

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER 2001-027

April 5, 2002

EDMONTON POLICE SERVICE

Review Number 2177

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Summary: The Edmonton Police Service (the “Public Body”) investigated an alleged assault against the Applicant. No charges were laid. The Applicant applied to the Public Body under the *Freedom of Information and Protection of Privacy Act* (the “Act”), for access to the records of that investigation. The Public Body provided access to some records, but did not disclose certain information in other records. The Adjudicator agreed with the Public Body that the exceptions to disclosure contained in section 17 of the Act (personal information) and section 20(3)(a) of the Act (information in a law enforcement record) applied to that information. Consequently, the Public Body did not have to disclose that information to the Applicant.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(h) [previously section 1(1)(h)], 1(h)(ii) [previously section 1(1)(h)(ii)], 1(n) [previously section 1(1)(n)], 1(n)(i) to (ix) [previously section 1(1)(n)(i) to (ix)], 17 [previously section 16], 17(1) [previously section 16(1)], 17(4) [previously section 16(4)], 17(4)(b) [previously section 16(4)(b)], 17(4)(g) [previously section 16(4)(g)], 17(5) [previously section 16(5)], 17(5)(a) to (i) [previously section 16(5)(a) to (i)], 17(5)(c) [previously section 16(5)(c)], 17(5)(e) [previously section 16(5)(e)], 17(5)(i) [previously section 16(5)(i)], 20(3)(a) [previously section 19(2)(a)], 71(2) [previously section 67(2)], 72 [previously section 68]; **CAN:** *Criminal Code*, R.S.C. 1985, c. C-46.

Authorities Cited: **AB:** Orders 96-015, 96-019, 96-020, 99-028, 2000-028.

I. BACKGROUND

[para 1] The Edmonton Police Service (the “Public Body”) investigated an alleged assault against the Applicant. No charges were laid.

[para 2] In March 2001, the Applicant, through his agent, applied to the Public Body under the *Freedom of Information and Protection of Privacy Act* (the “Act”), for access to the records of that investigation.

[para 3] The Public Body provided access to some records. However, the Public Body refused to disclose certain information in other records, on the grounds that section 17 [previously section 16] of the Act (personal information) and section 20(3)(a) [previously section 19(2)(a)] (information in a law enforcement record) applied to that information.

[para 4] The Applicant requested a review of the Public Body’s decision. Mediation was authorized but was not successful. The matters were set down for a written inquiry.

[para 5] On January 1, 2002, the revised *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, came into force. Most of the section numbers of the Act changed, but not the substance of the sections. Consequently, in this Order, I have set out the new section numbers. The previous section numbers appear in square brackets after the new section numbers.

II. RECORDS AT ISSUE

[para 6] The records at issue consist of only six of the original 27 pages at issue when the Notice of Inquiry was sent to the parties. Before the date set for the inquiry, the Public Body gave the Applicant access to all but those six pages of the records.

[para 7] Consequently, only the following numbered pages of the records are now at issue: pages 1, 3, 4, 5, 6 and 7.

[para 8] In this Order, I will refer to each record individually by page number, where necessary, and will refer to all the records collectively as the “Records”.

III. ISSUES

[para 9] There are two issues in this inquiry:

A. Did the Public Body properly apply section 20(3)(a) [previously section 19(2)(a)] to the Records?

B. Does section 17 [previously section 16] apply to the Records?

IV. DISCUSSION OF THE ISSUES

ISSUE A: Did the Public Body properly apply section 20(3)(a) [previously section 19(2)(a)] to the Records?

1. Application of section 20(3)(a) [previously section 19(2)(a)]

[para 10] The Public Body says that section 20(3)(a) [previously section 19(2)(a)] applies to the information the Public Body withheld on pages 4, 6 and 7 of the Records.

[para 11] Section 20(3)(a) [previously section 19(2)(a)] reads:

20(3) The head of a public body may refuse to disclose information to an applicant if the information

(a) is in a law enforcement record and the disclosure could reasonably be expected to expose to civil liability the author of the record or an individual who has been quoted or paraphrased in the record...

[para 12] To meet the criteria of section 20(3)(a) [previously section 19(2)(a)], the Public Body must establish that the information is in a law enforcement record, and that disclosure of the information in the law enforcement record could reasonably be expected to expose to civil liability either the author of the record or a person quoted or paraphrased in the record.

[para 13] “Law enforcement” is defined in section 1(h) [previously section 1(1)(h)] of the Act. As the information in the Records relates to a police investigation, the relevant provision of “law enforcement” is section 1(h)(ii) [previously section 1(1)(h)(ii)], which reads:

1 In this Act,

(h) “law enforcement” means

...

(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...

[para 14] The police investigation concerns an alleged assault. In Order 96-015, the Commissioner said that, for an investigation conducted by a police service to be “law enforcement”, the evidence need only show that the police service is conducting an investigation under a particular statute or regulation containing an offence that leads or could lead to a penalty or sanction being imposed. In this case, the investigation was conducted under the *Criminal Code*, R.S.C. 1985, c. C-46, which contains an offence for assault that could lead to a penalty or sanction being imposed. Therefore, the Public Body has met the requirements for “law enforcement” under section 1(h)(ii) [previously section 1(1)(h)(ii)].

[para 15] In Order 96-019, the Commissioner said that a record of information produced during the course of an investigation that met the criteria of section 1(h)(ii) [previously section 1(1)(h)(ii)] was a “law enforcement record”. Since there is a police investigation that meets the definition of “law enforcement”, the information withheld on pages 4, 6 and 7 of the Records is in a law enforcement record for the purposes of section 20(3)(a) [previously section 19(2)(a)].

[para 16] I turn now to the second criterion under section 20(3)(a) [previously section 19(2)(a)].

[para 17] An individual has authored the information the Public Body withheld on pages 6 and 7 of the Records. The information withheld on page 4 quotes or paraphrases an individual.

[para 18] Based on the Public Body’s affidavit evidence contained in its submission, I find that disclosure of the information on those pages could reasonably be expected to expose to civil liability the author of the record or an individual who has been quoted or paraphrased in the record.

2. Exercise of discretion under section 20(3)(a) [previously section 19(2)(a)]

[para 19] Section 20(3)(a) [previously section 19(2)(a)] is a discretionary (“may”) exception. Even if the section applies to information, a public body may nevertheless exercise its discretion to disclose the information. In exercising its discretion not to disclose the information, a public body must show that it considered the objects and purposes of the Act, and did not exercise its discretion for an irrelevant or improper purpose.

[para 20] Given all the other information the Public Body disclosed to the Applicant, I am satisfied that the Public Body exercised its discretion properly in withholding certain information under section 20(3)(a) [previously section 19(2)(a)].

3. Conclusion under section 20(3)(a) [previously section 19(2)(a)]

[para 21] Having found that the information on pages 4, 6 and 7 of the Records meets the criteria of section 20(3)(a) [previously section 19(2)(a)], and that the Public Body exercised its discretion properly in refusing to disclose that information, I find that the Public Body properly applied section 20(3)(a) [previously section 19(2)(a)] to the information the Public Body withheld on pages 4, 6 and 7 of the Records.

ISSUE B: Does section 17 [previously section 16] apply to the Records?

1. General

[para 22] The Public Body says that section 17 [previously section 16] applies to the information the Public Body withheld on pages 1, 3, 4, 5, 6, and 7 of the Records.

[para 23] I have found that section 20(3)(a) [previously section 19(2)(a)] applies to the information the Public Body withheld on pages 4, 6 and 7 of the Records. Therefore, I do not find it necessary to consider whether section 17 [previously section 16] also applies to that same information.

[para 24] I intend to consider whether section 17 [previously section 16] applies to only the information the Public Body withheld on pages 1, 3 and 5 of the Records.

[para 25] For section 17 [previously section 16] to apply, there must be personal information of a third party, and disclosure of the personal information must be an unreasonable invasion of a third party's personal privacy.

2. Is there personal information of a third party?

[para 26] "Personal information" is defined in section 1(n) [previously section 1(1)(n)] of the Act to mean recorded information about an identifiable individual, including the kinds of personal information listed in section 1(n)(i) to (ix) [previously section 1(1)(n)(i) to (ix)].

[para 27] I have carefully reviewed the information the Public Body withheld on pages 1, 3 and 5 of the Records. I find that that information consists of recorded information about an identifiable individual, including many of the kinds of information listed in section 1(n)(i) to (ix) [previously section 1(1)(n)(i) to (ix)]. Therefore, that information is personal information of a third party.

3. Would disclosure of the personal information be an unreasonable invasion of a third party's personal privacy?

[para 28] Section 17(1) [previously section 16(1)] of the Act reads:

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.

[para 29] The Public Body says that disclosure of a third party's personal information is presumed to be an unreasonable invasion of a third party's personal privacy, as provided by section 17(4)(b) [previously section 16(4)(b)] and section 17(4)(g) [previously section 16(4)(g)].

[para 30] Section 17(4)(b) [previously section 16(4)(b)] reads:

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...

[para 31] I have already found that the information is in a law enforcement record for the purposes of section 20(3)(a) [previously section 19(2)(a)]. Consequently, I find that the personal information is an identifiable part of a law enforcement record and also meets the criteria of section 17(4)(b) [previously section 16(4)(b)].

[para 32] Having made this finding, I do not find it necessary to consider whether the personal information also meets the criteria of section 17(4)(g) [previously section 16(4)(g)].

[para 33] In determining under section 17(1) and (4) [previously section 16(1) and (4)] whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, section 17(5) [previously section 16(5)] requires that the head of a public body consider all the relevant circumstances, including those circumstances listed in section 17(5)(a) to (i) [previously section 16(5)(a) to (i)].

[para 34] The Public Body says it considered the relevant circumstances set out in section 17(5)(c) [previously section 16(5)(c)] and section 17(5)(e) [previously section 16(5)(e)]. I note that section 17(5)(i) [previously section 16(5)(i)] is no longer applicable as the Public Body disclosed that information to the Applicant before the inquiry.

[para 35] Section 17(5)(c) and section 17(5)(e) [previously section 16(5)(c) and section 16(5)(e)] read:

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

...
(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...

a. Section 17(5)(c) [previously section 16(5)(c)] (personal information relevant to a fair determination of the Applicant's rights)

[para 36] If found to be a relevant circumstance, section 17(5)(c) [previously section 16(5)(c)] weighs in favour of disclosing a third party's personal information.

[para 37] The Applicant says he sustained a serious head injury as a result of the assault. The Applicant maintains his application for compensation under the Victims of Crime Financial Benefits Program (the "Program") was dismissed on the basis of the information in the Records. The Applicant believes that the Program relied heavily on the information the Public Body did not disclose to him. The Applicant says that he wants the information to pursue an appeal.

[para 38] The Public Body agrees that the information in the Records might be relevant in determining the Applicant's eligibility for benefits under the Program. However, the Public Body maintains that releasing a third party's personal information for that determination is not necessary, since the Program has already received a copy of the Records. As such, the personal information has already been disclosed so that it can be considered in determining the Applicant's rights under the Program. Consequently, the Public Body determined that further release of third parties' personal information was not necessary under section 17(5)(c) [previously section 16(5)(c)].

[para 39] The Public Body concludes that section 17(5)(c) [previously section 16(5)(c)] is not a relevant circumstance weighing in favour of disclosing a third party's personal information.

[para 40] In Order 99-028, the Commissioner accepted that for a third party's personal information to be relevant to a fair determination of an applicant's rights, four criteria must be met:

(a) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds;

(b) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed;

(c) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and

(d) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

[para 41] I would expect the Applicant to have something to say about how the Applicant's situation meets these criteria, so that section 17(5)(c) [previously section 16(5)(c)] could be found to be a relevant circumstance weighing in favour of disclosing a third party's personal information.

[para 42] I am prepared to assume, without deciding, that an appeal involves a proceeding that could affect a "legal right" the Applicant may have to compensation. There is no evidence before me of an existing appeal. The Applicant says that he wants the information to pursue an appeal, indicating that an appeal is contemplated.

[para 43] However, the Applicant has not provided me with any information that would show how a third party's personal information has some bearing on or is significant to the determination of the right in question. It is equally possible that the information the Applicant himself provided to the Program (page 25B of the Records) had a bearing on and was significant in determining that the Applicant was not entitled to compensation as the innocent victim of a crime.

[para 44] Furthermore, the Applicant says only that he will be at a distinct disadvantage in pursuing his rights because the Criminal Injuries Appeal Board will be looking at information he has not seen. The Applicant has not indicated in what way the personal information is required to prepare for the proceeding or to ensure an impartial hearing. Therefore, the Applicant has not met all the criteria of section 17(5)(c) [previously section 16(5)(c)].

[para 45] Consequently, I find that section 17(5)(c) [previously section 16(5)(c)] is not a relevant circumstance weighing in favour of disclosing a third party's personal information.

b. Section 17(5)(e) [previously section 16(5)(e)] (unfair exposure to financial or other harm)

[para 46] If found to be a relevant circumstance, section 17(5)(e) [previously section 16(5)(e)] weighs in favour of not disclosing a third party's personal information.

[para 47] The Public Body points out that, in Order 96-020, the Commissioner decided that exposure to civil liability can constitute "harm" for the purposes of section 17(5)(e) [previously section 16(5)(e)].

[para 48] The Public Body says that, in reviewing the facts of the incident, under the circumstances described in the Records, it decided that exposure to civil liability was

unfair. I agree with the Public Body, and would add that exposure is also unfair because most of a third party's personal information is contained in a summary prepared by an investigator. As the Public Body decided not to disclose the personal information and therefore was not required to notify the third party, the third party has not seen, and has not had an opportunity to respond to or rebut, that summary: see Order 2000-028.

[para 49] Consequently, I find that section 17(5)(e) [previously section 16(5)(e)] is a relevant circumstance weighing in favour of not disclosing a third party's personal information.

c. Conclusion under section 17(5) [previously section 16(5)]

[para 50] The relevant circumstances weigh in favour of not disclosing a third party's personal information that the Public Body withheld on pages 1, 3 and 5 of the Records.

4. Applicant's burden of proof under section 71(2) [previously section 67(2)]

[para 51] Under section 71(2) [previously section 67(2)] of the Act, the Applicant has a burden to show that disclosure of a third party's personal information would not be an unreasonable invasion of a third party's personal privacy.

[para 52] I have considered the Applicant's arguments in the context of section 17(5) [previously section 16(5)]. I have also considered, and find no merit in, the Applicant's argument that the Public Body's disclosure of third parties' personal information in statements made by the Applicant's relatives means that it would not be an unreasonable invasion of third parties' personal privacy to disclose the remaining pages of the Records. I find that the Applicant has not met the burden of proving that disclosure of a third party's personal information would not be an unreasonable invasion of a third party's personal privacy.

5. Conclusion under section 17 [previously section 16]

[para 53] Section 17 [previously section 16] applies to the personal information of a third party that the Public Body withheld on pages 1, 3 and 5 of the Records. Disclosure of that personal information would be an unreasonable invasion of that third party's personal privacy, as provided by section 17(1) [previously section 16(1)] and section 17(4)(b) [previously section 16(4)(b)].

V. ORDER

[para 54] I make the following Order under section 72 [previously section 68] of the Act.

Issue A: Application of section 20(3)(a) [previously section 19(2)(a)]

[para 55] The Public Body properly applied section 20(3)(a) [previously section 19(2)(a)] to the information the Public Body withheld on pages 4, 6 and 7 of the Records.

[para 56] I uphold the Public Body's decision to refuse to disclose that information. I order the Public Body not to disclose that information to the Applicant.

Issue B: Application of section 17 [previously section 16]

[para 57] Section 17 [previously section 16] applies to the personal information of a third party that the Public Body withheld on pages 1, 3 and 5 of the Records. Disclosure of that personal information would be an unreasonable invasion of that third party's personal privacy, as provided by section 17(1) [previously section 16(1)] and section 17(4)(b) [previously section 16(4)(b)].

[para 58] I uphold the Public Body's decision to refuse to disclose that personal information. I order the Public Body not to disclose that personal information to the Applicant.

Dave Bell
Adjudicator