

ALBERTA
OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER

ORDER 2001-031

January 25, 2002

ALBERTA JUSTICE

Review Number 2148

Office URL: <http://www.oipc.ab.ca>

Summary: The Applicant made a request under the *Freedom of Information and Protection of Privacy Act* to Alberta Justice for access to a copy of the review/report regarding a prosecutor's decision to withdraw a charge of assault. In addition, if the matter had been referred to the Chief Crown Prosecutor, the Applicant requested a copy of that file as well.

The Commissioner found that Alberta Justice properly applied section 20(1)(g) [previously section 19(1)(d.3)] of the Act (prosecutorial discretion) to the information. Therefore, the Commissioner upheld Alberta Justice's decision not to disclose the records.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c.F-25, ss. 20(1)(g) [previously section 19(1)(d.3)], 24(1)(a) [previously section 23(1)(a)], 27(1)(a), (b) and (c) [previously section 26(1)(a), (b), and (c)], 72 [previously section 68].

Authorities Cited: AB: Order 2001-011

Cases Cited: *Krieger v. Law Society of Alberta* [2000] A.J. No.1129 (ABCA); *Nelles v. R. et al.* [1989] 49 C.C.L.T. 217 (S.C.C.)

I. BACKGROUND

[para 1] On February 21, 2001, the Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the "Act") to Alberta Justice (the "Public Body") for a copy of the review/report regarding a prosecutor's decision to

withdraw a charge of assault. In addition, if the matter had been referred to the Chief Crown Prosecutor, the Applicant requested a copy of that file as well.

[para 2] On March 9, 2001, the Public Body denied the Applicant's access request. The Public Body cited sections 20(1)(g) [previously section 19(1)(d.3)], 24(1)(a) [previously section 23(1)(a)], 27(1)(a),(b) and (c) [previously section 26(1)(a), (b) and (c)], as its authority to withhold the records.

[para 3] On March 24, 2001, the Applicant requested a review of the Public Body's decision to withhold the records. The matter was set down for a written inquiry.

[para 4] The Public Body and the Applicant both submitted an initial and rebuttal submission to this Office.

[para 5] I have reviewed all of the submissions and arguments before me. I note that as part of the Applicant's submission, the Applicant raised some concerns about whether the Minister conducted or should have conducted an independent review of the Crown's decision to withdraw the charges. The Applicant also questioned the extent to which the Crown investigated the allegations.

[para 6] In this inquiry, my jurisdiction is limited to determining whether the Public Body properly applied the Act in refusing the Applicant access to the records. I do not have the jurisdiction to address whether the Crown properly investigated the allegations or the extent to which the Minister conducted or should have conducted an independent review.

II. RECORDS AT ISSUE

[para 7] The records consist of a two-page briefing note which outlines the facts relating to the charge of assault and the reasons why the Crown withdrew the charge.

III. ISSUES

[para 8] The inquiry notice which was sent to the parties outlined the following issues:

1. Did the Public Body properly apply section 19(1)(d.3) of the Act (prosecutorial discretion) to the records/information?
2. Did the Public Body properly apply section 23(1)(a) of the Act ("advice") to the records/information?
3. Did the Public Body properly apply section 26(1)(a), (b) or (c) of the Act (privileged information) to the records/information?

[para 9] However, on January 1, 2002, the Revised Statutes of Alberta 2000 came into force. Although this did not result in substantive changes to the *Freedom of Information and Protection of Privacy Act*, various sections of that Act have been renumbered. As such, for ease of reference, in this Order I will refer to both the new and old section numbers. I have also rephrased the issues to reflect this change:

1. Did the Public Body properly apply section 20(1)(g) [previously section 19(1)(d.3)] of the Act (prosecutorial discretion) to the records/information?
2. Did the Public Body properly apply section 24(1)(a) [previously section 23(1)(a)] of the Act (“advice”) to the records/information?
3. Did the Public Body properly apply section 27(1)(a), (b) or (c) [previously section 26(1)(a), (b) or (c)] of the Act (privileged information) to the records/information?

IV. DISCUSSION

A. Did the Public Body properly apply section 20(1)(g) [previously section 19(1)(d.3)] of the Act (prosecutorial discretion) to the records/information?

[para 10] Section 20(1)(g) [previously section 19(1)(d.3)] states:

20(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

...

(g) reveal any information relating to or used in the exercise of prosecutorial discretion

[para 11] The Public Body argues that the records fall within section 20(1)(g) [previously section 19(1)(d.3)]. The Public Body states that the records reveal information related to or used in the exercise of prosecutorial discretion. The Public Body also states that it properly exercised its discretion to withhold the information. The Public Body states that disclosing this information would impair its ability to properly discharge its responsibilities. In addition, the Public Body states that in exercising its discretion, it took into account that it had already released a number of documents to the Applicant in response to a prior access request.

[para 12] The meaning of the phrase “exercise of prosecutorial discretion” was addressed in Order 2001-011. That Order referred to the decision of *Krieger v. Law Society of Alberta* [2000] A.J. No.1129, where the Alberta Court of Appeal discussed the issue of disclosure in relation to a prosecutor’s discretion. Mr. Justice Sulatycky stated:

The prosecutor’s discretion arises from the Attorney General on whose behalf the Crown prosecutors act. The Attorney General is a member of the executive and is charged with the responsibility to represent the interest of the community in

seeing that justice is done. The Crown prosecutor's role in this process was discussed by Lamer J.(as he then was) in Nelles v. R. et al. (1989), 49 C.C.L.T. 217 ... Lamer J. at page 237 reviewed the powers of Crown prosecutors and discussed the historical reasons for prosecutorial discretion:

Among the many powers of a prosecutor are the following: the power to detain in custody, the power to prosecute, the power to negotiate a plea, the power to charge multiple offences, the power of disclosure/non-disclosure of evidence before trial, the power to prefer an indictment, the power to proceed summarily or by indictment, the power to withdraw charges, and the power to appeal.

[para 13] After a review of the records and the arguments of all the parties, I find that these records reveal information related to or used in the exercise of prosecutorial discretion under section 20(1)(g) [previously section 19(1)(d.3)]. The records in this inquiry consist of a two-page briefing note which outlines the facts relevant to the assault charge and the reasons why the Crown did not and should not prosecute the individual mentioned in the records. I find that the Public Body properly applied section 20(1)(g) [previously section 19(1)(d.3)] and properly exercised its discretion to withhold the information under that section.

B. Did the Public Body properly apply section 24(1)(a) [previously section 23(1)(a)] of the Act (“advice”) to the records/information?

[para 14] I have found that the Public Body properly applied section 20(1)(g) [previously section 19(1)(d.3)] to the information in the records at issue. As such, I do not find it necessary to decide whether the Public Body properly applied section 24(1)(a) [previously section 23(1)(a)] to that same information.

C. Did the Public Body properly apply section 27(1)(a), (b) or (c) [previously 26(1)(a), (b) or (c)] of the Act (privileged information) to the records/information?

[para 15] I have found that the Public Body properly applied section 20(1)(g) [previously section 19(1)(d.3)] to the information in the records at issue. As such, I do not find it necessary to decide whether the Public Body properly applied section 27(1)(a), (b) or (c) [previously section 26(1)(a), (b) or (c)] to that same information.

V. ORDER

[para 16] I make the following Order under section 72 (previously section 68) of the Act.

[para 17] The Public Body properly applied section 20(1)(g) [previously section 19(1)(d.3)] to the information in the records at issue. As such, I uphold the Public Body's decision not to disclose this information to the Applicant.

[para 18] In addition, as I have found that the Public Body properly applied section 20(1)(g) [previously section 19(1)(d.3)] to the information, I do not find it necessary to decide whether the Public Body properly applied section 24(1)(a) [previously section 23(1)(a)] or section 27(1)(a), (b) and (c) [previously section 26(1)(a), (b) and (c)] to that same information.

Frank J. Work, Q.C.
Acting Information and Privacy Commissioner