

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2013-29

September 20, 2013

EDMONTON POLICE SERVICE

Case File Number F5960

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Summary: An allegation was made that an individual (the “Applicant”) had sexually assaulted a minor, the matter was investigated by the Edmonton Police Service (the “Public Body”), but no charges were laid. As contemplated by section 36(1) of the *Freedom of Information and Protection of Privacy Act* (the “Act”), the Applicant asked the Public Body to correct the status of the police investigation by classifying it as “closed”, and to correct the nature of his involvement in that investigation, as shown on a Police Information Check Certificate, by indicating that he was “cleared”.

The Adjudicator found that the Public Body properly refused to correct the information, as it consisted of opinions that a public body must not correct under section 36(2) of the Act. Specifically, the investigating detective held the subjective view that the investigation should be suspended, rather than closed, because he was not satisfied that the allegations against the Applicant were wholly unfounded, and he believed that additional evidence might come to light. The staff member who conducted the police information check believed, based on her application of particular guidelines, that there was relevant information, namely the Applicant’s involvement as a subject in the sexual assault occurrence, that did not permit the issuance of a “clear” certificate.

The Adjudicator accordingly confirmed the Public Body’s decision not to correct the Applicant’s personal information. He also concluded that the Public Body had properly linked the Applicant’s personal information to his correction request, as required by section 36(3) of the Act.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(n), 36, 36(1), 36(2), 36(3), 72 and 72(3)(d).

Orders Cited: AB: Orders 97-020, 2000-007, F2004-025, F2005-008 and F2005-023.

I. BACKGROUND

[para 1] In March 2004, there was an allegation that an individual (the “Applicant”) had sexually assaulted a minor. The Edmonton Police Service (the “Public Body”) investigated the matter but laid no charges against the Applicant. The investigation was classified as “suspended”. In December 2008, the Applicant requested a police information check for the purpose of clearing him to work with vulnerable persons, given that his prospective employment involved working with children. The check accordingly included a vulnerable sector search to effectively ascertain whether the Applicant had ever been involved in a matter involving a vulnerable person, such as a child. The Public Body issued a Police Information Check Certificate dated December 3, 2008, indicating the Applicant’s involvement as a subject in the police case file dealing with the sexual assault occurrence.

[para 2] In a form dated September 1, 2011, the Applicant asked the Public Body to correct the status of the police case file by changing it to “closed”. He also asked that the Police Information Check Certificate be corrected, so that it showed that he was “cleared” of the accusations against him. The Applicant’s requested corrections are contemplated by section 36(1) of the *Freedom of Information and Protection of Privacy Act* (the “Act”).

[para 3] In a letter to the Applicant dated October 3, 2011, the Public Body refused to make the requested corrections, but indicated that the Applicant’s correction request would be attached to his police case file.

[para 4] In a form dated October 25, 2011, the Applicant requested a review of the Public Body’s response to his correction request. The Commissioner at the time authorized a portfolio officer to investigate and try to settle the matter. This was not successful, and the Applicant requested an inquiry in a form dated January 13, 2012. A written inquiry was set down.

II. INFORMATION AT ISSUE

[para 5] The information that the Applicant wants to have corrected consists of the status of the police case file or investigation in which he was involved (he wants it to be classified as “closed”), and the nature of his involvement in that matter as shown on the Police Information Check Certificate (he wants it to indicate that he was “cleared”, or to show as “clear”).

III. ISSUE

[para 6] The Notice of Inquiry, dated October 29, 2012, set out the issue of whether the Public Body properly refused to correct the Applicant’s personal information under section 36 of the Act.

IV. DISCUSSION OF ISSUE

Did the Public Body properly refuse to correct the Applicant's personal information under section 36 of the Act?

[para 7] Section 36 of the Act reads, in part, as follows:

36(1) An individual who believes there is an error or omission in the individual's personal information may request the head of the public body that has the information in its custody or under its control to correct the information.

(2) Despite subsection (1), the head of a public body must not correct an opinion, including a professional or expert opinion.

(3) If no correction is made in response to a request under subsection (1), or if because of subsection (2) no correction may be made, the head of the public body must annotate or link the personal information with that part of the requested correction that is relevant and material to the record in question.

...

[para 8] Under section 36, an individual has the initial burden of establishing that the public body has personal information about him or her and that there is an error or omission in the personal information that the public body refused to correct (Order 97-020 at para. 108; Order F2005-023 at para. 10). The public body has the burden of showing why it refused to correct the personal information and that it instead properly annotated or linked the personal information with the requested correction (Order 97-020 at para. 109; Order F2005-023 at para. 10).

[para 9] For section 36(1) to be engaged, a correction request must be directed toward the "personal information" of an individual, as that term is defined in section 1(n) of the Act. I find that the classification of the police case file as "suspended" and the indication that the Applicant was the "subject" of a sexual assault occurrence, as indicated on the Police Information Check Certificate, constitute his personal information. These references are recorded information about the Applicant within the terms of the definition. While the word "suspended" refers to the file or investigation, it reveals the fact that the Applicant was the subject of criminal allegations and that the file or investigation has not been closed.

[para 10] The Applicant argues that the Public Body improperly refused to make the corrections that he requested because he was falsely accused by the minor in question. He says that the Public Body effectively concluded that there was no basis to support the sexual assault allegations, given that the Public Body noted that the complainant had changed her story several times and that a medical examination of her had revealed no physical evidence of a sexual assault. The Applicant further submits that his personal information should be corrected because the investigating detective told him and his children's social worker in April 2004 that he had been cleared of any wrongdoing and that the investigation was being closed (a fact that the Public Body disputes). The Applicant says that the result of this acknowledgment on the part of the detective was that he was able to resume visitation of his children, which had been suspended

due to the investigation. The Applicant also notes that a police information check requested by him and conducted by the Public Body in November 2005 did not indicate the existence of the police case file in question or his involvement in the sexual assault occurrence, which is inconsistent with the results of the subsequent police information check in December 2008. He adds that his career in child care and education has been significantly affected by the result of the December 2008 police information check.

[para 11] The Public Body responds that it has properly refused to make the requested corrections because the two items of information that the Applicant wants to have corrected constitute opinions within the terms of section 36(2), which cannot be corrected. It alternatively argues that the Applicant has failed to establish that there is an error or omission in his personal information within the terms of section 36(1).

[para 12] An opinion is a belief or assessment based on grounds short of proof, and is a view held as probable; an opinion is subjective in nature, and may or may not be based on fact (Order 2000-007 at para. 16). In my view, the two items of information that the Applicant wants to have corrected are properly considered to be opinions.

[para 13] The characterization of the police case file or investigation as suspended, rather than closed, reflects the subjective view of the investigating detective that the allegations against the Applicant were not wholly unfounded, and that additional evidence might come to light. The detective provided an affidavit indicating that the serious nature of the sexual assault allegations was also a factor in suspending rather than closing the file. As noted by the Public Body, the investigating detective evaluated the evidence in the case and performed an assessment of the file, based on his professional knowledge and experience. The fact that the Applicant considers himself to be innocent of the allegations against him, or the possibility that he is actually innocent, does not change the matter. Police members record information in and about a file based on how they view the events in question and based on reports by various individuals; just because an applicant views matters differently does not render the information subject to possible correction (Order F2004-025 at para. 36). In short, the Applicant's view that the underlying facts contradict the detective's opinion that the file should be suspended does not render the view of the detective correctible; it remains an uncorrectable opinion within the terms of section 36(2).

[para 14] Similarly, the indication on the Police Information Check Certificate that the Applicant was the subject of a file dealing with a sexual assault occurrence reflects the subjective view of the staff member who performed the check, in that she believed that there was relevant information that did not permit the issuance of a clear certificate. The Public Body explains that, when deciding whether or not a clear certificate can be issued, the staff member applies guidelines developed by the Association of Chiefs of Police that were adopted by the Public Body. In this particular case, the staff member determined that the Applicant's involvement as a subject in the sexual assault of a minor was relevant information for the purposes of the vulnerable sector search, and that she therefore could not issue him a clear certificate. As noted by the Public Body, the application of guidelines and the determination of whether particular criteria are met are matters of opinion (see, e.g., Order F2005-008 at para. 65).

[para 15] The Applicant argues that the file should be closed and that he should be cleared because no new evidence has come to light in several years, and the police file has effectively remained inactive since that time. These points do not alter my conclusions. The investigating detective can nonetheless hold the opinion that the sexual assault complaint has possible merit, and that additional evidence might eventually surface at some point in the future. In turn, the staff member who performed the police information check can nonetheless hold the opinion that the Applicant was involved in a relevant police file that will not permit the issuance of a clear Police Information Check Certificate.

[para 16] The fact that the Public Body issued the Applicant a clear certificate in November 2005 likewise does not change my conclusions. The Public Body says that the discrepancy may be the result of the guidelines for issuing certificates being in transition at the time. Regardless, the staff member who held the opinion, in December 2008, that the Applicant was the subject of a file relevant to the police information check, and that she therefore could not issue a clear certificate, still held that opinion. For this same reason, it does not matter that a particular individual known to the Applicant, who had previously been the subject of a police investigation, was cleared in the course of a police information check, or that the Applicant himself was cleared in the course of checks by the Royal Canadian Mounted Police in April 2008, and by Alberta Child and Youth Services in December 2008. The facts relevant to the other individual's case, and the checks performed by entities other than the Public Body, have no bearing on the opinions of the detective who investigated the matter involving the Applicant and of the staff member of the Public Body who performed the police information check on the Applicant that is at issue in this inquiry.

[para 17] As I find that the information that the Applicant wants to have corrected consists of opinions within the terms of section 36(2), the Public Body had no ability to correct the information. I accordingly conclude that the Public Body properly refused to correct the Applicant's personal information.

[para 18] If I am wrong, and the information that the Applicant wants to have corrected is more properly characterized as factual and can therefore possibly be corrected under section 36(1), I still find that the Public Body properly refused to correct the two items. That the file or investigation is classified as "suspended" is a true fact, and that the Applicant was or remains a "subject" in the sexual assault occurrence is a true fact. While he may not agree with these characterizations and their consequences, they remain the characterizations that have, in fact, been made by the Public Body. It has, in fact, classified the file as suspended rather than closed, and it has, in fact, designated the Applicant as a subject in the investigation, with the consequence that a clear Police Information Check Certificate cannot be issued.

[para 19] The Applicant suggests that the file has, in fact, been closed and that he has, in fact, been cleared, given that notes written by his children's social worker on April 27, 2004 indicate that the social worker had been told that the Public Body would not be charging the Applicant and would be closing the file. The investigating detective says that he never made any such assertions to the social worker, or to the Applicant, and the Public Body points to the detective's own notes of April 29, 2004, which state that the "file will be suspended pending new information". I prefer the evidence of the investigating detective, as he was the one who

effectively made the decision to suspend the investigation. I accordingly find that the Applicant and his children's social worker were and are mistaken in their belief that the file was or would be closed, or that the Applicant was or would be cleared of the allegations against him.

[para 20] On refusing to correct an individual's personal information, a public body must show that it properly annotated or linked the personal information with the requested correction, as required by section 36(3). The Applicant expresses no concerns about the manner in which the Public Body linked his correction request to the personal information that he wants to have corrected. I find that the Public Body properly did so, in any event.

[para 21] The Public Body indicates that it has attached, or appended, the Applicant's correction request of September 1, 2011 to the entire police case file in question. I find that this satisfies the requirement of section 36(3), as the personal information that the Applicant wants corrected relates to the whole of the case file, in that the whole of the file is suspended and the Applicant is a subject in the whole of the underlying matter. The Public Body need not link the Applicant's requested correction with a specific item of personal information or specific record within the file, including the Police Information Check Certificate of December 3, 2008. Indeed, the purpose of the link or annotation required by section 36(3) is to alert others of the Applicant's correction request, and his request is far more apparent if appended to the police case file as a whole, rather than buried in the file wherever the Certificate might happen to be. It has also been stated that section 36(3) of the Act should be interpreted sensibly, so that a public body has some administrative leeway in deciding the manner in which annotation or linking will occur (Order 97-020 at para. 184).

V. ORDER

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

[para 23] I find that the Public Body properly refused to correct the Applicant's personal information under section 36 of the Act. Under section 72(3)(d), I confirm the Public Body's decision not to correct the personal information of the Applicant that is at issue in this inquiry.

Wade Raaflaub
Adjudicator