

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

DECISION F2008-D-003

November 6, 2008

EDMONTON POLICE COMMISSION

Case File Number F3782

Office URL: www.oipc.ab.ca

Summary: The Applicant made a request for records from the Edmonton Police Commission (the Public Body). The records related to dismissals made by the Police Chief under section 43(11) of the *Police Act*. The Public Body withheld the records under sections 17, 20, 24, and 27 of the *Freedom of Information and Protection of Privacy Act*. The Applicant requested review of the decision and a written Inquiry was scheduled.

The Edmonton Police Service (EPS) applied to have the Chief of Police (the Chief) considered a person affected by a request for review under section 67 of the Act. Alternatively, it requested to be allowed to intervene at the inquiry.

The Adjudicator decided that EPS, or alternately, the Chief of Police, was a person affected by the request for review.

Statutes Cited: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 2, 16, 17, 20, 24, 27, 30, 67; 69, 72; *Police Act* R.S.A. 2000, c. P- 17, s. 43; *Interpretation Act* R.S.A. 2000, c. I-8, s. 10

Authorities Cited: Decision F2008-D-001

Cases Cited: *R. v. Szczerba* [2002] A.J. No. 915(Q.B.); *R. v. Horzempa* 2005 MBQB 282; *Edmonton (City of) v. Alberta (Human Rights and Citizenship Commission)*, 2002 ABQB 1013; *C.U.P.E., Local 38 v. Calgary (City)* [1987] A.J. No. 249; *Guide Outfitters*

Assoc. v. British Columbia (Information and Privacy Commissioner), 2004 BCCA 210; *R. v. O'Connor* [1995] 4 S.C.R. 411; *Telecommunications Workers Union v. Canada (Radio-television and Telecommunications Commission)* [1995] 2 S.C.R. 781

I. BACKGROUND

[para 1] The Applicant requested access to the following records from the Edmonton Police Commission (the Public Body): “All records relating to communications to the EPS in 2005 and 2006 relating to investigations of complaints about EPS officers by the EPS, whether the complaints are public complaints, complaints by EPS officers or complaints initiated by the Chief or the EPS relating to dismissals pursuant to section 43(7)(10) and (11) of the *Police Act*.”

[para 2] The Public Body responded to the Applicant’s access request on June 19, 2006. It withheld records on the basis of sections 17, 20, 24 and 27 of the *Freedom of Information and Protection of Privacy Act* (the Act).

[para 3] On August 4, 2006, the Applicant requested review by this office of the Public Body’s decision to deny access to the records.

[para 4] The Commissioner authorized mediation. As mediation did not resolve the dispute, the matter was set down for a written inquiry.

[para 5] On May 1, 2007, EPS requested that it be given the opportunity to participate at the Inquiry.

[para 6] On April 16, 2008, this office sent out the notice of inquiry to the Public Body and to the Applicant. The notice indicated that persons affected by the request for review had not yet been determined.

[para 7] On May 5, 2008, the Public Body requested that EPS be granted status as a person affected by the inquiry.

[para 8] On June 17, 2008, I identified three persons affected by the Applicant’s request for review on the basis that the records which will be the subject to the Inquiry contain their personal information. However, I did not make a decision in relation to the EPS’s request to be considered a person affected by the Applicant’s request for review. Instead, I advised the Applicant, the Public Body, and the three affected persons, of EPS’s application. I provided the parties to the Inquiry and the EPS the opportunity to make written submissions. In addition, I suggested that the parties might wish to consider the following decisions in preparing their submissions: *Edmonton (City of) v. Alberta (Human Rights and Citizenship Commission)*, 2002 ABQB 1013, *Guide Outfitters Assoc. v. British Columbia (Information and Privacy Commissioner)*, 2004 BCCA 210, and *Telecommunications Workers Union v. Canada (Radio-television and Telecommunications Commission)*, [1995] 2 S.C.R. 781.

[para 9] The Applicant, the Public Body, EPS, and one affected person provided submissions. The Public Body also provided rebuttal submissions.

[para 10] EPS did not argue that it was a person affected by the request for review. Rather, counsel for EPS argued that the Chief of EPS (the Chief) is a person affected by the request for review. Alternatively, she argued that the Chief should be given standing as an intervenor. I will therefore consider whether the Chief is affected by the request for review or whether it is appropriate to give the Chief standing as an intervenor. However, I will also consider whether EPS should be given standing.

II. RECORDS AT ISSUE

[para 11] There are no records at issue, as this is a preliminary issue regarding the standing of the Chief to participate at the Inquiry.

III. ISSUES

Preliminary Issue 1: Is the Chief of the Edmonton Police Service a person affected by the Applicant's request for review so that he is entitled to receive a copy of the request for review and to make representations under sections 67 and 69 of the Act?

Preliminary Issue 2: Should the Chief of the Edmonton Police Service be given standing as an intervenor at the Inquiry?

IV. DISCUSSION OF ISSUES

Preliminary Issue: Is the Chief of the Edmonton Police Service a person affected by the Applicant's request for review so that he is entitled to receive a copy of the request for review and to make representations under sections 67 and 69 of the Act?

[para 12] EPS states that no authority has come to the attention of the Chief in which any other police service has sought and been denied the opportunity to make submissions in the context of a disclosure application concerning the police service's records. Further, the EPS argues that the Chief is the creator and owner of the records and for that reason is affected by disclosure of the records. EPS argues that both section 67 and the principles of procedural fairness require that I hear from the Chief as he could be adversely affected by my decision and because he has no control over the Public Body's positions or arguments at the Inquiry. Finally, EPS relies on *R. v. Szczerba* [2002] A.J. No. 915(Q.B.) in support of its position that the Chief should be granted status as an intervenor affected by the request for review or as an intervenor.

[para 13] The Applicant argues that EPS should not be considered a person affected by the request for review as it has no privacy interest in its records. The Applicant relies

on *R. v. Horzempa* 2005 MBQB 282, a case addressing whether a police service has a privacy interest in its records for this position.

[para 14] The affected person provided submissions in relation to the substantive issues of the Inquiry, but not in relation to the preliminary issue as to whether the EPS is an affected person. I will consider his submissions about the substantive issues at the Inquiry.

Section 67

[para 15] Section 67 of the Act establishes the process for notifying public bodies and persons other than a public body that the Commissioner has received a request for review of the decision of a head of a public body. It states, in part:

67(1) On receiving a request for a review, the Commissioner must as soon as practicable

- (a) give a copy of the request*
 - (i) to the head of the public body concerned, and*
 - (ii) to any other person who in the opinion of the Commissioner is affected by the request,*

and

- (b) provide a summary of the review procedures and an anticipated date for a decision on the review*
 - (i) to the person who asked for the review,*
 - (ii) to the head of the public body concerned, and*
 - (iii) to any other person who in the opinion of the Commissioner is affected by the request.*

Section 67 imposes a duty on the Commissioner to give a copy of the request for review to a person that is, in his opinion, affected by the request and he must do this as soon as practicable. If, in the opinion of the Commissioner or the Commissioner's delegate, a person is affected by the request for review, then the person is entitled to receive a copy of the request for review under section 67, and to make representations and to be represented by counsel at the inquiry under section 69.

Who can be a person affected by the request for review?

[para 16] The provision "person affected by the request for review" encompasses third parties who would be entitled to notice under section 30 and parties whose interests are affected by a request for review other than those recognized by section 30. For example, if a third party requests review of a decision of the head of a public body to give access to its information, the individual who requested the information would be entitled to notice under section 67.

[para 17] Section 67 refers to a “person” affected by a request for review. It is therefore necessary to decide whether an entity that is not a legal person can be a person for the purposes of section 67.

[para 18] The Public Body argues that EPS is a legal person because it is part of the municipal corporation of Edmonton. However, the Edmonton Police Commission, which is created by City of Edmonton Bylaw 14040, is similarly part of the municipal corporation of Edmonton. I do not agree with the Public Body that EPS is a person because it is part of the City of Edmonton and because it was not created by a municipal bylaw. EPS applied for standing initially in its capacity as a public body under the Act, and not as the City of Edmonton. It later modified its request as applying only to the Police Chief, who, it contends is a legal person.

[para 19] I gather that EPS and the Public Body interpreted *Edmonton (City of) v. Alberta (Human Rights and Citizenship Commission)*, 2002 ABQB 1013 as standing for the proposition that EPS is not a legal person. However, the Court actually decided that the question of the ambit of personhood is a contextual one and that personhood can and will extend to public bodies when the purposes of legislation are served by doing so. The Court said:

The authorities appear to show that an inclusive definition of “person” will extend to public bodies in some circumstances and that the discussion and judgment on the question of the ambit of “person” is a contextual one. For example, the Calgary Police Commission has been determined to be a “person” for the purpose of legal responsibility under the *Labour Relations Code (CUPE, Local 38 v. Calgary Police Association* (1987), 79 A.R. 63 (Q.B.)); and the Edmonton Board of Police Commissioners has been determined to be an employer, and therefore a “person,” for the purpose of responsibilities under human rights legislation (*Re Prue and City of Edmonton et. al.* (1984), 57 A.R. 140 (Q.B.)).

This case, and those on which it relies, suggests that an entity, including a public body or other statutory entity, that is not a person at common law, may be a person under a statute if such a result would best ensure the attainment of the statute’s objects, as required by section 10 of the *Interpretation Act*.

[para 20] The Act defines “head of a public body” in part as:

“head”, in relation to a public body, means

(iii) if the public body is a local public body, the person or group of persons designated under section 95(a) as the head, and

Under the Act, the head of a local public body, such as EPS, is a person.

[para 21] If, in the opinion of the Commissioner or the Commissioner’s delegate, an entity is affected by a request for review within the meaning of the Act, then the Commissioner, or the Commissioner’s delegate, may find that the entity is a person affected by the request for review, even if the entity is not, strictly speaking, a person.

It appears that EPS made its arguments in relation to the Chief of Police as it was not certain whether it could be considered a “person” under the Act. As I have found that EPS may be a person affected by a request for review under the Act, I will therefore consider whether EPS or the Chief is a person affected by the request for review.

Is EPS or the Chief a person affected by the request for review?

[para 22] EPS argues that the Chief is an affected person both in his role as the head of a public body under the Act, and as the Chief under the *Police Act*.

In this case, the Chief clearly meets the test and he must be named as an affected person. The records at issue are the Chief’s records. The records contain privileged information, advice, and recommendations of members of the Professional Standards branch. Any order affecting records created by and for the chief pursuant to his duties and obligations under the *Police Act* could have a significant impact to the organization, the individuals named in the records, and how the Chief, through his delegate, processes access to information requests. Any order making findings as to the process through which records are provided to the EPS affects the Chief. Any order affecting privileged communications between the Chief and the Crown could have significant consequences as to how the Chief fulfils his obligations regarding the investigations of complaints of criminal conduct.

The EPS is a separate and distinct public body from that of the EPC and the perspective of the EPC is not necessarily the same as the Chief’s. The Chief has no control over the positions or arguments that the EPC will take at the Inquiry. As the records are the Chief’s records, he is the party that will be most significantly affected by any orders with respect to them. As a result, the Chief must be provided the opportunity to be heard.

The Chief also has a special expertise regarding the Records and is in the best position to provide information about the Records. On behalf of the Chief, EPS Professional Standards Branch’s duties include investigating complaints and through that process, they create the types of records at issue in this Inquiry. Further to the Chief’s reporting responsibilities, these records may be disclosed to the Edmonton Police Commission (EPC). The Records at issue in this Inquiry were provided with the expectation that they would not be released by the EPC without the consent of the Chief. In deciding the issue of how the FOIPP Act applies to the Records, the Adjudicator must have the chief’s perspective, which is separate and unique.

Furthermore, a significant and fundamental issue regarding the disclosure of police disciplinary records is the privacy rights of the individuals named in those records. The right to privacy is protected by section 7 of the Charter and an order directing disclosure of the Records without affording the affected individuals the right to participate in the process would be a violation of their rights. The Chief has no objection if the EPS members and other individuals named in the records are named as affected parties and provided the opportunity to make representations at the inquiry.

However, there is a public interest in effective, expeditious, and efficient decision-making. The practical reality is that EPS records contain countless amounts of third party information and in most cases it is not in the public interest to name every individual as an affected party to each inquiry. The Chief, who created, and has custody and control, of the records is in the best position to make representations as to the process and reason for their creation, why the records were disclosed, and under what circumstances. When appropriate, the Chief has also advanced arguments regarding the privacy interests of its members and other individuals named in its records.

[para 23] I interpret the EPS as arguing that the Chief is a person affected by the request for review because the records that will be at issue in the Inquiry belong to him, because an order in relation to the records would affect the way he performs his statutory duties under the *Police Act* and the Act, and because orders affecting privileged communications between the Chief or the Chief's delegates and the Crown affect the Chief. Further, EPS argues that the Chief may be able to provide evidence in relation to the process and reason for the creation of the records, the disclosure of the records and the circumstances of disclosure. In addition, EPS argues that the Chief has made arguments regarding the privacy of members and individuals named in its records in the past.

[para 24] I disagree with the Public Body that *Guide Outfitters Assoc. v. British Columbia (Information and Privacy Commissioner)*, 2004 BCCA 210 is irrelevant. Rather, this case holds that the Privacy Commissioner of British Columbia has discretion in determining affected party status and is not limited to granting standing only to those with a direct interest. The Court said:

By contrast, s. 54 of the Act, the section under consideration here, is framed in much more general terms. It provides simply that the Commissioner, upon receiving a request for review (as occurred here), must afford notification to the head of the public body concerned and any other person that the Commissioner considers appropriate. (Emphasis in original) The emphasized category of parties to whom notice is to be given is phrased in such a way as to afford a fair measure of discretion to the Commissioner. The Commissioner must engage in a process of consideration and analysis to reach an informed decision on such an issue. The use of the terminology "that the Commissioner considers appropriate" is an indication that the Commissioner is to exercise his judgment as to who might reasonably be thought to be affected by his decision; this of course will inform any decision as to those groups or individuals who should receive notice and be given formal standing at any inquiry.

In my view, the phrase "any other person that the Commissioner considers appropriate" affords the Privacy Commissioner of Alberta similar discretion as the provision "to any other person who in the opinion of the Commissioner is affected by the request."

[para 25] In Decision F2008-D-001, for which an application for judicial review has been made under section 74(3) of the Act, the Adjudicator reviewed decisions and scholarly texts on the subject of affected party standing and concluded that there are several factors that may be considered when determining whether a person is affected by a request for review.

- Is there an arguable possibility that the person has business or personal information falling within the mandatory exception to disclosure under section 16 or 17 of the Act?
- Does the request for review, or will the ultimate decision, directly and adversely affect the person?
- Will there be an important impact or serious consequences in relation to the person if their information were disclosed?
- Are representations from the person necessary or desirable in order to determine whether requested information falls within a mandatory exception to disclosure?

The Adjudicator noted that these factors are not necessarily discrete and that the list is not necessarily exhaustive. I will consider these factors in deciding whether EPS is reasonably or sufficiently affected by the request for review.

[para 26] The first factor does not apply, as EPS does not have business or personal information falling within the mandatory exception to disclosure under section 16 or 17 of the Act. While EPS argues that Charter values and the right of an individual to privacy require that EPS make arguments on behalf of individuals whose personal information could be potentially disclosed, I will address EPS's interest in relation to section 17 in my consideration of the second factor.

[para 27] The second factor to be considered is whether the ultimate decision will directly affect the person. As noted above, EPS argues that "any order affecting privileged communications between the Chief and Crown could have significant consequences as to how the Chief fulfils his obligations regarding the investigations of complaints of criminal conduct. If I were to order disclosure of information that is the subject of privilege, the benefits of privilege would be lost. In my view, a decision to order disclosure of privileged information would directly affect EPS. As the Public Body withheld records on the basis of privilege, I find that EPS is sufficiently affected by the request for review as it relates to the decision to apply section 27.

[para 28] In addition to withholding records under section 27, the Public Body withheld records under section 17, 20, and 24 of the Act. The question becomes whether EPS is directly affected by a decision that could be potentially made in relation to these issues as well. In my view, the second and third factors are relevant to this determination.

[para 29] The records at issue were created by EPS. I do not agree with the Public Body or EPS that the fact that EPS created the records, in and of itself, creates a direct interest in those records. However, disclosure of information about a public body or its activities can affect its ability to carry out its statutory functions. For this reason, the Act recognizes that in some situations, the public interest in granting the right of access to information is outweighed by the public interest in permitting a public body to withhold types of information which could harm the ability of a public body to perform its function and duties. For example, section 20 of the Act protects a public interest in withholding information that would be harmful to law enforcement. Similarly, section 24 of the Act protects a public interest in withholding information in situations where disclosure could prevent public bodies from making decisions and policies effectively.

[para 30] Section 24, as applied by the Public Body, relates to information it considers to be advice given and received by employees of EPS. Consequently, it is the public interest in withholding advice received by EPS that the Public Body considered when it made its decision. Similarly, it appears that section 20 was applied to protect the public interest in withholding records that could limit EPS' law enforcement function. Consequently, the Chief or EPS is sufficiently affected by decisions I make in relation to whether sections 20 or 24 were properly applied, as the abilities of both entities to perform their public functions and obligations may be affected by the decision I make.

[para 31] I do not agree with EPS's submission that it is in a better position than the individuals whose personal information is at issue to make arguments on their behalf or that Charter values and individual privacy rights require it to be given the opportunity to make representations about the personal information of individuals. The three individuals whose personal information is at issue have chosen to participate and to represent their own interests in relation to their personal privacy. Further, the interests of these persons may be adverse to those of the Public Body. In my view, the Charter does not create a requirement that an adversary represent the personal privacy interests of an individual at an inquiry. Consequently, I do not find it necessary or desirable for the EPS to represent the interests of these third parties at the inquiry.

[para 32] However, I note that section 17(5)(a) requires consideration of whether disclosure of personal information is desirable for the purposes of subjecting the activities of a public body to public scrutiny when weighing whether disclosure would be an unreasonable invasion of personal privacy. As the activities of a public body that would be exposed to public scrutiny are those of the EPS, I agree it could reasonably be affected by the decision I make in relation to section 17. Further, I find that the representations of EPS in relation to the application of section 17(5)(a) would be desirable at the inquiry.

[para 33] Both the Public Body and EPS appear to argue that EPS is an affected party because its employees are able to give evidence in relation to the circumstances in which the records that are the subject of Inquiry 3782 were created. It is entirely appropriate for either the Public Body or EPS to provide affidavits or statements of these employees into evidence. However, I do not accept that the ability to give evidence leads to a conclusion that a person is affected by a request for review.

[para 34] Neither *Horzempa*, relied on by the Applicant, nor *Szczerba* relied on by EPS is relevant to the issue of whether EPS or the Chief is an affected person. These cases consider or follow the procedure for disclosure of third party information established by the Supreme Court of Canada in *R. v. O'Connor* [1995] 4 S.C.R. 411. The *O'Connor* procedure is a process for determining whether records in the custody of third parties should be produced to an accused. The test is intended to balance the right of an accused to make full answer and defense with the privacy rights of third parties. The cases cited by counsel for EPS relate to situations where the Police Chief was potentially a third party, distinct from the Crown. I am not satisfied that the *O'Connor* procedure has any bearing on an inquiry under the Act, as the Act contains a complete statutory scheme for determining the procedures for disclosing information when an access request is made under the Act.

[para 35] These cases can also be distinguished on the basis that they deal with situations in which the Chief, as custodian of records, has been served with a subpoena and could be ordered by the Court to produce records in the possession of EPS to the defense, if the records are found to be relevant in a criminal trial. That is not the case in the present circumstances, as the Chief is not the custodian in this matter, has not been served with a subpoena and could not be ordered to disclose records under section 72 of

this Act. Instead, the Order I make under section 72 of the Act will be in relation to the head of the Public Body. Consequently, I do not find that the cases brought to my attention by EPS and by the Applicant are relevant to the determination of whether the Chief or EPS should be permitted to intervene at an inquiry under the Act.

[para 36] For these reasons, I find that EPS is sufficiently affected by the request for review to be considered a person affected by the request for review. Similarly, the Chief, as the head of EPS, is a person sufficiently affected by the request for review.

Should the Police Chief be given status as an intervenor?

[para 37] As I have found that the EPS and /or the Chief is a person affected by the request for review, I will not consider whether the Chief or EPS should be given standing as an intervenor.

V. DECISION

[para 38] I make this decision under section 67 of the Act. I have decided that EPS is a person affected by the request for review. It is entitled to receive a copy of the request for review under section 67 and is entitled participate at the inquiry under section 69. The parties will receive an amended Notice of Inquiry to reflect this decision forthwith.

Teresa Cunningham
Adjudicator