

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2006-024

November 20, 2006

CALGARY POLICE SERVICE

Case File Number 3476

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

Summary: The Applicant made a request under the *Freedom of Information and Protection of Privacy Act* to the Calgary Police Service for access to a number of records which included a report authored by a working group of the Alberta Association of Chiefs of Police and a portion of the Association Minutes.

In response, the Calgary Police Service decided to disclose the records subject to a number of exceptions. The Alberta Association of Chiefs of Police, as the third party, objected to the disclosure and requested a review.

The issues before the Commissioner at the time of inquiry were whether the Calgary Police Service had custody or control of the records and, if so, whether the records were excluded from the Act under section 4(1)(n) as personal records of an appointed or elected member of a governing body of a local public body.

The Commissioner held that the records were in the custody and control of the Calgary Police Service. The Commissioner also found that the records were not personal records and, as such, did not fulfill the section 4(1)(n) criteria.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(e), 4(1), 4(1)(b), 4(1)(n), 23(1)(b), 24(1)(a), 24(1)(b)(i), 72; *Police Act*, R.S.A. 2000, c. P-17, s. 36(1).

Authorities Cited: AB Orders: 99-032, 99-025, 2000-003, 2000-005, 2000-021, F2002-006, F2002-014, F2003-018; **ON Order:** P-239 *Institution: Ministry of Government Services* (1991) O.I.P.C. No.33.

I. BACKGROUND

[para 1] In August, 2005, the Applicant made a request under the *Freedom of Information and Protection of Privacy Act* (the “FOIP Act”) to the Calgary Police Service (the “CPS”). The request was for:

“Any Minutes of Meetings held by the Alberta Association of Chiefs of Police concerning the disclosure of youth criminal records and relevant occurrence reports, including pre and post-charge Extrajudicial Sanctions completions

And

That portion of any Calgary Police Service policy and procedure manual(s), Memoranda of Understanding or Standard Operating Procedures Manual that concerns the disclosure of youth criminal records, relevant occurrence reports including pre and post-charge Extrajudicial Sanctions completions.”

[para 2] On September 22, 2005, the CPS provided a third party notice to the Alberta Association of Chiefs of Police (the “AACP”). On October 3, 2005, the AACP responded to the CPS, objecting to the disclosure.

[para 3] On October 19, 2005, the CPS informed the AACP that it had decided to disclose the records subject to a number of exceptions.

[para 4] On November 7, 2005, the AACP requested a review of the CPS’s decision.

[para 5] Mediation was authorized and a mediator’s report was issued on February 6, 2006.

[para 6] On February 21, 2006, the AACP requested that the matter proceed to inquiry.

[para 7] On March 22, 2006, the CPS disclosed the records to the Applicant.

[para 8] On April 18, 2006, the AACP again requested a review of the decision to disclose the records notwithstanding that the records had already been disclosed. The

matter was set down for a written inquiry. The CPS and the AACP each submitted an initial submission and a rebuttal. The Applicant did not make a submission.

II. RECORDS AT ISSUE

[para 9] The records at issue consist of the following:

a) a Final Report by the AACP Provincial Standards Working Group regarding security clearance protocols which includes:

i) the AACP working committee Final Report regarding police information checks,

ii) a AACP draft resolution regarding the security clearance protocols, and

iii) sample security clearance certificates; and

b) a portion of the Minutes for two AACP meetings which address the security clearance protocol.

III. ISSUES

[para 10] The issues in this inquiry are:

A. Are the records in the custody or under the control of the Public Body, as provided by section 4(1) of the Act?

B. Are the records excluded from the application of the Act by section 4(1)(n) (personal record of appointed or elected member of governing body of a local public body)?

[para 11] In the AACP's submission, the AACP also addressed sections 23(1)(b), 24(1)(a) and 24(1)(b)(i) as new issues. Sections 23(1)(b), 24(1)(a) and 24(1)(b)(i) are all discretionary provisions. These provisions were not included in the inquiry notice as issues for this inquiry.

[para 12] In Order F2003-018, the Adjudicator addressed whether he had the authority to address discretionary provisions raised by an affected party at the submission stage of an inquiry. The Adjudicator held he did not have this authority. He held that by raising these provisions at the submission stage of the inquiry the affected party was, in effect, asking the Adjudicator to disregard the public body's exercise of discretionary authority under the Act and unilaterally apply those provisions to the records. The Adjudicator held that he did not have the authority to unilaterally apply those provisions.

[para 13] I apply the reasoning outlined in Order F2003-018. I find that I do not have the authority to unilaterally apply the new discretionary provisions raised in the

AACP's submission. By raising these issues at the submission stage of the inquiry, the AACP is, in effect, asking me to disregard the CPS's exercise of discretionary authority under the Act. The CPS, as Public Body, did not apply these provisions to the records when it processed the request, did not raise these provisions as issues after the Notice of Inquiry was issued or address these provisions as issues in its initial submission. As such, I will not address these provisions in this inquiry.

IV. DISCUSSION

A. Are the records in the custody or under the control of the Public Body, as provided by section 4(1) of the Act?

[para 14] The first part of section 4(1) reads as follows:

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:...

[para 15] In Orders 2000-003 and 2000-005 the Commissioner said that the use of the word "or" in section 4(1) indicates that either "custody" or "control" needs to be established to meet the requirements of the section. It is not necessary for a public body to establish both custody and control.

1. Custody

[para 16] The CPS states that it has physical possession and, therefore, custody of the records.

[para 17] The AACP states that the CPS does not have custody of the records. The AACP states that physical possession, in and of itself, is not sufficient to establish custody. It states that in order to establish custody, a public body should have some right to deal with the records and some responsibility for their care and protection. In support the AACP refers to Ontario Order P-239; *Institution: Ministry of Government Services* (1991) O.I.P.C. No.33. In that Order the Ontario Commissioner held that bare possession did not amount to custody for the purposes of Ontario's privacy legislation. The Ontario Commissioner held that a number of factors were relevant in determining whether a public body has custody. These factors included the length of time the public body had possession and whether the records related to the public body's mandate and function.

[para 18] In Order 2000-003, the Commissioner held that that physical possession of a record was sufficient to establish custody of that record. Furthermore, the Commissioner held that a legal right to control the record, over and above simple possession, is not relevant to a determination regarding custody. A legal right of control would be a criterion for control and not custody. The Commissioner held that the capacity or authority under which a person has possession of a record are also criteria for control and not custody.

[para 19] In this inquiry, I find that the records at issue are in the physical possession and, pursuant to the reasoning set out in Order 2000-003, in the custody of the Public Body. Although some of the factors cited by the AACP may be relevant to the issue of control, I do not find that these factors are relevant to custody.

2. Control

[para 20] In Order F2002-014, I said that the word “control” refers to the authority of a public body to manage, even partially, what is done with a record. I said that the right to demand possession of a record or to authorize or forbid access to a record points to a public body having control of a record.

[para 21] In Orders 99-032 and 2000-021, the Commissioner identified a number of non-exhaustive criteria relevant to the issue of control. I have reviewed all of the submissions and the evidence before me regarding each criterion. My decision regarding each criterion is outlined below.

a. Was the record created by an officer or employee of the public body?

[para 22] After a review of the records and the submissions of all of the parties, I find that this criterion is fulfilled. I find that the Chief of Police and the CPS Coordinator of the Security Clearance Unit (CPS Coordinator) were involved in the creation of the records. In addition, I find that both the Chief of Police and the CPS Coordinator are employees of the CPS for the purposes of section 1(e) of the FOIP Act. Section 1(e) defines an “employee” as follows:

I In this Act,

(e) “employee”, in relation to a public body, includes a person who performs a service for the public body as an appointee, volunteer or student or under a contract or agency relationship with the public body;

[para 23] The CPS Coordinator performs a service for the CPS and therefore is an “employee” for the purposes of section 1(e). Furthermore, pursuant to section 36(1) of the *Police Act*, the Chief of Police is appointed to be Chief of the CPS by the police commission. As such, the Chief of Police also fulfills the requirements of this section.

[para 24] I acknowledge that other members of the AACP also participated in the creation of these records. This, however, does not negate the involvement of the CPS employees.

[para 25] I find that this criterion weighs in favour of a finding that the CPS has control of the records at issue.

b. What use did the creator intend to make of the record?

[para 26] After a review of the records and the submissions of all of the parties, I accept that the AACP Minutes and the AACP Final Report were created for internal use by the AACP. However, I find that these records were also created for use by the CPS. In coming to this conclusion, I took into account the fact that the AACP Minutes and the Final Report were distributed to the CPS employees. I also took into account that the AACP Final Report itself states that the AACP working group was developed to research and provide recommendations for a provincial disclosure standard for police information checks. Furthermore, the AACP Minutes confirm that the AACP adopted the Final Report as a guideline for all police agencies. Lastly, I also took into account the fact that the CPS used the AACP Final Report to amend its security clearance procedures in accordance with the protocol contained in that report.

[para 27] I find that this criterion weighs in favour of a finding that the CPS has control of the records at issue.

c. Does the public body have possession of the record either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?

[para 28] I find that the CPS has possession of the records and that the CPS acquired possession of the records through its employees. I find that the CPS employees were involved in the creation of the records and voluntarily provided the records to the CPS. As such, I find that this criterion is fulfilled.

[para 29] I find that this criterion weighs in favour of a finding that the CPS has control of the records at issue.

d. If the public body does not have possession of the record, is it being held by an officer or employee of the public body for the purposes of his or her duties as an officer or employee?

[para 30] I find that this criterion does not apply as I have already found that the CPS has possession of the records as per criterion (c). As such, this criterion neither weighs in favour or against a finding of control.

e. Does the public body have a right to possess the record?

[para 31] In Order 2000-021, the Commissioner said that in order to fulfill this criterion, a public body must have some legal authority to exercise a degree of control over the records. In Order F2002-006, the Adjudicator expanded on the prior order and held that other circumstances may also create a right of possession. The Adjudicator said that if a public body requests that a record be created for its use, and subsequently obtains a copy, it will, in the absence of any contractual or statutory authority that says otherwise, have a right to possess the record.

[para 32] I find that the CPS has the right to possess the records. As previously mentioned, the CPS employees were involved in the creation of the records and the AACP distributed the records to the CPS employees. In addition, the records indicate that the AACP working group was developed to research and provide recommendations for a provincial standard and that the AACP adopted the Final Report as a guideline for police agencies such as the CPS. Lastly, the CPS submission states that the CPS later used the Final Report to amend its security clearance procedures. All of these factors support the conclusion that the CPS has a right to possess the records.

[para 33] I find that this criterion weighs in favour of a finding that the CPS has control of the records at issue.

f. Does the content of the record relate to the public body's mandate and functions?

[para 34] The records at issue relate to security clearance protocols. I find that these records relate to the CPS's mandate and functions.

[para 35] I find that this criterion is fulfilled and weighs in favour of a finding that the CPS has control of the records at issue.

g. Does the public body have the authority to regulate the record's use?

[para 36] In Order F2002-006, the Adjudicator for this Office defined the word "regulate" to mean "govern or control by law; subject to esp. legal restrictions". I am not aware of any legislative authority (outside of the FOIP Act) that gives the CPS the authority to regulate the records.

[para 37] I find that this criterion is not fulfilled and therefore weighs against a finding that the CPS has control of the records at issue.

h. To what extent has the record been relied upon by the public body?

[para 38] I find that the CPS has relied on the records at issue. I accept the CPS's submission that the CPS, as a participatory agency, relied on the records to amend its security clearance procedures.

[para 39] I find that this criterion weighs in favour of a finding that the CPS has control of the records.

i. How closely is the record integrated with other records held by the public body?

[para 40] The AACP submits that this criterion is not fulfilled. The AACP states it expected the CPS to keep the records at issue separate and that it considered the records confidential. As such, the AACP argues that the records were not integrated with other CPS records.

[para 41] I have reviewed all of the parties submissions, including the AACP's argument regarding the integration of records. Although the AACP strongly argues that the records were confidential and should have been kept separate by the CPS, I find that there is no evidence before me that the AACP informed the CPS employees of its expectation. There is also no evidence within the records of the same. In addition, the AACP Minutes confirm that the AACP adopted the Final Report as a guideline for all police agencies. Given all of these factors, it seems improbable that the AACP would have realistically expected the CPS to keep the records separate from other records or have considered them to be confidential. In any event, it is irrelevant whether the AACP expected the records to be kept separate from other records or whether the AACP considered the records to be confidential. The issue under this criterion is whether the records were actually kept separate or whether they were integrated with other records.

[para 42] After a review of all of the submissions before me, I accept the CPS's assertion that the records were used to implement the AACP Provincial Standard Guidelines for Police Information Checks and that the records were integrated with other records for that purpose.

[para 43] I find that this criterion weighs in favour of a finding that the CPS has control of the records at issue.

j. Does the public body have the authority to dispose of the record?

[para 44] I find that the CPS has the authority to dispose of the record. In coming to this conclusion, I took into account that the AACP provided the records to the CPS employees. In addition, I took into account that the records themselves indicate that the AACP working group was developed to research and provide recommendations to police agencies such as the CPS. Furthermore, the records also indicate that the AACP Final Report was adopted by the AACP as a guideline for all police agencies. Lastly, the CPS states that it later used the records to amend its security clearance procedures and, pursuant to criterion (i), the records were integrated with other CPS records. I find that, absent evidence of an agreement or legislative authority that would suggest otherwise, the CPS has authority to dispose of the records.

[para 45] I find that this criterion weighs in favour of a finding that the CPS has control of the records at issue.

k. Conclusion

[para 46] Given my findings under each of the above criteria I find that, on balance, the CPS has control of the records at issue.

B. Are the records excluded from the application of the Act by section 4(1)(n) (personal record of appointed or elected member of governing body of a local public body)?

[para 47] Section 4(1)(n) 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:...

(n) a personal record of an appointed or elected member of the governing body of a local public body;

[para 48] There are two criteria under section 4(1)(n):

a) the record must be a record of an appointed or elected member of a governing body of a local public body; and

b) the record must be a personal record.

[para 49] In order for section 4(1)(n) to be fulfilled, both criteria must be fulfilled.

[para 50] This Office has not issued an Order which addresses the meaning of the term “personal record” under section 4(1)(n). However, in Order 99-025, the Commissioner addressed the meaning of “personal note” for the purposes of section 4(1)(b). In that context, the Commissioner defined the word “personal” to mean “one’s own; individual; private” and “intended for a particular person rather than a group”. He defined a “personal note” as including notes taken by an individual as long as those notes were intended only for that individual’s use.

[para 51] I accept the definition of “personal” found in Order 99-025 and find that a “personal record” would, similarly, only include those records that are for the individual’s own use and intended only for that particular person and not for a group.

[para 52] After a review of all of the submissions and the records at issue, I find that the records are not personal records and therefore do not fulfill the section 4(1)(n) criteria. I find that the AACP Minutes were created to keep track of AACP meetings and as per the AACP submission, were distributed to the AACP members. It follows that these Minutes were intended for use by a group rather than solely for personal use. Similarly, I find that the AACP Final Report on security clearance protocols was also intended for use by a group. In coming to this conclusion, I took into account the fact that, as per the AACP submission, the final report was distributed to the AACP members.

Furthermore, the records indicate that the AACP working group was developed to research and provide recommendations to police agencies and that the AACP Final Report was adopted by the AACP as a guideline for all police agencies. Lastly, the CPS states that the AACP Final Report was adopted by the CPS as a participating agency and the AACP security clearance protocols were implemented by the CPS.

V. ORDER

[para 53] I make the following Order under section 72 of the Act.

[para 54] I find that the records at issue are in the custody and under the control of the CPS pursuant to section 4(1) of the FOIP Act.

[para 55] I find that the records at issue are not excluded from the Act by section 4(1)(n). I find that the records are not personal records and, as such, do not fulfill the section 4(1)(n) criteria.

Frank Work, Q.C.
Information and Privacy Commissioner