

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2006-011

June 6, 2007

EDMONTON POLICE SERVICE

Case File Number F3441

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Summary: A June 16, 2005 newspaper article reported the testimony of a witness at a Fatality Inquiry. The witness (Ms. M) had stated in the Inquiry that members of the EPS had intimidated her into providing certain inaccurate details in her witness statement. On behalf of a subcommittee of a lawyers' association to which he belonged, the Applicant wrote to the Chief of the EPS asking what steps it was taking "as a result of this allegation". The EPS replied that the Chief had conducted a thorough review of the circumstances surrounding the testimony of Ms. M, and that he was satisfied that no further action was required.

On behalf of Ms. M, the Applicant made a request to the EPS under the *Freedom of Information and Protection of Privacy Act* ("the Act") for records, in relation to the interview of Ms. M and the testimony she gave at the Fatality Inquiry, as well as in relation to the Police Chief's "thorough review" of the circumstances surrounding the testimony. He also asked for all records relating to any PROBE or CPIC queries with respect to Ms. M from July 2004 until the date of the request, the identity of the EPS members who made the queries, and copies of all records accessed on these occasions.

The EPS provided some information relating to the CPIC and PROBE queries, but, relying on section 12(2) of the Act, it refused to confirm or deny whether other records exist. In addition, it located 11 pages of responsive records, but refused to provide them, on the basis of sections 27(1)(a), (b), and (c) of the Act (privileged information).

The Adjudicator found that the Public Body had properly applied section 27(1)(a) (legal privilege) to the 11 pages of withheld records. However, she found that the Public Body's refusal to confirm or deny the existence of a record, pursuant to section 12(2) of the Act, had not been proper. She ordered the Public Body to reply to the Applicant without relying on section 12(2).

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 12(2), 20, 27(1)(a), 27(1)(b), 27(1)(c), 72.

Authorities Cited: AB: Orders F2003-015; F2006-012; F2006-013.

I. BACKGROUND

[para 1] A witness in a Fatality Inquiry (Ms. M) testified in the Inquiry that members of the Edmonton Police Service ("EPS" or "the Public Body") had intimidated her into providing certain inaccurate details in her witness statement. This testimony was reported in a newspaper article on June 16, 2005. On behalf of the Policing Committee of the Criminal Trial Lawyers' Association, the Applicant wrote to the Chief of the EPS asking what steps it was taking "as a result of this allegation".

[para 2] The Applicant received a reply from the EPS on June 22, 2005. It indicated that the Police Chief had "conducted a thorough review of the circumstances surrounding the testimony of [Ms. M]" and that the Chief "was satisfied that no further action was required with respect to her evidence at the Fatality Inquiry".

[para 3] The Applicant contacted Ms. M and discussed this response with her. He says he ascertained that the Chief's review did not include interviewing her (or her mother, who had been present when the statement was taken). He obtained from Ms. M an authorization to make a request to the EPS on her behalf. He then made this request, under the *Freedom of Information and Protection of Privacy Act*. It was for "copies of all records, as defined under the Act, in relation to the interview of [Ms. M], the circumstances surrounding the interview of [Ms. M], the testimony given at the Fatality Inquiry by [Ms. M], and the 'thorough review of the circumstances surrounding the testimony of [Ms. M]' referred to in your letter of June 22, 2005." He also asked for all records relating to any PROBE or CPIC queries with respect to Ms. M from July 2004 until the date of the request, the identity of the EPS members who made the queries, and copies of all records accessed on these occasions.

[para 4] The EPS replied on September 9, 2005. It provided some information relating to the CPIC and PROBE queries, but, relying on section 12(2) of the Act, it refused to confirm or deny whether other records relative to such queries exist. It also refused to provide 11 pages of records on the basis of sections 27(1)(a), (b), and (c) of the Act.

[para 5] The Applicant requested a review of the response and this Office assigned a mediator. According to the Applicant, the mediator provided information to the Applicant that the 11 withheld pages consisted of:

- (a) 3 pages of an internal memo and supporting documentation;

- (b) 6 pages from in-house counsel to the Police Chief;
- (c) 2 pages with in-house counsel's notes on it.¹

[para 6] The matter was not resolved, and it was brought to inquiry.

II. RECORDS AT ISSUE

[para 7] The records at issue are the 11 withheld pages, as well as additional records, if any, withheld on the basis of section 12(2).

III. ISSUES

[para 8] The Issues stated in the Notice of Inquiry are:

Issue A: Did the Public Body properly apply sections 27(1)(a), (b), and (c) of the Act (legal privilege) to the records/information?

Issue B: Did the Public Body properly refuse to confirm or deny the existence of a record, as authorized by section 12(2) of the Act?

I will also discuss an additional issue, raised by the parties in their submissions, relating to section 32 of the Act.

IV. DISCUSSION OF ISSUES

Issue A: Did the Public Body properly apply sections 27(1)(a), (b), and (c) of the Act (legal privilege) to the records/information?

[para 9] Section 27 (1) provides:

27(1) The head of a public body may refuse to disclose to an applicant

- (a) *information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,*
- (b) *information prepared by or for*
 - (i) *the Minister of Justice and Attorney General,*

¹ In its rebuttal submission, the Public Body noted that this description was inaccurate, and provided a corrected description, as follows:

- Fax coversheet sent by the Applicant to the Public Body with handwritten notes by the Public Body's counsel and the latter attached to the coversheet
- Three (3) page memorandum prepared by the Public Body's legal counsel to the Acting Chief
- Six (6) pages of supporting documents attached to the memorandum.

The Public Body confirmed these were the only records withheld under section 27.

- (ii) *an agent or lawyer of the Minister of Justice and Attorney General, or*
 - (iii) *an agent or lawyer of a public body,*
- in relation to a matter involving the provision of legal services, or*
- (c) *information in correspondence between*
 - (i) *the Minister of Justice and Attorney General,*
 - (ii) *an agent or lawyer of the Minister of Justice and Attorney General, or*
 - (iii) *an agent or lawyer of a public body,*
- and any other person in relation to a matter involving the provision of advice or other services by the Minister of Justice and Attorney General or by the agent or lawyer.*

[para 10] I have reviewed the 11 pages at issue in this case. All of them appear to have been provided to a lawyer as part of a response to a request by the lawyer to another lawyer for information needed by the Police Chief.² The request was not expressly for legal advice, but, having regard to the nature of the matter and the role of the person to whom it was made, it was implicit in the request that legal advice was called for, and the response that was given included legal advice. Some parts of the records do not consist of advice, but consist of attachments outlining facts in relation to which the advice was given, or which provide factual background for the advice. This latter material has the same character as factual material that is supplied by someone requesting advice as background for the advice being sought. Many cases have held that the latter can be withheld on the basis that it forms part of the “continuum of communications” in the seeking and giving of advice. I find the material in the attachments relative to which the advice was given is covered by the privilege in this case on the basis of the same principle.

[para 11] With regard to the suggestion that the first lawyer (who requested the advice) was acting in administrative capacity, this does not seem to be the case, as she was requesting legal advice from another lawyer. Even if it were, her request is subsumed in the correspondence from the second lawyer that provided the advice, and is part of the “continuum of communications” covered by the legal advice privilege.

[para 12] I have noted the Applicant’s comment that the letter he received from the Public Body (on June 22, 2005) referred to a review by the Police Chief, not by a lawyer. As his request was for records documenting the Police Chief’s review, he thinks that

² The response incorporated the original request.

section 27(1) should not apply to the records responsive to his request. However, the Applicant's request for a review pertains to the EPS response to him that withheld 11 specific pages of records under section 27(1), and these 11 pages were all part of the response to a request for advice, and were provided by a lawyer to the Chief. Other than one page which it did provide to the Applicant (the letter of June 22, 2005), the Public Body did not mention any other records that it had located that were responsive to the part of the request that pertained to Ms M's testimony and witness statements. I presume that had it done so, it would have mentioned them and indicated on what basis they were being withheld. Thus I am proceeding on the basis that there were no other records responsive to this part of the request, and I need go no further than to be satisfied that the 11 pages were all covered by section 27(1).³

[para 13] I note the Applicant's argument that a statement, made by the Public Body's legal counsel and reported in a newspaper article, which invited the Applicant to pose questions about his concerns related to the investigation directly to the Public Body, constituted a waiver by the Public Body of its legal privilege relative to the records at issue. I reject the idea that the Public Body's privilege could be waived by such a statement by its legal counsel.

[para 14] Thus I find that all the withheld records fall within section 27(1)(a) of the Act.

[para 15] With respect to the manner in which it exercised its discretion in this case, the Public Body provided a statement in its submission as to how it did this. It says that in exercising its discretion to withhold the materials in this case, it "assessed the specific facts of this case, disclosed the non-privileged records, and determined that disclosure of the privileged records was not appropriate in the circumstances".

[para 16] In Order F2003-015, the Commissioner said

... legal advice about what action to take in one's dealings with someone who is, or may become, on the other side of a legal dispute, relative to the subject matter of the dispute, may lose its utility if it is disclosed. Withholding documents that relate to obtaining legal advice in order to preserve the utility of that advice is proper, and consistent with the purposes of the Act.

The Applicant, and the person on whose behalf he made the request, appear to have been raising an objection to actions of members of the Public Body, and it was appropriate for the Public Body to obtain legal advice relative to the matter. There was a possibility that the Applicant or Ms M might be or become a person "on the other side of a legal dispute". Thus, in my view, this principle behind the privilege applied in the present case. There is, in other words, nothing in the present circumstances that would take this case outside the purpose of the section in the Act that creates an exception to disclosure for information subject to legal privilege. I take it this is what the Public Body meant when it

³ A review of the Public Body's *in camera* arguments reveals that its refusal to confirm or deny the existence of additional records under section 12(2) was in relation to the request for records relative to CPIC and PROBE queries.

said that disclosure was not appropriate in the circumstances. Thus I accept that the Public Body exercised its discretion properly in this case.

[para 17] As I have held that the Public Body properly applied section 27(1)(a), I do not need to decide if it properly applied sections 27(1)(b) and (c).

Additional Issue

[para 18] Further with respect to the 11 pages of withheld records, I note the Public Body in its rebuttal has interpreted part of the Applicant's submission about these records as having been made relative to section 32 of the Act. Section 32 requires a Public Body to disclose information, despite any other provisions in the Act, that it is clearly in the public interest to disclose.

[para 19] The Applicant does cite authorities in which it was held that, in particular cases, particular investigations into police practices should be held in an open forum. He also suggests in his submission that he thinks there is a serious public concern about the integrity of the investigation that was conducted by the Public Body into the conduct of its own members.

[para 20] I agree that the idea that police officers intimidated witnesses into giving false statements could be a matter of serious public concern. However, that is not the same thing as saying the adequacy of the investigation that was conducted to determine whether there was support for this allegation in this case is a matter of serious public concern. There is nothing in the documents that I have reviewed that persuades me that the latter is so. Thus, even if, which is not clear, the Applicant intended to argue that section 32 applied so as to require disclosure of these records even though they are subject to legal privilege, I would not accept this contention.

Issue B: Did the Public Body properly refuse to confirm or deny the existence of a record, as authorized by section 12(2) of the Act?

[para 21] Section 12 provides in part:

12(1) In a response under section 11, the applicant must be told

- (a) whether access to the record or part of it is granted or refused,...*
- (c) if access to the record or to part of it is refused,*

- (i) the reasons for the refusal and the provision of this Act on which the refusal is based,...*

(2) Despite subsection (1)(c)(i), the head of a public body may, in a response, refuse to confirm or deny the existence of

- (a) a record containing information described in section 18 or 20, or
- (b) a record containing personal information about a third party if disclosing the existence of the information would be an unreasonable invasion of the third party's personal privacy.

[para 22] I have reviewed the Public Body's reasons, provided to me *in camera*, for refusing to confirm or deny whether there were any records responsive to the request in addition to those which it did provide to the Applicant. These reasons are similar to those provided by the Public Body in the inquiries giving rise to Orders F2006-012 and F2006-013, which related to harm to law enforcement under section 20.

[para 23] For reasons similar to those expressed in those orders, I do not accept the Public Body's justifications for using section 12(2) in this case. In my view, in this case as in the cases just mentioned, the facts on which the Public Body bases its theory as to the impact of disclosing whether additional records exist are improbable, and the theory itself is unsound. Thus I do not accept that the provision must be used to avoid harm to law enforcement, even at a general level. Furthermore, the Public Body has not demonstrated in this case a likelihood of harm from disclosing the information for any specific law enforcement matter (which is required in order to meet the terms of section 20).

[para 24] As well, in the circumstances of this case, I do not think the language of section 12(2)(a) in combination with the provisions of section 20 that were cited by the Public Body, apply to the Applicant or the person on whose behalf he made the request. Thus I conclude the Public Body was not entitled to respond to the Applicant in this case by refusing to confirm or deny the existence of responsive records in addition to the information it did provide to the Applicant.

V. ORDER

[para 25] I make this Order under section 72 of the Act.

[para 26] I confirm the Public Body properly applied section 27(1)(a) to the 11 pages of records it withheld in this case. I do not need to decide if it properly applied sections 27(1)(b) and (c).

[para 27] I order the Public Body to respond to the Applicant without relying on section 12(2) of the Act.

[para 28] I further order the Public Body to notify me in writing within 50 days of being given a copy of this Order that the Public Body has complied with this Order.

Christina Gauk, Ph.D.
Director of Adjudication

