ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2015-30

October 16, 2015

EDMONTON POLICE SERVICE

Case File Number F6957

Office URL: www.oipc.ab.ca

Summary: An individual made an access request to the Edmonton Police Service (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for a copy of an EPS Disciplinary Decision involving a named constable with the EPS (the Decision).

The Public Body located the Decision and provided a copy to the Applicant withholding information under sections 17, 18, and 20 of the FOIP Act. The Applicant requested a review of the Public Body's decision.

Prior to the inquiry, the Public Body claimed informer privilege (under section 27) over the information to which it had applied sections 18 and 20. The Public Body refused to provide that information to the Adjudicator for the inquiry. As such, the Adjudicator was not in a position to decide the issue of whether the Public Body had properly applied sections 18, 20 or 27 of the Act to the records withheld under section 27. The inquiry proceeded on the issue of section 17 only.

The Adjudicator found that section 17 applied to two names in the Decision that were withheld under section 17 only, but not the third. The Adjudicator ordered the Public Body to disclose the latter information.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 17, 52, 71, 72.

Order Cited: AB: 97-002, 2001-013, F2003-002, F2004-015, F2008-028, F2013-01, F2014-16.

I. BACKGROUND

[para 1] An organization (the Applicant) made an access request to the Edmonton Police Service (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for a copy of an EPS Disciplinary Decision involving a named constable with the EPS (the Decision).

[para 2] The Public Body provided the Applicant with a copy of the Decision, consisting of 40 pages, but withheld some information under sections 17, 18 and 20 of the FOIP Act. Prior to the inquiry, the Public Body also identified section 27 as applying to some information in the Decision.

[para 3] The Applicant sought a review of the Public Body's response. An investigation was authorized to attempt to settle the matter. This was not successful and an inquiry was set down.

[para 4] The Public Body initially applied section 17 in conjunction with sections 18 and 20 to some information in the records, and section 17 alone to other information. Applicant's request for inquiry specified that it did not dispute the application of exceptions to information that would identify a confidential informant. By letter dated May 26, 2014, I told the Applicant that it was my understanding that it was interested only in the information to which section 17 alone had been applied and asked the Applicant to comment on whether this understanding was correct. The Applicant did not respond to my letter.

[para 5] By letter dated June 9, 2014, the Public Body provided me with a new copy of the records at issue. It had decided to apply sections 20(1)(d) and 27(1)(a) to some of the information to which it had previously applied only section 17. By letter dated June 16, 2014, I asked the Public Body to send a new copy of the records to the Applicant that clearly marked to what information the Public Body was *newly* applying section 20(1)(d) and 27(1)(a). I also asked the Applicant to review the Public Body's new decision and inform me whether its request for inquiry now included the information to which only 17 *had* been applied but to which the Public Body has recently decided to also apply sections 20(1)(d) and 27.

[para 6] The Applicant was informed that if it did not respond, I would conclude that it was interested only in the information to which section 17 alone continued to be applied. The Applicant did not respond to that letter.

[para 7] However, in its rebuttal submissions, the Applicant included arguments regarding a name that had been withheld under sections 17, 20 and 27, as well as an

address withheld under section 20 (and possibly 27) – i.e. information that had been excluded from the scope of the inquiry with the tacit agreement of the Applicant.

[para 8] On March 12, 2015 I met with the parties to clarify the issues for the inquiry. It became clear that while the Applicant was not interested in the identity of the informant, it was interested in some of the information withheld by the Public Body under sections 20 and 27 (specifically, the name of a detective).

[para 9] In order to be able to make a decision regarding the Public Body's application of sections 20 and 27, I asked the Public Body to provide me with a complete copy of unredacted records. The Public Body asked for an opportunity to respond in writing. By letter dated March 12, 2015, I asked the Public Body to also to respond to the options I presented in the meeting, which were:

- providing me with a copy of the records with redactions only of the names individuals to which sections 20 and 27 have been applied; and/or
- my attendance at the Public Body in order to view an unredacted copy of the records.

[para 10] By letter dated April 10, 2015, the Public Body refused to provide an entirely unredacted copy of the records at issue. It argued that the information it is withholding under sections 20 and 27 of the FOIP Act is subject to informer privilege, and that section 56(3) of the FOIP Act does not authorize me to compel information over which informer privilege has been claimed. Both the Applicant and the Public Body provided further submissions on this point.

[para 11] On June 18, 2015, I sent the Public Body a notice under section 56(2) of the Act to produce the records over which it is claiming informer privilege, so that I could decide whether the Public Body had the authority to withhold those records under the Act.

[para 12] On June 22, 2015, the Public Body filed an application for judicial review of my decision to require it to produce the records in question. I am therefore unable, at this time, to proceed with the issue regarding the application of sections 18, 20 and 27, as the Public Body has not provided me with the information withheld under those provisions. I reserve my decision on these issues, pending the outcome of the application for judicial review.

[para 13] The Applicant's rebuttal submissions also referred to an address being withheld in the records at issue. The parties discussed this information in our meeting of March 12, 2015; in my letter to the parties following that meeting, I said:

> The Public Body has also agreed to confirm whether an item of information sought by the Applicant (an address) appears in the records at issue. The Applicant stated that if the Public Body confirms that this information does *not* appear in the records at issue, [it] would be satisfied with that response.

[para 14] The Public Body confirmed, by letter dated March 20, 2015, that the address sought by the Applicant does not appear in the Decision. Therefore, that information is not at issue.

II. RECORDS AT ISSUE

[para 15] The records at issue consist of those portions of the Decision that were withheld by the Public Body relying only on section 17(1) of the FOIP Act.

III. ISSUES

[para 16] The issue set out in the Notice of Inquiry dated September 5, 2014, is as follows:

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

IV. DISCUSSION OF ISSUES

Is the information personal information?

[para 17] Section 1(n) defines personal information under the Act:

> *1 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;*

[para 18] The information withheld under section 17 alone is comprised of the names of the Crown Prosecutor, a Constable and a Detective, who were witnesses in the disciplinary proceeding that resulted in the Decision.

[para 19] Names and contact information of third parties are personal information under the FOIP Act. However, the disclosure of the names and job titles of individuals acting in their professional capacities is not an unreasonable invasion of personal privacy under section 17 (see Orders 2001-013 at para. 88, F2003-002 at para. 62, F2008-028 at para. 53) unless that information has a personal dimension in the circumstances.

[para 20] The Public Body acknowledges that

> [a]lthough the names and job titles/positions of third parties are strictly speaking, "personal information" under the Act, it has been noted that this alone may not suffice as "there is no personal dimension" to that information. Where, however, there is associated information that suggests that an individual performing "work-related responsibilities" was "wrongful" or may have an adverse effect on the individual, there is a personal dimension. (Initial submission, para 19)

[para 21] The Public Body argues that, in this case

> … the [Decision] contains comments by the Presiding Officer, or in the case of the Detective, allegations by the cited officer, that could be interpreted to have an adverse effect on the Third Parties. As such, there is the necessary personal dimension in this case so that what might seem innocuous information ought not to be disclosed. (Initial submission, para. 20)

[para 22] I agree with the Public Body that there is a personal dimension to the information about the Detective. Although he is not the subject of the Decision, allegations were made against him by the officer who was the subject of the Decision (the cited officer), and the propriety of the Detective's actions are discussed in the Decision. Specifically, the testimony cited in the Decision alleges that the Detective may have provided bad or erroneous advice to the cited officer, which calls his competence and/or integrity into question. I will consider whether the factors in section 17 weigh in favour of, or against, the disclosure of the Detective's name.

[para 23] There is far less information in the Decision about the Constable, and that information does not relate to the propriety of the Constable's actions in the same manner as the information about the Detective. I am inclined to find that the information about the Constable does *not* have a personal dimension such that section 17(1) could apply; however, the Decision refers to the Constable as being the Detective's partner. Therefore, it seems to me that revealing the Constable's name would also reveal the Detective's name. If I find that the Detective's name cannot be withheld under section 17(1), then the same finding will be made about the Constable's name. However, if I find that the Detective's name was properly withheld, the same finding will be made about the Constable's name.

[para 24] The third name withheld under section 17(1) only is the name of the Crown Prosecutor. The information about the Crown Prosecutor in the Decision relates only to her job duties as a Crown Prosecutor. I cannot find anything in the Decision that would have an "adverse effect" on the Crown Prosecutor such that the information about her had a personal dimension, as argued by the Public Body. The information relates the testimony of the Crown Prosecutor, which is comprised of her recollection of her interaction with the cited officer that occurred as part of her job duties. The Public Body has not identified any particular information in the Decision that could adversely affect the Crown Prosecutor. Part of the Decision provided to the Applicant reveals comments made by the presiding officer about the actions of the Crown Prosecutor that appear to be only a narrative of relevant facts, and do not seem to include any judgment about whether those actions were appropriate. For these reasons, I find that the information about the Crown Prosecutor does not have a personal dimension such that her name can be withheld under section 17. I will therefore order the Public Body to disclose her name to the Applicant.

Would disclosure be an unreasonable invasion of a third party's personal privacy?

[para 25] Section 17 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*
>
> *(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,*
>
> *…*
>
> *(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,*
>
> *…*
>
> *(c) the personal information is relevant to a fair determination of the applicant's rights,*
>
> *…*
>
> *(e) the third party will be exposed unfairly to financial or other harm,*
>
> *(f) the personal information has been supplied in confidence,*
>
> *…*
>
> *(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 provide by the applicant.*

[para 26] Section 17 is a mandatory exception: if the information falls within the scope of the exception, it must be withheld.

[para 27] Under section 17, if a record contains personal information of a third party, section 71(2) states that it is then up to the applicant to prove that the disclosure would not be an unreasonable invasion of a third party's personal privacy.

[para 28] Neither party has argued that section 17(2) or (3) apply to any of the withheld information, and from the face of the records, neither provision appears to apply.

Section 17(4)

[para 29] The Public Body argues that sections 17(4)(b), (d) and (g) apply to the personal information, creating a presumption that disclosing the information would be an unreasonable invasion of personal privacy.

[para 30] Section 17(4)(b) creates a presumption against disclosure of information contained in an identifiable part of a law enforcement record. Law enforcement is defined in section 1(h) of the Act, to include:

> *1 In this Act,*
> *…*
>
> *(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 proceeding are referred;*

[para 31] The Public Body states that the Decision followed a disciplinary hearing that resulted from charges against the cited officer under the *Police Service Act* and Regulation, which resulted in a penalty or sanction. I agree that this meets the requirements for "law enforcement"; therefore, section 17(4)(b) applies, weighing against disclosure of the names of the Detective and Constable.

Section 17(4)(d)

[para 32] 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). Therefore, this section applies to the names of the Detective and Constable in the Decision; specifically, this provision weighs against disclosure.

Section 17(4)(g)

[para 33] The Public Body has disclosed information about the Constable and Detective but withheld their names. Section 17(4)(g) (third party's name with other information) applies, weighing against disclosure.

Section 17(5)

[para 34] The factors giving rise to a presumption that disclosing the personal information is an unreasonable invasion of personal privacy must be weighed against any factors listed in section 17(5), or other relevant factors, that weigh in favour of disclosure.

[para 35] The Applicant argues that the issue at inquiry is a matter of public interest and that section 17(5)(a) (disclosure desirable for public scrutiny) applies to the severed information.

[para 36] The Public Body argues that sections 17(5)(e), (f), (h) and (i) apply, weighing against disclosure.

Section 17(5)(a)

[para 37] In order for the desirability of public scrutiny to be a relevant factor, there must be evidence that the activities of the public body have been called into question, which necessitates the disclosure of personal information in order to subject the activities of the public body to public scrutiny. (See Order 97-002, at para. 94; Order F2004-015, at para. 88; Order F2014-16, at para. 34.)

[para 38] In Order F2014-16, the Director of Adjudication discussed appropriate factors to consider in determining whether public scrutiny is desirable. She said (at paras. 35-36):

> In determining whether public scrutiny is desirable, I may consider factors such as:
>
> 1. whether more than one person has suggested public scrutiny is necessary;
> 2. whether the applicant's concerns are about the actions of more than one person within the public body; and
> 3. whether the public body has not previously disclosed sufficient information or investigated the matter in question.
>
> (Order 97-002, paras 94 and 95; Order F2004-015, para 88).
>
> It is not necessary to meet all three of the foregoing criteria in order to establish there is a need for public scrutiny. (See *University of Alberta v. Pylypiuk* (cited above) at para 49.) For example, in Order F2006-030, former Commissioner Work said (at para 23) that the first of these 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", commenting that "[i]f an allegation of impropriety that has a credible basis were to be made in this case, this reasoning would apply".

[para 39] The Applicant states in its request for review, that:

> [i]t is important to [the Applicant] and the public to know the name of the officer who [the cited officer] said told her to lie and the name of the officer who corroborated her on that, whose evidence was rejected by the presiding officer.

[para 40] The Applicant further argued in its rebuttal submission:

> While it is true that the Merits Decision, on the face of it, concerns the actions of [the cited officer], the Merits Decision calls into question the actions of the EPS concerning how search warrants are carried out within the EPS. [the cited officer] gave evidence that Det. #1 counselled her to lie in order to get a search warrant. This is especially concerning given that Det. #2 named Det. #1 as the "guru of west division," which suggests that Det. #1 is often relied on to give advice about matters such as obtaining search warrants. If that is true, it is probably the case that other Information to Obtain search warrants ("ITO") have contained false or misleading information. This is especially concerning given that ITOs are sworn affidavits.
>
> If it is true that Det. #1 advised [the cited officer] to lie about what was put in her ITO, it is probably the case that Det. #1 has given similar advice to other officers on previous occasions. So, Det. #1 's practice of making misleading or false statements in ITOs may have spread to other members of the EPS. If that is the case, the public has an interest in holding the EPS accountable for that.

> It is also of note that Det. #1 is now employed in EPS' Homicide Division. This indicates that Det. #1 is now investigating serious crimes. This heightens the importance of disclosing this information to the public, as Det. #1 may be carrying on his practice of making misleading or false statements in ITOs within Homicide Division. (Rebuttal submission of the Applicant, at paras. 17-19, footnotes omitted)

[para 41] The Public Body states that the Applicant has not provided credible evidence that activities of the Public Body need to be scrutinized. Regarding the Applicant's argument cited above, the Public Body counters that "[t]he Applicant uses those unfounded allegations [made against the Detective in the Decision] to 'presume' that other officers consult with the Detective and that the Detective counsels them to lie 'in similar situations'. As such, the Applicant's broader institutional concerns are founded on speculation and unproven allegations." (Reply submission of the Public Body, at para. 13) The Public Body also noted that in the Decision the presiding officer who authored the Decision "did not find the cited officer's evidence [that the Detective told her to lie] to be credible" (Reply submission of the Public Body, at para. 19).

[para 42] I also note that while the Detective was not the subject of the hearing leading to the Decision, the presiding officer writing that Decision made a finding as to whether or not the Detective told the cited officer to lie. The unredacted portions of the Decision indicate that the Presiding Officer did not believe the cited officer's allegations that the Detective told her to lie (although his instructions were found to be 'very deficient and incomplete').

[para 43] I find that the Applicant has not provided credible evidence to suggest that activities of the Public Body require scrutiny. The unredacted portions of the Decision reveal that the actions of the Detective were called into question; however, there is no indication that the activities of the Public Body more broadly are being called into question, beyond this particular case in which the Detective may have provided deficient advice to a colleague. I may have found otherwise had the Applicant provided some evidence that the Detective routinely advised colleagues to lie or use misleading language on warrant applications or similar documents. However, the Applicant's arguments merely speculate that this is the case, and the records themselves do not support such a finding.

[para 44] I find that section 17(5)(a) does not apply to the names of the Detective or Constable in the Decision.

Conclusions under section 17

[para 45] I agree with the Public Body that sections 17(4)(b), (d), and (g) apply to the names of the Detective and Constable in the Decision. The Public Body has argued that several provisions in section 17(5) also weigh against disclosure of the information in the records. However, I find that there are no factors weighing in favour of disclosing the information; therefore, I do not need to consider whether additional factors weigh against disclosure.

[para 46] I find that the disclosure of the names of the Detective and Constable in the Decision would be an unreasonable invasion of privacy.

V. ORDER

[para 47] I make this Order under section 72 of the Act.

[para 48] I find that section 17 does not apply to the name of the Crown Prosecutor in the Decision. I order the Public Body to disclose that information to the Applicant.

[para 49] I find that section 17(1) applies to the names of the Constable and Detective that were withheld by the Public Body under that section alone, and that it would be an unreasonable invasion of third parties' privacy to disclose it. Under section 72(2)(b), I confirm the Public Body's decision to refuse access to that information.

[para 50] I make no findings or order, at this time, regarding the Public Body's application of sections 18, 20 and 27 of the Act to the information withheld under that section that was not provided to me in reliance on informer privilege. I reserve jurisdiction to deal with this information should circumstances permit this in the future.

[para 51] I order the Public Body to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

_____

Amanda Swanek
Adjudicator