

Confidentiality *versus* Access to Information

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Case commented on:

Edmonton Police Service v Alberta (Information and Privacy Commissioner), [2012 ABQB 595](#)

Introduction

In any society, a healthy balance is needed to protect personal and private information, whilst also allowing individuals and groups access to information that is in the public interest. In Alberta, the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 (*FOIPPA*) sets out the rules that govern the collection, use or disclosure of personal information by public bodies. It also provides a method of requesting access to information which is not available through other means.

In the recent decision of *Edmonton Police Service v Alberta (Information and Privacy Commissioner)*, 2012 ABQB 595 (*Edmonton Police Service*), the issue of keeping information confidential versus granting access to it was addressed by the Court of Queen's Bench. More specifically, the Court reviewed a decision made by the Adjudicator in the Office of the Information and Privacy Commissioner (OIPC) in which the Edmonton Police Service (EPS) asked the Court to reverse a decision made by the Adjudicator ordering the EPS to disclose certain portions of its Professionalism Committee's Final Report (the Report) to the Criminal Trial Lawyers' Association (CTLA).

This report was created as part of the Professionalism Committee's mandate to enhance ethics and professionalism among its members in order to gain public trust and confidence in the EPS. The report contained information provided by several outside entities including Alberta Justice, the Edmonton Police Commission (EPC), the Vancouver Police Department (VPD) and the Toronto Police Service (TPS). CTLA made an access request for the Report in April of 2006. EPS ultimately released most of it to the CTLA, except for certain portions which it withheld pursuant to sections 21(1)(b) of *FOIPPA*. CTLA requested the OIPC to review this decision, which led to the order granting CTLA access to the report.

The section of *FOIPPA* at issue dealt with disclosure of information harmful to intergovernmental relations. The section 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
- (a) harm relations between the Government of Alberta or its agencies and any of the following agencies:
 - (i) the Government of Canada or a province or territory of Canada,

- (ii) a local government body,
 - (iii) an aboriginal organization that exercises government functions, including
 - (A) the council of a band as defined in the *Indian Act* (Canada), and
 - (B) an organization established to negotiate or implement on behalf of aboriginal people, a treaty or land claim agreement with the Government of Canada,
 - (iv) the government of a foreign state, or
 - (v) an international organization of states,
- or
- (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** [emphasis added]

The Adjudicator ordered that the information be disclosed in its entirety, concluding that section 21(1)(b) was not applicable for two reasons. First, the information had not been supplied “explicitly, or implicitly, in confidence,” and thus did not fall within the scope of the section. Second, with respect to information supplied by Alberta Justice, the Adjudicator held that the Government of Alberta was not an entity listed in sections 21(1)(a)(i) to (v) and therefore did not come within the scope of section 21(1)(b). With respect to the EPC, VPD, and TPS, the Adjudicator held that the evidence did not determine whether these entities were acting as or on behalf of entities listed in section 21(a) when they provided information. However, given the finding that the information was not provided in confidence, such a determination was not needed [*Edmonton Police Service*, para 11].

EPS, Alberta Justice, and the EPC disagreed with the Adjudicator’s finding that the information was not supplied in confidence, as well as the interpretation of section 21(1)(b) as applying only to those entities listed in sections 21(1)(a)(i) to (v). In addition, EPS also argued that the Adjudicator breached the requirements of procedural fairness [*ibid*, para 12].

Standard of Review

With regard to the correct standard of review, in *Alberta (Information and Privacy Commissioner) v Alberta Teachers Association*, 2011 SCC 61, [2011] 3 SCR 654, the Supreme Court of Canada stated that the standard of review in considering a decision of an administrative tribunal that interprets or applies its home statute with which it has particular familiarity should be presumed to be reasonableness. On the other hand, the correctness standard will apply where constitutional questions, questions of law that are of central importance to the legal system as a whole, and true questions of jurisdiction arise [*Edmonton Police Service*, para 22].

In *Edmonton Police Service*, Justice Ross of the Court of Queen’s Bench found that issues dealing with the interpretation and application of section 21 of *FOIPPA* were not general in such a way that they were outside the expertise of OIPC, nor were they questions of central importance to the legal system as a whole. Although interpretation of the scope of section 21(1)(b) in relation to section 21(1)(a) had precedential implications and necessitated a consideration of “intergovernmental relations,” that did not make it a question of law of central importance to the legal system as a whole or a true question of jurisdiction. The interpretive issue was limited to the meaning of a provision of privacy legislation and was within the expertise of the Commissioner. Therefore, reasonableness was the appropriate standard of review [para 24].

Issue One: Information Supplied In Confidence

In deciding whether the information supplied to the Professionalism Committee was confidential, the adjudicator relied on a test laid out by the BC Privacy Commissioner's Order No. 01-36 (adopted in Alberta Privacy Commissioner's Order 99-018, at 8) that asks whether the information was:

1. Communicated to the public body on the basis that it was confidential and that it was to be kept confidential?
2. 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?
3. Not otherwise disclosed or available from sources to which the public has access?
4. Prepared for a purpose which would not entail disclosure?

As noted by the Adjudicator, the test requires "an objectively reasonable expectation of confidentiality" which can be based either on express communication or other objective criteria that ground the expectation [*ibid*, para 32-33].

Taking an objective view of the circumstances surrounding the communication of the information, the Adjudicator found that there was no condition of confidentiality, but instead, one of anonymity. This condition was upheld, as the authors of the report did not link any information provided with the identity of particular participants. The Adjudicator concluded that the contemplated use of the information, which was gathered for the creation of a Professionalism Report to be distributed at the discretion of the Professionalism Committee, was indicative that the information was not supplied in confidence [*supra*, para 44].

The Court found that the Adjudicator's decision fell "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law," and that her conclusion that the information in question was not provided in confidence was a reasonable decision based on the law and evidence before her. Given this finding, the Court did not find it necessary to review the alternative ground considered by the Adjudicator as to what entities come within the scope of ss. 21(1)(a) and (b) [*supra*, para 45].

Issue Two: Procedural Fairness

In making her decision, the Adjudicator noted that she was not satisfied that the information provided by the VPD was "sensitive, such that it could only have been supplied in confidence," as the information discussed a labour shortage that was discussed in the national media and contained details that were publicly known [*supra*, para 48].

EPS stated the Adjudicator's comment may have reasonably prejudiced EPS's right to procedural fairness, as none of the parties in the case submitted any information to the Adjudicator regarding the national media. EPS argued that the Adjudicator relied on evidence that was unknown to the parties and that they were not provided an opportunity to make submissions regarding this evidence. EPS contended that it is a breach of the duty of procedural fairness to rule on a matter that was not brought to the attention of the parties, and that the Adjudicator's analysis was incomplete, unreasonable and unfair [*supra*, para 49-50].

The Court responded to this argument by citing the case of *Maslej v Canada (Minister of Manpower and Immigration)*, [1977] 1 FC 194 at 198, 13 NR 263 (FCA). In that case, the Court stated that no tribunal can "...approach a problem with its collective mind blank and devoid of

any of the knowledge of a general nature which has been acquired in common with other members of the general public....” The Court argued that the Adjudicator had to consider whether the VPD supplied information which by its nature would indicate that it had been provided in confidence. This was in response to a submission by the EPS that the nature of the information indicated its confidentiality. The Court found that by asking the Adjudicator to determine whether the information was by its nature confidential, she had to rely on her general knowledge as to what kind of information fits within this category. This was the context in which the Adjudicator, after reviewing the information in question, made her comment regarding the discussion of the incident in the national media and that the information contained details publicly known. The Court accepted this statement by the Adjudicator as “knowledge of a general nature”. The Court also noted that there was no evidence or any submission made that the Adjudicator’s statement was incorrect. Thus, any reference to the national media would not have raised a serious possibility of prejudice to the EPS [*supra*, para 64-66].

EPS also argued that after notifying the Adjudicator that other police services were Affected Parties, such as the TPS, OPIC took no steps to notify or contact these potential Affected Parties. EPS argued that the inability of TPS to participate in the proceedings before the Adjudicator precluded EPS of the ability to rely on the evidence of a potential Affected Party, and that may have reasonably prejudiced EPS’s position [*supra*, para 51-52].

However, the Court noted that it was significant that the Adjudicator was advised by EPS that it had requested both TPS and VPD to contact OIPC directly if they wished to participate in the inquiry. VPD did and was allowed to participate. TPS did not, and also did not apply to be added as a party to the judicial review. Thus, the Court concluded that TPS was aware of the OIPC proceeding, and could have taken action had it wished to participate. Citing the decision of *Tomko v Nova Scotia (Labour Relations Board)* (1974), 9 NSR (2d) 277, the Court noted that “the failure to give any formal opportunity to be heard is immaterial if the person affected was in fact aware of what was proposed or knew or ought to have known that he could have made representations had he wished.” The Court concluded that any lack of notice to TPS did not constitute a “serious possibility” of prejudice to EPS [*supra*, para 60-61].

Conclusion

This case is interesting because it illustrates how the OIPC has to balance the right of the public to know about police operations with the interest of the EPS to encourage members of various organizations to provide them with information on the belief that the information will be held confidential. Given the outcome of this case, one has to wonder whether a future Professionalism Committee would be able to find willing participants. On the other hand, in this case, the identities of the persons providing the information remained anonymous and were not tied to the information provided. This was in fact something that those individuals requested. Further, the information provided by at least one party appears to have been a matter of public record. Thus, the decision by the Adjudicator as well as Justice Ross does seem fair.