]).
>
> (Public Body's additional submissions, page 2)

[para 33] All of the investigations at issue in this inquiry proceeded past the initial stage, to a disciplinary hearing before a designate of the Chief of Police. Criminal hearings were also held regarding allegations of criminal conduct uncovered in the investigations. None of the matters at issue in this inquiry were appealed to the LERB. This also appears to be true of the matters before the Court in the CPS decision. While the disciplinary hearings at issue did not go before the LERB in the CPS decision, the Court still found that the need for public scrutiny was met by the process set out in the *Police Act* (summarized above) apparently by the fact there is public membership on the Police Commission, and by the oversight role the Police Commission has in such matters. In the matters in this inquiry, the Commission was likely involved in granting time extensions but it does not appear to have been actively involved in substantive aspects of these cases, and I am not sure that there was much oversight of the details of the investigations themselves. However, because it is also unclear how the Police Commission exercised its oversight role in the decisions at issue in the CPS decision, I am not able to distinguish the CPS decision on this point.

[para 34] I find that section 17(5)(a) of the Act weighs in favour of disclosure. However, I believe that all of the records at issue in this inquiry fall within the principles articulated by the Court in the CPS decision. Therefore, I am bound by the CPS decision. As a result I must find that while section 17(5)(a) of the Act does weigh in favour of disclosing the records, the need for public scrutiny of the Public Body has been met by the Police Commission, in accordance with the CPS decision.

b. Unfair damage to reputation:

[para 35] The Public Body argues that third parties' reputations will be unfairly damaged if the disciplinary records were disclosed to the Applicant (section 17(5)(h)).

[para 36] In order for section 17(5)(h) of the Act to weigh against the disclosure of the records at issue, the damage to the Affected Parties' reputations must be unfair. The Court in the CPS decision found that where a matter was referred to the Minister of Justice so that criminal charges could be filed, there may be some reputational harm but no more than any other member of the public in a sensitive position. The Court felt the same about disciplinary decisions that result from criminal charges. Alternatively, the Court in the CPS decision found that where a disciplinary decision did not involve or result from a criminal offence, section 17(5)(h) of the Act would weigh in favour of not disclosing the record.

[para 37] In this inquiry I am faced with the former situation. The disciplinary investigations led to criminal charges. However, I note that the Applicant is seeking not only the disciplinary decisions, but the entire disciplinary file which may include untested allegations. With regard to that information, I believe that section 17(5)(h) of the Act would weigh in favour of withholding it.

c. Third Parties object to the release of their information:

[para 38] The Public Body advised (with greater detail in its *in camera* submission) that some of the Affected Parties objected to the release of some of the records at issue. While not an enumerated factor under section 17(5) of the Act, this is a valid factor for the Public Body to consider. It is also one that would weigh in favour of not disclosing the records at issue.

d. Conclusions on section 17 of the Act:

[para 39] The only section 17(5) factor that weighs in favour of disclosing information in the records at issue is section 17(5)(a) of the Act. However, as per the CPS decision, I find that this factor is satisfied by the public membership of the Police Commission, such that no further public scrutiny is desirable. Therefore, I find that the Public Body properly withheld the records at issue in their entirety pursuant to section 17 of the Act.

Issue B: Did the Public Body properly apply section 20(1) of the Act (disclosure harmful to law enforcement) to the records at issue.

Issue C: Did the Public Body properly apply section 21(1) of the Act (disclosure harmful to intergovernmental relations) to the records at issue?

Issue D: Did the Public Body properly apply section 24(1) of the Act (advice, etc. from officials) to the records at issue?

Issue E: Did the Public Body properly apply section 27(1) of the Act (privileged information, etc.) to the records at issue?

[para 40] As I have decided that section 17 of the Act was properly applied to all records at issue, I will not make any further findings regarding the other sections applied by the Public Body.

V. ORDER

[para 41] I make this Order under section 72 of the Act.

[para 42] I find that the Public Body properly applied section 17 of the Act to the records at issue.

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Keri H. Ridley
Adjudicator