

**ALBERTA**

**OFFICE OF THE INFORMATION AND PRIVACY  
COMMISSIONER**

**ORDER F2004-023**

August 16, 2005

**EDMONTON POLICE SERVICE**

Review Number 2868

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

**Summary:** The Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the “Act”) to the Edmonton Police Service (the “Public Body”). The request included copies of a videotaped interview, polygraph test and any other information relating to interviews the Applicant had with the Public Body. The Public Body refused to disclose the records arguing that section 20(1)(f) of the Act (interference or harm to an ongoing or unsolved law enforcement investigation, including a police investigation) applied.

The Adjudicator found that the police investigation was ongoing and that disclosure of the records/information could reasonably be expected to harm the ongoing police investigation. The Adjudicator confirmed the decision of the Public Body not to disclose the records.

**Statute Cited:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(h), 4(1)(k), 20(1)(f).

**Orders Cited: AB:** Orders 96-003, 2001-010 and F2002-024.

## I. BACKGROUND

[para 1] The Applicant, the subject of a police investigation regarding an alleged sexual assault of a minor, submitted an access request to the Edmonton Police Service (the “Public Body”) under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (the “Act”) for copies of the videotaped interview, polygraph examination and any other information relating to interviews the Applicant had with the Public Body.

[para 2] The Public Body applied section 20(1)(f) of the Act (interference with or harm to an ongoing or unsolved law enforcement investigation) and refused to provide the requested records to the Applicant.

[para 3] The Applicant asked the Office of the Information and Privacy Commissioner to review the decision of the Public Body under section 20(1)(f) of the Act. Mediation was authorized but was unsuccessful and the matter proceeded to inquiry.

[para 4] The Public Body provided *in camera* copies of investigation reports related to the Applicant. I made a subsequent request to the Public Body for copies of the videotaped interview and the polygraph records that were not initially supplied by the Public Body. I accepted those records *in camera*.

[para 5] In the initial written submissions of the Applicant and Public Body, there were conflicting statements regarding the status of the investigation. I therefore asked the parties to provide me with a further written submission on that matter.

## II. RECORDS AT ISSUE

[para 6] The records at issue are copies of the videotaped interview, polygraph examination and other information relating to interviews the Applicant had with the Public Body.

## III. ISSUE: Did the Public Body properly apply section 20 of the Act (law enforcement) to the records/information?

## IV. DISCUSSION OF THE ISSUE

[para 7] The Public Body is seeking to withhold records requested through the application of section 20(1)(f) of the Act, which reads:

20(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to...  
(f) interfere with or harm an ongoing or unsolved law enforcement investigation, including a police investigation,....

***Is this a law enforcement investigation or a police investigation?***

[para 8] The definition of “law enforcement” is contained in section 1(h) of the Act, which reads:

1 In this Act,

(h) “law enforcement” means

- (i) policing, including criminal intelligence operations,
- (ii) a police, security or administrative investigation, including the complaint giving rise to the investigation, that leads or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the investigation or by another body to which the results of the investigation are referred, or
- (iii) proceedings that lead or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the proceedings or by another body to which the results of the proceedings are referred;...

[para 9] The definition of “law enforcement” includes a police investigation. I accept that this is a police investigation and therefore a law enforcement investigation for the purposes of section 20(1)(f) of the Act.

***Is the investigation ongoing or unsolved?***

[para 10] Definitions for the terms “ongoing” or “unsolved” are not found in the Act. I will first address the applicability of the word “ongoing”. My understanding as to the meaning of the word “ongoing” is that it describes an activity, in this case a police investigation, that is currently taking place or in progress. The Public Body and the Applicant dispute whether the investigation is ongoing. I therefore asked the parties to provide me with a written submission on that matter.

[para 11] The Public Body argued that the Applicant is under an active police investigation regarding his step-daughter and that the review by the Justice Department (the “Crown”) of the information gathered is a stage or a component of an ongoing police investigation. The Applicant argued that the file is with the Crown and that the Crown elected not to proceed with charges. Therefore, the Applicant argued that the Crown is no longer actively considering the matter and the status of the police investigation is not ongoing. The Applicant did not provide any evidence that the Crown made a recommendation that charges should not be laid against the Applicant. The Public Body provided me with a letter from the Crown, who advised that it is in the process of

assessing the evidence before it and that a recommendation regarding charges was still under consideration.

[para 12] It is my understanding that at any stage of the assessment of the evidence by the Crown, the Crown may ask the Public Body for additional evidence to be gathered as well as seek clarification of issues related to the investigation. This process supports the argument of the Public Body that a police investigation does not de-activate or terminate just because the Crown is in the process of assessing information gathered to date. The Crown, in these circumstances, plays a key role in determining the status of the investigation but in so doing, that does not necessarily result in the termination of a police investigation. In these circumstances, there is no evidence that the Public Body has terminated or suspended its investigation. I accept the arguments of the Public Body as to the ongoing nature of the police investigation, that the files are in the hands of the Crown for assessment, and that the assessment by the Crown is only one stage of the ongoing police investigation. As I am satisfied that this is an ongoing investigation, I do not need to consider whether the police investigation is unsolved.

***Could disclosure of the information reasonably be expected to interfere with or harm the investigation?***

[para 13] The words “harm” and “interfere” are not defined in the Act. As the harm component was the primary focus of the submissions, I will first address the applicability of the word “harm” to these circumstances. In these circumstances, I accept the meaning of the word “harm” to mean the potential to impair a police investigation or potentially damage or be detrimental to a police investigation.

[para 14] The Applicant, referring to Order F2002-024, argued that if a public body seeks to apply section 20(1)(f) of the Act, it must show harm with explicit and sufficient evidence so that there is a reasonable expectation of harm. The Applicant also argued that the evidence must demonstrate harm resulting from disclosure and not just a well-intentioned but unjustifiably cautious approach to the avoidance of risks because of the sensitivity of the matters at issue. The Applicant could find no reason for anyone to believe that the disclosure he seeks could result in harm or interference with a police investigation.

[para 15] The Public Body referenced the harm test found in Orders 96-003, 2001-010 and F2002-024. The Public Body acknowledged that it is required to meet the reasonable expectation of harm test found in Order F2002-024, as follows:

- the public body must show a clear cause and effect relationship between the disclosure of harm and the harm alleged;
- the harm that would be caused by the disclosure constitutes “damage” or “detriment” to the matter and not simply hindrance or minimal interference; and
- the likelihood of harm must be genuine and conceivable.

[para 16] In other words, the Public Body accepts that it has to provide evidence that the harm caused by the disclosure would be damaging or detrimental to the police investigation and not simply a hindrance or minimal interference. The Public Body also accepted that the harm must be evidenced as being genuine and conceivable.

[para 17] The Public Body provided credible *in camera* evidence and arguments about the harm that would flow if it were to disclose the records to the Applicant. The arguments addressed how vulnerable to influences the young alleged sexual assault victim was and reviewed the relationship she had with her biological mother and the Applicant. The Public Body provided evidence that these factors were seriously considered and weighed when it was deciding the impact that disclosure would have on the investigation.

[para 18] Based on experience the Public Body is very concerned that the Applicant may also wish to manipulate the information to bolster the support of the biological mother and, in turn, have the mother direct that support towards encouraging her daughter to amend or withdraw her allegations against the Applicant. The Public Body provided background evidence that it is not merely being cautious in adopting this approach, but in order for there to be a fair and reasonable review of the circumstances, without harming the police investigation, it is in the best interests of all the parties that it does not disclose the records. The Public Body noted that *in camera* evidence supports the conclusion that there exists a real potential for harm to the investigation.

[para 19] The Applicant does not believe that the investigation is ongoing and that disclosure could affect or in any way harm the police investigation. The Applicant argued that he is not permitted contact with the alleged victim and that the mother, when in contact with her daughter, is under constant surveillance. The Public Body provided evidence that the surveillance of the mother/daughter visits are not constant, and unsupervised contact is a possibility, thereby supporting the concerns regarding the potential for harm or possibly interference.

[para 20] The Public Body said that there is a civil suit between the biological parents regarding the alleged sexual assault victim. Should the records sought by the Applicant be released prior to a possible criminal trial and subsequently used for purposes of the civil suit, the release could result in the victim being prematurely exposed to information that may contaminate the memory of the victim and thereby harm or contaminate the ongoing police investigation.

[para 21] The Public Body argued that sexual assault cases are to be handled with extreme care as the potential for contamination through undue influence must always be factored into a decision regarding the disclosure of records. The fact that the Applicant was previously involved in child sexual assault issues is also a significant factor as to the reasonableness of the potential for harm.

[para 22] I have studied and weighed the entire *in camera* evidence before me. I am satisfied that in these circumstances, there is compelling evidence to support a finding

that disclosure of the information could reasonably be expected to harm the police investigation. There is *in camera* evidence that the Public Body has good reason not to disclose the information for fear that disclosure could likely result in the contamination of witnesses crucial to an ongoing police investigation. By contamination, I mean that the records, if shared with possible witnesses, have the potential to influence the witnesses and thereby harm the outcome of the investigation and possibly influence the victim's recollection of events. The Applicant argued that the harm concerns argued by the Public Body are indicative of an ulterior or improper motive on the part of the Public Body. I find that there is nothing in the evidence before me to allow me to make that type of inference or conclusion.

[para 23] I am satisfied that in these circumstances, the Public Body has met the test for establishing that a reasonable expectation of harm exists if the records are disclosed. The Public Body has clearly established a causal relationship between the disclosure and the harm alleged: the disclosure would harm an ongoing police investigation; and the likelihood of harm is genuine and quite conceivable. As I am satisfied that disclosure could reasonably be expected to harm an ongoing police investigation, I do not find it necessary to address the meaning and application of the word "interfere".

***Did the Public Body properly exercise its discretion?***

[para 24] Section 20(1)(f) of the Act is discretionary ("may"). The purpose of the section is to allow public bodies the option to refuse to disclose information that the public body could reasonably expect to interfere with or harm an ongoing law enforcement investigation, including a police investigation. A public body, in exercising its discretion under section 20(1)(f) of the Act, must do so reasonably and take into account all relevant factors.

[para 25] The Public Body shared some general considerations it used when deciding whether or not discretion should be exercised to disclose under section 20(1)(f) of the Act, as follows:

- Police law enforcement investigations require the ability to conduct interviews where disclosures are voluntary with minimal interference that could influence the victim's responses.
- Early release of the records has the potential to compound the victim's growing apprehension and fear.

[para 26] The Applicant argued that there is an unwritten policy within the Public Body that disallows disclosure while an investigation is ongoing. The Applicant alleges that the existence of this unwritten policy prevents the Public Body from properly exercising its discretion under section 20(1)(f) of the Act. The Applicant did not provide any evidence to support the allegation of an unwritten policy and the Public Body denied that such a policy exists. I note that if the Applicant did provide clear evidence of the Public Body blindly following an unwritten or written policy as alleged, I would likely

conclude that the Public Body improperly restricted its discretion under section 20(1)(f) of the Act.

[para 27] The Public Body has satisfied me that it took seriously its initial refusal to disclose any records. I am also satisfied that in so doing the Public Body did not appear to be slavishly following a policy of absolute non-disclosure as the Applicant alleges. I find that the Public Body properly exercised its discretion.

[para 28] I find that the Public Body properly applied section 20(1)(f) of the Act to the records/information.

***Information provided subsequent to the inquiry***

[para 29] I note that after I made my decision in this inquiry, I was advised by the Public Body that the investigation had evolved and that the Public Body was seeking to have records excluded from the Act under section 4(1)(k) of the Act. Section 4(1)(k) reads:

4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:..

(k) a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed;...

[para 30] This section would, if determined to be applicable, bring the records at issue outside of the jurisdiction of the Act for the duration of the prosecution. I appreciate that the Public Body has taken the time and effort to update me regarding this latest development. However, this information cannot alter or influence the decision I made in this Inquiry. This Inquiry is restricted to the Applicant's request for information and the response to that request made by the Public Body under 20(1)(f) of the Act as applicable to those circumstances.

**V. ORDER**

[para 31] I make this Order under section 72 of the Act.

[para 32] I find that the Public Body properly applied section 20(1)(f) of the Act to the records/information. I confirm the Public Body's decision to withhold the records/information from the Applicant.

Dave Bell  
Adjudicator



