

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2008-007

February 28, 2008

ALBERTA JUSTICE AND ATTORNEY GENERAL

Case File Number 3923

Office URL: www.oipc.ab.ca

Summary: The Applicant made a request under *the Freedom of Information and Protection of Privacy Act* (the Act) for copies of all records relating to the Calgary Crown Prosecutor's Office's investigation into an incident involving a peace officer and the decision of the Office not to press criminal charges against the officer.

Alberta Justice and Attorney General (the Public Body) denied the request, citing sections 17(1), 17(4), 20(1), 21(1) and 27 of the Act.

The Adjudicator found that the records at issue revealed information relating to or used in the exercise of prosecutorial discretion and that the Public Body had properly applied its discretion to withhold them under section 20(1)(g). As the records were properly withheld under section 20(1)(g), the Adjudicator did not consider whether sections 17, 20, 21, and 27 also applied.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 17, 20, 21, 27, 72

Authorities Cited: **AB:** Orders 2001-011, F2004-026, F2006-005

Cases Cited: *Krieger v. Law Society of Alberta* [2002] 3 S.C.R. 372

I. BACKGROUND

[para 1] On November 3, 2006, the Applicant made an access request for records relating to an incident that took place in Edmonton on June 18, 2006. The Applicant noted that a media release indicated that the Calgary Crown Prosecutor's Office did not recommend laying criminal charges in relation to the incident.

[para 2] On December 12, 2006, the Public Body advised the Applicant that it had located 133 pages of records, but that it had determined that none of the records would be disclosed. It cited sections 17, 20, 21, 24 and 27 of the Act as the basis for withholding the records.

[para 3] The Applicant requested review by this office of the decision to withhold information reviewed by the Calgary Crown Prosecutor's Office in coming to its decision not to lay criminal charges.

[para 4] The Commissioner authorized mediation. As mediation was unsuccessful, the matter was scheduled for a written inquiry. The Public Body provided submissions but the Applicant did not.

II. RECORDS AT ISSUE

[para 5] There are 133 records at issue. They include a ministry briefing note, a letter to a police service, internal memoranda from counsel, a letter from a police service, and investigation records.

III. ISSUES

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

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

Issue C: Did the Public Body properly apply section 21(1)(a) of the Act (intergovernmental relations) to the records / information?

Issue D: Did the Public Body properly apply section 24(1)(a)(b) and (c) of the Act (advice) to the records / information?

Issue E: Did the Public Body properly apply section 27(1)(b) and (c) of the Act (privileged information) to the records / information?

IV. DISCUSSION OF ISSUES

[para 6] Section 20(1)(g) is a discretionary exception to the requirement to disclose records. It states:

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

(g) reveal any information relating to or used in the exercise of prosecutorial discretion

[para 7] The Public Body argues that the records and information were properly withheld under section 20(1)(g), as they could reasonably be expected to reveal information relating to or used in the exercise of prosecutorial discretion. The Public Body cites *Krieger v. Law Society of Alberta* [2002] 3 S.C.R. 372 in support of its position.

[para 8] “Prosecutorial discretion” is not defined in the Act. However, as the Public Body notes, “prosecutorial discretion” was determined to be a term of art by the Supreme Court of Canada in *Krieger*. The Court determined that the exercise of prosecutorial discretion includes:

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

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

[para 9] Ruth Sullivan notes on page 47 of *Sullivan and Driedger on the Construction of Statutes* 4th Edition (Markham: Butterworths, 2002) that where a legislative instrument uses a legal term of art, it is generally presumed that the term is used in its correct legal sense. I will therefore determine whether the records and information at issue related to or were used in the making of decisions as to the nature and extent of prosecution and the Attorney General’s participation in it, as the Supreme Court of Canada has determined that this is the legal meaning of prosecutorial discretion.

[para 10] The Applicant essentially requested all records relating to a decision of the Crown Prosecutor’s Office not to lay charges against a peace officer. Consequently, all records responsive to the request are either records relating to the nature and extent of

prosecution or were used in the making of the decision as to the nature and extent of prosecution. I have reviewed all the records and have determined that they either explain why the decision not to prosecute was made, in which case the record relates to the making of the decision, or consist of information on which the decision was based, in which case, the record contains information used in the making of the decision. As a result, section 20(1)(g) applies to the records and information.

[para 11] As section 20(1)(g) applies to the records and information, I must now consider whether the Public Body properly applied its discretion to withhold the record. In Order 2001-011, the Commissioner stated:

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

[para 12] In Order F2004-026, the Commissioner reviewed the conditions for applying discretionary exceptions. He said:

In my view a Public Body exercising its discretion relative to a particular provision of the Act should do more than consider the Act's very broad and general purposes; it should consider the purpose of the particular provisions on which it is relying, and whether withholding the records would meet those purposes in the circumstances of the particular case.

[para 13] In other words, a Public Body must consider the purpose of a particular exception and consider its application to the records and information it is seeking to withhold. The Public Body must also provide evidence of the factors it considered when applying the exception, as required by Order F2001-011.

[para 14] The Public Body provided the direct evidence of the person who acted with the delegated authority of the head of the Public Body and made the decision to withhold the records. He advised that he considered the following principle when he decided to apply section 20(1)(g) to withhold the records.

It is imperative that prosecutors are able to make informed decisions on issues surrounding whether or not to proceed with a prosecution. Deliberations leading to these decisions must be "*protected from the influence of ... vitiating factors by the principle of independence.*"

[para 15] In *Krieger*, the Supreme Court commented on the public policy interests on which prosecutorial discretion immunity is based. The Court said:

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

[para 16] The Public Body has established that it considered the purpose of section 20(1)(g) and its relationship to the Act, when it decided to withhold the records and

information. The Public Body provided direct evidence from the person who made the decision to withhold the records that the records were withheld as to release them would undermine the principle of prosecutorial independence.

[para 17] For these reasons, I find that the Public Body properly applied section 20(1)(g) to the records and information and exercised its discretion appropriately when it decided to withhold the records.

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

[para 18] As I have found that the records and information were properly withheld under section 20(1)(g), there is no need to consider whether section 17 also applies to the records.

Issue C: Did the Public Body properly apply section 21(1)(a) of the Act (intergovernmental relations) to the records / information?

[para 19] As I have found that the records and information were properly withheld under section 20(1)(g), there is no need to consider whether section 21 also applies to the records and information.

Issue D: Did the Public Body properly apply section 24(1)(a)(b) and (c) of the Act (advice) to the records / information?

[para 20] As I have found that the records and information were properly withheld under section 20(1)(g), there is no need to consider whether section 24 also applies to the records and information.

Issue E: Did the Public Body properly apply section 27(1)(b) and (c) of the Act (privileged information) to the records / information?

[para 21] As I have found that the records and information were properly withheld under section 20(1)(g), there is no need to consider whether section 27 also applies to the records and information.

V. ORDER

[para 22] I make this Order under section 72 of the Act.

[para 23] I confirm the decision of the Public Body to withhold the records at issue.

Teresa Cunningham
Adjudicator