ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2011-010

September 23, 2011

ALBERTA SOLICITOR GENERAL AND PUBLIC SECURITY

Case File Number F5356

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Summary: Under the *Freedom of Information and Protection of Privacy Act* (the "Act"), the Applicant asked Alberta Solicitor General and Public Security (the "Public Body") for records relating to allegations of sexual assault on female prisoners who were in the custody of a sheriff, a third party, employed by it. The Public Body refused to confirm or deny the existence of responsive records, on the basis that disclosing the existence of the information would be an unreasonable invasion of the third party's personal privacy under section 12(2)(b) of the Act. The Applicant requested a review.

The Adjudicator found that disclosing the existence of responsive records, if they existed, would be an unreasonable invasion of the third party's personal privacy, as the records would relate to law enforcement and employment history. While the Applicant argued that the Public Body should have indicated whether responsive records exist on the basis that it was desirable for public scrutiny, the Adjudicator found that public scrutiny was not desirable in the particular case. While the Applicant argued that the Public Body had not properly exercised its discretion in relying on section 12(2)(b), the Adjudicator found that it had, as it had taken into account the relevant considerations. The Adjudicator concluded that the Public Body properly refused to confirm or deny the existence of records responsive to the Applicant's access request.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(n), 12, 12(2), 12(2)(a), 12(2)(b), 17, 17(2)(a), 17(4), 17(4)(b),

17(4)(d), 17(4)(g), 17(5), 17(5)(a), 17(5)(e), 17(5)(f), 17(5)(h), 20, 32, 32(1)(b) and 72. **CAN:** *Canadian Charter of Rights and Freedoms*, 1982, s. 2(b).

Authorities Cited: AB: Orders 97-002, 98-009, 99-014, 2000-016, F2004-015, F2004-024, F2005-016, F2009-029 and F2010-010; *University of Alberta v. Pylypiuk*, 2002 ABQB 22; *Newton v. Criminal Trial Lawyers' Association*, 2010 ABCA 399. **CAN:** *Ontario (Public Safety and Security) v. Criminal Lawyers Association*, 2010 SCC 23.

I. BACKGROUND

[para 1] In a letter dated February 16, 2010, the Criminal Trial Lawyers' Association (the "Applicant") asked Alberta Solicitor General and Public Security (the "Public Body") for information under the *Freedom of Information and Protection of Privacy Act* (the "Act"). The representative of the Applicant wrote as follows:

> *I have been informed that Sheriff [name] was alleged to have sexually assaulted or otherwise assaulted female prisoners who were in his custody at [a particular town or city's] Provincial Court and/or in transit or otherwise. The allegations are that the assaults involved a female adult prisoner and a female youth prisoner. It is also my information that this resulted in some sort of investigation and may or may not have resulted in criminal charges. It is also my information that this resulted in the termination or resignation of Sheriff [name].*
>
> *This is a FOIPP Act application for copies of all records relating to this issue. I trust that you will agree that it is in the public interest that the public and participants in the criminal justice system be made aware of this issue, including the response of the Sheriff's Department to the issue. Accordingly, I ask that you apply Section 17(5)(a) of the Act.*

[para 2] By letter dated March 24, 2010, the Public Body neither confirmed nor denied that it had responsive records, on the basis that doing so would be an unreasonable invasion of the personal privacy of the Sheriff (the "Third Party") under section 12(2)(b) of the Act.

[para 3] In a letter dated April 21, 2010, the Applicant requested a review of the Public Body's response. Mediation was authorized but was not successful. The matter was therefore set down for a written inquiry.

II. RECORDS AT ISSUE

[para 4] As the issue in this inquiry is whether the Public Body properly refused to confirm or deny the existence of a record, there are no records at issue, whether or not there were records responsive to the Applicant's access request.

III. ISSUE

[para 5] The Notice of Inquiry, dated January 4, 2011, set out the issue of whether the Public Body properly refused to confirm or deny the existence of a record, as authorized by section 12(2) of the Act.

[para 6] In its response to the Applicant's access request, the Public Body stated that, if responsive records did exist, there would be a possibility that the material could be withheld under section 20 of the Act (disclosure harmful to law enforcement). The Applicant makes submissions in reply. However, the hypothetical application of section 20 – or the application of section 12(2)(a), which refers to section 20 – is not an issue in this inquiry. While the Public Body made some additional comments in its letter to the Applicant, it specifically relied only on section 12(2)(b) in refusing to confirm or deny the existence of responsive records, making the application of that section the only issue to be addressed in this Order.

IV. DISCUSSION

[para 7] Section 12 of the Act reads, in part, as follows:

> *12(1) In a response [to an access request] 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,*
>
> *…*
>
> *(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 8] In this case, the Public Body specifically relies on section 12(2)(b) in order to refuse to confirm or deny the existence of a record. The Public Body has the burden of proving that it properly relied on section 12(2) (Order F2009-029 at para. 11). Having

said this, it is in the Applicant's best interest to also provide argument and evidence (Order 99-014 at para. 11; Order F2009-029 at para. 11).

[para 9] In order for a public body to properly apply section 12(2)(b) of the Act, it must do each of the following: (a) search for the requested records, determine whether responsive records exist and provide any such records to this Office for review; (b) determine that responsive records, if they existed, would contain the personal information of a third party and that disclosure of the existence of the information would be an unreasonable invasion of the third party's personal privacy; and (c) show that it properly exercised its discretion in refusing to confirm or deny the existence of a record by considering the objects and purpose of the Act and providing evidence of what was considered (Order 98-009 at paras. 8 to 10; Order 2000-016 at paras. 35 and 38).

[para 10] Part (b) of the foregoing test was recently re-worded as requiring the public body to show that confirming the existence of responsive records, if they existed, would reveal the personal information of a third party, and to show that revealing this personal information (that the records exist, if they exist) would be an unreasonable invasion of the third party's personal privacy (Order F2010-010 at para. 14).

1. Did the Public Body carry out the proper process?

[para 11] The Public Body made *in camera* submissions addressing whether it conducted an adequate search for records and whether responsive records were identified. On review of those submissions, I am satisfied that the Public Body fulfilled the requirement under section 12(2) of the Act regarding appropriate process. I cannot discuss my finding in any greater detail, as it would reveal to the Applicant whether or not there were records responsive to its access request.

2. If records existed, would confirming their existence reveal personal information of a third party?

[para 12] "Personal information" is defined in section 1(n) of the Act as "recorded information about an identifiable individual". The Public Body submits that, if the fact scenario alleged by the Applicant were true, a confirmation that responsive records exist would reveal that the Third Party was alleged to have assaulted two prisoners, and that this resulted in an investigation. I agree that disclosure of the existence of records, if they existed, would reveal that the Third Party was alleged to have committed assault and was investigated in some way. I also find that this would be his personal information.

[para 13] The Public Body also submits that, if the fact scenario alleged by the Applicant were true, a confirmation that responsive records exist would reveal that the Third Party resigned or that his employment was terminated, and would reveal that two particular females were incarcerated in prison and that they were allegedly the victims of assault. However, these facts would not be revealed by a confirmation of the existence of records, as the information could be severed (see Order F2009-029 at para. 21). For instance, if responsive records existed, the Public Body would be able to withhold

whether or not the Third Party resigned, or was terminated, and could withhold the identities of the two female prisoners.

[para 14] The names of the female prisoners are not provided in the Applicant's access request, and there is no indication that the Applicant is aware of the identities of the individuals whom he alleges to have been assaulted. I therefore find that a confirmation or denial of the existence of records would not reveal any personal information about them as identifiable individuals. Therefore, the only personal information in question in this Order is that of the Third Party, being the Sheriff. I will not be reviewing whether disclosure of the existence of records would be an unreasonable invasion of the personal privacy of the two female prisoners.

[para 15] The Applicant submits that the Public Body failed to consider severing the records so as eliminate or reduce any concerns about an unreasonable invasion of personal privacy. However, if responsive records existed and the Public Body confirmed their existence, the confirmation would reveal, by virtue of the wording of the Applicant's access request, that the Third Party was alleged to have committed assault. The Public Body would not be able to avoid that disclosure by way of severing. It therefore remains possible for the Public Body to rely on section 12(2)(b) of the Act in this case.

3. If records existed, would confirming their existence be an unreasonable invasion of the third party's personal privacy?

[para 16] In order to rely on section 12(2)(b), the Public Body must show that disclosing the existence of records responsive to the Applicant's access request, if they existed, would be an unreasonable invasion of the Third Party's personal privacy. The provisions regarding an unreasonable invasion of personal privacy under section 17 of the Act may be used as guidance (Order 2000-016 at para. 35).

[para 17] Section 17 reads, in part, as follows:

> *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.*
>
> *(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if*
>
> *(a) the third party has, in the prescribed manner, consented to or requested the disclosure,*
>
> *...*
>
> *(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*
>
> *...*

(b) the personal information is an identifiable part of a law enforcement record, except to the extent that the disclosure is necessary to dispose of the law enforcement matter or to continue an investigation,

…

(d) the personal information relates to employment or educational history,

…

(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,

…

(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,

…

(e) the third party will be exposed unfairly to financial or other harm,

(f) the personal information has been supplied in confidence,

…

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and

…

[para 18] The Public Body points to the presumptions against disclosure under sections 17(4)(b), 17(4)(d) and 17(4)(g). I agree that they are relevant here. If records responsive to the Applicant's access request existed, disclosure of their existence would be in the context of a law enforcement record, reveal that the Third Party allegedly engaged in misconduct in the course of his employment, and reveal his name in conjunction with other personal information about him, namely that he was alleged to have committed assault and was investigated in some way.

[para 19] The Public Body submits that the relevant circumstance under section 17(5)(e) is present in this case because the Third Party "would be harmed with respect to

future civil litigation if the existence or non-existence of the records was disclosed". However, if the alleged fact scenario of the Applicant were true and responsive records existed, a civil action against the Third Party would not expose him unfairly to financial or other harm. In my view, unless it is frivolous, vexatious or the like, a legal proceeding does not constitute unfair harm.

[para 20] The Public Body submits that the relevant circumstance under section 17(5)(f) is present in this case, in that there is a reasonable expectation that serious allegations of the type described by the Applicant would be kept confidential. However, the personal information in question in this inquiry – in other words, the personal information that would be revealed if the Public Body disclosed the existence of responsive records, if they existed – is that the Third Party was the subject of assault allegations and some form of an investigation. Neither of these facts, if true, would likely have been supplied in confidence by the Third Party, as it implies that he would have reported his own alleged misconduct. I also find it unlikely that, if the fact scenario alleged by the Applicant were true, the two alleged victims would have intended that the allegations themselves remain confidential. The victims might hypothetically have supplied their identities and details about the alleged incidents in confidence, but their identities and the details would not be revealed by disclosure of the existence of records. The Public Body would be in a position to sever this information from the records, if responsive records existed.

[para 21] Finally, the Public Body submits that disclosure of the existence of responsive records, if they existed, would unfairly damage the reputation of the Third Party under section 17(5)(h). I find this circumstance neutral, as it depends on whether there would have been merit to the assault allegations, if they in fact were made. If there were merit, damage to the Third Party's reputation might not be unfair. If there were little or no merit to the allegations, there might be unfair damage to reputation.

[para 22] To summarize thus far, I find that the Public Body has not raised any relevant circumstances, in reference to section 17(5) of the Act as guidance, that weigh in favour of relying on section 12(2)(b) of the Act in this case. However, there are factors, in reference to section 17(4) as guidance, that weigh in favour of refusing to confirm or deny the existence of records responsive to the Applicant's access request.

[para 23] I now turn to the Applicant's argument and evidence.

[para 24] The Applicant says that there is no indication that the consent of third parties was sought or considered, suggesting that section 17(2)(a) is relevant in determining whether the Public Body properly relied on section 12(2)(b). Under section 17(2)(a), a disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if the third party has consented to the disclosure.

[para 25] First, the Act does not require a public body to seek or consider obtaining the consent of third parties when determining whether disclosure of information would be an unreasonable invasion of their personal privacy, even for the purpose of deciding whether

section 17 of the Act applies to information, separate and apart from any reliance on section 12(2)(b).

[para 26] Second, in the context of a reliance on section 12(2)(b), if a public body were to indicate, openly to an applicant, that it sought or considered the consent of third parties, the public body would effectively be indicating that responsive records exist, defeating the purpose of refusing to confirm or deny the existence of records in the first place. Having said this, a public body could indicate, in an *in camera* submission, that it did or did not seek or obtain the consent of third parties. This would then be considered by the Commissioner or Adjudicator when determining whether disclosure of the existence of responsive records would or would not be an unreasonable invasion of personal privacy, and therefore whether the particular public body could or could not rely on section 12(2)(b). Of course, details of what the Commissioner or Adjudicator considered could not be revealed to the particular applicant, again because it would reveal whether or not responsive records exist.

[para 27] In this inquiry, my review of the Public Body's *in camera* submission does not lead me to conclude that the factor set out in 17(2)(a) of the Act is relevant. This could be because there are no records responsive to the Applicant's access request and therefore no reason for the Public Body to seek the consent of any third parties, or it could be because there are responsive records but the Public Body did not indicate that it obtained the consent of any third parties with respect to disclosure of their personal information.

[para 28] The Applicant argues that the circumstance under section 17(5)(a) is relevant in this case, in that disclosure of the existence of responsive records is desirable for the purpose of subjecting the activities of the Public Body to public scrutiny. For public scrutiny to be a relevant circumstance, there must be evidence that the activities of the Public Body have been called into question, which makes the disclosure of personal information necessary in order to subject the activities of the Public Body to public scrutiny (Order 97-002 at para. 94; Order F2004-015 at para. 88). There should be some public component, such as public accountability, public interest or public fairness (*University of Alberta v. Pylypiuk* at para. 48; Order F2005-016 at para. 104).

[para 29] The Applicant cites *Newton v. Criminal Trial Lawyers' Association* (at para. 59), in which the Alberta Court of Appeal stated: "Because of the extraordinary powers they have to use force and to put restraints on liberty, the misconduct of police officers is always a matter of public interest." The Applicant says that police agencies often publicize sexual assault allegations so that others with similar complaints against the same suspect may come forward, and it submitted a copy of a news release relating to a different case, in which sexual assault allegations were made public. The Applicant submits that the foregoing points equally apply to the Public Body and the Third Party, as he was a sheriff and peace officer. It argues that the Public Body failed to consider that the Third Party was a law enforcement officer, in a position of trust in relation to the alleged victims, and that he is therefore entitled to little or no privacy if the allegations are of substance. The Applicant says that the Public Body's refusal to indicate whether

responsive records exist should be considered part of the overall process of how it handles alleged misconduct, and that its reliance on section 12(2)(b) is an effort to avoid public scrutiny. The Applicant argues that it is important for the public to know whether the allegations were properly investigated or "swept under the carpet".

[para 30] Conversely, the Public Body says that the fact scenario alleged by the Applicant is mere speculation by a private entity with respect to criminality that it believes to have occurred. It submits that the fact scenario, even if it were true, does not involve any activity of the Public Body that should be subjected to public scrutiny.

[para 31] I find that disclosure of whether records responsive to the Applicant's access request exist is not desirable for the purpose of publicly scrutinizing the activities of the Public Body, or the activities of the Third Party as an employee of the Public Body. The Applicant cites a general statement about police misconduct being of public interest and notes an instance when sexual assault allegations were made public, submitting that these points apply here, but they do not lend themselves to a conclusion that the activities of the Public Body have been called into question. The Applicant submits that the Third Party was in a position of trust in relation to the alleged victims and that it is important, generally, to scrutinize how the Public Body handles alleged misconduct, but these points do not mean that the Public Body might have mishandled the matter, even if it were the case that there were allegations of assault against the Third Party.

[para 32] In short, the broad principles and general statements offered by the Applicant have an insufficient bearing on the alleged facts of this particular case. It is alleged that a sheriff employed by the Public Body assaulted two prisoners, was investigated, may have been criminally charged, and may have been terminated or resigned. None of these alleged facts, even if true, suggest that the Public Body might have improperly investigated the matter. If I were to accept that public scrutiny was desirable here, it would effectively imply that public scrutiny is desirable in every case involving alleged misconduct of a law enforcement officer.

[para 33] In addition to citing section 17(5)(a), the Applicant raises the application of section 32 of the Act. Its submissions are to the effect that disclosure of the existence of responsive records would be clearly in the public interest under section 32(1)(b). However, for section 32(1)(b) to apply, there must be circumstances *compelling* disclosure, or disclosure *clearly* in the public interest, as opposed to a matter that may be of interest to the public (Order F2004-024 at para. 57). This threshold is not met here.

[para 34] Finally, the Applicant notes that its request for an inquiry was based, in part, on the Public Body's failure to apply section 2(b) (freedom of expression) of the *Canadian Charter of Rights and Freedoms*, and it says that I should "interpret the application of the Act in accordance with constitutional standards". The Applicant fails to elaborate in any way. I therefore do not see how the foregoing points affect my determination of whether the Public Body properly relied on section 12(2)(b).

4. Did the Public Body properly exercise its discretion?

[para 35] The Applicant cites *Ontario (Public Safety and Security) v. Criminal Lawyers Association*, in which the Supreme Court of Canada noted that the head of a public institution under access to information legislation must properly exercise his or her discretion, and that the reviewing Commissioner must then properly inquire into the head's exercise of discretion (see paras. 66 to 73). The Court stated that a decision may be quashed and returned for reconsideration where the decision was made in bad faith or for an improper purpose, the decision took into account irrelevant considerations, or the decision failed to take into account relevant considerations (at para. 71).

[para 36] I find that the Public Body properly exercised its discretion under section 12(2)(b) of the Act. The question of whether a public body had the discretion to rely on section 12(2)(b) is answered, in part, by weighing the presumptions and relevant circumstances under section 17 (Order F2010-010 at para. 50). Here, the Public Body referred to section 17 as guidance and correctly concluded that there were factors against indicating whether records responsive to the Applicant's access request exist, and no relevant circumstances weighing in favour. While the Applicant argues that the Public Body failed to consider public scrutiny under section 17(5)(a), I have found that public scrutiny is not desirable in this case. The Public Body also says that it invoked section 12(2)(b) because, if responsive records existed, they would be sensitive in nature, which I take to be a reference to the fact that the records would relate to sensitive allegations of assault, if indeed the fact scenario of the Applicant were true. I find the Public Body's point about sensitivity to be an additional relevant factor that it considered when exercising its discretion, and demonstrates to me that it did not rely on section 12(2)(b) in bad faith or for an improper purpose.

[para 37] I conclude that disclosing whether records responsive to the Applicant's access request exist would be an unreasonable invasion of the Third Party's personal privacy under section 12(2)(b) of the Act, and that the Public Body properly exercised its discretion when it relied on that section in order to refuse to confirm or deny the existence of a record.

V. ORDER

[para 38] I make this Order under section 72 of the Act.

[para 39] I find that the Public Body properly refused to confirm or deny the existence of a record under section 12(2) of the Act, and I confirm its decision to do so.

Wade Riordan Raaflaub
Adjudicator