SUPREME COURT OF NOVA SCOTIA
Citation: Cummings v. Nova Scotia (Public Prosecution Service),
2011 NSSC 38

Date: 20110201
Docket: Hfx. No. 335079
Registry: Halifax

Between:

Wanda Cummings

Applicant

-and-

Nova Scotia Public Prosecution Service

Respondent

Decision

Judge: The Honourable Justice Robert W. Wright

Heard: January 27, 2011 at Halifax, Nova Scotia

Written Decision: February 1, 2011

Counsel: The Applicant - Wanda Cummings (personally)
Counsel for the Respondent - Sheldon Choo

Wright, J.

FACTUAL BACKGROUND

[1] This appeal is brought by Wanda Cummings against the Nova Scotia Public Prosecution Service ("PPS") pursuant to s.41 of the *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5 (the "Act"). Essentially, Ms. Cummings seeks unrestricted access to two PPS files pertaining to her which were opened following an incident with police which occurred on April 27, 2008. As a result of that incident, Ms. Cummings was charged by police with one count of public mischief, contrary to s.140(1)(c) and one count of assaulting a police officer, contrary to s.270(2) of the Criminal Code.

[2] Ms. Cummings appeared in Provincial Court on April 28, 2008 as a result of which she was admitted to the East Coast Forensic Psychiatric Hospital under an Inpatient Assessment Order pursuant to s.672.13 of the Criminal Code. While there, an assessment of Ms. Cummings' mental condition was conducted by Dr. Neilson who submitted her report to the court under date of May 26, 2008.

[3] Shortly thereafter, on June 5, 2008, Ms. Cummings was found not criminally responsible on account of a mental disorder on the charge of public mischief. She was then further detained at the same hospital where a second assessment report was prepared by Dr. Theriault under date of July 2, 2008 for purposes of a disposition hearing to be held by the Criminal Code Review Board. That disposition hearing was held on July 8, 2008 at which time Ms. Cummings was given an absolute discharge. The second charge of assaulting a police officer was not dealt with by the court at the time and it remained outstanding.

[4] These proceedings generated two PPS files. One pertained to the Provincial Court matters in Port Hawkesbury bearing file number PH 08-0211 and the other pertained to the Criminal Code Review Board proceedings bearing number HA 08-2982.

[5] Ms. Cummings first applied for access to these two files on June 20, 2009. However, her request was refused at the time by way of a letter written by Linda Raskin, an administrator for PPS under the Act, because the files were still considered as being active. Ms. Raskin cited s. 4(2)(i) of the Act as the basis for that refusal.

[6] The next development of note occurred on April 13, 2010 when the charge of assaulting a police officer was withdrawn by the Crown and hence dismissed in Provincial Court for want of prosecution. With that development, Ms. Cummings then resubmitted her request for access to these two PPS files by application dated June 22, 2010.

[7] The response to that request is contained in a letter by Ms. Raskin dated July 21, 2010. In the result, some of the requested file material was released to Ms. Cummings and some was withheld. The explanation given to Ms. Cummings for the withholding of certain documents can be summarized as follows:

(a) Some records were being withheld under the exemption for documents relating to or used in the exercise of prosecutorial discretion under s.15(1)(f) of the Act;

(b) Any RCMP generated records in the PPS files were outside the jurisdiction of the Act and that access to such documents must be sought directly from the RCMP under the federal counterpart legislation;

(c) Some of the records sought were matter of public record and hence outside the scope of the Act under s. 4(2)(b).

[8] Ms. Raskin further explained that returning Ms. Cummings' health records and expunging them from PPS files was outside the jurisdiction of the Act.

[9] Given that response, Ms. Cummings then filed an appeal directly to this court under s. 41 of the Act. She thereby seeks unrestricted access to the file records requested, correction of personal information in the records requested, and the return and expungement of all her medical/health records contained in the PPS files.

STANDARD OF REVIEW AND BURDEN OF PROOF

[10] The Act provides in s.42(1) that on an appeal, the Supreme Court may determine the matter *de novo* and examine any record *in camera* in order to determine on the merits whether the information in the record may be withheld.

[11] The Act further provides in s.45(1) that on an appeal such as this, the burden is on the head of the public body to prove that the applicant has no right of access to the record or part thereof.

[12] Accordingly, counsel for PPS acknowledges that this court may determine the matter *de novo* and that the burden of proof falls upon PPS to establish that Ms. Cummings has no right of access to those file materials which have been withheld from disclosure.

[13] Counsel for PPS has, of course, provided this court with a complete copy of the contents of both subject files to enable the court to examine those file materials *in camera* pursuant to s.42.1(b) above mentioned. Both files have been divided into two parts, one containing the file materials disclosed to Ms. Cummings and the other part containing the file materials withheld from disclosure.

PURPOSE OF THE ACT AND POWERS OF THE COURT

[14] Whenever applying the provisions of the Act, it is useful to set out at the beginning its stated purpose and objectives. Section 2 reads as follows:

> The purpose of this Act is
>
> (a) to ensure that public bodies are fully accountable to the public by
>
> (i) giving the public a right of access to records,
>
> (ii) giving individuals a right of access to, and a right to correction of, personal information about themselves,
>
> (iii) specifying limited exceptions to the rights of access,
>
> (iv) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and
>
> (v) providing for an independent review of decisions made pursuant to this Act; and
>
> (b) to provide for the disclosure of all government information with necessary exemptions, that are limited and specific, in order to
>
> (i) facilitate informed public participation in policy formulation,

> (ii) ensure fairness in government decision-making,
>
> (iii) permit the airing and reconciliation of divergent views;
>
> (c) to protect the privacy of individuals with respect to personal information about themselves held by public bodies and to provide individuals with a right of access to that information. 1993, c. 5, s. 2 .

[15] Section 5 then expressly confers on all persons a right of access to any record in the custody or under the control of a public body (upon complying with the specified procedural requirements) with the proviso that the right of access does not extend to information exempted from disclosure pursuant to the Act. This section further provides that if the exempted information requested can reasonably be severed from the record, an applicant has the right of access to the remainder of the record. Indeed, that is what has happened here in the partial disclosure made by PPS.

[16] The exemptions referred to in both ss. 2 and 5 are then expressly set out in ss. 12-19 of the Act. Of particular relevance in the present case is s. 15(1)(f) under the law enforcement exemptions which reads as follows:

> The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to ....
>
> (f) reveal any information relating to or used in the exercise of prosecutorial discretion;

[17] The powers of this court on an appeal under the Act are set out in s. 42. Ultimately, if the court determines that the public body is not authorized to refuse to give access to the requested record or part of it, it shall order that such access be made (or make any other order the court considers appropriate). If the court finds

that a record falls within an exemption, the court shall not order the public body to give the applicant access to the record (regardless of whether the exemption requires or merely authorizes the head of the public body to refuse to give access to the record).

FINDINGS AND CONCLUSIONS

[18] I have examined each and every one of the documents contained in both PPS files. I will first deal with those for which access was refused under the exemption found in s.15(1)(f) of the Act, namely, where disclosure of the documents could reasonably be expected to reveal any information relating to or used in the exercise of prosecutorial discretion.

[19] The wording of this exemption is very broad. It is the submission of counsel for PPS that a public body seeking to withhold information under this exemption must satisfy the following requirements on a balance of probabilities:

(1) That prosecutorial discretion was exercised;

(2) That there is information in the file records that relates to or was used in the exercise of that discretion; and

(3) That disclosure of the information in the records withheld could reasonably be expected to reveal such information.

[20] The phrase “exercise of prosecutorial discretion” is not defined in our Act. That phrase is defined, however, in the counterpart legislation in British Columbia

in the following terms:

> "exercise of prosecutorial discretion" means the exercise by Crown counsel, or by a special prosecutor, of a duty or power under the Crown Counsel Act, including the duty or power
>
> (a) to approve or not to approve a prosecution,
>
> (b) to stay a proceeding;
>
> (c) to prepare for a hearing or trial,
>
> (d) to conduct a hearing or trial,
>
> (e) to take a position on sentence, and
>
> (f) to initiate an appeal;

[21] In my view, this phrase should be similarly interpreted as it is used in our Act. Moreover, it is consistent with the comments of the Supreme Court of Canada in *Krieger v. Law Society of Alberta*, 2002 SCC 65 where the following passage is found (at paras. 46-47):

> 46. Without being exhaustive, we believe the core elements of prosecutorial discretion encompass the following: (a) the discretion whether to bring the prosecution of a charge laid by police; (b) the discretion to enter a stay of proceedings in either a private or public prosecution, as codified in the Criminal Code, R.S.C. 1985, c. C-46, ss. 579 and 579.1; (c) the discretion to accept a guilty plea to a lesser charge; (d) the discretion to withdraw from criminal proceedings altogether: R. v. Osborne (1975), 25 C.C.C. (2d) 405 (N.B.C.A.); and (e) the discretion to take control of a private prosecution: R. v. Osiowy (1989), 50 C.C.C. (3d) 189 (Sask. C.A.). While there are other discretionary decisions, these are the core of the delegated [page395] sovereign authority peculiar to the office of the Attorney General.
>
> 47. Significantly, what is common to the various elements of prosecutorial discretion is that they involve the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for. Put differently, prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it. Decisions that do not go to the nature and extent of the prosecution, i.e., the decisions that govern a Crown prosecutor's tactics or conduct before the court, do not fall within the scope of prosecutorial discretion.
>
> Rather, such decisions are governed by the inherent jurisdiction of the court to control its

own processes once the Attorney General has elected to enter into that forum.

[22] In short, the statutory exemption for documents relating to or used in the exercise of prosecutorial discretion is intended to protect the decision-making process of the Crown Prosecutor. That protected area cannot be subjected to interference through access to information requests.

[23] The present case has the unusual element where the decision was made, for purposes of the April 28, 2008 Provincial Court appearance, to refer Ms. Cummings to the East Coast Forensic Psychiatric Hospital under an Inpatient Assessment Order (apparently with her consent). Ultimately, she was found not criminally responsible for the public mischief charge as aforesaid and was given an absolute discharge by the Criminal Code Review Board. The Crown prosecutor's ultimate decision with respect to the second charge of assaulting a police officer was to withdraw that charge, as a result of which it was dismissed for want of prosecution on April 13, 2010.

[24] It follows that any and all notes, correspondence or other file material that relate to the decision-making process of the Crown in respect of these two charges, whether it be to approve the prosecution, prepare or conduct a trial, or to withdraw the prosecution are exempted from disclosure under s.15(1)(f). I am satisfied that if the subject file material withheld were to be provided to Ms. Cummings, they could reasonably be expected to reveal information relating to or used in the exercise of prosecutorial discretion. I therefore find that PPS was justified in withholding it from disclosure.

[25] I now turn to that part of the file records which consist of RCMP generated documents. Ms. Cummings argues that the RCMP, by virtue of its law enforcement agreements with the Province of Nova Scotia, thereby becomes a provincial agency which is subject to the provincial Act. I do not agree.

[26] In my view, notwithstanding any provincial agreements with the RCMP whereby they provide local law enforcement services in some areas, it is the federal access to information legislation that applies to that organization. As such, federal legislation such as the *Privacy Act*, R.S. 1985, c. P-21 and the *Access to Information Act*, R.S. 1985, c. A-1 applies to the RCMP rather than our provincial Act.

[27] Indeed, Ms. Cummings has made a similar request for access to information to the RCMP through those channels as far back as 2009. However, disclosure was refused because the criminal files were not yet then completed. If the disclosure of RCMP generated documents is now to be pursued with the closure of these PPS files, it will have to be done through the appropriate channels under federal legislation where the RCMP would be a party to the proceeding.

[28] The mere fact that the RCMP, as a local law enforcement agency, provided its intake and investigation documents to the PPS does not constitute a waiver of confidentiality, as suggested by Ms. Cummings, or open them up to an access request under the Act. Undoubtedly, a good many of them would have been

subject to the disclosure obligation of the Crown in the criminal proceeding under *Stinchcombe* principles. Whether there was proper Crown disclosure to Ms. Cummings under those principles in the criminal proceeding is not within the scope of the present appeal.

[29] Accordingly, I find that the RCMP generated documents contained in the PPS files are outside the purview of the Act. Even if they were not, for the sake of argument, such documents would also be exempted from disclosure by virtue of s. 15(1)(f) insofar as they could reasonably be expected to reveal information relating to or used in the exercise of prosecutorial discretion.

[30] Ms. Cummings also writes in her brief that she has sought the return of all of her health records which were unlawfully obtained and are now filed in a federal information bank. Specifically, she has sought the return of the original and any copies of such records as well as the destruction of any copies held in the PPS (and RCMP) files.

[31] As referenced earlier in s.2 of the Act, individuals have both a right of access to, and a right to correction of, personal information about themselves. The Act does not, however, provide any mechanism or authority for the expungement or removal of documents in a file and their return to the applicant.

[32] In any event, having reviewed the entirety of the contents of both these PPS files, I have determined that they do not contain any medical or health records

pertaining to Ms. Cummings whatsoever with the exception of the two mental health assessment reports above referred to, one prepared by Dr. Neilson for Provincial Court purposes and the other by Dr. Theriault for Criminal Code Review Board purposes. Those reports have already been provided to Ms. Cummings but no application has been made for correction of the content of either of those assessments pursuant to s.25 of the Act. Otherwise, it is trite to say that neither of these two assessment reports can be expunged from the PPS files. The Act does not authorize such a remedy and in any event, those reports are, and will remain, part of the Provincial Court and Review Board records respectively.

[33] Ms. Cummings also submits, based on things she has read or heard over the course of the multiple legal proceedings she has initiated against various public bodies, that PPS (among others) harbours other medical records and information about her that even present counsel for PPS may be unaware of. I have no sound reason that would lead me to draw such a conclusion. Ms. Cummings also alleges prosecutorial misconduct by PPS in the criminal proceeding brought against her. I have seen no indication of that whatsoever from my reading of the PPS files. Hence, I see no basis for making disclosure to the Minister of Justice of suspected wrongdoing by an officer or employee of a public body, as raised by Ms. Cummings under s.42(4) of the Act.

[34] Lastly, there are a few documents in the PPS files which were not sent to Ms. Cummings pursuant to her FOIPOP request because they were matters of public record (and thus outside the Act pursuant to s.4(2)(b)). The files also contain a smattering of other documents in the part withheld which were

documents earlier sent directly to Ms. Cummings or her legal counsel or were simply so perfunctory as to be completely immaterial.

[35] Based on all the foregoing reasons, I conclude that PPS was justified in withholding the documents in question from disclosure to Ms. Cummings. I am satisfied that PPS has complied with the requirements of the Act by making the severed disclosure that it did. In the result, this appeal is dismissed.

[36] If PPS decides to seek costs of this appeal, I will await written submissions to that end. Otherwise I would ask counsel for PPS to prepare and submit the usual order for dismissal.

J.