

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2006-005

September 28, 2007

ALBERTA JUSTICE AND ATTORNEY GENERAL

Case File Number 3333

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Summary: The Applicant requested a copy of a crown prosecutor's file in relation to a criminal prosecution. The Public Body withheld this record under sections 17 and 20(1)(g) of the *Freedom of Information and Protection of Privacy Act*.

The adjudicator confirmed a decision of Alberta Justice and Attorney General (the Public Body) to withhold a crown prosecutor's file under the Act.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 4(1)(a), 17, 20(1)(g)

Authorities Cited: AB: Order 2001-011

Cases Cited: *Krieger v. Law Society of Alberta* [2002] 3 S.C.R. 372, *Welton v. Mugford* LERB 003-2003, *British Columbia v. Crockford*, 2006 BCCA 360

I. BACKGROUND

[para 1] On March 14, 2005, the Applicant requested a copy of a crown prosecutor's file in relation to a criminal prosecution from Alberta Justice and Attorney General (the Public Body).

[para 2] The Public Body responded to the Applicant's access request on May 13, 2005 and advised that it was withholding the entire file on the basis of sections 17 and 20(1)(g) of the *Freedom of Information and Protection of Privacy Act* (the Act).

[para 3] On June 17, 2005, the Applicant requested review by the Information and Privacy Commissioner of the Public Body's decision to withhold the prosecutor's file.

[para 4] Notice of the inquiry was provided to a party who would be affected by the decision under section 67. The party (the Affected Party) chose to participate and provide submissions.

[para 5] Mediation was authorized but was unsuccessful in resolving the issues. Accordingly, the matter was scheduled for a written inquiry.

[para 6] The Public Body, the Applicant and the Affected Party provided written submissions. The Affected Party also provided rebuttal submissions.

II. RECORDS AT ISSUE

[para 7] The records at issue are the contents of a crown prosecutor's file relating to a prosecution.

III. ISSUES

Issue A: Did the Public Body properly apply section 20(1)(g) of the Act (prosecutorial discretion) to the records and information?

Issue B: Does section 17 of the Act (personal information) apply to the records and information?

IV. DISCUSSION OF ISSUES

Issue A: Did the Public Body properly apply section 20(1)(g) of the Act (prosecutorial discretion) to the records and information?

Application of section 20(1)(g)

[para 8] Section 20(1)(g) is a discretionary exception relating to law enforcement matters. It 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 9] The Applicant argues that providing the information in the prosecutor's file would not "reveal information" as the prosecutor provided reasons to the Court for staying the prosecution.

[para 10] The Public Body argues that the records and information were properly withheld under section 20(1)(g), as the records could reasonably be expected to reveal information relating to or used in the exercise of prosecutorial discretion.

[para 11] The meaning of the phrase "exercise of prosecutorial discretion" was determined to be a term of art by the Supreme Court of Canada in *Krieger v. Law Society of Alberta* [2002] 3 S.C.R. 372. The Court determined that the exercise of prosecutorial discretion includes:

Without being exhaustive, we believe the core elements of prosecutorial discretion encompass the following: (a) the discretion whether to bring the prosecution of a charge laid by police; (b) the discretion to enter a stay of proceedings in either a private or public prosecution, as codified in the *Criminal Code*, R.S.C. 1985, c. C-46, ss. 579 and 579.1; (c) the discretion to accept a guilty plea to a lesser charge; (d) the discretion to withdraw from criminal proceedings altogether: *R. v. Osborne* (1975), 25 C.C.C. (2d) 405 (N.B.C.A.); and (e) the discretion to take control of a private prosecution: *R. v. Osioy* (1989), 50 C.C.C. (3d) 189 (Sask. C.A.). While there are other discretionary decisions, these are the core of the delegated sovereign authority peculiar to the office of the Attorney General.

Significantly, what is common to the various elements of prosecutorial discretion is that they involve the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for. Put differently, prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it. (emphasis in the original)

[para 12] "Exercise of prosecutorial discretion" is not defined in the Act. Ruth Sullivan notes on page 47 of *Sullivan and Driedger on the Construction of Statutes* 4th Edition (Markham: Butterworths, 2002) that where a legislative instrument uses a legal term of art, it is generally presumed that the term is used in its correct legal sense.

[para 13] I will therefore determine whether providing the information contained in the prosecutor's file would reveal information relating to or used in the making of decisions as to the nature and extent of the prosecution and the Attorney General's participation in it, in accordance with the Supreme Court of Canada's decision in *Krieger*.

[para 14] While the Applicant argues that disclosure would not "reveal information" that has not already been revealed in open court, this interpretation does not give meaning to 20(1)(g) as a whole. Section 20(1)(g) creates an exception for the records and information on which a prosecutorial decision is based, not necessarily the decision itself. For example, a prosecutor's decision to call a particular witness at trial or to stay a proceeding becomes a matter of public record, but the information on which these decisions are based is subject to the exception in 20(1)(g).

[para 15] Having reviewed the records and information, I am satisfied that, with the exception of docket sheets contained in the file, which are exempt from the Act under section 4(1)(a), the information in the file relates to or was used by the prosecutor in the making of decisions as to the nature and extent of prosecution and the Attorney General's participation in the prosecution and is therefore subject to section 20(1)(g).

Exercise of Discretion

[para 16] The Applicant submits that the head of the Public Body did not properly exercise its discretion when it withheld the records and information under section 20(1)(g). The Applicant cites order F2001-011, in which the Commissioner stated:

In an inquiry, a public body must provide evidence on how a particular exception applies; and secondly, on how the public body exercised its discretion. A public body must show that it took into consideration all the relevant factors when deciding to withhold access to information. Consequently, Alberta Justice must show that it considered the purposes of the Act, one of which includes allowing access to information.

Alberta Justice did not provide any direct evidence by way of affidavit or otherwise, to show how the head exercised its discretion. Often, this evidence can be given by the public body's FOIP coordinator or the person responsible for reviewing the records.

Nonetheless, I note that Alberta Justice did a second review of the Applicant's request for access in November 2000. It again concluded that the records not be disclosed. Therefore, I find from a review of the records and the submissions, that it appeared that Alberta Justice exercised its discretion properly under section 19(1)(d.3).

[para 17] The Applicant also argues that as the Public Body disclosed reasons for staying the prosecution in Court, it waived any claim to prevent disclosure. The Applicant relies on *Welton v. Mugford* LERB 003-2003 for this position.

[para 18] The Public Body submits that it properly applied its discretion to withhold the information as deliberations leading to decisions about charging and prosecution must be unfettered by the threat of disclosure.

[para 19] The Affected Party agrees that the Public Body properly applied its discretion to withhold the records at issue, as the release of the records could result in witnesses, including an accused, being more reluctant to come forward with evidence if they knew it would be released to parties without a direct interest in the proceedings.

[para 20] The Affected Party also submits that providing reasons to the Court for staying charges does not constitute a waiver of privilege or prosecutorial discretion.

[para 21] In Order F2004-026, the Commissioner revised the conditions for applying discretionary exceptions set out in F2001-011 (*supra*):

In my view a Public Body exercising its discretion relative to a particular provision of the Act should do more than consider the Act's very broad and general purposes; it should consider the

purpose of the particular provisions on which it is relying, and whether withholding the records would meet those purposes in the circumstances of the particular case.

In other words, a Public Body must consider the purpose of a particular exception and consider its application to the records and information it is seeking to withhold. The Public Body must also provide evidence of the factors it considered when applying the exception, as required by Order F2001-011 (*supra*).

[para 22] The employee of the Public Body who responded to the Applicant's access request on behalf of the head of the Public Body advised that he exercised the discretionary authority afforded him by s. 20(1)(g) and was mindful that the Act provides:

- a right of access to records held by a Public Body [open and transparent government] subject to certain exceptions,
- a mechanism for control over disclosure of personal information.

As noted above, the employee also advised that the purpose of withholding records on the basis of prosecutorial discretion ensures that prosecutors may make unfettered decisions.

[para 23] While it may have been desirable for the Public Body to have provided affidavit evidence, regarding its decision to apply section 20(1)(g), as set out in F2001-011 above, I find that the direct evidence of the employee who made the decision, provided in the Public Body's submissions, is sufficient to establish that the Public Body considered relevant factors when it withheld the prosecutor's file under section 20(1)(g). Not only did he consider the broad purposes of the Act, but he considered the purpose of the exception on which he relied.

[para 24] While I agree with the rationale provided for withholding the prosecutor's file, I would add that section 20(1)(g) protects even broader policy interests. As the Court noted in *Krieger*, *supra*:

The quasi-judicial function of the Attorney General cannot be subjected to interference from parties who are not as competent to consider the various factors involved in making a decision to prosecute. To subject such decisions to political interference, or to judicial supervision, could erode the integrity of our system of prosecution. Clearly drawn constitutional lines are necessary in areas subject to such grave potential conflict.

[para 25] In *Krieger*, the Court noted that there were two situations in which the public interest in maintaining prosecutorial discretion immunity is outweighed by other factors:

In *Campbell v. Attorney-General of Ontario* (1987), 35 C.C.C. (3d) 480 (Ont. C.A.), it was held that an Attorney General's decision to stay proceedings would not be reviewed save in cases of "flagrant impropriety". See also *Power*, *supra*; *Chartrand v. Quebec (Minister of Justice)* 1987 CanLII 751 (QC C.A.), (1987), 59 C.R. (3d) 388 (Que. C.A.). Within the core of prosecutorial discretion the courts cannot interfere except in such circumstances of flagrant impropriety or in actions for "malicious prosecution": *Nelles*, *supra*. In all such cases, the actions of the Attorney

General will be beyond the scope of his office as protected by constitutional principle, and the justification for such deference will have evaporated.

[para 26] In *British Columbia v. Crockford*, 2006 BCCA 360, the Court held that policies implemented by the Attorney General do not fall within the ambit of prosecutorial discretion and may be reviewable.

[para 27] In general, when considering whether to disclose information which relates to or was used in the exercise of prosecutorial discretion, a Public Body will consider whether there are factors that outweigh the public interest in maintaining the immunity afforded to prosecutorial discretion. In the present case, the Applicant's stated purpose for requesting the record is to determine whether the prosecutor was diligent in conducting a prosecution. As the Supreme Court of Canada noted in *Krieger (supra)*, such a purpose may have the effect of eroding the integrity of Canada's system of prosecution.

[para 28] I do not find that *Welton*, which was cited by the Applicant, is relevant. *Welton* is a case in which solicitor client privilege in relation to a legal opinion was waived when a decision maker made reference to the opinion in his decision. Prosecutorial discretion is not a form of solicitor client privilege, but a broad immunity founded on public policy principles. As a result, actions that might be construed as a waiver of solicitor client privilege have no effect in relation to prosecutorial discretion.

[para 29] For these reasons, I find that the Public Body properly applied its discretion to withhold the prosecutor's file under section 20(1)(g).

Issue B: Does section 17 of the Act (personal information) apply to the records and information?

[para 30] Given that I have found that the Public Body properly applied section 20(1)(g) to the records and information, it is unnecessary to consider whether section 17 also applies.

V. ORDER

Issue A: Did the Public Body properly apply section 20(1)(g) of the Act (prosecutorial discretion) to the records and information?

[para 31] I confirm the decision of the Public Body to withhold the prosecutor's file under section 20(1)(g).

Issue B: Does section 17 of the Act (personal information) apply to the records and information?

[para 32] As I found that the Public Body properly withheld the prosecutor's file on the basis of section 20(1)(g), I make no order in relation to section 17.

[para 33] I make this Order under section 72 of the Act.

Teresa Cunningham
Adjudicator