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Further Developments in the Cassels FOIPPA Matter

By Linda McKay-Panos

Cases Considered:

Edmonton Police Service v. Alberta (Information and Privacy Commissioner), 2009 ABQB 593

Recent developments in the case of Cassels highlight a difficulty faced by many people who request access to information held by public bodies. Since one is hoping to gain access to the desired information, one has to "guess" wisely about what information to ask for, from which department and in which format (e.g., electronic or paper). The agencies from which one requests information are not obligated under the law to create new records from their information, nor to incur great inconvenience and expense in order to provide the requested information. Thus, the wording of the request becomes very important—even in the absence of specific knowledge about what information is available.

In 2005, Mr. David Cassels ("Cassels") was being considered by the Edmonton Police Commission for the job of Chief of Police in Edmonton. When Mr. Mike Boyd was appointed to the job, Cassels applied to the Edmonton Police Service ("EPS") for access to certain paper and electronic records that were archived, held or distributed between January 1, 2002 and December 1, 2005. In January 2006, Cassels was advised that the EPS was unable to conduct one of the requested searches. Cassels then complained to the Office of the Information and Privacy Commissioner (OIPC) and that office reviewed the matter. In 2007, Cassels requested that the OIPC hold an inquiry. In August 2007, the parties were granted an extension to complete the review and the order was given in February, 2008. An earlier decision of the Alberta Court of Queen's Bench found that the OIPC did not lose jurisdiction to issue the order despite the delays (see 2009 ABQB 268 and my earlier post on this case).

The Commissioner, in February 2008, held that the EPS had improperly severed and withheld personal third party information from the emails it disclosed under s. 17 of the *Freedom of Information and Protection of Privacy Act* R.S.A. 2000, c. F-25 ("*FOIPPA*"). Secondly, the Commissioner held that the EPS had not fully complied with its duty to assist Cassels in making the access to information request. Finally, the Commissioner directed the EPS to conduct a search of its backup records for February 1, 2005 to March 31, 2005.

The EPS applied to the Alberta Court of Queen's Bench for judicial review of the decisions on these three issues. Mr. Justice K.G. Nielsen noted that the Commissioner generally has expertise on the interpretation of privacy legislation and its application to the facts, and concluded that the correct standard of review to be applied to all three issues was reasonableness. Thus, Justice Nielsen was charged with looking at the "existence of justification, transparency and intelligibility within the decision-making process…[and] also concerned with whether the decision falls within a range of possible acceptable outcomes which are defensible in respect of the facts and law" (para. 31, citing *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paras. 47-49).

In reviewing the decisions, Justice Nielsen held that the first two decisions were reasonable and confirmed them. However, the order that directed the EPS to search the backup records was set aside and the matter was returned to the Commissioner for consideration. Justice Nielsen opined that this order was unreasonable because the Commissioner did not address his mind to the obligations of the EPS under s. 10(2) of the *FOIPPA*. This section provides:

> **10 (2)** The head of a public body must create a record for an applicant if
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> (a) the record can be created from a record that is in electronic form and in the custody or under the control of the public body, using its normal computer hardware and software and technical expertise, and
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> (b) creating the record would not unreasonably interfere with the operations of the public body.

One employee, Billinger, had provided an affidavit in which he stated that the EPS computer backups are retained for two years; the time required to conduct a search would be approximately 23 weeks of one person's time; and the hardware costs were estimated at $50,000. Another employee, Jenkins, swore that the process to respond to the request by the applicant could not be completed using EPS normal computer hardware and software and would be very expensive. Justice Nielsen found the Jenkins affidavit to be "confusing, and in many areas, deficient" (para 72).

The Commissioner had concluded that there may be situations where a public body cannot search or access electronic backup records. A public body can establish that it has performed an adequate search for records without searching the backup records. In the Cassels case, however, the Commissioner held that the EPS had the ability to access and search its electronic backup records but had chosen not to do so (para. 80).

Justice Nielsen held that this was an unreasonable conclusion. The Court noted (at para. 82) that section 10(2) imposes on public bodies a duty to "create a record" only in certain circumstances. Creation of a record is required where a record can be created "from a record that is in electronic form…using its normal computer hardware and software and technical expertise" (*FOIPPA* s.10(2)). In this case, at least with respect to some external emails, creating a record from the

backup records was not possible using EPS normal computer hardware and software. Justice Nielsen also disagreed with the Commissioner that EPS would not search the backup records; rather, EPS asserted that it had no duty to create records from the backup records, because of extra hardware or software requirements, technical expertise, cost and interference with its operations under s. 10(2).

In the end, Justice Nielsen directed the Commissioner to reconsider his position regarding the issue of backup records.

It is perhaps interesting to note that other orders involving s. 10(2) have indicated that the public body has the duty to provide evidence to show that it does not have a duty to create a new record under s. 10(2) (see e.g. *Re Calgary Regional Health Authority*, Order 2001-016). Although Justice Nielson did not address the issue of proof, he did indicate that one of the affidavits relied upon by the EPS to indicate there was no duty to create a record was "confusing and deficient". He concluded that it was not possible for the court to determine on the basis of the record whether any of the electronic records sought by Cassels could be created using existing EPS computer hardware, software and technical expertise, and without unreasonable interference with EPS operations. Presumably, upon reconsideration, the Commissioner will be in a position to determine whether the public body has proven its case under s. 10(2).