

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2014-45

October 31, 2014

EDMONTON POLICE SERVICE

Case File Number F6795

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Summary: An individual made an access request to the Edmonton Police Service (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for all records in relation to his involvement with the Public Body from January 1, 2009 to the date of the request (November 13, 2012).

The Public Body located 81 pages of responsive records. It withheld information under sections 4 and 17 of the FOIP Act. The Applicant requested a review of the Public Body's decision.

The Adjudicator found that section 4(1)(a) applies to some of the withheld information, as the information consisted of records of a judge or justice of the peace. The Adjudicator therefore did not have jurisdiction to review the Public Body's decision regarding that information.

The Adjudicator determined that the Public Body properly applied section 17 the information in the records. She ordered the Public Body to withhold that information.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 4, 17, 71, 72; Police Service Regulation, Alberta Regulation 356/90.

Order Cited: AB: 97-002, F2004-030, F2004-015, F2007-007, F2008-012/H2008-003, F2008-031, F2010-031, F2012-20, F2013-51, F2014-16.

Cases Cited: *Alberta (Attorney General) v. Krushell*, 2003 ABQB 252 (CanLII), 2003 ABQB 252, *Edmonton (Police Service) v. Alberta (Law Enforcement Review Board)*, 2014 ABCA 267.

I. BACKGROUND

[para 1] An individual made an access request to the Edmonton Police Service (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for all records in relation to his involvement with the Public Body from January 1, 2009 to the date of the request (November 13, 2012).

[para 2] The Public Body located 81 pages of responsive records. It withheld information under section 17 of the FOIP Act. In the course of the inquiry, the Public Body also identified section 4(1)(a) as applying to 3 pages of records.

[para 3] The Applicant sought a review of the Public Body's decision. A portfolio officer was authorized to investigate and attempt to settle the matter. This was not successful and an inquiry was set down.

II. RECORDS AT ISSUE

[para 4] The records at issue consist of the withheld portions of 81 pages of records provided to the Applicant in response to his request.

III. ISSUES

[para 5] The issue set out in the Notice of Inquiry dated June 23, 2014, is as follows:

Does section 17 of the Act (disclosure harmful to personal privacy) apply to information in the records?

[para 6] By letter dated August 26, 2014 I added the following issue to the inquiry:

Are records excluded from the application of the Act by section 4(1)(a)?

[para 7] I will discuss the application of section 4 first, then the Public Body's application of section 17.

IV. DISCUSSION OF ISSUES

Are records excluded from the application of the Act by section 4(1)(a)?

[para 8] If section 4(1)(a) applies to the records at issue, I do not have jurisdiction to review the Public Body's decision to withhold them. The Public Body applied this provision to pages 45-47 of the records.

[para 9] Section 4(1)(a) of the Act states:

4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

(a) information in a court file, a record of a judge of the Court of Appeal of Alberta, the Court of Queen’s Bench of Alberta or The Provincial Court of Alberta, a record of a master of the Court of Queen’s Bench of Alberta, a record of a justice of the peace other than a non-presiding justice of the peace under the Justice of the Peace Act, a judicial administration record or a record relating to support services provided to the judges of any of the courts referred to in this clause;

[para 10] This provision applies to information taken or copied from a court file (Order F2004-030 at para. 20 and F2007-007 at para. 25); it also applies to information copied from a court file to create a new document, such as a court docket (*Alberta (Attorney General) v. Krushell*, 2003 ABQB 252 (CanLII), 2003 ABQB 252). However, these orders state that records emanating from the Public Body itself or from some source other than the court file are within the scope of the Act, even though duplicates of the records may also exist in the court file (F2010-031).

[para 11] The Public Body states that “the records in question consist of documents filed by the Clerk of the Court with the Provincial Court of Alberta in relation to an action before the Provincial Court of Alberta. This is indicated by the court ‘filed’ stamp, and thus is contained in a court file.”

[para 12] Pages 45-47 of the records are consecutive pages of a record; the first page (page 45) includes a header of a court of Alberta, and is signed by justice of that court or a justice of the peace. I cannot locate the “filed” stamp that the Public Body states is located on these pages. Nevertheless, as the record is signed by a justice (or justice of the peace), it is a record of that justice (or justice of the peace) and falls within the scope of section 4(1)(a) regardless of whether there is a “filed” stamp. I therefore do not have jurisdiction to review the Public Body’s decision to withhold these pages.

Does section 17 of the Act (disclosure harmful to personal privacy) apply to information in the records?

Is the information personal information?

[para 13] Section 1(n) defines personal information under the Act:

1 In this Act,

...

(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 14] The information withheld under section 17 includes primarily names of third parties involved in an incident with the Applicant, including individuals having a personal relationship with the Applicant. The Public Body describes the withheld information as including dates of birth, race, employment history, medical history, and contact information related to these individuals. Some of the withheld information also consists of statements made by individuals to the Public Body. All of the information is contained in police files.

[para 15] Names and contact information of third parties is personal information under the FOIP Act. Opinions about an individual are that individual's personal information under section 1(viii) of the Act. However, as stated by the Director of Adjudication in Order F2013-51, the fact that an individual expressed an opinion is *that* individual's personal information as well.

[para 16] In almost all of the records, the Public Body disclosed most of the information, withholding only discrete items of information (such as names and contact information). However, in one instance (pages 51-53), the Public Body withheld a three-page record in its entirety, except the header. This record consists of a witness statement made by a third party to the Public Body. I confirm that the information in that statement cannot be severed without identifying the witness and revealing his or her personal information (in other words, none of the information can be rendered non-identifiable such that section 17 would not apply to it).

Would disclosure be an unreasonable invasion of a third party's personal privacy?

[para 17] Section 17 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.

...

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

(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,

(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,

...

(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,

...

(c) the personal information is relevant to a fair determination of the applicant's rights,

...

(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

(i) the personal information was originally provide by the applicant.

[para 18] Section 17 is a mandatory exception: if the information falls within the scope of the exception, it must be withheld.

[para 19] Under section 17, if a record contains personal information of a third party, section 71(2) states that it is then up to the applicant to prove that the disclosure would not be an unreasonable invasion of a third party's personal privacy.

[para 20] Neither party has argued that section 17(2) or (3) apply to any of the withheld information, and from the face of the records, neither provision appears to apply.

Section 17(4)

[para 21] The Public Body argues that sections 17(4)(a), (b), and (g) apply to the personal information, creating a presumption that disclosing the information would be an unreasonable invasion of personal privacy.

[para 22] Section 17(4)(a) creates a presumption against disclosure of personal information that relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation. Some information in the records about a particular third party discusses his or her medical conditions and treatments. I agree that this factor applies to that information, weighing against disclosure.

[para 23] Section 17(4)(b) creates a presumption against disclosure of information contained in an identifiable part of a law enforcement record. Law enforcement is defined in section 1(h) of the Act, to include:

1 In this Act,

...

(h) "law enforcement" means

(i) policing, including criminal intelligence operations,

(ii) a police, security or administrative investigation, including the complaint giving rise to the investigation, that leads or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the investigation or by another body to which the results of the investigation are referred, or

(iii) proceedings that lead or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the proceedings or by another body to which the results of the proceeding are referred

[para 24] The records at issue are part of a police file; most include a header with the Public Body name and file number; as such, section 17(4)(b) applies to all of the personal information in the records. However, pages 54-59 consist of emails that do not indicate that they would be part of a law enforcement record.

[para 25] In Order F2012-20, the adjudicator stated that section 17(4)(b) does not apply to personal information where it is not possible to associate the personal information with a law enforcement investigation. She stated (at para. 17):

The requirement that personal information be an “identifiable part” of a law enforcement record, means that it must be possible, on viewing the personal information, to identify the personal information as compiled or created as part of a law enforcement proceeding.

[para 26] I agree with this conclusion. Although the emails on pages 54-59 of the records are addressed to an officer employed by the Public Body, there is no indication that they are associated with a law enforcement proceeding; nor does the withheld personal information indicate this. I find that this factor does not weigh against disclosure of the personal information on those pages.

[para 27] The Applicant points out that section 17(4)(b) does not weigh against disclosing the personal information if the disclosure is necessary to dispose of the law enforcement matter, or to continue an investigation. The Applicant argues that disclosure of the information in the records would “properly enable the Applicant to contemplate or pursue a *Police Act* Complaint or complaint pursuant to the *Criminal Code* or complaints to other bodies or the release of information to the media if the disclosed information indicates that such action is necessary. Until the Applicant receives such disclosure, the Applicant is prevented from fully exercising the option of either disposing of a law enforcement matter or investigation.” (Rebuttal submission, page 9).

[para 28] The Applicant cited, in support of this position, the Alberta Court of Appeal in *Edmonton (Police Service) v. Alberta (Law Enforcement Review Board)*, 2014 ABCA 267. In the paragraphs cited by the Applicant, the Court discusses the importance of public access to records filed with a tribunal in the course of a legal proceeding. It is not clear why the Applicant believes that this decision supports his request for access to police investigation records (which have not, as far as I am aware, been introduced in any legal proceeding).

[para 29] It seems unlikely that the second part of section 17(4)(b) is intended to allow an Applicant to access law enforcement records to dispose of, or continue, his or her own investigation. Additionally, the provision states that the information must be necessary to dispose of *the* law enforcement matter, or to continue an investigation. In other words, section 17(4)(b) applies to records that are part of a law enforcement matter that has already been undertaken; it does not apply to records that *may become* part of a law enforcement matter in the future. The second part of clause (b) states that the presumption against disclosure does not apply if the disclosure is necessary to further *the* law enforcement matter – this applies to the law enforcement matter that is already underway. The Public Body created (or compiled) the records for its investigation; the Applicant cannot claim that section 17(4)(b) does not apply because disclosure is necessary for him to dispose of his own law enforcement matter (if he had one). Further, the Applicant has not provided me with any argument to indicate that he has initiated an investigation; therefore, I conclude that the disclosure is not necessary to *continue* an investigation (which is the other condition under which the presumption against disclosure would not apply).

[para 30] I find that section 17(4)(b) weighs against disclosure of the personal information, except the personal information withheld on pages 54-59.

Section 17(4)(g)

[para 31] Much of the personal information includes the names of third parties. Section 17(4)(g) (third party's name with other information) therefore applies to that personal information, weighing against disclosure.

Section 17(5)

[para 32] The factors giving rise to a presumption that disclosing the personal information is an unreasonable invasion of personal privacy must be weighed against any factors listed in section 17(5), or other relevant factors, that weigh in favour of disclosure.

[para 33] The Applicant argues that the issue at inquiry is a matter of public interest; suggesting that section 17(5)(a) (disclosure desirable for public scrutiny) may apply to the severed information. He also argues that section 17(5)(c) is relevant.

[para 34] The Public Body argues that sections 17(5)(e), (f), (h) and (i) apply, weighing against disclosure.

Section 17(5)(a)

[para 35] In order for the desirability of public scrutiny to be a relevant factor, there must be evidence that the activities of the public body have been called into question, which necessitates the disclosure of personal information in order to subject the activities of the public body to public scrutiny. (See Order 97-002, at para. 94; Order F2004-015, at para. 88; Order F2014-16, at para. 34.)

[para 36] In Order F2014-16, the Director of Adjudication discussed appropriate factors to consider in determining whether public scrutiny is desirable. She said (at paras. 35-36):

In determining whether public scrutiny is desirable, I may consider factors such as:

1. whether more than one person has suggested public scrutiny is necessary;
2. whether the applicant's concerns are about the actions of more than one person within the public body; and
3. whether the public body has not previously disclosed sufficient information or investigated the matter in question.

(Order 97-002, paras 94 and 95; Order F2004-015, para 88).

It is not necessary to meet all three of the foregoing criteria in order to establish there is a need for public scrutiny. (See *University of Alberta v. Pylypiuk* (cited

above) at para 49.) For example, in Order F2006-030, former Commissioner Work said (at para 23) that the first of these factor “is less significant where the activity that has been called into question, though arising from a specific event and known only to those immediately involved, is such that it would be of concern to a broader community had its attention been brought to the matter”, commenting that “[i]f an allegation of impropriety that has a credible basis were to be made in this case, this reasoning would apply”.

[para 37] In his request for inquiry, the Applicant states that he is seeking the records “to determine whether the police acted properly.” This does not indicate that any activities of the Public Body have been called into question, but rather that the Applicant is trying to determine whether Public Body employees have acted wrongly. This does not meet the test for section 17(5)(a).

[para 38] In his rebuttal submission, the Applicant alleged that there has been political interference in the legal matters between him and his family member, because the family member is an elected official.

[para 39] As evidence, the Applicant provided a sworn affidavit, in which he recounts an incident involving his family member. He stated that he met his family member at an Alberta courthouse to “speak to a legal dispute” with his family member. He states that the family member was guarded by four sheriffs, who appeared to be there to protect the family member. The Applicant alleges that the family member used his or her “political influence to get assistance in the legal dispute and the additional protection from the Sheriffs on the false pretenses that I was a danger to [his or her] safety. This causes me to believe that [the family member] may have obtained political influence over Edmonton Police Service in relation to the same dispute.”

[para 40] The Applicant acknowledges that the incident with the sheriffs at the courthouse does not relate to the Public Body (as the sheriffs are not employees of the Public Body, but rather are employed by Alberta Justice and Solicitor General). It is not clear how this incident supports the Applicant’s arguments.

[para 41] The Applicant argues that “these matters” (presumably, the Applicant’s dealings with the Public Body) are of great interest to the public, because the Applicant’s family member is an elected official and was involved in “the incident referred to in the disputed records.” Although I have reviewed the records, it is not clear to what incident the Applicant is referring. Perhaps the Applicant means to indicate his interactions with his family member more generally.

[para 42] The Applicant also submits as evidence of public interest several media stories about Alberta’s former deputy premier’s cell phone roaming charges, which were allegedly a result of the deputy premier’s involvement in legal matters of another elected official. The Applicant states that he believes that the legal matters referred to in the media stories are the legal matters between him and his family member.

[para 43] The media stories about the former deputy premier's cell phone bill do not seem relevant to the public scrutiny factor. It might be the case that the former deputy minister was somehow involved with the legal matters between the Applicant and his family member; however, even if that were true, the Applicant has not indicated any link between the former deputy premier and the Public Body.

[para 44] Further, the election of the Applicant's family member is publicly available information: the member was elected to public office in 2012. Many of the records at issue relate to matters that occurred prior to that date (including the incident at the courthouse).

[para 45] The Applicant has not provided sufficient evidence of political interference, or any other activity of the Public Body that requires scrutiny. Even if the Applicant had provided sufficient evidence of the need for public scrutiny, the information withheld under section 17 would not, in my view, be desirable for subjecting the activities of the Public Body to scrutiny. The Public Body disclosed to the Applicant much of the information in the records, including most witness statements and police notes (with discrete items of information, such as names, removed). The Applicant has not indicated how the withheld information would shed light on the actions of the Public Body in responding to the incident involving the Applicant. (The names of Public Body officers were not withheld under section 17).

[para 46] I find that section 17(5)(a) does not apply to any information in the records at issue.

Section 17(5)(c)

[para 47] Section 17(5)(c) weighs in favour of disclosing information that is relevant to a fair determination of an applicant's rights. Four criteria must be fulfilled for section 17(5)(c) to apply:

- (a) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds;
- (b) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed;
- (c) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
- (d) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing. (F2008-012/H2008-003at para. 55, Order F2008-031 at para. 112)

[para 48] The Applicant argues that he has a legal right to pursue a complaint under the *Police Service Regulation*, which he is currently contemplating. He states that "[u]pon receipt of the requested records, the Applicant can make an informed decision as to

whether or not he will proceed with these actions” (rebuttal submission, para. 32). He further states:

In this case, the Applicant cannot take any further action or quell his serious concerns without the information that is requested as he has been barred from knowing the full extent of his [family member]’s and the Alberta Government’s involvement with the EPS in his matters.

...

The Applicant needs this information to determine whether his rights have been violated. Without this information, the Applicant is unable to determine whether or not there has been misconduct on the part of the EPS or on the part of the Alberta government. (Rebuttal submission, paras. 33 and 34).

[para 49] In order for section 17(5)(c) to weigh in favour of disclosing personal information, the information must be *relevant to* a fair determination of the Applicant’s rights. In this case, the Applicant appears to be seeking the information *in case* the information indicates wrongdoing on the part of the Public Body, in which case he may pursue a complaint against the Public Body (or employees of the Public Body). The Applicant has not provided me with any evidence that the conduct of the Public Body, or any member of the Public Body, was such that the Applicant could pursue a complaint under the *Police Service Regulation*. The Applicant has provided only mere speculation of political interference, which I rejected with respect to the application of section 17(5)(a).

[para 50] I find that section 17(5)(c) does not apply to the information in the records at issue.

Conclusions under section 17

[para 51] At least one presumption in section 17(4) applies to each item of personal information withheld in the records at issue (and in most cases, more than one presumption applies). The Public Body has argued that several provisions in section 17(5) also weigh against disclosure of the information in the records. However, I find that there are no factors weighing in favour of disclosing the information; therefore, I do not need to consider whether additional factors weigh against disclosure.

[para 52] I find that the disclosure of the personal information in the records at issue would be an unreasonable invasion of privacy.

V. ORDER

[para 53] I make this Order under section 72 of the Act.

[para 54] I find that section 4(1)(a) applies to the information withheld on pages 45-47. Therefore I do not have jurisdiction to review the Public Body’s decision regarding that information.

[para 55] I find that section 17(1) applies to the information withheld by the Public Body under that provision, and that it would be an unreasonable invasion of third parties' privacy to disclose it. Under section 72(2)(b), I confirm the Public Body's decision to refuse access to that information.

Amanda Swanek
Adjudicator