

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2007-005

December 6, 2007

EDMONTON POLICE SERVICE

Case File Number 3635

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Summary: The Applicant made an access request to the Edmonton Police Service (the Public Body) for directives and training materials relating to canine units.

The Public Body provided the requested information, but withheld a video on the basis of section 20(1)(c), 20(1)(j) and 20(1)(k). The Applicant requested review of the decision of the Public Body to sever the information to the Commissioner.

The Adjudicator found that some of the information contained in the video was properly withheld under section 20(1)(k), but that the remainder of information in the video should be disclosed. The Adjudicator ordered the Public Body to sever the information withheld under section 20(1)(k) and to make the remainder available to the Applicant.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 6(2), 10(2), 20; *Freedom of Information and Protection of Privacy Act* R.S.O. 1990, c. F.31 s. 14

Authorities Cited: **AB:** Orders 99-010

Cases Cited: *Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner)*, 2006 ABQB 515; *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy*

I. BACKGROUND

[para 1] On March 30, 2006, the Applicant made an access request to the Public Body under the *Freedom of Information and Protection of Privacy Act* (the Act). He requested that the Public Body provide a copy of a video entitled “EPS K-9 UNIT... Life’s Short – Bite Hard!” (the training video).

[para 2] On April 3, 2006, the Public Body withheld the training video on the basis of sections 20(1)(c), 20(1)(j) and 20(1)(k) of the Act.

[para 3] The Applicant requested review of the Public Body’s decision to withhold the training video. As mediation did not resolve the issue, this matter was scheduled for a written inquiry.

[para 4] The Public Body provided written submissions while the Applicant provided no submissions.

II. RECORDS AT ISSUE

[para 5] A training video entitled “EPS K-9 UNIT... Life’s Short- Bite Hard!” is at issue.

III. ISSUES

Issue A: Did the Public Body properly apply section 20 of the Act to the records and information?

IV. DISCUSSION OF ISSUES

[para 6] The Public Body relies on section 20(c), (j) and (k) to withhold a training video. Section 20 describes situations in which disclosing information would be harmful to law enforcement and may be withheld for that reason. It states in part:

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

- (c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement,*
- (j) facilitate the escape from custody of an individual who is being lawfully detained,*
- (k) facilitate the commission of an unlawful act or hamper the control of crime...*

Section 20(1)(c)

[para 7] The Public Body argues that the video depicts tactics and strategies which may be classified as investigative techniques and procedures in law enforcement. It argues that use of Canine Unit officers and dogs to investigate criminal activities as well as pursue, apprehend, and detain suspects, meets the definition of law enforcement in section 20(1)(c).

[para 8] The Public Body provided affidavit evidence that the video depicts and explains tactics and strategies, generally unknown to the public, used by employees of the Public Body and canines to conduct searches and apprehensions. The affidavit also indicates that the Public Body relies significantly on the canine teams to detect criminal activity and apprehend suspects.

[para 9] In Order 99-010, the former Commissioner considered the purpose of section 19(1)(c), now section 20(1)(c). He said:

Section 19(1)(c) permits a public body to refuse disclosure of information that could harm the effectiveness of investigative techniques used in law enforcement. The harms test contained in this exception precludes the refusal of basic information about well-known investigative techniques. The focus in this exception is on the refusal of information on investigative techniques and procedures that relate directly to their continued effectiveness.

Section 20(1)(c) gives a public body the discretion to withhold information relating to investigative techniques and procedures in situations where general knowledge of the investigative technique or procedure would reduce effectiveness.

[para 10] While I agree with the Public Body that the video contains information relating to the canine unit's methods of searching for suspects and apprehending them, and police protocols for conducting these searches and apprehensions, I do not find that the video contains any information that could be classified as an "investigative technique" or "investigative procedure".

[para 11] The *Concise Oxford Dictionary* (9th Edition) provides the following definition of "investigate": "a) inquire into; examine, study carefully b) make a systematic inquiry or search". "Investigative" is defined as "seeking or serving to investigate".

[para 12] *Black's Law Dictionary* (8th Edition) defines "investigate" as "to inquire into (a matter) systematically; to make (a suspect) the subject of a criminal inquiry"

[para 13] "Investigative techniques and procedures", under 20(1)(c), then, would refer to techniques and procedures used to conduct an investigation or inquiry for the purpose of law enforcement. In my view, apprehension and pursuit of a suspect may be consequences of an investigation, but do not form part of the investigation or inquiry process itself.

[para 14] I have reviewed the video and find that it contains information relating to techniques and procedures for pursuing and apprehending suspects. While these are clearly law enforcement techniques and procedures, I am not satisfied that they are investigative techniques and procedures. Consequently, I find that section 20(1)(c) does not apply to the information contained in the video.

Section 20(1)(j)

[para 15] The Public Body also relies on section 20(1)(j) to withhold the video and argues that disclosure could result in the following scenario:

...disclosure of the Video would cause certain tactics and strategies to become publicly available. A member of the public who was lawfully detained by a Canine Team could utilize knowledge of such tactics and strategies to execute countermeasures and facilitate his or her escape from custody... the Public Body asserts that individuals who view the Video can discern certain vulnerabilities of the Canine Teams that are generally unknown to the public. Knowledge of such vulnerabilities would facilitate an individual's escape from custody.

[para 16] By its nature, section 20(1)(j) is a provision that requires speculation as to the consequences of releasing information.

[para 17] In *Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner)*, 2006 ABQB 515 the Court said:

In my view, the Privacy Commissioner's requirement for an evidentiary foundation withstands a somewhat probing examination. As discussed, the scope and intention of FOIPP presumes access to information, subject only to limited exceptions, and the responsibility for establishing an exception rests with the party resisting access to the information.

The requirement of some cogent evidence permits the Privacy Commissioner to discharge his duty of balancing competing interests and policy considerations by rationally assessing the likelihood of reasonable expectations of harm. To suggest that requiring some evidence is unreasonable means that access to information could be denied based solely on hypothetical possibilities, and that only the most preposterous theoretical risks could be rejected by the Commissioner.

[para 18] In *Ontario (Ministry of Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)* [2007] O.J. No. 4233, the Ontario Divisional Court adopted a similar approach:

The Adjudicator did not err in requiring "detailed and convincing evidence". He recognized that all predictions of future harm are by their nature speculative, and made it clear that the words "detailed and convincing" were not used to describe a higher standard of proof, but rather the quality and cogency of the evidence required to establish a reasonable expectation of harm.

[para 19] The Public Body therefore bears the burden of providing cogent evidence to establish that its expectation that disclosure of the training video will facilitate the escape of individuals from lawful custody is reasonable.

[para 20] The Public Body provided argument but no evidence to establish that it has a reasonable expectation that disclosure of the training video could facilitate the escape from custody of individuals who are being lawfully detained.

[para 21] The Public Body argues that a member of the public detained by the canine team could escape custody if they were aware of the training video's contents. Having reviewed the video, I am not satisfied that it contains any information that would assist an individual to escape from police custody.

[para 22] For these reasons, I find that the Public Body did not apply section 20(1)(j) correctly.

Section 20(1)(k)

[para 23] The Public Body argues that section 20(1)(k) applies for the following reasons:

...disclosure of the Video would cause certain tactics and strategies to be made publicly available. Individuals with such knowledge could execute countermeasures to facilitate the commission of unlawful acts and, as a consequence, hamper the Public Body's ability to investigate, prosecute, and control crimes. For example, if a suspect is planning to vandalize a series of cars and in the course of doing so realizes a Canine Team is attempting to, or is in fact pursuing the suspect, the execution of a countermeasure against the Canine Team's strategies and tactics could enable the individual to effectively defeat the Canine Team's efforts and thereby afford an opportunity to continue the vandalism.

[para 24] The affidavit evidence notes:

EPS members and canines, working together as teams, constitute highly valued components of the Public Body's policing operations.

The Video depicts and explains tactics and strategies utilized by EPS members and canines to conduct searches and apprehensions that are generally unknown to the public.

The video is used strictly as a training device and is not intended to be made public.

If the Video, and other similar training resources that contain investigative techniques are made public, the EPS would be significantly challenged in fulfilling its mandate of protecting the public...

It is likely that disclosure of the Video would cause harm to the EPS, its members, and the canines, since there is a reasonable likelihood that the Canine Unit will be rendered less effective as a result.

[para 25] From my review of the training video and the affidavit evidence, I am satisfied that it is reasonable to assume that if some of the information contained in the video were disclosed to the public at large, that the Canine Unit could become less effective in apprehending suspects as a result. Therefore, I find that disclosure of some of the information in the video could hamper the control of crime within the meaning of

section 20(1)(k) and that the Public Body applied its discretion appropriately in withholding that information.

[para 26] However, I am not satisfied that all the information in the video is subject to section 20(1)(k). It is important to note that section 6(2) of the Act states:

(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record.

[para 27] The Public Body seeks to withhold the video in its entirety and does not appear to have considered whether the information to which section 20(1)(k) applies could be severed under section 6(2). It did not provide any argument or evidence as to whether information could reasonably be severed from the video.

[para 28] If there is difficulty in providing the Applicant with a copy of an electronic record, severed or otherwise, then section 10(2) of the Act requires a public body to create a record for the Applicant unless creating the record would unreasonably interfere with the operations of the public body.

[para 29] I find that the introductory and concluding segments of the video do not contain information subject to section 20(1)(k). Specifically, I find that the first four minutes and fifty-three seconds of the video and the final segment entitled “EPS Canine Unit” do not contain information falling under section 20(1)(k). Instead, these segments contain historical information and general information about the Canine Unit that the Public Body has not established would hamper the control of crime if disclosed.

IV. ORDER

[para 30] I make this Order under section 72 of the Act.

[para 31] I order the Public Body to disclose the first four minutes and fifty-three seconds of the video entitled “EPS Canine Unit Life’s Short, Bite Hard!” and the final segment to the Applicant.

[para 32] I further order the Public Body to notify me, in writing, within 50 days of receiving a copy of this Order that it has complied with the Order.

Teresa Cunningham
Adjudicator