

**ALBERTA**

**OFFICE OF THE INFORMATION AND PRIVACY  
COMMISSIONER**

**ORDER F2023-R-01  
(RECONSIDERATION OF ORDER F2020-17)**

November 24, 2023

**EDMONTON POLICE SERVICE**

Case File Number 008124

**Office URL:** [www.oipc.ab.ca](http://www.oipc.ab.ca)

**Summary:** The Alberta Court of Appeal quashed the decision in Order F2020-17 and remitted the matter back to the Information and Privacy Commissioner for further consideration of whether the Public Body properly withheld information under section 21(1)(b) of the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (the Act). The Court of Appeal found that the RCMP, which provided the information at issue to the Public Body, was a local government body as listed in section 21(1)(a)(ii), for the purposes of section 21(1)(b).

Upon further consideration, the Adjudicator found that the Edmonton Police Service (the Public Body) applied section 21(1)(b) to information within its parameters, but failed to properly exercise its discretion to withhold information under that section. In particular, the Public Body's reliance on its presumption that the RCMP would not consent to disclosure under section 21(3) was an irrelevant consideration.

The Adjudicator ordered the Public Body to reconsider its decision to withhold discretion, and to seek consent to disclose information as required under section 21(3) of the Act if it found any previously withheld information should be disclosed.

**Statutes Cited: AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 ss. 1(i), 17(1), 21(1)(a)(ii), 21(1), 21(1)(b), 21(3), 72.

**Authorities Cited: AB:** Orders 99-018, 2001-037, F2008-027, F2012-24, F2017-28, F2017-86, and F2020-17.

**Cases Cited:** *Edmonton Police Service v Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10; *Edmonton Police Service v Alberta (Information and Privacy Commissioner)*, 2021 ABQB 304; *Edmonton Police Service v Alberta (Information and Privacy Commissioner)*, 2022 ABCA 397; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23

## **I. BACKGROUND**

[para 1] The factual background of this inquiry is fully set out in Order F2020-17. In brief, the Edmonton Police Service (the Public Body) received three pages of records (a police report) from the RCMP, on May 29, 2017. On or around July 25, 2017, the Applicant made an access request to the Public Body. The Public Body informed the Applicant that it would be more appropriate if he sought the records directly from the RCMP.

[para 2] Subsequently, the Applicant made an access request to the RCMP. The RCMP disclosed to the Applicant the same records withheld by the Public Body, with redactions. The Applicant was not satisfied with that response and proceeded with his access request made to the Public Body. On January 11, 2018, the Public Body responded to the access request. The Public Body withheld all information in the three pages of records that it had received from the RCMP under section 21(1)(b) of the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (the Act).

[para 3] Upon learning that the RCMP had provided the same records to the Applicant with redactions, the Public Body provided the Applicant with copies of the records, with the same redactions as the RCMP. The Public Body continued to withhold redacted information under section 21(1)(b).

[para 4] In Order F2020-17, I determined that the Public Body failed the first part of the test applicable to determining whether it properly withheld information under section 21(1)(b) of the Act. Specifically, I found that that RCMP was not a government, local government body, organization, or an agency thereof listed in clause (a) of section 21(1), and as such section 21(1)(b) did not apply.

[para 5] Order F2020-17 was upheld upon judicial review brought by the Public Body in *Edmonton Police Service v Alberta (Information and Privacy Commissioner)*, 2021 ABQB 304. The Public Body then appealed that decision. In *Edmonton Police Service v Alberta (Information and Privacy Commissioner)*, 2022 ABCA 397 (*Edmonton Police Service*), the Alberta Court of Appeal quashed my decision in Order F2020-17 and found that the Public Body had satisfied the first step of the section 21(1)(b) test. The Court of Appeal found that the RCMP is a local government body within the terms of sections 1(i) and 21(1)(a)(ii) of the Act, as required by the first step. The Court of Appeal remitted the matter back to the Information and Privacy Commissioner for consideration of remaining steps of the test. I consider those steps in this Order.

## II. RECORDS AT ISSUE

[para 6] The records at issue consist of a three-page police report that the RCMP provided to the Public Body.

[para 7] I note that there is very little information in the records to be considered in this case. In Order F2020-17, I found that the Public Body properly withheld some of the information to which it applied section 21(1)(b) under section 17(1) of the Act as third party personal information; that finding has not been disturbed. Thus, I do not need to consider whether the Public Body properly withheld that information under section 21(1)(b). The only information I need to consider here is that which I had ordered the Public Body to disclose in Order F2020-17, by reason that it was not personal information (*Edmonton Police Service* at para. 13).

[para 8] The information consists of statements of facts provided to the RCMP by two individuals concerning an incident reported to the RCMP in 2016, and steps taken by the RCMP in performance of their duties.

## III. ISSUE

**Did the Public Body properly apply section 21(1)(b) to information in the records?**

## IV. DISCUSSION OF ISSUE

[para 9] *Preliminary Matter – RCMP did not provide a submission*

[para 10] As noted in Order F2020-17 at para. 11, the RCMP was invited to make a submissions on the issues in the inquiry, which included the application of section 21(1)(b), but did not do so.

**Did the Public Body properly apply section 21(1)(b) to information in the records?**

[para 11] Section 21(1)(b) states,

*21(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*

...

*(b) reveal information supplied, explicitly or implicitly, in confidence by a government, local government body or an organization listed in clause (a) or its agencies.*

...

[para 12] There are four criteria that are used to determine whether information is captured under section 21(1)(b) (see Order 2001-037):

- a) the information must be supplied by a government, local government body or an organization listed in clause (a) or its agencies;
- b) the information must be supplied explicitly or implicitly in confidence;
- c) the disclosure of the information must reasonably be expected to reveal the information; and
- d) the information must have been in existence in a record for less than 15 years.

[para 13] The Alberta Court of Appeal determined that step a) has been satisfied. I consider the remaining steps, b) through d)

*b) the information must be supplied explicitly or implicitly in confidence*

[para 14] I find that the information in the records was implicitly provided to the Public Body, by the RCMP, in confidence.

[para 15] In determining whether information has been implicitly supplied in confidence, the totality of the circumstances must be considered. Within the totality of the circumstances, factors indicative of implicit confidentiality include whether the information was:

- a. Communicated to the public body on the basis that it was confidential and to be kept confidential,
- b. Treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the public body,
- c. Not otherwise disclosed or available from sources to which the public has access; and,
- d. Prepared for a purpose which would not entail disclosure

(See Orders 99-018 and F2008-027) This test was upheld by the Court of Queen's Bench in *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2012 ABQB 595 (at para. 41).

[para 16] Regarding point a., I find that the information in the records was communicated on the basis that it was confidential and to be kept confidential, for the reasons that follow.

[para 17] The information was provided to the RCMP by two individuals who reported an incident to the RCMP. As such, the RCMP collected it as a matter of police work. Despite reporting the incident and accusing the Applicant of assault, the two individuals had no desire to press charges. In view of these circumstances, in Order F2020-17, I determined that the information was provided to the RCMP in confidence. I stated at para. 61,

...In this case, however, the records indicate that no charges were pursued. Upon review of the records, it seems to me that the two individuals reported an incident to the RCMP, but declined to press charges and otherwise went on with their lives. I infer that they preferred to avoid dealing with the matter any further, and as such provided their personal information in confidence, to that end.

[para 18] I continue to find that the individuals provided their personal information in confidence. As discussed in more detail under point c., I note that the RCMP has always treated this information as confidential.

[para 19] It also appears that the Public Body acquired the information to use in confidential police work, and that it informed the RCMP of its intention to use the information *solely for that purpose*.

[para 20] One of the Public Body's detectives (the Detective), swore an affidavit explaining how the Public Body came by the records. The records came to it as a result of a request made to the RCMP by the Detective. In making the request, the Detective informed the RCMP that she required the records for the *sole purpose* of conducting a threat assessment, which is, according to the Public Body, "highly confidential" police work.

[para 21] Considering that the information appears to have been provided to the RCMP in confidence, and that the RCMP has always treated it as confidential, and was provided to the Public Body for the sole purposes of conducting threat assessment, the circumstances support a finding that, on the balance of probabilities, the information was communicated to the Public Body on the basis that it was confidential and would be kept confidential. The RCMP held the information as confidential to its police work, and provided it to the Public Body in order that it may conduct further confidential police work.

[para 22] Regarding point b., I note that the RCMP did not, at all times, treat the entirety of the records with concern for its protection from disclosure. The RCMP provided the Applicant with some information from the records in response to his access request made directly to it. However, it has at all times treated the information that remains redacted by the Public Body with concern for its protection from disclosure. The RCMP withheld this information from the Applicant in response to his access request, and nothing indicates that it treated the information in a manner inconsistent with concern for protection against disclosure, prior to providing it to the Public Body.

[para 23] Regarding point c., the Public Body states that the records came from RCMP files, to which the public does not have access. There is no indication that the information in the records is publically available or have otherwise been disclosed, even to a limited degree.

[para 24] Regarding point d., the Public Body observes that the information is part of a police report, and as such, "...would only be disclosed in connection with a specific prosecution." That being the case, the information cannot be said to have been prepared for a purpose that, strictly speaking, would not entail disclosure.

[para 25] However, there is no evidence before me that indicates that prosecution was ever expected or considered. Even at the time the RCMP acquired the information, those providing it made clear that they were not interested in pressing charges.

[para 26] In light of the above, even though it is possible that the information could have been disclosed for the purposes of prosecution, in the absence of any prospect of one, it seems that the information was not prepared for a purpose that would entail disclosure. There is no evidence to suggest that the information would be disclosed for any reason other than prosecution. As such, the information would be expected to remain confidential as information from an RCMP file.

[para 27] Considering the points a. through d. above, I find that the information was implicitly provided in confidence.

*c) the disclosure of the information must reasonably be expected to reveal the information;*

[para 28] Disclosing the information will reveal the information in this case.

*d) the information must have been in existence in a record for less than 15 years.*

[para 29] The information is in a record from 2016, concerning events in 2016. It has been in existence for less than 15 years.

[para 30] I find that the information in the records is captured under section 21(1)(b).

#### *Exercise of Discretion*

[para 31] Section 21(1) is a discretionary exception to disclosure. In order to properly withhold information under it, a public body must demonstrate that it properly considered whether to exercise discretion to do so. Under section 21(1)(b), the operation of section 21(3) will also inform whether or not information that is captured under section 21(1)(b) will be disclosed. Section 21(3) states,

*(3) The head of a public body may disclose information referred to in subsection (1)(b) only with the consent of the government, local government body or organization that supplies the information, or its agency.*

[para 32] The approach to exercising discretion under section 21(1)(b) with regard for the consent requirement in section 21(3) has been noted in previous Orders F2012-24 at para. 81, and F2017-28 at para. 78. A public body must first consider whether to exercise discretion to withhold information under section 21(1)(b) or to disclose it. If the latter, then it must seek the consent of the entity that provided the information to do so.

[para 33] In my view, this two-step approach to exercising discretion is necessary since while both section 21(1)(b) and section 21(3) work to protect governmental relations, they do so in different ways, and involve different considerations.

[para 34] As a discretionary exception to disclosure, section 21(1) requires a public body to properly exercise discretion. In this way, it ensures that public bodies heed the need to balance access to information against the public interests in confidentiality of information embedded in the Act. This is done through careful considerations of relevant factors.

[para 35] Exercising discretion was considered in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (*Ontario Public Safety and Security*). Numerous orders of this office have confirmed that the reasoning therein is applicable to the exercise of discretion under the Act. At paragraph 71 of *Ontario Public Safety and Security*, the following factors were identified as relevant to the question of whether or not a public body has properly exercised its discretion:

- the decision was made in bad faith
- the decision was made for an improper purpose
- the decision took into account irrelevant considerations
- the decision failed to take into account relevant considerations.

[para 36] Justice Renke elaborated on what *Ontario Public Safety and Security* requires in *Edmonton Police Service v Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (*EPS*) at para. 416:

What Ontario Public Safety and Security requires is the weighing of considerations “for and against disclosure, including the public interest in disclosure:” at para 46. The relevant interests supported by non-disclosure and disclosure must be identified, and the effects of the particular proposed disclosure must be assessed. Disclosure or non-disclosure may support, enhance, or promote some interests but not support, enhance, or promote other interests. Not only the “quantitative” effects of disclosure or non-disclosure need be assessed (how much good or ill would be caused) but the relative importance of interests should be assessed (significant promotion of a lesser interest may be outweighed by moderate promotion of a more important interest). There may be no issue of “harm” in the sense of damage caused by disclosure or non-disclosure, although disclosure or non-disclosure may have greater or lesser benefits. A reason for not disclosing, for example, would be that the benefit for an important interest would exceed any benefit for other interests. That is, discretion may turn on a balancing of benefits, as opposed to a harm assessment.

[para 37] With regard to consideration of harmful effects of disclosure, Justice Renke stated at para. 420 in *EPS*,

...In my view, that is the implication of the Ontario Public Safety and Security passages quoted above. A public body is entitled to show that disclosure could have other adverse effects (whatever those might be) –but the public body must indicate what those adverse effects are and that the negative consequences of disclosure outweigh the interests in the disclosure, the “interest in open government.”

[para 38] When exercising discretion, public bodies should also consider the particular purpose of the exception to disclosure being considered. The purpose of section 21(1)(b) was stated in Order F2017-86 at para. 18,

...Section 21(1)(b), like section 21(1)(a), is intended to protect intergovernmental relations of the Government of Alberta.

[para 39] In contrast to the balancing done by a public body responding to an access request under section 21(1), section 23(1) recognizes that the entity providing confidential information to a public body responding to an access request may have its own interest in that information. For example, the entity providing the information may have different concerns and considerations about the prospect of disclosure that the public body responding to the access is not aware of, or does not share or value in the same way. Section 23(1) provides such entities the ability to prevent disclosure in order to preserve their own interests.

[para 40] Considering the foregoing, I find that the Public Body has failed to demonstrate that it properly exercised discretion under section 21(1)(b).

[para 41] In the present case, the Public Body states that it does not have consent from the RCMP to disclose the information at issue. It also states, “...the evidence suggests that the RCMP would not consent to the disclosure of the information.” I infer from the speculative nature of the preceding statement that the Public Body has not asked whether the RCMP consents to disclose the information.

[para 42] The Public Body does not indicate that it considered anything other than its belief that the RCMP would not consent to disclosure when deciding to withhold information under section 21(1)(b). It failed to make the proper considerations relevant to exercising discretion described above. As well, the Public Body’s mere belief that the RCMP would not consent is an irrelevant consideration to the exercise of discretion; it is presumptive in nature. Had the Public Body properly considered whether to exercise discretion under section 21(1)(b), it may have determined that the information should be disclosed, and then inquired of the RCMP whether it would consent to disclosure.

[para 43] I have considered that the fact that the RCMP implicitly provided the information to the Public Body in confidence would suggest that it would not consent to disclosure. However, I am also mindful that there were months between the dates when the RCMP provided the information to the Public Body, when the Applicant made his



access request, and the time when the Public Body finally responded to it. In that time, the RCMP's perspective on whether the information should remain confidential may have shifted. As well, it is now more than six years since the access request was made. Even if the RCMP would have not consented to disclosure before, circumstances may have since shifted such that it would if asked today.

## **V. ORDER**

[para 44] I make this Order under section 72 of the Act.

[para 45] I order the Public Body to reconsider exercising its discretion to withhold information under section 21(1)(b). If the Public Body concludes that the information should be disclosed to the Applicant, it shall inquire of the RCMP whether the RCMP consents to disclosure.

[para 46] I order the Public Body to provide to the Applicant a written explanation of the considerations that it took into account when reconsidering whether to exercise discretion, and to inform the Applicant in writing whether it contacted the RCMP regarding consent to disclose any information, and, if so, what, if any, response the RCMP provided.

[para 47] I order the Public Body to confirm to the Applicant and to me, in writing, that it has complied with this Order within 50 days of receiving it.

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John Gabriele  
Adjudicator