ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2017-79

October 26, 2017

EDMONTON POLICE SERVICE

Case File Number F6957

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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. The inquiry proceeded in two parts.

Part 1 of the inquiry resulted in Order F2015-30, which addressed the Public Body's application of section 17(1) to three names in the Decision; those names were withheld under that provision only.

This Order concludes the second (and final) part of the inquiry, which addresses the Public Body's application of section 27(1)(a) to the name of a detective appearing in the records at issue.

The Adjudicator found that section 27(1)(a) applies to the name of the detective sought by the Applicant. The law on informer privilege is clear that it must be applied broadly, to include information that could implicitly reveal the identity of the informer (at paras. 22-23). Evidence provided by the Public Body *in camera* satisfied the Adjudicator that disclosing the name of the detective could lead to the identification of a confidential informant.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 27, 72.

Order Cited: AB: Orders F2015-30.

Cases Cited: *R. v. Leipert* [1997] 1 S.C.R. 281.

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 only to other information.

[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. This includes the name of a particular detective.

[para 6] 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 7] 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 8] 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. The inquiry was divided into parts; the first part of the inquiry addressed the Public Body's application of section 17(1) to three names in the records, which were withheld only under section 17(1). That part of the inquiry resulted in Order F2015-30. I reserved my decision on the Public Body's application of sections 17(1), 18, 20 and 27 to the remaining redacted information, pending the outcome of the application for judicial review.

[para 9] The Applicant's submissions to the judicial review proceedings stated that the Applicant believes that my "order" (the notice to produce records) should be quashed. As such, I informed the parties by letter dated March 1, 2017:

> It is my view that if neither party in this inquiry believes that the Public Body ought to provide me with the records I requested in my June 18, 2015 notice, the most expeditious manner to proceed is my rescinding that notice to produce records.
> …
>
> While the Public Body has withheld the remaining information at issue under sections 18, 20 and 27(1)(a), I [propose] to proceed only on the issue of section 27(1)(a), specifically the Public Body's claim of informer privilege. If I find that the Public Body properly claimed that privilege, the inquiry will be complete (subject to any judicial review of such an order). If I find that the Public Body has not properly claimed that privilege over any or all of the information, I can order the Public Body to provide me with that information so that I may address the application of sections 18 and 20 (subject to any judicial review of such an order). This approach has worked well in the past (see Order F2016-31; part 2 of that inquiry is currently ongoing) and it seems likewise appropriate here.

[para 10] The *Notice of Inquiry* for the second part of the inquiry was issued on March 31, 2017, listing the Public Body's application of section 27(1)(a) to information in the records at issue as the sole issue in the inquiry.

[para 11] The Applicant's submissions to the inquiry concerned only the disclosure of the name of a particular detective (Det. B); this is consistent with the Applicant's Request for Review, Request for Inquiry, and his November 19, 2014 submissions to the initial inquiry (those latter submissions also addressed the disclosure of an address; that address is no longer at issue for the reasons provided in Order F2015-30). As such, by letter to the parties dated June 29, 2017, I said:

> It seems nonsensical for me to make determinations about information the Applicant is not interested in. Therefore, unless the Applicant objects, I will assume that he is interested **only** in obtaining Det. B's name.

[para 12] The Applicant confirmed this by letter dated August 1, 2017. Therefore, this part of the inquiry deals with the Public Body's application of section 27(1)(a) to the name of Det. B appearing in the records at issue.

II. RECORDS AT ISSUE

[para 13] The records at issue consist of the Decision that was provided to the Applicant by the Public Body with information redacted. The name of Det. B is the only information at issue.

III. ISSUES

[para 14] The issue set out in the Notice of Inquiry dated March 31, 2017, is as follows:

> Does section 27(1)(a) of the Act (privileged information) apply to the information in the records?

IV. DISCUSSION OF ISSUES

[para 15] Although the name of the constable who is the subject of the Decision has been disclosed, she is referred to as "Cst. A" throughout the submissions.

[para 16] The name being sought by the Applicant is the name of Det. B. In related decisions by various bodies, Det. B has also been referred to as Det. #2. I will refer to this detective as Det. B.

Preliminary issue – sealing order

[para 17] Based on the Public Body's submission, I understand that the constable who was the subject of the Decision brought an appeal of that Decision before the Law Enforcement Review Board (LERB). She then sought a judicial review of the LERB decision. In the course of the judicial review, the Public Body sought an order from the court that the relevant file be sealed and that the name of "Det. #2" (Det. B) not be disclosed. That request was granted by Greckol J.; the Public Body provided me with a copy of the Order.

[para 18] The Public Body also provided an affidavit sworn on May 25, 2017, by a legal assistant to counsel acting on behalf of the Public Body in this inquiry. The affidavit states that the assistant reviewed the Public Body's brief prepared for the sealing order application; she states that the basis for seeking the order, as set out in the brief, was to protect information subject to informer privilege. The affidavit further states that the assistant requested a transcript of the application, but was denied on the basis that the matter was heard by the Court *in camera*. Copies of the assistant's request and response from the court Transcript Management Services were provided with the affidavit.

[para 19] The Public Body has argued that this sealing Order applies to this inquiry because, in granting the order, Greckol J. found that information in the LERB decision (specifically including the name of Det. B) was subject to informer privilege. The application of a sealing Order issued by the Court to separate proceedings such as this one is a matter that is beyond my area of expertise. I do not discount those arguments; however, I am able to make my finding in reliance on the FOIP Act, which is my home statute, rather than the law relating to sealing orders.

Does section 27(1)(a) of the Act (privileged information) apply to the information in the records?

[para 20] The Public Body has applied section 27(1)(a) to the information withheld in the Decision. Specifically, the Public Body argues that the information is protected by informer privilege. It further argues that informer privilege 'belongs to' the confidential informer, and therefore section 27(2) also applies. The relevant sections state:

[para 21] Section 27 of the Act states:

> *27(1) The head of a public body may refuse to disclose to an applicant*
>
> *(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,*
> *…*
>
> *(2) The head of a public body must refuse to disclose information described in subsection (1)(a) that relates to a person other than a public body.*
> *…*

[para 22] *R. v. Leipert* [1997] 1 S.C.R. 281 is a leading case on informer privilege. In that case the Supreme Court of Canada addressed whether an accused was entitled to receive details of an informer telephone tip to Crime Stoppers in order to make a full answer and defence. The Court stated (at paras. 14-15, 17-19, emphasis added):

> In summary, informer privilege is of such importance that it cannot be balanced against other interests. Once established, neither the police nor the court possesses discretion to abridge it.
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> (b) Who May Claim Informer Privilege?
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> **The privilege belongs to the Crown**: Solicitor General of Canada v. Royal Commission of Inquiry (Ontario Health Records), [1981] 2 S.C.R. 494. However, the Crown cannot, without the informer's consent, waive the privilege either expressly or by implication by not raising it: Bisaillon v. Keable, supra, at p. 94. **In that sense, it also belongs to the informer.** This follows from the purpose of the privilege, being the protection of those who provide information to the police and the encouragement of others to do the same. **This is the second reason why the police and courts do not have a discretion to relieve against the privilege.**
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> **…**

(c) The Scope of Informer Privilege

> Connected as it is to the essential effectiveness of the criminal law, informer privilege is broad in scope. While developed in criminal proceedings, it applies in civil proceedings as well: Bisaillon v. Keable, supra. It applies to a witness on the stand. Such a person cannot be compelled to state whether he or she is a police informer: Bisaillon v. Keable, supra. And it applies to the undisclosed informant, the person who although never called as a witness, supplies information to the police. Subject only to the "innocence at stake" exception, the Crown and the court are bound not to reveal the undisclosed informant's identity.
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> **Informer privilege prevents not only disclosure of the name of the informant, but of any information which might implicitly reveal his or her identity. Courts have acknowledged that the smallest details may be sufficient to reveal identity.** In R. v. Garofoli, [1990] 2 S.C.R. 1421, at p. 1460, Sopinka J. suggested that trial judges, when editing a wiretap packet, consider:
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> > . . . whether the identities of confidential police informants, and consequently their lives and safety, may be compromised, bearing in mind that such disclosure may occur as much by reference to the nature of the information supplied by the confidential source as by the publication of his or her name;
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> This principle was also confirmed by the British Columbia Court of Appeal in R. v. Hardy (1994), 45 B.C.A.C. 146, at p. 149:
>
> > It is well recognized that information which might identify a confidential informant need not be disclosed to the Justice of the Peace or at trial.
>
> Similarly, McEachern C.J.B.C. in the case at bar suggested (at para. 35) that an "accused may know that only some very small circle of persons, perhaps only one, may know an apparently innocuous fact that is mentioned in the document". He noted: "The privilege is a hallowed one, and it should be respected scrupulously".
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> **The jurisprudence therefore suggests that the Crown must claim privilege over information that reveals the identity of the informant or that may implicitly reveal identity**. In many cases, the Crown will be able to contact the informer to determine the extent of information that can be released without jeopardizing the anonymity of the tipster. The informer is the only person who knows the potential danger of releasing those facts to the accused. The difficulty in this case is that the identity of the informer is unknown. Therefore, the Crown is not in a position to determine whether any part of the information could reveal his or her identity. This led the Crown in the case at bar to claim privilege for all of the information provided by the informer. The extension of privilege to all information that could identify an informant justifies this claim in the case of an anonymous informant.

[para 23] From the above, it is clear that informer privilege belongs to both the Crown and the informer. It is also to be applied broadly, to any information that may implicitly reveal the identity of the informer.

[para 24] An affidavit sworn by the Public Body's Disclosure Analyst on April 9, 2015 (originally provided during Part 1 of the inquiry and provided again with the Public Body's initial submission to Part 2) provides context for the Decision. It states:

> 7. I am advised by [counsel for the Public Body], and believe to be true, that Cst. A has brought an application for judicial review of the decision of the Board. That application was heard before the Honourable Madam Justice Sulyma on January 27, 2015, and is currently under reserve.
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> 8. I am advised by [counsel for the Public Body], and believe to be true, that the criminal investigation from which the allegations of misconduct against Cst. A arose resulted in an individual being arrested and charged, although those charges were subsequently withdrawn.
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> 9. I am advised by [counsel for the Public Body], and believe to be true, that after criminal charges were laid and before those charges were withdrawn, counsel for the individual who was charged requested and received a package of disclosure (the "Disclosure") from the Crown with respect to those charges. That Disclosure identified Cst. A as being the investigating officer and also identified "Det. #2" by name as being Cst. A's partner in the investigation. That Disclosure also contained certain information that, taken together with information from the Board Decision and other information known to the individual who was charged, could identify the confidential source to the individual who was charged. The name of "Det. #2" as being Cst. A's partner in the investigation would assist in connecting the information about Cst. A's conduct set out in the Board Decision to the information in the Disclosure.

[para 25] Having reviewed the Public Body's submissions, I was not persuaded that the disclosure of Det. B's name could reveal the identity of an informant. By letter dated June 29, 2017, I asked the Public Body to provide more information as to how the name of Det. B could reveal the identity of a confidential informant such that informer privilege applies.

[para 26] The Public Body responded by letter dated July 19, 2017, and applied to have its response accepted *in camera*, in its entirety (the letter itself was exchanged with the Applicant). The reasons provided for this request are in part:

> In the Response, in explaining how the name of Det. B could reveal the identity of the Informer, the EPS provides other additional information which might itself reveal the identity of the Informer. This entire inquiry relates to the EPS' decision to redact information from the Disciplinary Decision pursuant to section 27(1)(a) of the Act for the purpose of protecting informer privilege. If the Response was not made *in camera*, it would defeat this very purpose.
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> ...
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> Additionally, as was set out in its Initial Submissions, the EPS provided a written brief (the "Brief") to Greckol J. in support of its application for an order restricting court access. The application was allowed and Greckol J. ordered that, among other things, the court file be sealed. As such, the Brief itself is subject to a sealing order. The Response includes the very same level of detail as the Brief. Because the Brief is subject to a sealing order and the Response includes the very same level of detail as the Brief, the Response must be *in camera.*

[para 27] I accepted the Public Body's response *in camera*; having reviewed the response, I agreed that exchanging the contents of the Public Body's response would undermine the purpose of the Public Body's application of section 27(1)(a).

[para 28] Because I have accepted the Public Body's response *in camera*, and particularly since the information in that response could lead to an accurate inference regarding the identity of Det. B and the identity of the informer, I can provide only very general reasons for my decision in this public Order.

[para 29] The Public Body's response provided details about the events leading up to the disciplinary proceedings that resulted in the Decision. The Public Body's response also clarified arguments made in its earlier exchanged submissions. Specifically, the Public Body had argued in an exchanged submission that information disclosed in a separate process (which occurred before all parts of this inquiry) could be combined with the name of Det. B in such a way that could lead to an accurate inference regarding the identity of the confidential informant. The *in camera* submission made clear to me how this could be the case.

[para 30] These details, along with the Public Body's initial submission, satisfy me that disclosing the name of Det. B could reasonably be expected to reveal the name of the confidential informant. This is sufficient to fulfill the criteria set out by the Supreme Court in *R v. Leipert* for informer privilege.

[para 31] I find that the Public Body properly applied section 27(1)(a) to the information at issue in this inquiry: the name of Det. B. I also agree with the Public Body that because informer privilege also belongs to the informer, section 27(2) applies such that the Public Body is prohibited from disclosing that information.

V. ORDER

[para 32] I make this Order under section 72 of the Act.

[para 33] I find that section 27(1)(a) applies to the name of Det. B in the Decision. Under section 72(2)(b), I confirm the Public Body's decision to refuse access to that information.

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Amanda Swanek
Adjudicator