

ALBERTA INFORMATION AND PRIVACY COMMISSIONER

Report on Investigation Regarding
Collection, Use and Disclosure of Personal Information
And
Protection of Personal Information

September 10, 2007

Alberta Energy and Utilities Board
(Investigation #F4138)

Investigation Report F2007-IR-005

I. INTRODUCTION

[para 1] On June 19, 2007, the Edmonton Journal reported that the Alberta Energy and Utilities Board (“the EUB”) had hired four private investigators to “spy” on landowners and individuals during proceedings held at Rimbey, Alberta. The proceedings were part of the EUB hearing to consider applications for a proposed 500 kilovolt transmission line between Edmonton and Calgary, associated facilities and alterations to the Genesse substation. The article said the landowners believed the private investigators may have collected and disclosed information to the EUB, including conversations between the landowners and their lawyers.

[para 2] In a subsequent article dated June 20th, 2007, the Edmonton Journal reported that one of the private investigators posed as “an aggrieved landowner” to participate in at least one conference call, which involved landowners and groups who opposed major power-line projects.

[para 3] On June 26th, 2007, the Commissioner issued a news release announcing his decision to conduct an investigation on his own motion under the Freedom of Information and Protection of Privacy Act (“the FOIP Act”) in relation to allegations that the private investigators may have collected, used or disclosed personal information on behalf of the EUB.

[para 4] The Commissioner authorized me to investigate this matter and this report outlines my findings and recommendations.

II. COMMISSIONER'S AUTHORITY

[para 5] The Commissioner is an Officer of the Legislature and his Office is separate and independent of government. Under section 53(1)(a) of the FOIP Act, the Commissioner has the authority to conduct investigations to ensure public bodies are in compliance with any provision of the FOIP Act.

III. ISSUES

[para 6] The EUB is a "public body" subject to the provisions of the FOIP Act.

[para 7] There are no provisions in the FOIP Act governing a public body's staffing decisions. Therefore, this investigation has no authority to review or comment on when the EUB should or should not employ external parties such as private investigators.

[para 8] However, once the EUB hired the private investigators, these individuals are "employees" of the EUB under the FOIP Act for the services they are contracted to perform for the EUB. Section 1(e) of the FOIP Act states:

1 In this Act,

(e) "employee", in relation to a public body, includes a person who performs a service for the public body as an appointee, volunteer or student or under a contract or agency relationship with a public body

[para 9] The definition of "employee" includes "a person", which can be an individual or a corporation (Order 96-019 [68] and Order 97-003 [17]). Public bodies are held accountable under the FOIP Act for the actions of their employees (Order 99-032 [51]).

[para 10] The FOIP Act sets out the circumstances under which a public body may collect, use or disclose personal information. Therefore, the Commissioner has jurisdiction over the EUB to review whether the private investigators had collected, used or disclosed personal information in contravention of Part 2 of the FOIP Act.

[para 11] Section 38 of the FOIP Act requires public bodies to protect personal information against such risks as unauthorized access, collection, use, disclosure or destruction. Consequently, the Commissioner can review whether the EUB had made reasonable security arrangements to protect personal information when it employed the private investigators.

[para 12] In summary, the issues of this investigation are:

1. Did the EUB collect, use or disclose personal information in contravention of Part 2 of the FOIP Act?
2. Did the EUB make reasonable security arrangements to protect personal information against such risks as unauthorized access, collection, use, disclosure or destruction, as required by section 38 of the FOIP Act?

IV. INVESTIGATION FINDINGS

A. Background

[para 13] On March 12-13, 2007 and April 16-17, 2007, the EUB conducted a hearing in Red Deer, Alberta to consider applications for the proposed Edmonton-Calgary transmission line, associated facilities and alterations to the Genesee substation.

[para 14] On April 18, 2007, the EUB announced it had adjourned the hearing. The EUB said the adjournment was due to safety and security concerns after several incidents in which hearing participants and EUB staff were either threatened with violence or physically confronted by individuals who opposed the applications.

[para 15] The EUB issued a public notice on April 23, 2007 that it had decided to move to a written process for the hearing. All evidentiary submissions were to be made by the parties in writing. However, to allow parties an opportunity to make their case, the EUB said it would hold oral cross-examinations at the Provincial Court House in Rimbey, Alberta.

[para 16] The EUB said space in the Rimbey Court House was limited and only parties directly participating in the cross-examinations would be allowed into the courtroom. The EUB arranged for a live video feed of the cross-examinations at the nearby Rimbey Community Centre for individuals or parties who wished to watch the proceedings or were waiting to participate.

[para 17] The cross-examinations were held at Rimbey from May 14, 2007 to June 28, 2007.

B. Private Investigators Employed by the EUB

[para 18] The EUB described the hearing held in Red Deer as “extraordinary and unprecedented in terms of the conduct of participants”.

[para 19] The EUB provided this Office with an excerpt of the April 16th transcript of the Red Deer hearing. It is difficult to assess the conduct of participants from a transcript. However, in the transcript, it appears that there were interruptions and negative comments on the side while EUB staff and/or others were speaking to the panel. I noted that the panel Chair made a number of requests for individuals to return to their seats so that the hearing could proceed. I also noted some individuals objected to the proceedings and that the panel turned off the microphones at some point.

[para 20] The EUB said there were three incidents at the April 16th hearing in Red Deer. In the first incident, the EUB said an individual approached one EUB employee and swung twice at the employee’s head with a closed fist. The EUB said the employee was able to duck and none of the punches landed. The EUB provided this Office with a copy of a news video which showed a second incident involving an individual raising his hand close to another EUB employee’s neck and then grabbing the employee’s arm and pushing the employee aside. The EUB said the third incident occurred later that same day when a group of landowners attempted to prevent a lawyer from approaching the podium to give evidence by physically standing between the lawyer and the podium.

[para 21] In a letter to this Office, the EUB wrote:

“A few hearing participants stated publicly that there was a potential for more violent actions both in and outside the EUB hearing room; in fact, one of the landowners’ counsel stated on the record of the hearing that he sensed there was the potential for more of the disruptive behavior that took place in Red Deer...”

[para 22] After the Red Deer hearing was adjourned on April 17, 2007, the EUB conducted a threat assessment and decided additional security measures were required to ensure a safe environment for EUB personnel and all hearing participants.

[para 23] The EUB developed two security plans: one for the Rimbey Provincial Court House and one for the Rimbey Community Centre. The EUB said neither the local law enforcement (sheriffs) nor the RCMP would provide an ongoing security presence at the Rimbey Community Centre. The decision was made to engage the services of a private sector security company.

[para 24] On May 9th, 2007, the EUB’s Security Team Leader sent an email to the security company and the RCMP regarding the security arrangements for the Rimbey Court House and the Rimbey Community Centre.

[para 25] The email stated that the security company had been “contracted to provide a *covert security presence at the Rimbey Community Centre*” from May 14, 2007 to June 8, 2007. The security company would supply “one person” who would “provide intelligence gathering and observation for what takes place inside the facility” and “note and record any incidents of criminal activity or untoward behavior to the proprietor of the Rimbey Community Centre..and or law enforcement depending on the severity”. The email was copied to the three Board panel members and five EUB employees.

[para 26] The FOIP Act does not apply to private sector organizations. However, as stated earlier, the security company is an “employee” of the EUB under the FOIP Act for the services it was contracted to perform for the EUB.

[para 27] The security company sent three private investigators to the Rimbey Community Centre. Two of the private investigators were employees of the security company. The third private investigator was an independent service provider contracted by the security company. The three private investigators attended the Rimbey Community Centre at different times during the proceedings, with the intention that there would be at least one private investigator present at most times. A fourth private investigator was involved in the management and reporting of the security measures but did not attend the Rimbey proceedings.

[para 28] On June 8, 2007, one of the private investigators informed the EUB Security Team Leader that there were suspicions among the public participants at the Rimbey Community Centre that undercover private investigators may be present. Later that day, the EUB made the decision to end the services of the private investigators.

C. Did the EUB collect personal information?

1. Application of the FOIP Act

[para 29] Part 2 of the FOIP Act applies only to “personal information”. Section 1(n) of the FOIP Act defines “personal information” as “recorded information about an identifiable individual”. Personal information can include an individual’s name, telephone number, age, sex, marital status, political beliefs or associations, an individual’s personal views or opinions, etc. Only individuals can have “personal information”. An “individual” cannot include a corporation or any entity other than a single human being (Order 96-019 [68]).

[para 30] In the news articles, the landowners expressed concerns that the private investigators may have collected privileged or confidential information such as solicitor-client communications. However, if the information is not about an “identifiable individual”, it is not “personal information” and is not subject to Part 2 of the FOIP Act.

[para 31] The June 20th, 2007 news article stated that the “landowners and their lawyers have accused the private investigators of eavesdropping on their conversations, in violation of solicitor-client *privilege*”.

[para 32] In Order F2006-002, Commissioner Frank Work wrote:

[para 11] The Act clearly states that personal information must be recorded, that is, it must be contained in a record. In my view, the Legislature appears to have decided that personal information must be recorded in order to fulfill the purposes set out under section 2 of the Act, which includes rights of access and correction, and obligations of public bodies concerning the manner of collecting personal information.

[para 12] ...Merely hearing an individual’s personal information as a result of a conversation does not amount to a collection of that personal information under the Act, because there is no ability under the Act to access that personal information, or to correct it, or to control the manner in which it is collected.

[para 33] Consequently, personal information that the private investigators may have heard would not constitute a collection under the FOIP Act, unless that information was recorded, that is, contained in a record.

2. Information At Issue

[para 34] I reviewed the records relating to the communications between the security company/private investigators and the EUB.

[para 35] The private investigators reported to the EUB Security Team Leader the number of people in attendance at the Rimbey Community Centre on specific dates (e.g. 20 in morning, 18 in afternoon). An aggregate total is not “personal information” as the information is not about an identifiable individual.

[para 36] The private investigators also reported to the EUB Security Team Leader the names of some of the individuals at the Rimbey Community Centre, their organizational affiliations, email addresses, and telephone numbers. This information is “personal information” as defined by the FOIP Act.

[para 37] The private investigators provided descriptions of some individuals such as gender, age, hair colour. This information would only be “personal information” if the individuals to whom the information relates can be identified.

[para 38] One of the private investigators participated in a conference call on May 28th, 2007. The private investigator provided the names of the conference call participants to the EUB Security Team Leader. The private investigator called the EUB Security Team Leader on May 29th about the conference call. The records relating to that conversation contain names of some individuals, which is “personal information”, and some descriptions of individuals which may be “personal information” if the individuals can be identified.

[para 39] The private investigator also provided the EUB Security Team Leader with copies of an information handout regarding an upcoming 5-day Global Warming Action Camp; a one-page document entitled “Action Plan for Public Inquiry Letter”; a letter addressed to the Premier and the EUB Chair requesting a public inquiry into the approvals of power lines and power plants in Alberta; and a planned press release and backgrounder by groups opposed to power line and power plant projects. These documents contain the following personal information: names, telephone numbers, email addresses and organizational affiliations of contact individuals.

[para 40] Therefore, I find that the EUB did collect personal information. While the amount of the personal information collected is limited, the collection is subject to the provisions of the FOIP Act.

D. Was the personal information collected in contravention of Part 2 of the FOIP Act?

1. EUB Submissions

[para 41] On July 27th, 2007, I received a submission from the EUB that the personal information was collected pursuant to section 33(c) of the FOIP Act. Section 33(c) authorizes a public body to collect personal information if the information relates directly to and is necessary for an operating program or activity of the public body.

[para 42] I received a Supplemental Submission from the EUB on August 29, 2007, that section 33(b) of the FOIP Act was also applicable to its authority to collect the personal information. Section 33(b) authorizes a public body to collect personal information for the purposes of law enforcement.

2. Was the EUB authorized to collect the personal information under section 33(c) of the FOIP Act?

[para 43] The EUB said conducting public hearings of applications is one of its core businesses and is an operating program or activity of the EUB.

[para 44] The EUB said it had obligations under the law to ensure the facilities in which it conducted hearings were safe for EUB personnel and for others attending the hearings. The EUB referred to section 2(1) of the Occupational Health and Safety Act, R.S.A. 2000, c. 0-2, which reads:

2(1) Every employer shall ensure, as far as it is reasonably practicable for the employer to do so,

(a) the health and safety of

(i) workers engaged in the work of that employer, and

(ii) those workers not engaged in the work of that employer but present at the work site at which that work is being carried out, and...

[para 45] The EUB also said it was legally responsible for any damages to the Rimbey Community Centre, even if caused by a third party. The EUB claimed it was the "occupier" of the Rimbey Community Centre as that word is defined in the *Occupier's Liability Act*, R.S.A. 2000, c. 0-4. The relevant portions of that Act read:

5 An occupier of premises owes a duty to every visitor on the occupier's premises to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which the visitor is invited or permitted by the occupier to be there or is permitted by law to be there.

6 The common duty of care applies in relation to

(a) the condition of the premises,

(b) activities on the premises, and

(c) the conduct of third parties on the premises.

[para 46] I accept the EUB's submission that conducting hearings is an operating program or activity of the EUB. I also accept that the provision of a safe environment for its staff and hearing participants is part of the EUB's operating program or activity of conducting hearings. Therefore, section 33(c) of the FOIP Act would allow the EUB to collect personal information if that information relates directly to and is necessary for the safety and security of EUB staff and participants at its hearings.

[para 47] In my view, the EUB's concerns about safety and security at the Rimbey proceedings are understandable. The exchanges and comments, the requests from the panel Chair for individuals to return to their seats, and the turning off of the microphone by the panel members which were recorded in the April 16th, 2007 Red Deer hearing transcript and the incidents at the Red Deer hearing in which EUB employees were grabbed and pushed provide evidence that emotions were running high. Where there is sufficient anger to make physical contact, it creates an unpredictable situation where it is reasonable for the EUB to review its security arrangements.

[para 48] The opposition to the applications and the physical confrontations against EUB staff are referenced in the June 19th, 2007 Edmonton Journal article:

"...For months, the proposal to build the power line has angered landowners and townspeople along the route. That anger became evident during a recent series of public hearings.

In April, the panel restricted public participation at its hearings after an elderly woman allegedly "took a swing" at a lawyer...That altercation occurred after the meeting broke down in chaos, with irate landowners yelling at the panel and the panel chairman turning off a microphone that allowed them to pose questions..."

[para 49] The article also contained the following quote from a landowner:

"Yet another denial will very likely ignite even more serious opposition by growing groups from various facets of the citizenry demanding their democratic right, leading to the probability of more volatile actions both in and outside the EUB chambers".

[para 50] The article further stated the Edmonton Journal contacted the landowner regarding what he meant by "volatile actions" and that the landowner said, "I think there could be violence".

[para 51] The opposition to the applications before the EUB was also referenced in a subsequent Edmonton Journal article dated June 22, 2007:

"...earlier hearings in Red Deer were disrupted by yells, catcalls, shoving and- in one case - a 70-year-old woman's punch aimed at a staff member..."

[para 52] Given the circumstances at the Red Deer hearing I find it was reasonable for the EUB to ensure there were security measures in place for the Rimbey proceedings. However, I am not convinced that the personal information collected by the private investigators for the EUB was necessary for the provision of a safe environment for EUB staff and participants at the Rimbey proceedings, as required by section 33(c) of the FOIP Act.

[para 53] I found that:

1. The oral cross-examination proceedings were held at the Rimbey Court House, a separate building from the Rimbey Community Centre. I was told the distance between the two buildings was approximately 50 feet. The two buildings shared a parking lot.
2. Access to the Rimbey Court House was restricted. The EUB's security plan for the Court House included a sheriff at the front door to assist in ensuring that only authorized persons were allowed entry to the Court House.
3. The EUB had arranged for sheriffs to escort the panel members to and from the Rimbey Court House.

4. The security plan included two sheriffs and two EUB security staff members at the Rimbey Court House. Local law enforcement and the RCMP were on call.
5. Arrangements were made for a sheriff's highway patrol member and vehicle to attend daily in the mornings to monitor and assist if required. In addition, arrangements were made for the RCMP to show a security presence from time to time.

[para 54] In my opinion, the arrangements at the Rimbey Court House provided EUB staff and hearing participants with the safe environment required for the proceedings. I also believe the security arrangements taken at the Court House minimized the potential risk of disruptions to the proceedings and confrontations between hearing participants and protestors.

[para 55] The EUB advised me, when it ended the services of the security company on June 8th, it had determined at that time "that the other security arrangements for the hearing, namely limiting the public access to the hearing room in the Court House, had greatly reduced the risk that there *would be a repeat of the Red Deer incidents*". I also note that there was no security personnel at the Rimbey Community Centre after the services of the private investigators were terminated on June 8th. The Rimbey proceedings ended on June 28th. I believe this confirms my views that the security arrangements at the Rimbey Court House addressed the threats identified from the earlier Red Deer hearing.

[para 56] The EUB says the private investigators at the Rimbey Community Centre were to listen and observe for indications that individuals intended to disrupt the proceedings. The disruptions could include demonstrations, harm to or threats of harm to individuals participating in the cross-examination, or physical damage to the facilities.

[para 57] I asked the EUB whether uniformed security personnel could have been contracted for the Rimbey Community Centre. The EUB Security Team Leader said the private investigators were trained and experienced security personnel. However, the private investigators said they were instructed to observe and not to intervene in any disruptions but to contact the Security Team Leader, the RCMP or the community centre proprietor. It seems to me that uniformed security personnel would also be able to observe and report any incidents to the EUB Security Team Leader, the RCMP or the community centre proprietor. In addition, uniformed security personnel would provide a visible deterrent.

[para 58] I note that the EUB also had employees at the Rimbey Community Centre responsible for monitoring the audio and video feed. I appreciate these employees are not security personnel but it seems to me that they would also be able to report potential disruptions or incidents of physical damage to the facilities. The EUB employees informed me they had ongoing communication with the Court House via email and 2-way radio. I also note that after the decision was made on June 8th to remove the private investigators from the Community Centre, the expectation was that the EUB employee responsible for the audio and visual feed would contact the community centre proprietor if there were problems.

[para 59] The EUB said the private investigators were undercover because a visible security presence at the Rimbey Community Centre would have placed the security personnel at risk. However, the EUB communications personnel traveled between the Rimbey Court House and the Rimbey Community Centre during the proceedings without incidents. In

addition, EUB employees responsible for the audio and video equipment and system were also at the Rimbey Community Centre.

[para 60] There were generally one to two EUB employees at the Rimbey Community Centre at a given time. There were no physical barriers separating the EUB staff from the other individuals at the Rimbey Community Center. These employees said that, while they did not wear identification, it was known that they were employed with the EUB. One employee said there were a couple of times when that employee felt some concern about safety. However, the others said they did not feel threatened at the Rimbey Community Centre.

[para 61] With the exception of one employee, the others said they either did not know there were private investigators present at the Community Centre or who the private investigators were. Therefore, these employees would not have known who to turn to if they required security assistance.

[para 62] In relation to the collection of personal information by the private investigators, I believe the Commissioner's comments in Order F2005-003 are relevant. In that Order, Commissioner Frank Work reviewed the personal information collected by a public body through a keystroke logging software that had been installed without the employee's knowledge. The Commissioner said:

[para 25] ...the method of collection that was chosen collected information that was not necessary for managing the Applicant as an employee. The information collected by the keystroke logger was information as to everything the Applicant did on his computer. In my view it was not necessary for the Public Body's managers to know every single thing the Applicant did on his computer in order to know if he was being productive or prioritizing his work according to their instructions. They did not need all this information, or information of this particular type, in order to manage him effectively...

[para 32] With respect to surreptitious use of keystroke logging software, this is a form of surveillance. In my view information collected through surreptitious use would be considered "necessary" within the meaning of section 33(c) only when the information needed for managing could not be obtained by other means...

[para 63] It seems to me that the EUB wanted to ensure that the Rimbey proceedings were able to be conducted in an orderly manner, without disruptions from observers and groups, and that panel members, hearing staff and participants would be protected from confrontations. I find the security arrangements that were taken at the Rimbey Court House demonstrate that this objective could be met without the need to collect personal information.

[para 64] The EUB says it needed to identify any intentions to disrupt the proceedings. However, as stated earlier, there were other means available to monitor the groups and individuals at the Rimbey Community Centre without requiring the collection of personal information. In addition, the security arrangements at the Court House would have minimized disruptions arising from any demonstration organized to protest the EUB hearing.

[para 65] Consequently, I conclude that the personal information collected was not necessary for the provision of a safe environment for staff and hearing participants at the Rimbe proceedings, which is an operating program or activity of the EUB. Therefore, the collection was not authorized under section 33(c) of the FOIP Act.

3. Was the EUB authorized to collect the personal information under section 33(b) of the FOIP Act?

[para 66] In its Supplemental Submission, the EUB says its authority to collect the personal information was also pursuant to section 33(b) of the FOIP Act. Section 33(b) allows a public body to collect personal information for the purposes of law enforcement.

[para 67] The EUB said the Security Team Leader is a Peace Officer appointed under section 7 of the Peace Officer Act, S.A. 2006, c. P-3.5. The EUB states the appointment authorizes the Security Team Leader to enforce the following legislation and all regulations thereunder, and serve court documents relating to:

- Crown Property Regulations;
- The Petty Trespass Act;
- The Provincial Offences Procedure Act; and
- The Trespass to Premises Act.

[para 68] In my view, personal information collected for the purpose of enforcing the legislation and regulations listed in the Security Team Leader's Peace Officer appointment may be authorized under section 33(b) of the FOIP Act. However, there is no evidence before me that this was the case at Rimbe. In addition, the EUB's Supplemental Submission makes no arguments that the personal information was collected at Rimbe so that the Security Team Leader could enforce the legislation and regulations listed under the Security Team Leader's Peace Officer appointment.

[para 69] The EUB submission said the Peace Officer appointment also grants the Security Team Leader a general duty under section 7(5) of the Peace Officer Act, which states:

7(5) Subject to the terms of the appointment, a person appointed as a peace officer under this Act is a person appointed for the purposes of preserving and maintaining the public peace.

[para 70] The EUB said the definition of "law enforcement" under section 1(h) of the FOIP Act includes "policing" and referred to the former Commissioner's Order 2000-027 [para. 16], which stated that policing "should be defined as those activities carried out under the authority of a statute, regarding the maintenance of public order, detection and prevention of crime, or the enforcement of law".

[para 71] The EUB claims there was a need for ongoing threat assessment as a result of the incidents at the earlier Red Deer hearing. The EUB said some of its staff stated, after the Red Deer hearing, they feared for their safety and were not prepared to attend further hearing sessions. The EUB argued that identifying individuals who were present or anticipated to be present at the Rimbe proceedings and whether these individuals intended to disrupt the

proceedings in any way was “fundamental” to the Security Team Leader’s ongoing threat assessment, which was an activity that was carried out for the “maintenance of public order, and the detection and prevention of crime”. Consequently, the EUB says the collection was authorized under section 33(b) of the FOIP Act.

[para 72] The EUB also referred to Order F2006-002 in which Commissioner Work wrote:

[para 28] It seems to me that if a member of the EPS (or anyone else) “fears for their safety” and expresses that to a peace/police officer, section 33(b) of the Act is engaged, as the matter involves “policing” and therefore law enforcement. Regardless of whether the officer refers the matter to a more appropriate authority, that officer is allowed to collect personal information because “fears for safety” and threats are generally law enforcement matters. It must be assumed so.

[para 29] For example, if someone is chasing me and I run up to a police officer and tell that person, the police officer can ask “Who?”, “Why?”, etc., and collect the personal information. The officer does not have to do anything more to trigger the investigation. Even if the officer decides my fear is groundless or there is no breach of any law, the officer can collect personal information in order to make that determination...

[para 73] However, the Commissioner is not saying in Order F2006-002 that a public body has authority to collect personal information under section 33(b) of the FOIP Act on a continual basis whenever someone expresses fears for their safety. In a subsequent paragraph of that same Order, the Commissioner said:

[para 31] There is a point when there is no longer justification under section 33(b) to collect personal information. That point is reached when the officer knows or should know that there is no longer a law enforcement issue: no threat, no crime, no law broken...

[para 74] The EUB Security Team Leader had conducted a threat assessment prior to the Rimbey proceedings. As a result of that threat assessment, two security plans were developed: one specific to the Rimbey Court House and one for the Rimbey Community Centre.

[para 75] I said earlier that the security arrangements at the Rimbey Court House provided a safe environment for staff and participants at the proceedings and that the arrangements minimized the potential risk of disruptions to the proceedings and potential confrontations with protestors. In my view, the threats identified from the assessment were dealt with by the security arrangements at the Court House.

[para 76] There was no evidence before me that any staff or hearing participant feared for their safety at the Court House and as stated earlier, the EUB staff based at the Community Centre said they did not feel threatened.

[para 77] I appreciate there was a need for the EUB Security Team Leader to monitor the situation at Rimbey. However, given the security arrangements established at the Court House and the absence of a specific threat, I do not accept that the monitoring by the Security Team Leader in this case falls within the situation described by the Commissioner in Order F2006-002 [para 28-29].

[para 78] Consequently, I find the EUB's reliance on section 33(b) of the FOIP Act is not substantiated in this situation.

E. Did the EUB disclose personal information to the Board Panel members?

[para 79] The EUB said the private investigators reported their information only to the EUB Security Team Leader. The EUB said the Security Team Leader reported periodically to the Board Panel Chair, Board legal counsel and EUB Hearing Coordinator on general assessments relating to security risks to hearing participants and facilities.

[para 80] I found no evidence that the personal information collected by the private investigators had been disclosed to the three Board panel members.

F. Did the EUB make reasonable security arrangements to protect personal information against such risks as unauthorized access, collection, use, disclosure or destruction, as required by section 38 of the FOIP Act?

[para 81] Section 38 of the FOIP Act states:

38 The head of a public body must protect personal information by making reasonable security arrangements against such risks as unauthorized access, collection, use, disclosure or destruction.

[para 82] As part of its obligations to protect personal information, a public body should incorporate privacy protection provisions into its contractual agreements when contracting services involving personal information. The contract should specify how the requirements of the FOIP Act will be met by the contractor in relation to the collection, use, disclosure, retention, destruction and security of personal information. The contract should also ensure that everyone working under the contract, including sub-contractors, comply with the requirements and provisions to protect personal information. Examples of these provisions are set out in the publication entitled "Managing Contracts under the FOIP Act, A Guide for Government of Alberta Contract Managers and FOIP Coordinators".

[para 83] In my investigation, I found the following:

1. The EUB engaged the services of the private sector security company through an email message as opposed to a formal contractual agreement.

[para 84] The EUB Security Team Leader said a formal contractual agreement was not used given the urgency of the situation. The hearing at Red Deer adjourned on April 17th. A threat assessment was conducted and the decision was then made to hire private investigators. The email to the security company was sent on May 9th.

[para 85] However, the EUB does have a standard Services Contract, which sets out the terms and conditions for contractors such as confidentiality and the application of the FOIP Act to the contractors. In my view, as a standard Services Contract was already established by the EUB, it could have been used to employ the services of the security company even with the time

constraints. Alternatively, the standard terms and conditions could have been an attachment to the email message sent to the security company.

[para 86] The email message placed no obligations on the security company as an “employee” of the EUB under the FOIP Act regarding their responsibilities and requirements in relation to the collection, use, disclosure, retention, destruction and protection of personal information.

2. Sub-contracting by Security Company not addressed by EUB

[para 87] As stated earlier in this report, one of the private investigators was an independent service provider contracted by the security company.

[para 88] The EUB said the security company was free to hire independent service providers in performing its security services to the EUB. The EUB did not place any obligations on the security company to ensure its independent service providers were prevented from using or disclosing information obtained during their services to the EUB for other purposes or to other clients.

3. Roles and Expectations for Private Investigators at the Rimbey Community Centre not defined

[para 89] The email did not set out the roles and expectations of the private investigators at the Rimbey Community Centre. The EUB Security Team Leader said the terminology for the services (“intelligence gathering and observation”) is understood by the security industry. The EUB Security Team Leader also said the private investigators were experienced security personnel and no specific instructions were provided as “they should know” what was required.

[para 90] Two of the private investigators confirmed they did not receive any instructions from the EUB as to how they were to present themselves to the individuals or groups at the Rimbey Community Centre. The third private investigator did not respond to my request for information.

[para 91] In response to my question on their understanding of the services they were required to provide to the EUB at the Rimbey proceedings, the private investigators said they received the following instructions from the security company:

- To obtain any intelligence relating to potential violence and/or any criminal acts in relation to property damage at or by the Community Hall facilities by protesters
- To monitor the hearing facilities for problems, disruptions or emergency situations; not to intervene in any disruption but to advise either the community centre proprietor or the EUB Security Team Leader or the RCMP as the situation warranted

[para 92] There were no records of information provided by one private investigator. The EUB Security Team Leader said that no record was made since the private investigator had

called in and said there was nothing to report. That private investigator only attended two days of the proceedings.

[para 93] The second private investigator reported generally non-personal information to the EUB Security Team Leader such as: number of attendees and comments such as “no issues” or “very quiet”. The second private investigator provided minimal personal information about some individuals.

[para 94] The third private investigator provided more information about individuals at the Community Center than the other two private investigators. The third private investigator also participated in the May 28th conference call and provided information regarding the 5-day Global Warming Action Camp; the “Action Plan for Public Inquiry Letter”; etc.

[para 95] In my opinion, the reports by the private investigators reflect the different views that the private investigators had as to what constitute “intelligence gathering and observation”. Consequently, the collection of personal information was dependent on each private investigator’s view of his/her role and the EUB’s expectations.

[para 96] When contracting services involving personal information, a public body should clearly define the contractor’s roles and the public body’s expectations. This is a safeguard to minimize the potential risk of unauthorized collection and access of personal information by the contractor.

4. No policies regarding the employment of undercover private investigators

[para 97] The EUB says it has no written policies regarding the employment of undercover private investigators.

[para 98] Given the privacy implications, the EUB may wish to consider establishing a policy that sets out the criteria when considering undercover private investigators and the circumstances which warrant the employment of undercover private investigators. The policy could also specify how the decision to employ undercover private investigators would be made and the privacy protection requirements for the operations. However, the decision to hire undercover security personnel will always be dependent on the situation at hand and there will inevitably be situations which a policy could not anticipate.

[para 99] The decision to employ undercover private investigators should consider whether there are other measures that would meet the safety and security concerns identified. The decision-making process should take into account that the primary objective of covert or undercover security personnel is to collect information whereas the primary objective of uniformed security personnel is to present a visual deterrent. In certain circumstances, the EUB may be justified in employing undercover security personnel to collect information.

[para 100] In conclusion, I find that the EUB did not meet its obligation to protect personal information as required by section 38 of the FOIP Act when it employed the private investigators because it did not ensure there were safeguards in place to protect personal information against such risks as unauthorized access, collection, use, disclosure or destruction.

V. RECOMMENDATIONS AND CLOSING COMMENTS

[para 101] I find that the personal information collected by the EUB was not authorized under section 33(b) or section 33(c) of the FOIP Act. I also find that the EUB failed to meet its obligation to protect personal information as required by section 38 of the FOIP Act in its employment of the private investigators.

[para 102] As a result of my findings, I recommend that:

1. The EUB consider establishing a policy regarding the employment of undercover private investigators and the circumstances which warrant the employment of undercover private investigators. The policy should specify how the decision to employ undercover private investigators would be made and the privacy protection requirements for the operations.
2. When employing private investigators, the EUB should ensure that the roles and the EUB's expectations of the private investigators are defined and set out in a contractual agreement. The contract should also incorporate privacy protection provisions. If the contract is with a security company, the contract should specify the security company's obligations to ensure its employees, sub-contractors/independent service providers and anyone working under the contract comply with the privacy protection provisions set out in the contract.

[para 103] The EUB said that, following the Rimbey proceedings, the EUB Chair has assumed personal direct oversight of all hearing-related security arrangements until the formal investigations are completed and any recommendations are dealt with. The EUB also said security personnel working in future hearings will be clearly identifiable as such. The EUB says it is committed to writing the process for dealing with hearing-related security issues and will take further actions/reviews if required.

[para 104] In closing, I would like to acknowledge that the EUB was extremely cooperative with this Office during the investigation. As this investigation has addressed those matters within the Commissioner's jurisdiction, this matter can be closed upon receipt of the EUB's acceptance of the above recommendations.

Submitted by,

Marilyn Mun
Director, FOIP