ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2004-018

May 26, 2005

EDMONTON POLICE SERVICE

Review Number 2826

Office URL: http://www.oipc.ab.ca

Summary:

The Applicant made a request under the *Freedom of Information and Protection of Privacy Act* to the Edmonton Police Service for access to records regarding an altercation between the Applicant and the RCMP.

At inquiry there were 37 pages of records at issue. The Edmonton Police Service cited non-responsiveness of the records, privilege (section 27(1)(a)) and intergovernmental relations (section 21(1)(b)) as its authority to withhold the records.

The Commissioner upheld the Edmonton Police Service's decision to withhold the records. The Commissioner held that the Edmonton Police Service properly withheld one of the records as non-responsive, properly applied section 27(1)(a) to another record and properly applied section 21(1)(b) to the remainder.

Statutes Cited:

AB: *Freedom of Information and Protection of Privacy Act,* R.S.A. 2000 c. F-25, ss. 20, 21, 27, 33, 34, 66(3), 72; *Judicature Act,* R.S.A. 2000 c.J-2 s. 24

BC: *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996 c. 165, s. 16(1)(b)

CAN: *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act* 1982 (U.K.), 1982, c.11 ss. 8, 11(h); *Department of Public Safety and Emergency Preparedness Act*, S.C. 2005, c.10, s. 5 ; *Royal Canadian Mounted Police Act*, R.S.C. 1985 c. R-10, s.5

Authorities Cited:

AB: Orders 96-017, 97-009, 97-020, 98-006, 2001-037, F2003-018

B.C.: Order 02-19

Cases Cited:

Canada [Combines Investigation Acts, Director of Investigation and Research) v. *Southam Inc.* [1984] 2 S.C.R. 145

Gernhart v. *The Queen* (1999) 181 D.L.R. (4th) 506 (F.C.A.)

2747-3174 Quebec Inc. v. *Quebec (Regie des permis d'alcool),* [1996] 3 S.C.R. 919

R. v. *Wigglesworth* (1987) 45 D.L. R. (4th) 235 (SCC)

Solosky v. *The Queen*, [1980] 1 S.C.R. 821

Syndicat des employes de production du Quebec et de l'Acadie v. *Canada (Canadian Human Rights Commission),* [1989] 2 S.C.R. 879

Westeel-Rosco Ltd. v. *Board of Governors of South Saskatchewan Hospital Centre*, [1977] 2 S.C.R. 238

I. BACKGROUND

[para 1] On September 21, 2002, the Applicant was involved in an altercation with the Royal Canadian Mounted Police (the "RCMP"). The RCMP subsequently arrested the Applicant.

[para 2] The Applicant's father, an officer with the Edmonton Police Service (the "EPS"), arrived during his son's arrest. There was a verbal exchange between the father and the RCMP officers. The RCMP subsequently sent information regarding the incident to the Crown Prosecutor's Office and to the EPS.

[para 3] On September 1, 2003, the Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the "FOIP Act") to the EPS for the records forwarded from the RCMP regarding the September 21, 2002 incident.

[para 4] On September 2, 2003, the EPS responded to the Applicant, refusing to provide access to the information.

[para 5] On September 26, 2003, the Applicant requested a review of the EPS's decision. Mediation was authorized but was unsuccessful in resolving this issue. The matter was set down for an oral inquiry with the RCMP identified as an Affected Party. The EPS, Applicant and the RCMP each submitted a written submission in advance of the inquiry.

[para 6] The inquiry was held on July 7, 2004 and was then adjourned pending further evidence from the parties regarding the confidentiality of information. On November 5, 2004, I reconvened the inquiry.

II. RECORDS AT ISSUE

[para 7] At the date of the inquiry, there were 37 pages of records at issue. Records 1-35 consist of records that originated from the RCMP and were sent to the EPS. Record 36 consists of a communication between the EPS legal counsel and a member of the EPS Internal Affairs. Record 37 consists of a memo from the EPS FOIP Coordinator to the Internal Affairs section of the EPS.

III. PRELIMINARY ISSUES

A) Was the requirement of procedural fairness met in this inquiry?

[para 8] When I reconvened the inquiry on November 5, 2004, the Applicant objected to my decision to permit two witnesses to testify, one on behalf of the EPS and one on behalf of the RCMP. The Applicant also objected to the RCMP entering exhibits through its witness. The Applicant stated that if the EPS and the RCMP had intended to call witnesses, they should have called the witnesses during the first part of the inquiry on July 5, 2005. The Applicant stated that reconvening the inquiry to hear from the witnesses regarding the confidentiality of information violated the principle of procedural fairness and, in particular, the principle of Audi Alteram Partem also known as the duty to be fair.

[para 9] At inquiry, I therefore had to decide whether allowing these witnesses to testify on November 5, 2004 would breach the principle of procedural fairness. I found that it did not.

[para 10] Procedural fairness, includes both the concepts of "natural justice" and the "duty to be fair". James L.H. Sprague, in his article, "Natural Justice and Fairness in a Nutshell", (1997), 3 Administrative Agency Practice 15 states the principles of procedural fairness apply to any person who, acting under the authority of a statute, makes a decision affecting the rights, privileges or interests of an individual. A decision having a substantial impact on an individual attracts the higher procedural standard, called natural justice, while a decision having a lesser impact attracts the lesser

procedural standard called fairness (the "duty to be fair"). One of the main principles of procedural fairness is that a person must be given an adequate opportunity to be heard, or in other words, the person must know the case being made against him or her, and be given the opportunity to answer to it.

[para 11] In Order 97-009, Commissioner Clark addressed a number of principles for determining the standard of procedural fairness. He adopted the approach of the Supreme Court of Canada in the case of *2747-3174 Quebec Inc*. v. *Quebec (Regie des permis d'alcool),* [1996] 3 S.C.R. 919, where the court cited, with approval, a quote from an earlier decision, *Syndicat des employes de production du Quebec et de l'Acadie* v. *Canada (Canadian Human Rights Commission),* [1989] 2 S.C.R. 879 at pages 895-896:

> *Both the rules of natural justice and the duty of fairness are variable standards. Their content will depend on the circumstances of the case, the statutory provisions and the nature of the matter to be decided. The distinction between them therefore becomes blurred as one approaches the lower end of the scale of judicial or quasi-judicial tribunals and the high end of the scale with respect to administrative or executive tribunals. Accordingly, the content of the rules to be followed by a tribunal is now not determined by attempting to classify them as judicial, quasi-judicial, administrative or executive. Instead, the court decides the content of these rules by reference to all the circumstances under which the tribunal operates.*

[para 12] Accordingly, to determine the standard of procedural fairness for an inquiry, I must consider three things: the statutory provisions under the Act; the nature of the matter to be decided; and the circumstances of the case.

[para 13] As Commissioner Clark stated in Order 97-009, the standard of procedural fairness required under the *FOIP Act* varies somewhat from what is required of other decision makers. While the Act maintains certain rights related to natural justice or the duty to be fair, it specifically limits certain other rights. For example, while section 66(3) provides an opportunity to make representations to the Commissioner, it specifically limits the right to be present during, to have access to, or to comment on another person's representations.

[para 14] I also find that it is within my authority to develop a set of procedures in order to control the process (see Order 98-006).

[para 15] In the case before me, the Applicant was aware, well in advance of the November 5, 2004 date, that the RCMP and the EPS would be calling further witnesses regarding the confidentiality of the disclosure between the RCMP and the EPS. In fact, I adjourned the first part of the inquiry on July 7, 2004 on the understanding that the inquiry may be reconvened. All parties agreed at the conclusion of the first part of the inquiry that the inquiry may need to be reconvened in order to hear additional testimony from the witnesses regarding the confidentiality of the disclosure. In addition, on August

11, 2004, this Office cc'd a letter to the Applicant which confirmed that the oral inquiry may be reconvened. Furthermore, on August 31, 2004, the RCMP cc'd a letter to the Applicant which informed the Applicant that, when the inquiry reconvened, the RCMP would be calling St. Albert former RCMP Detachment Commander Mr. George Shillaker to give evidence as a witness regarding the confidentiality of the disclosure. Lastly, on October 6, 2004, my Office sent a notice to the Applicant confirming November 5, 2004 as the date to reconvene the inquiry and attaching letters from both the EPS and the RCMP which identified the witnesses that would be called regarding the confidentiality of the disclosure. I also note that the Applicant did not object to these witnesses until the beginning of the inquiry on November 5, 2004, shortly before the witnesses were set to testify. Given the above, I find that the requirement for procedural fairness has been met in the circumstances of this case.

[para 16] When the inquiry reconvened on November 5, 2004, new information was presented which showed that there were two disclosures from the RCMP to the EPS instead of one. In response I gave the Applicant the option of either responding to this new information during the inquiry or adjourning the inquiry and permitting the Applicant to respond to this information at a later date. The Applicant chose to conclude their argument regarding this new information on November 5, 2004. The Applicant did not request further time to respond to this new information. I find that the duty to be fair was also met in regard to the introduction of this new information.

B) Are records 36 and 37 responsive to the Applicant's access request?

[para 17] The EPS's written submission states that record 37 is non-responsive to the access request. At inquiry, the EPS stated that record 36 is also non-responsive to the access request.

[para 18] In Order 97-020, the Commissioner said that information or records will be responsive to an access request if they are reasonably related to the request.

[para 19] The Applicant's access request reads as follows:

> *I am requesting information that was forwarded to the Edmonton Police Service from the RCMP in regards to an incident involving my father and myself on September 21, 2002. I believe this information is stored within the Internal Affairs section of the EPS. The RCMP file numbers are #2002-0010316 and #2002-11186. In addition, if there is any other information regarding myself related to this incident in possession of the EPS, I request it also be released to me. Thank-you in advance.*

[para 20] I find that the EPS properly withheld Record #37 as non-responsive to the access request. This record consists of a memo from the EPS FOIP Coordinator to the Internal Affairs section of the EPS. In this memo, the FOIP Coordinator tells Internal Affairs that she has taken a copy of the file for the purpose of responding to the

Applicant's FOIP request. This record does not contain any RCMP records nor does it directly relate to the incident in question.

[para 21] However, I do not find that the EPS properly withheld record #36 as non-responsive. This record consists of a communication between EPS's legal counsel and a member of EPS Internal Affairs regarding the incident on September 21, 2002. I find that this record is reasonably related to the access request.

C) Should I accept section 20 as a late exception in this inquiry?

[para 22] In the RCMP's written submission, the RCMP claimed that section 20(1) (harm to law enforcement) applied to the records.

[para 23] Section 20(1) was not identified as an issue in the inquiry notice nor did the EPS, as the Public Body, apply section 20(1) to the records. As such, I did not accept section 20(1) as a late exception. I do not have the discretion to unilaterally apply a discretionary exception at the request the RCMP which is an Affected Party (see Order F2003-018). Only a public body can apply a discretionary exception. If I were to add section 20(1) as an issue at the sole request of the RCMP, I would, in effect, be exercising this discretion in place of the EPS which is the Public Body in this inquiry. I do not have this authority.

IV. ISSUES

[para 24] There were two issues identified in the inquiry notice:

A) Did the Public Body properly apply section 27 of the FOIP Act (legal privilege) to the records/information?

B) Did the Public Body properly apply section 21 of the FOIP Act (intergovernmental relations) to the records/information?

[para 25] I note that although the issues regarding the collection and use of information under sections 33 and 34 of the FOIP Act and the destruction of records under section 72 were raised in this inquiry, I did not address these issues at the inquiry. The parties agreed that this inquiry would only address those issues outlined in the inquiry notice above. The parties also agreed that sections 33, 34 and the destruction of records under section 72 are issues that could be addressed in a subsequent inquiry.

V. DISCUSSION

A) Did the Public Body properly apply section 27 of the FOIP Act (legal privilege) to the records/information?

[para 26] The EPS applied section 27(1)(a) (solicitor-client privilege) to record 36. The EPS states that record 36 is a confidential communication between the EPS's legal counsel and a member of EPS Internal Affairs.

[para 27] At inquiry, the Applicant acknowledged that the communication within record #36 between EPS counsel and a member of EPS Internal Affairs would be subject to solicitor-client privilege.

[para 28] Section 27 reads:

> *27(1) The head of a public body may refuse to disclose to an applicant*
>
> *(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege*
>
> *(b) information prepared by or for*
>
> *(i) the Minister of Justice and Attorney General,*
>
> *(ii) an agent or lawyer of the Minister of Justice and Attorney General, or*
>
> *(iii) an agent or lawyer of a public body,*
>
> *in relation to a matter involving the provision of legal services, or*
>
> *(c) information in correspondence between*
>
> *(i) the Minister of Justice and Attorney General,*
>
> *(ii) an agent or lawyer of the Minister of Justice and Attorney General, or*
>
> *(iii) an agent or lawyer of a public body,*
>
> *and any other person in relation to a matter involving the provision of advice or other services by the Minister of Justice and Attorney General or by the agent or lawyer.*

(2) The head of a public body must refuse to disclose information described in subsection (1)(a) that relates to a person other than a public body.

(3) Only the Speaker of the Legislative Assembly may determine whether information is subject to parliamentary privilege.

[para 29] In Order 96-017, Commissioner Clark stated that in order for a record to be subject to solicitor-client privilege, the Public Body must meet the common law criteria set out in *Solosky* v. *The Queen*, [1980] 1 S.C.R. 821. In that case, the Supreme Court of Canada stated that solicitor-client privilege must be claimed document by document, and each document must meet the following criteria:

(i) it must be a communication between solicitor and client;

(ii) that entails the seeking or giving of legal advice; and

(iii) which is intended to be confidential by the parties.

[para 30] I find that record #36 fulfills the criteria for solicitor-client privilege under section 27(1)(a) and that the EPS properly exercised its discretion in this regard. I uphold the decision of the EPS to withhold this record from the Applicant.

B) Did the Public Body properly apply section 21 of the FOIP Act (intergovernmental relations) to the records/information?

1) General

[para 31] The EPS applied section 21(1)(b) to the records at issue. As I have found that the EPS properly withheld record 36 under section 27(1)(a) and record 37 as non-responsive, I will not address whether these records fulfill the criteria under section 21(1)(b). Records 1-35 remain at issue under section 21(1)(b).

[para 32] Section 21(1) reads:

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 or their 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.

[para 33] Sections 21(3) and 21(4) are also relevant:

21(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.

21(4) This section does not apply to information that has been in existence in a record for 15 years or more.

[para 34] There are four criteria 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 35] During the inquiry, the Applicant stated that, in addition to the above criteria, there are three other requirements that should be considered under section 21(1)(b). The Applicant stated harm to intergovernmental relations, consent of the Applicant, and whether the disclosure was lawful and in good faith were all factors that should be considered under section 21(1)(b).

[para 36] I find that these additional criteria are not contained in section 21(1)(b).

a) Harm to intergovernmental relations

[para 37] The Applicant stated that harm to intergovernmental relations is a relevant criterion under section 21(1)(b). The Applicant referred to the heading corresponding to section 21(1) which reads "Disclosure harmful to intergovernmental relations".

[para 38] After a review of section 21(1) and the arguments of the parties, I do not agree that section 21(1)(b) requires that there be harm to intergovernmental relations. I find the difference in wording between section 21(1)(a) and 21(1)(b) supports the conclusion. Although section 21(1)(a) clearly refers to a harm requirement, section 21(1)(b) does not include this criteria. In this regard, I find that the statutory principle of implied exclusion, also known as "*Expressio unius est exclusio alterius*" applies in this inquiry. This principle means "to express one thing is to exclude another". *Driedger on the Construction of Statutes,* 3rd ed. (Toronto: Butterworths, 1994) at 168 describes the statutory interpretation principle of *Expressio unius est exclusio alterius* as follows:

> *An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within the ambit of its legislation, it would have referred to that thing expressly. Because of this expectation, the legislature's failure to mention the thing becomes grounds for inferring that it was deliberately excluded. Although there is no express exclusion, exclusion is implied. The force of the implication depends on the strength and legitimacy of the expectation of express reference. The better the reason for anticipating express reference to a thing, the more telling the silence of the legislature.*

[para 39] I find that the reference to harm in section 21(1)(a) and the absence of a reference to harm in section 21(1)(b) implies that the reference to harm in section 21(1)(b) was deliberately excluded.

[para 40] Section 21(1)(b) is not ambiguous. If I were to add a harm requirement to section 21(1)(b), I would be fundamentally changing the requirements of that section. I find that the heading corresponding to section 21 does not, in and of itself, provide me with the authority to interpret the section in that manner.

b) Consent of the Applicant

[para 41] I find that the Applicant's consent is not required under section 21(1)(b). Section 21(1)(b) does not require an applicant to consent to a disclosure. I do not find that an applicant's consent is one of the criteria under section 21(1)(b).

c) Lawful and good faith disclosure

[para 42] The Applicant stated that in order for section 21(1)(b) to apply to the records, the disclosure between government organizations must have been lawful and in good faith.

[para 43] The Applicant stated that the values found within section 8 of the *Canadian Charter of Rights and Freedoms* (the "Charter") do not permit section 21(1)(b)

to apply to an unlawful disclosure or when mala fides is present. The Applicant also stated that the values found within section 8 should be applied when interpreting the remedy provisions found within the FOIP Act. The Applicant cited several decisions in support of its argument including *Canada [Combines Investigation Acts, Director of Investigation and Research)* v. *Southam Inc.* [1984] 2 S.C.R. 145 (*Southam*) and *Gernhart* v. *The Queen* (1999) 181 D.L.R. (4th) 506 (F.C.A.) (*Gernhart*). The Applicant also referred to the Supreme Court of Canada decision of *R.* v. *Wigglesworth* (1987) 45 D.L. R. (4th) 235 (SCC) (*Wigglesworth).* In addition, the Applicant referred to a copy of an article by John C. Kleefeld, Administrative Tribunals and the Constitution: Reclaiming the Grail (2004) 29 Advocates' Quarterly 54 and a portion of the following text: B. McIsaac, et. al. *The Law of Privacy in Canada* (Toronto: Thomson Canada Ltd., 2000).

[para 44] The Applicant stated that the disclosure from the RCMP to the EPS was unlawful, and referred to the May 25, 2004 decision by the Office of the Federal Privacy Commissioner which held that the disclosure violated the federal *Privacy Act.* The Applicant and the Applicant's father also extensively testified as to why they believe the RCMP was acting with improper intent and what they believe was the RCMP's motive behind the disclosure. In this regard the Applicant also submitted other evidence as exhibits including a copy of the casino surveillance tape of the night in question.

[para 45] I find that section 8 of the Charter does not require that I take into account the decision by the Office of the Federal Privacy Commissioner or that I incorporate a good faith requirement into section 21(1)(b). Section 8 of the Charter reads as follows:

> *8 Everyone has the right to be secure against unreasonable search and seizure.*

[para 46] I find that section 8 of the Charter also does not require me to "amend" the remedy provisions within the FOIP Act and order disclosure notwithstanding section 21(1)(b).

[para 47] In the *Southam* and *Gernhart* decisions, the Court addressed the constitutional validity of a statute. In *Wigglesworth,* the Court addressed whether a prosecution for common assault under the *Criminal Code of Canada* was in violation of a different section of the Charter, section 11(h). However, these cases do not state that I, as an administrative tribunal, am required or even permitted to add requirements to section 21(1)(b) or to interpret the remedy provisions in the manner suggested by the Applicant. In addition, although the reference from the McIsaac text discussed portions of the *Southam* and *Gernhart* decisions, it also did not refer to authorities which would require or permit me to add requirements to section 21(1)(b) or to interpret the remedy provisions as suggested by the Applicant. Lastly, although the Kleefeld article outlined the circumstances under which an administrative tribunal may consider Charter issues, the article did not, however, address an administrative tribunal's ability to interpret a piece of legislation such as the FOIP Act in the manner suggested by the Applicant. In this regard, I want to emphasize that the Applicant clearly stated at the inquiry that he is not questioning the constitutional validity of section 21(1)(b) or the remedy provisions within

the FOIP Act, but instead is requesting that the Charter be used to interpret the "breadth and application" of section 21(1)(b) and the remedy provisions. If I interpreted section 21(1)(b) and the remedy provisions in the manner suggested by the Applicant, I would be changing the statutory requirements found within that section. I find that I do not have the authority to change the requirements of this section. Furthermore, if I were to consider doing so, section 24 of the Alberta *Judicature Act* R.S.A. 2000 c.J-2 would require that the Applicant first have notified the Minister of Justice and Attorney Generals for Alberta and Canada.

[para 48] In this inquiry I want to make it clear that in making this decision, I am not making a finding as to whether or not the RCMP unlawfully disclosed the records to the EPS pursuant to the decision of the Office of the Federal Privacy Commissioner or whether the RCMP disclosed the records to the EPS with mala fides.

2) Was the information supplied by a government, local government body or an organization listed in clause (a) or its agencies?

[para 49] After a review of the records and the submission of the parties, I find this criterion is fulfilled. I find that records 1-35 were supplied by the RCMP which is a government agency referred to in clause (a) of section 21(1). In this regard I accept the reasoning found within Order 02-19 by the B.C. Information and Privacy Commissioner.

[para 50] In B.C. Order 02-19, the B.C. Commissioner referred to the test for agency set out in *Westeel-Rosco Ltd.* v. *Board of Governors of South Saskatchewan Hospital Centre* [1977] 2 S.C.R. 238 which held that whether a particular body is an agent of the Crown depends on the nature and degree of control which the Crown exercises over it. The B.C. Commissioner held that the RCMP's functions and duties under the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10 (the "RCMP Act") show that the RCMP is an agent of the Federal Government for the purposes of section 16(1)(b) of the B.C. FOIP Act. I agree with and adopt the reasoning within that order.

[para 51] In coming to this conclusion, I took into account section 5 of the RCMP Act which states that the Commissioner of the RCMP, has "under the direction" of the Minister of Emergency Preparedness (formerly known as the Solicitor General of Canada), the "control and management" of the RCMP and "all matters connected herewith". In addition, I reviewed section 5 of the *Department of Public Safety and Emergency Preparedness Act,* S.C. 2005, c.10 (the "Public Safety Act") which reiterates this authority of this Minister over the RCMP. I also agree with the B.C. Commissioner that the fact that the Federal Cabinet appoints the Commissioner of the RCMP is also a relevant, although less important, consideration.

3) Was the information supplied explicitly or implicitly in confidence?

[para 52] The EPS and the RCMP stated that records 1-35 were disclosed in confidence. In support, these parties referred to the Memorandum of Agreement (MOA)

between the Government of Canada and the Government of the Province of Alberta which came into effect on July 1, 1983, and the testimony of former St. Albert RCMP Detachment Commander George Shillaker and Staff Sergeant Larry Shewchuk of EPS Internal Affairs.

a) Memorandum of Agreement

[para 53] The EPS and the RCMP stated that the records were disclosed in confidence. The EPS and the RCMP stated that the records were disclosed according to the provisions of the MOA and, therefore, pursuant to the confidentiality provisions of the MOA found in clause 3:

> *3 Canada and Alberta agree that any personal information disclosed pursuant to this Agreement shall only be used or disclosed for the purpose of administering or enforcing any law or carrying out a lawful investigation or for a subsequent use which is consistent therewith.*

[para 54] After a review of the MOA, I do not find there is sufficient evidence in this inquiry that the disclosure in this case was pursuant to the MOA. Although I agree that the MOA serves a vital role in facilitating the exchange of law enforcement information between two police forces, it does not, as a matter of course, apply to every disclosure between these entities. In order to be considered a disclosure under the MOA, the disclosure must fall within the boundaries of the MOA. In particular, the disclosure must adhere to the purposes outlined in clause 2:

> *2. Pursuant to Section 8(2)(f) of the Privacy Act, S.C. 1980-81-82-83, Chapter 111, the purpose of this Agreement is to provide for the access, use and disclosure of personal information under the control of a government institution to Alberta or a provincial institution for the purpose of administering or enforcing any law or the carrying out of a lawful investigation.*

[para 55] The phrase "administering or enforcing any law or carrying out a lawful investigation" is defined in clause 1(c) of the MOA as follows:

> *1. In this agreement*
>
> …
>
> *(c) "administering or enforcing any law or carrying out a lawful investigation" includes the investigation, detection, prevention or suppression of crime and the gathering of intelligence information for law enforcement purposes.*

[para 56] The EPS and the RCMP stated that the information was disclosed for law enforcement and investigation purposes. At the inquiry, EPS counsel stated that the records may have been disclosed to the EPS for the purpose of administering or enforcing the *Police Service Regulations*. However, the EPS did not provide evidence to support this assertion. In addition, the testimony of former RCMP Detachment Commander

Shillaker indicates that he sent the records to the EPS because of a concern regarding the conduct of the Applicant's father. However, Mr. Shillaker testified that he sent it over on an information sharing basis only. He testified that although he was under the understanding that the information in the records would be used by EPS internal affairs, he did not, however, lodge a complaint with the EPS. I find that the disclosure falls short of fulfilling the requirements of the MOA.

[para 57] I am also not convinced that the RCMP disclosed the information for the purpose of conducting an investigation. Mr. Shillaker stated in testimony that he did not ask or suggest to the EPS that the EPS conduct an investigation. At inquiry, the EPS also confirmed that it did not conduct an investigation into the matter.

[para 58] For the reasons above, I find that there is insufficient evidence that the information in records 1-35 were sent from the RCMP to the EPS pursuant to the MOA.

[para 59] The EPS and the RCMP also argued that if the technical requirements of the MOA were not fulfilled, the RCMP nevertheless intended to disclose the information in the records pursuant to the MOA and therefore, pursuant to the confidentiality requirements within the MOA. The EPS and the RCMP argued that it is the intention of the RCMP that is relevant. However, in this inquiry, Mr. Shillaker testified that he was not aware of the existence of the MOA until after he disclosed the information to the EPS. As such, I find that Mr. Shillaker could not have intended to disclose the records pursuant to the MOA or pursuant to the confidentiality clause within the MOA.

b) Testimony of former RCMP Detachment Commander George Shillaker and Staff Sergeant Larry Shewchuk of EPS Internal Affairs

[para 60] Although I did not find that there was sufficient evidence that the RCMP sent the information to the EPS pursuant to the MOA, I find that the testimony of former St. Albert RCMP Detachment Commander George Shillaker and Staff Sergeant Larry Shewchuk of EPS Internal Affairs and other evidence presented in this inquiry shows that the information was nevertheless supplied in confidence.

[para 61] At inquiry, Mr. Shillaker testified that he sent the records to the EPS in confidence, on two separate occasions. He testified that he sent the records to the EPS on his belief that only those who needed to work with the material would have access to the material and that it was his belief that it would be used by EPS internal affairs. Mr. Shillaker was examined and cross-examined on his testimony. On balance, I accept his testimony that he supplied the information in confidence.

[para 62] In addition, I find the evidence of Staff Sergeant Shewchuk of EPS Internal Affairs also relevant to this issue. He testified that when the EPS receives this type of information from other police services such as the RCMP, this information is treated as confidential and restricted to internal affairs or even further confined within internal affairs. I accept the evidence of both of these witnesses and find that it weighs

heavily in favour of a finding that the information was disclosed by the RCMP to the EPS in confidence.

[para 63] At inquiry, Mr. Shillaker also referred to a security classification entitled "Protected A" which appeared on one of the records. Mr. Shillaker testified that, to his understanding, this classification meant that although the information was considered low sensitivity, the information requires protection and should be safeguarded. Mr. Shillaker testified that he believed the information would be treated with confidence by the EPS.

[para 64] At inquiry, the Applicant argued that the information was not submitted in confidence because Mr. Shillaker was aware that the information would be subject to disclosure if the Applicant were subject to a disciplinary hearing. The Applicant also stated that the records are not the type of records one would expect a reasonable person would regard as confidential. The Applicant stated that these records are the type of records that the Crown would have to disclose during a criminal prosecution.

[para 65] I do not agree with the Applicant's arguments. Although these records arguably may have to be disclosed in the event of a disciplinary hearing or as part of a criminal prosecution, it does not detract from Mr. Shillaker's testimony that the information was initially submitted to the EPS in confidence and that it was his understanding that the EPS would treat the information as being submitted in confidence.

[para 66] At inquiry, the Applicant also challenged whether Mr. Shillaker clearly understood what the phrase "Protected A" meant according to the definition within RCMP policy. I do not find that this line of reasoning is particularly relevant as it is clear from Mr. Shillaker's testimony that it was nevertheless his intent to submit the information in confidence. In this regard I also find it relevant that the information was specifically directed to the EPS Internal Affairs and not to the general EPS address.

[para 67] The Applicant also questioned whether the records were sent to the EPS by a person other than Mr. Shillaker. The Applicant referred to a copy of e-mail correspondence which the Applicant entered as Applicant Exhibit 2 and several handwritten notations found on a copy of the briefing note that the Applicant entered as Applicant Exhibit 7. The Applicant stated that the e-mail correspondence and the briefing notes seem to suggest that individuals other than Mr. Shillaker may have been involved in the disclosure or made the decision to disclose the information.

[para 68] After a review of Applicant Exhibits 2 and 7, I find they show that the information within the records may have been discussed or reviewed by several individuals. They also show that Mr. Shillaker asked for and received advice regarding a disclosure under the Federal *Privacy Act.* I also accept Mr. Shillaker's testimony that he spoke with other individuals within the RCMP regarding his authority under the Federal *Privacy* Act to disclose the information to the EPS. However, I do not find that individuals other than Mr. Shillaker disclosed the records to the EPS. On this point, I accept the evidence of Mr. Shillaker that he was the individual who disclosed the information to the EPS. In this regard I also refer to the cover letter for the first

disclosure (record 2), dated October 8, 2000, which Mr. Shillaker testified was typed by himself and signed by himself. I also refer to record 4 which consists of a photocopy of an envelope for the second disclosure. Although this envelope was not signed by Mr. Shillaker, Mr. Shillaker testified that the handwriting on the envelope was his own.

[para 69] In conclusion I find that, given the evidence outlined above, the records at issue under section 21(1)(b) were disclosed in confidence from the RCMP to the EPS.

4) Would the disclosure of the information reasonably be expected to reveal the information?

[para 70] I find that the disclosure of the information in records 1-35 could reasonably to be expected to reveal the information supplied by the RCMP to the EPS.

5) Was the information in existence in a record for less than 15 years?

[para 71] I find that the information in records 1-35 has been in existence for less than 15 years. The records at issue were created after the September 21, 2002 incident.

6) Conclusion

[para 72] I find that records 1-35 fulfill all four criteria under section 21(1)(b). As such, I uphold the EPS's decision to withhold this information from the Applicant.

VI. ORDER

[para 73] I make the following Order under section 72 of the FOIP Act:

Preliminary Issue A: Was the requirement of procedural fairness met in this inquiry?

[para 74] For the reasons outlined in this Order, I find that the requirement for procedural fairness was met in this inquiry.

Preliminary Issue B: Are Records 36 and 37 responsive to the Applicant's access request?

[para 75] I find that the EPS properly withheld Record 37 as non-responsive to the Applicant's access request. I find that the EPS did not properly withhold record #36 as non-responsive.

Preliminary Issue C: Should I accept section 20 as a late exception in this inquiry?

[para 76] I find that I did not have the authority to accept section 20 as a late exception in this inquiry. I do not have the authority to unilaterally apply a discretionary exception at the request of an Affected Party.

A) Did the Public Body properly apply section 27 of the FOIP Act (legal privilege) to the records/information?

[para 77] I find that the EPS properly applied section 27(1)(a) to record #36 and properly exercised its discretion in that regard. I uphold the EPS's decision to withhold this record from the Applicant.

B) Did the Public Body properly apply section 21 of the FOIP Act (intergovernmental relations) to the records/information?

[para 78] I find that the EPS properly applied section 21(1)(b) to records 1-35. I uphold the EPS's decision to withhold this information from the Applicant.

Frank Work, Q.C.
Information and Privacy Commissioner