

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2007-029

June 12, 2008

EDMONTON POLICE COMMISSION

Case File Number 3720

Office URL: www.oipc.ab.ca

Summary: The Applicant requested copies of his personal information and information about a Police Chief competition from the Edmonton Police Commission (the Public Body). The Public Body withheld records on the basis that the records were part of the discovery process. It released 20 records, but severed information from them on the basis of solicitor-client privilege and because they contained personal information. The Applicant requested review by the Commissioner.

The Commissioner considered whether the Public Body had properly applied sections 17 and 27 to the records and whether the Public Body had met its duty to assist the Applicant. The Commissioner ordered the Public Body to release information relating to city council members and the personal information of the author of a letter. The Commissioner determined that the Public Body had properly applied section 27 to the records at issue. However, the Commissioner found that the Public Body had not responded to the Applicant openly, accurately and completely as required by section 10 and had not conducted an adequate search for responsive records. The Commissioner ordered the Public Body to meet its duty to assist the Applicant.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 3, 6, 10, 12, 17, 27, 65, 72

Authorities Cited: **AB:** 97-009, 2001-016, F2004-026, F2007-028

Cases Cited: *University of Alberta v. Pylypiuk*, 2002 ABQB 22; *Ontario (Correctional Services) v. Goodis*, 2008 CanLII 2603 (ON S.C.D.C.)

I. BACKGROUND

[para 1] On December 5, 2005, the Applicant requested access to records from the Edmonton Police Commission (the Public Body). In particular, he requested:

All information regarding (the Applicant) on all Edmonton Police Commissioner records including all paper and electronic records on-line, off-line, archived, held, received or distributed between January 1, 2004 to November 17, 2005. This must include minutes of any meetings, correspondence with any third party involved in the selection of candidates for the (employment position) as it relates to (the Applicant), the ranking of candidates as it relates to (the Applicant), communications regarding inquiries about (the Applicant) either within the Edmonton Police Commission or externally and all e-mail messages received or distributed internally or externally and all records regarding the (employment position) competition leading to the appointment of (an employee of the Public Body) in 2004 and the most recent selection of a new Chief of Police completed in November of 2005.

[para 2] The Public Body replied to the Applicant's access request on March 21, 2006. It advised that it would not provide records that were producible through the discovery process. The Public Body indicated that some records would be subject to section 27 of the Act, although it did not specify which records those were. The Public Body also noted that its response would be limited to those records in its custody or under its control that were not included in an affidavit of records.

[para 3] On June 13, 2006, the Applicant requested that I review the decision of the Public Body to deny his request for records. In his request for review, he argued that there are many other records within the scope of his access request that the Public Body has not disclosed.

[para 4] I authorized mediation to resolve the issue. However, as mediation was unsuccessful, this matter was set down for a written inquiry.

[para 5] On June 13, 2007, my office sent out a Notice of Inquiry to the parties. The following issues were identified in that document:

1. Does section 17 of the Act (personal information) apply to the records / information?
2. Does section 27(1)(a), (b) and (c) (sic) of the Act (privileged information) apply to the records / information?

[para 6] On June 22, 2007, counsel for the Public Body requested that this matter not proceed until a Master in Chambers determined whether records at issue were privileged. I decided that the matter would proceed because section 3(1) of the Act is clear that access applications under the Act are in addition to existing processes for obtaining records and information. I decided that the Act does not prevent an applicant

from making requesting information when the applicant has also used the discovery process under the Rules of Court to get that information.

[para 7] On August 30, 2007, the Public Body provided additional records to the Applicant.

[para 8] The parties provided initial and rebuttal submissions for the inquiry. Following review of the parties' submissions and the 20 pages of records submitted by the Public Body, I identified a third issue, which was addressed by both parties:

3. Did the Public Body meet its duty to the Applicant, as provided by section 10(1) of the Act? In this case, the Commissioner will also consider whether the Public Body conducted an adequate search for responsive records.

[para 9] The parties provided additional submissions in relation to the third issue. In addition, the Public Body provided 144 pages of records for my review of additional responsive records it had identified. The Applicant has not requested that I review information severed from those records.

[para 10] The Public Body provided rebuttal submissions. I accepted the submissions and provided the Applicant the opportunity to comment on them. The Applicant advised my office that he had no further submissions.

II. RECORDS AT ISSUE

[para 11] The following records are at issue:

1. Records 3 – 5: Emails dated July 20, 2005 8:40 AM, July 19, 2005 3:51 PM, and July 12, 2005 9:37 PM
2. Record 7: Correspondence between a member of the Public Body and a solicitor
3. Records 8 – 9: Note to file written by a member of the Public Body
4. Records 10 – 16: Letter from a solicitor to the Public Body
5. Record 17: Letter from the Public Body to a solicitor
6. Record 18: Letter from a solicitor to the Public Body
7. Records 19 – 20: Letter to the Public Body from a member of the Public.

[para 12] In addition, the Applicant questions whether the Public Body has provided all records responsive to his request.

III. ISSUES

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

Issue B: Do sections 27(1)(a), (b) and (c) of the Act (privileged information) apply to the records / information?

Issue C: Did the Public Body meet its duty to the Applicant, as provided by section 10(1) of the Act, and did it conduct an adequate search for responsive records?

IV. DISCUSSION OF ISSUES

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

[para 13] The Public Body severed information under section 17 from records 3, 4, 5, 19, and 20.

[para 14] “Personal information” is defined in section 1(n) of the Act, which states:

1(n) “personal information” means recorded information about an identifiable individual, including

- (i) the individual’s name, home or business address or home or business telephone number,*
- (ii) the individual’s race, national or ethnic origin, colour or religious or political beliefs or associations,*
- (iii) the individual’s age, sex, marital status or family status,*
- (iv) an identifying number, symbol or other particular assigned to the individual,*
- (v) the individual’s fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,*
- (vi) information about the individual’s health and health care history, including information about a physical or mental disability,*
- (vii) information about the individual’s educational, financial, employment or criminal history, including criminal records where a pardon has been given,*
- (viii) anyone else’s opinions about the individual, and*
- (ix) the individual’s personal views or opinions, except if they are about someone else;*

[para 15] Section 17 prohibits disclosure of a third party’s personal information if the disclosure of personal information would be an unreasonable invasion of personal privacy. It states, in part:

17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party’s personal privacy.

17(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party’s personal privacy if

(g) the personal information consists of the third party’s name when

- (i) it appears with other personal information about the third party, or*
- (ii) the disclosure of the name itself would reveal personal information about the third party,*

17(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

- (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,*
- (c) the personal information is relevant to a fair determination of the applicant's rights,*
- (f) the personal information has been supplied in confidence...*

[para 16] Section 17 does not say that a public body is never allowed to disclose third party personal information. It is only when the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy that a public body must refuse to disclose the information to an applicant under section 17(1).

[para 17] When certain types of personal information are involved, disclosure is presumed to be an unreasonable invasion of a third party's personal privacy under section 17(4). A public body must consider and weigh the factors set out in section 17(5), and other relevant circumstances, when determining whether a disclosure would be an unreasonable invasion of the personal privacy of a third party. In *University of Alberta v. Pylypiuk*, 2002 ABQB 22, the Court commented on the interpretation of what is now section 17. The Court said:

In interpreting how these sections work together, the Commissioner noted that s. 16(4) lists a set of circumstances where disclosure of a third party's personal information is presumed to be an unreasonable invasion of a third party's personal privacy. Then, according to the Commissioner, the relevant circumstances listed in s. 16(5), and any other relevant factors, are factors that must be weighed either in favour of or against disclosure of personal information once it has been determined that the information comes within s. 16(1) and (4). In my opinion, that is a reasonable and correct interpretation of those provisions in s. 16. Once it is determined that the criteria in s. 16(4) (now s. 17(4)) is (sic) met, the presumption is that disclosure will be an unreasonable invasion of personal privacy, subject to the other factors to be considered in s. 16(5). The factors in s. 16(5) must then be weighed against the presumption in s. 16(4).

Burden of proof for s. 17

[para 18] Section 17 has a two-fold burden of proof. A public body has the initial burden to show that section 17 applies to the personal information withheld, pursuant to section 71(1) of the Act. The burden then shifts to the applicant to show that disclosure would *not* be an unreasonable invasion of the third party's personal privacy.

Presumptions

[para 19] When information falls under one of the provisions in section 17(4) of the Act, disclosure of the personal information is presumed to be an unreasonable invasion of a third party's personal privacy. Section 17(4) creates a presumption only. A Public Body must then consider the factors under section 17(5), as these factors may outweigh the presumption. It is also important to note that section 17(5) is not intended to be an exhaustive list, and that other factors weighing for or against disclosure may be considered.

Records 3 – 5

[para 20] As noted above, records 3 – 5 contain email correspondence. An individual authored a letter and sent it to members of city council and to the Public Body. The Public Body withheld the name of an individual who authored the email, and the names of the members of city council to whom the email was addressed. The Public Body also withheld the email address and company information of the individual. The Public Body released the body of the email, the response made by a member of the city council, and the name and contact information of the Public Body employee who responded to the email, as well as the Public Body's response.

[para 21] The Public Body argues that it did not sever information of individuals acting in an official capacity, but only the personal information of those acting in a personal capacity.

[para 22] The Applicant argues that if records containing information about himself also contain information about individuals, then this information is likely not personal information but rather information about individuals acting in their public capacity.

[para 23] In Order F2004-026, I said:

Information *about* a person's "employment responsibilities" – a description of their position or duties – is different from information that records their performance of their responsibilities. The fact that a description of a person's employment responsibilities is personal information does not conflict with the conclusion (found in the Ontario cases) that recorded information created by people "in their professional capacity or the execution of employment responsibilities" is not personal information about them. The Ontario cases also acknowledge that even information consisting of records of employment activities can, depending on its nature, have a personal aspect. I agree with the Ontario cases referred to above insofar as they stand for the proposition that a record of what a public body employee has done in their professional or official capacities is not *personal* or *about the person*, unless that information is evaluative or is otherwise of a 'human resources' nature, or there is some other factor which gives it a personal dimension...

Thus, in my view, the parts of the records that record the execution of work duties that are not otherwise exempt (names associated with comments prefacing or surrounding the conveying of advice) are not, for the most part, personal information about the employees. The same reasoning applies to the names associated with a record of the subject matter or topic of the work.

However, some of the records contain comments of a purely personal nature, and reveal something personal about the correspondents. The presumption under section 17(4)(g)(i) applies to these records, and there are no factors under section 17(5) in favour of disclosing them.

[para 24] In relation to the individual who authored the letter initiating the email chain, the email contains his opinion, as well as his name, and because he sent it from his place of business, it contains the name of his employer, and his business contact information. I do not find that his email was intended to reflect the views of his company. Consequently, I find that the email contains information about him as an identifiable individual. Further, this information falls under section 17(4)(g)(i) and there are no factors under section 17(5) that favour disclosure. As a result, I find that the Public Body was correct to withhold the identifying information pursuant to section 17(1).

[para 25] In relation to the names and contact information of the members of the city council to whom the email was sent, I find that the email was sent to the council members in their official capacities as members of city council. The email requests that the council members to whom the email is addressed take action using their authority as council members. I therefore find that this email does not contain the personal information of the council members, but rather, information about them as officials.

[para 26] In relation to the response sent by one of the council members, I find that this response is sent in an official, rather than a personal, capacity. The email directs the individual to the Public Body as the appropriate place to raise his concerns.

[para 27] For these reasons, I find that the Public Body was wrong to sever the identifying information of city council members from the emails as information about individuals acting in their official capacities is not personal information under the Act.

Records 19 – 20

[para 28] A letter from an individual addressed to the Public Body, the city of Edmonton, the Mayor and council members, the Editor of the Edmonton Journal, and the Editor of the Edmonton Sun comprises records 19 and 20. The Public Body withheld the name, identifying information, address, and signature of the author of the letter pursuant to section 17(1).

[para 29] The Applicant argues that the fact that the letter's author sent it to two newspapers indicates that he intended the letter to become public, and that therefore, disclosing his personal information would not be an unreasonable invasion of personal privacy.

[para 30] The Public Body argues that section 17(4)(g)(i) applies to this information and that there are no factors under section 17(5) that argue against withholding the information. In particular, it notes that it considered section 17(5)(c) when determining whether disclosure would be an unreasonable invasion of personal privacy.

[para 31] In Order F2007-028, I said:

I find that the author of email 2 intended his identity, associated with that email, to be public. Consequently, the author had no expectation of privacy in relation to the email for the purposes of

section 17(5)(f) and it is not an unreasonable invasion of his personal privacy for the Public Body to now disclose it.

[para 32] Similarly, in relation to the letter at issue, I find that the author of the letter intended both the letter and his identity in association with it, to be made public by virtue of the fact that he sent it to the media for consideration. I find that this is a factor that outweighs sections 17(4)(i). Further, I do not consider section 17(5)(c), considered by the Public Body, to be relevant in relation to this record.

[para 33] For these reasons, I find that the Public Body did not properly apply section 17 to records 19 and 20.

Issue B: Do sections 27(1)(a), (b) and (c) of the Act (privileged information) apply to the records / information?

[para 34] Section 27(1) explains when a Public Body may withhold privileged information. It states, in part:

*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...*

[para 35] The Applicant stated the following in his submissions:

(The Applicant) is not seeking the documents pertaining to him that were created by the EPC where the primary purpose was to seek or receive advice from their solicitor. To the extent that there is privilege in these records, (the Applicant) agrees that the EPC has the right to withhold the privileged information from him.

It is our submission that the mere presence of legal counsel at a meeting of its client(s) is “not sufficient to establish privilege in respect of the communication between and among the Board members.”

...The fact that litigation is proceeding between the parties is not the primary issue; however, it is our submission that (the Applicant’s) right to access his personal information is a separate and distinct right...

It is acknowledged that the legal advice provided by counsel for the EPC is subject to privilege. However it is our submission that the EPC is improperly relying on the fact that a solicitor was present during the course of the hiring and ratification process in making a claim that all personal information pertaining to (the Applicant) is privileged.

It is clear from the Applicant’s submissions that he does not take issue with the decision of the Public Body to withhold Records 7 – 18 on the basis of privilege.

[para 36] Records 7 and 10 – 18 are communications between solicitor and client, and are intended to seek or give legal advice. In addition, it is clear from these records that they were intended to be confidential. These records are therefore subject to solicitor-client privilege.

[para 37] Records 8 and 9 are a memo to file recording legal advice received from a solicitor. The memo to file documents advice received and is also clearly intended for use in instructing counsel and obtaining legal advice in the future. I therefore find that it contains information that is subject to solicitor-client privilege.

[para 38] There are no records before me that meet the description provided by the Applicant in his submissions. As I understand from the parties' submissions, this is because the Public Body withheld all records relating to the discovery process.

[para 39] The Applicant does not take issue with the fact that records 7 – 18 have been withheld on the basis of privilege. Rather, he takes issue with the fact that the Public Body has claimed privilege over certain records in relation to the discovery process. The Act does not provide me with jurisdiction to review decisions made about documents during the discovery process. However, section 65 of the Act grants me jurisdiction to review decisions made by public bodies about the information and records they withhold in relation to access requests. I will therefore review the Applicant's concerns about discovery documents withheld by the Public Body, under Issue C, below.

[para 40] For these reasons, I find that the Public Body properly applied section 27(1)(a) to records 7 – 18.

Issue C: Did the Public Body meet its duty to the Applicant, as provided by section 10(1) of the Act and did it conduct an adequate search for responsive records?

[para 41] The Public Body argues that a public body has met the duty to assist an applicant if it conducts an adequate search for responsive records. It further argues that it has, in this case, conducted a reasonable search. In support of its argument, the Public Body provided affidavit evidence documenting the steps it took to locate responsive records.

[para 42] In addition to the arguments made in relation to the discovery process, set out above, the Applicant argues that the Public Body has not located all responsive records, on the basis that he believes that there should be more records than those provided.

[para 43] Section 6 of the Act establishes an applicant's rights to access information. It states, in part:

6(1) An applicant has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.

(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.

(3) The right of access to a record is subject to the payment of any fee required by the regulations.

[para 44] The Applicant therefore has a right to access any of his personal information in the custody of or under the control of the Edmonton Police Commission, and any other records responsive to his access request, unless an exception under Division 2 applies to the information.

[para 45] Section 10 of the Act explains a public body's obligations when an applicant makes an access request. It states, in part:

10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.

[para 46] The Public Body has the onus to establish that it has made every reasonable effort to assist the Applicant, as it is in the best position to explain the steps it has taken to assist the applicant within the meaning of section 10(1).

[para 47] Sections 11 and 12 explain when a Public Body must respond to an Applicant and what a response under the Act must contain. These provisions state:

11(1) The head of a public body must make every reasonable effort to respond to a request not later than 30 days after receiving it unless

- (a) that time limit is extended under section 14, or*
- (b) the request has been transferred under section 15 to another public body.*

(2) The failure of the head to respond to a request within the 30-day period or any extended period is to be treated as a decision to refuse access to the record.

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,*
- (b) if access to the record or part of it is granted, where, when and how access will be given, and*
- (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,*
 - (ii) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and*
 - (iii) that the applicant may ask for a review of that decision by the Commissioner or an adjudicator, as the case may be.*

(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 48] Section 10 establishes the quality of a response required by the Act, while section 11 establishes the timing of the response, and section 12 establishes the formal content requirements of a response. A failure to comply with section 10 does not necessarily mean that a Public Body has contravened sections 11 or 12. However, if a Public Body fails to meet the requirements of section 12, the response will, in most cases, fail to meet the requirements of completeness, openness and accuracy under section 10.

[para 49] Consequently, to meet the duty to assist an Applicant, a Public Body must inform the Applicant of all records in its custody or under its control that are responsive to the request, whether access will be granted to those records and when access will be given. If the Public Body intends to sever information from records, it must notify the Applicant not only of the provision of the Act on which it relies, but also the reasons for refusal, the name of a contact person, and notice of the right to request review. Further, this response must be full, complete, and accurate.

[para 50] Previous orders of my office have established that the duty to assist includes the duty to conduct an adequate search for records. In Order 2001-016, I said:

In Order 97-003, the Commissioner said that a public body must provide sufficient evidence that it has made a reasonable effort to identify and locate records responsive to the request to discharge its obligation under section 9(1) (now 10(1)) of the Act. In Order 97-006, the Commissioner said that the public body has the burden of proving that it has fulfilled its duty under section 9(1) (now 10(1)).

Previous orders... say that the public body must show that it conducted an adequate search to fulfill its obligation under section 9(1) of the Act. An adequate search has two components: (1) every reasonable effort must be made to search for the actual record requested and (2) the applicant must be informed in a timely fashion about what has been done.

[para 51] I will first consider whether the Public Body responded to the Applicant's access request in accordance with section 10 and then consider whether it conducted an adequate search for responsive records.

Response

[para 52] The Public Body provided two letters in response to the Applicant's access request. The first letter, dated March 21, 2006, states:

We have commenced the FOIP process and will keep you informed of the status. However, to avoid the duplication of costs and efforts, records that have been dealt with in the First and Second

Parts of Schedule 1 in the Affidavit of Records of the Edmonton Police Commission (dated February 24, 2006) will not be included in the FOIP process for the following reasons:

- In the case of the records under the First Part, they are producible documents and are available for your review in our solicitor's office.
- In the case of the records under the Second Part, the EPC has objected to the production under the discovery process. The EPC will also refuse to disclose these records under FOIP application, pursuant to section 27(1)(a),(b)(c) of the *Freedom of Information and Protection of Privacy Act*.

Thus, the FOIP application... will deal with records that are in the custody or under the control of the EPC that were not included in the above-noted Affidavit of records.

The letter included a contact person and notice of the right to request review.

[para 53] In its response to the Applicant, dated April 5, 2006, the Public Body stated:

This is further to my letter of March 21, 2006. We indicated that those records that have been dealt with under the discovery process between yourself and the Edmonton Police Commission (EPC) et al will not be included in the FOIP process.

The EPC has decided to provide you with partial access to the responsive records that are outside of the discovery process. Following is an outline of the decision:

- Some pages are being disclosed in their entirety.
- Some pages are being disclosed with certain information severed. The FOIP Act provisions supporting the severing are noted on those pages.
- Some pages are being withheld in their entirety. These pages along with the FOIP Act provisions supporting the non-disclosure are noted in the attached package.

The Public Body provided the name of a contact person and advised the Applicant that he had the right to request review of its decision to withhold information.

[para 54] Neither response meets the requirements of section 10. In relation to the letter of March 21, 2006, the Public Body has not relied on a provision of the Act, but instead relied on the discovery process to deny access to responsive records. However, the Act does not permit a public body to withhold records for that reason.

[para 55] Records and information may be the subject of both the discovery process set out in the Rules of Court and an access request under the Act. Through the discovery process, a party may be granted the opportunity to view relevant documents. In contrast, the Act gives an individual the right to be provided a copy of responsive records in the custody or under the control of a public body, if the records can be reasonably reproduced, subject to the exceptions in the Act.

[para 56] In Order 97-009, the former Commissioner commented on the relationship between the discovery process and access requests under the Act. He said:

The Act provides in section 3(a) that “This Act is in addition to and does not replace existing procedures for access to information or records.” I was not referred to any authority, either in the Rules of Court or elsewhere, that would restrict an applicant to obtaining information only in the discovery process under the Rules of Court when the applicant has commenced that process in the court.

In my view, the *Freedom of Information and Protection of Privacy Act*, which is a substantive body of legislation, operates independently of the Rules of Court, which is a regulation. The Rules of Court do not prevent an applicant from making an application for information under the Act, nor does the Act prevent an applicant from making an application for information when the applicant has used the discovery process under the Rules of Court to get that same information. Furthermore, the Rules of Court do not affect my jurisdiction to apply the Act where there is an issue of whether information in the custody or control of a public body is subject to a privilege to which the Rules of Court may also apply.

[para 57] In addition, in *Ontario (Correctional Services) v. Goodis*, 2008 CanLII 2603 (ON S.C.D.C.), the Ontario Divisional Court commented on the relationship between Ontario’s *Freedom of Information and Protection of Privacy Act* and the discovery process. The court said:

The Ministry submitted that the records should be exempt because of the deemed undertaking rule. That rule of civil procedure prohibits parties engaged in litigation from using information obtained on discovery for a collateral purpose (*Goodman v. Rossi* 1995 CanLII 1888 (ON C.A.), (1995), 24 O.R. (3d) 359 (C.A.) at pp. 363-64). Here, the deemed undertaking rule is said to apply because the records at issue are informed by and reveal information learned on discovery.

I see no basis to read the implied undertaking rule into s. 19 of the Act. As Lane J. observed in *Jane Doe v. Board of Commissioners of Police for the Municipality of Metropolitan Toronto* (unreported, Ont. Ct. (Gen. Div.), June 3, 1997), the *Rules of Civil Procedure* and the disclosure mechanisms under the Act operate independently of one another.

[para 58] Not only did the Public Body deny access to records for a reason not permitted by the Act, but the letter of March 21, 2006 is not an open, accurate or complete response. At best, it refers to records in general, and how it might withhold some of them if it were going to do so under the Act.

[para 59] The response of April 5, 2006 granted partial access to only 20 records of all the responsive records in the Public Body’s custody or under its control, because these records were outside the discovery process. For the reasons set out above, I find that the Act does not permit the Public Body to deny access to information on the basis that the records are also subject to the discovery process, and its response was accordingly not open, accurate, or complete.

[para 60] In addition, while reference is made in the April 5, 2006 response to the section numbers on which the Public Body relied to withhold information from the 20 records to which it granted partial access, the response does not provide the reason for its refusal to release the information. However, a response under the Act must contain both the provision of the Act on which the Public Body relies to sever information *and* its reasons for refusal. The Public Body’s response was therefore not open, accurate, or complete for this reason as well.

[para 61] Because of these omissions, the responses of the Public Body are not open, accurate or complete within the meaning of section 10.

Adequacy of Search

[para 62] The affidavit indicates that the Public Body's practice when responding to access requests is to ask employees to review their files and search for and retrieve any responsive records. The FOIP coordinator then follows up with employees. The author of the affidavit indicates that he has been advised that this practice was followed when it searched for records responsive to the Applicant's request.

[para 63] The author of the affidavit also indicates that the Public Body's FOIP Coordinator asked the firm of Conroy Ross, which had contracted with the Public Body to conduct an executive search, to review its records in case it had records responsive to the request.

[para 64] Finally, the author of the affidavit explains that prior to conducting the search for responsive records, eight members of the Commission were asked to review their records and produce any and all documents in their possession relating to the access request. The result of this request is described in an Affidavit of Records that refers to records withheld from the Applicant.

[para 65] I am not satisfied from the Public Body's evidence that it conducted an adequate search for responsive records. The affidavit evidence does not establish when the firm of Conroy Ross, which conducted the executive search, was asked to search for records, or whether the company located any records. Further, it does not explain who was responsible for conducting this aspect of the search and what steps Conroy Ross took to locate records. As the Applicant requested all records, internal or external, leading to the appointment of a police chief, records from Conroy Ross would appear to be necessary to satisfy this aspect of the request.

[para 66] In general, evidence as to the adequacy of a search should cover the following points:

- The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
- The scope of the search conducted – for example: physical sites, program areas, specific databases, off-site storage areas, etc.
- The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
- Who did the search

- Why the Public Body believes no more responsive records exist than what has been found or produced

[para 67] The Public Body has not provided an indication of the steps it took to locate responsive records located at Conroy Ross, who performed that search, or what the outcome of that search was.

[para 68] In addition, the Public Body has not provided the basis for its position that no further responsive records exist, other than those it has already located.

[para 69] As the affidavit evidence notes, the Public Body provided records to the Applicant on April 5, 2006 and August 30, 2007. The author of the affidavit indicates that the additional records were provided because the Applicant expanded his request for responsive records.

[para 70] However, on review of the Complainant's access request, which I have set out in paragraph 1 of this Order, I find that the documents the Public Body released to the Applicant in August 2007 were well within the scope of the original access request and should have been located at the time the Public Body was responding to that request. As the only reason provided for producing these records at a later date is that the scope of the access request changed in some way, I am not satisfied that the Public Body conducted an adequate search for records in 2006. Otherwise, it would have located the records it later released at the time of the Applicant's access request.

[para 71] For these reasons, I find that the Public Body has not established that it conducted an adequate search for responsive records.

Conclusion

[para 72] I find that the Public Body has not met its duty to assist the Applicant under section 10 of the Act, because it did not respond openly, accurately and completely and did not conduct an adequate search for responsive records.

V. ORDER

[para 73] I make this Order under section 72 of the Act.

[para 74] I order the Public Body to release the identifying information of city council members in records 3 – 5.

[para 75] I confirm the decision of the Public Body to withhold records 7 - 18

[para 76] I order the Public Body to release records 19 and 20 in their entirety.

[para 77] I order the Public Body to meet its duty to assist the Applicant by responding to the Applicant openly, accurately and completely. The response must

contain reference to all responsive records in its possession, including those that are also subject to the discovery process. The response must also contain the provisions of the Act on which the Public Body relies to withhold records, if any, and its reasons for doing so.

[para 78] I order the Public Body to conduct an adequate search for responsive records, including those in the custody of Conroy Ross, and to communicate to the Applicant the steps it took to locate records and the results of that search.

[para 79] 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.

Frank Work, Q.C.
Information and Privacy Commissioner