

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2006-027

January 2, 2008

EDMONTON POLICE SERVICE

Case File Number F3498

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

Summary: The Applicant requested records about the investigation of a newspaper relating to the "Overtime Stakeout incident", an alleged police "sting". EPS ("Edmonton Police Service") disclosed some information to the Applicant, but withheld other information. The Commissioner confirmed the decision of EPS to withhold the information pursuant to the exceptions to access for third party personal information in section 17, advice from officials in section 24(1)(a) and privileged information in section 27(1)(c) of the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 ("FOIP").

Statutes Cited: AB: *Criminal Code*, R.S.C. 1985, c. C-46, ss. 122, 129, 139; *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(h), 1(h)(ii), 1(h)(iii), 1(n), 1(n)(i), 1(n)(iii), 1(n)(vi), 1(n)(vii), 1(n)(ix), 17, 17(1), 17(4), 17(4)(b), 17(4)(g)(i), 17(4)(g)(ii), 17(5), 17(5)(a), 17(5)(c), 17(5)(f), 17(5)(h), 24, 24(1), 24(1)(a), 24(1)(b), 27, 27(1), 27(1)(a), 27(1)(b), 27(1)(c), 71, 71(1), 71(2), 71(3)(a), 72; *Radiocommunication Act*, R.S.C. 1985, c. R-2, s. 9(2).

Orders Cited: AB: OIPC External Adjudication Order #4, October 3, 2003, *Hugh MacDonald, M.L.A. v. Alberta Justice and The Globe and Mail*; F2003-016, F2002-024, F2002-002, 2001-001, 99-028, 98-016, 97-014, 96-020, 96-019, 96-008, 96-006 (upheld in Action No. 9603 - 16335), 96-003.

I. BACKGROUND

[para 1] On August 19, 2005, the Applicant made a request to the Edmonton Police Service (“EPS” or “Public Body”) under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (“FOIP”) for access to:

All records, as defined by section 1(q) of the *Freedom of Information and Protection of Privacy Act* related to the investigation of [name of newspaper], or any employee of the [name of newspaper], into how [name of newspaper] obtained a recording of a police radio broadcast into the so-called Overtime Stakeout incident.

[para 2] On November 25, 2005, the Public Body responded to the Applicant by disclosing 14 pages of records, which were severed pursuant to section 17 and section 24 of FOIP. An additional 23 pages of responsive records were withheld in their entirety pursuant to section 17 and section 27 of FOIP. On November 29, 2005, the Applicant asked for a review of the Public Body’s decision, but the Applicant was not satisfied with mediation authorized.

[para 3] The matter was set down for a written inquiry (the “Inquiry”). At the Inquiry, the Applicant and Public Body provided written initial submissions and written rebuttal submissions, which were exchanged between the parties. At the Inquiry, the Public Body provided a complete copy of the records, which was accepted *in camera*. The Affected Party did not provide a submission. In its written initial submission, the Public Body describes the context of this access request as follows:

[Name of Applicant’s] access request stems from the widely-publicized incident in November 2004 involving the EPS known as the “Overtime incident”. It was alleged that on the evening of November 18, 2004, members of the EPS were involved in a police “sting” operation at the Overtime Boiler and Taproom. In particular, it was alleged that the “sting” operation targeted two specific members of the Edmonton community with the objective of catching these individuals driving while their ability to do so was impaired.

As a result of the events associated with the Overtime incident, the EPS launched both an internal service investigation into the incident as well as a criminal investigation which considered whether conduct amounting to a breach of trust or obstruction of justice had occurred.

II. RECORDS/INFORMATION AT ISSUE

[para 4] The Public Body numbered a complete copy of the responsive records from page #1 to page #96, which include pages that are no longer at issue as well as pages that remain at issue. The 28 pages of information that remain at issue are as follows:

- Pages severed (5 pages):

- Pages #1-2: Briefing Note,
 - Page #14: R-1 Report, and
 - Pages #16-17: R-2 Report.
- Pages withheld in their entirety (23 pages):
 - Pages #3-5: Letter,
 - Pages #6-7: Memorandum,
 - Page #18: Letter,
 - Pages #20-23: Email,
 - Pages #24-26: Letters,
 - Pages #27-29: Memorandum,
 - Pages #30-31: Letter,
 - Pages #32-34: Memorandum, and
 - Pages #35-36: Letter.

[para 5] During the Inquiry, the Public Body disclosed an unsevered version of page #15 to the Applicant. This Order does not address page #15 or any other information that is no longer at issue. The records/information remaining at issue are/is referred to in this Order as the "Records at Issue". A summary of the responsive records provided by the Public Body at the Inquiry is provided in the Appendix.

III. INQUIRY ISSUES

[para 6] The issues in the Notice of Inquiry are:

- ISSUE A: Does section 17 of FOIP (personal information) apply to the records/information?
- ISSUE B: Did the Public Body properly apply section 24(1)(a) and section 24(1)(b) of FOIP (advice from officials) to the records/information?
- ISSUE C: Did the Public Body properly apply section 27(1)(a), section 27(1)(b) and section 27(1)(c) of FOIP (privileged information) to the records/information?

IV. BURDEN OF PROOF

[para 7] The burden of proof is set out in section 71 of FOIP. Pursuant to section 71(1) of FOIP, a public body that refuses an applicant the right of access has the burden of proof to justify its refusal. When access is denied under discretionary exceptions, a public body must not only show that the information falls under an exception to access under FOIP but also that it properly exercised its discretion when deciding whether to refuse (Order 96-003 (page 15)). Therefore, I find that the Public Body has the burden of proof to show that it properly applied section 24 and section 27 of FOIP when it refused access.

[para 8] Section 17 has a two-fold burden of proof. A public body has the initial burden to show that section 17 applies to the personal information withheld, pursuant to section 71(1) of FOIP. As there is a presumption that disclosure of personal information is an unreasonable invasion of a third party's personal privacy, the burden shifts to the applicant to show that disclosure would *not* be an unreasonable invasion of the third party's personal privacy under section 71(2) and section 71(3)(a) of FOIP (Orders F2002-024 (para 17), 99-028 (para 12), 96-019 (para 90)).

V. DISCUSSION OF INQUIRY ISSUES

ISSUE A: DOES SECTION 17 OF FOIP (PERSONAL INFORMATION) APPLY TO THE RECORDS/INFORMATION?

[para 9] The relevant parts of section 17 of FOIP say:

17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

17(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

(b) the personal information is an identifiable part of a law enforcement record, except to the extent that the disclosure is necessary to dispose of the law enforcement matter or to continue an investigation,

(g) the personal information consists of the third party's name when

(i) it appears with other personal information about the third party, or

(ii) the disclosure of the name itself would reveal personal information about the third party,

17(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,

(c) the personal information is relevant to a fair determination of the applicant's rights,

(f) the personal information has been supplied in confidence,

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

[para 10] Section 17 of FOIP is a "must" or mandatory provision. This means that if the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy, the public body *must* refuse to disclose the information to an

applicant under section 17(1) of FOIP. If a disclosure would be an unreasonable invasion of a third party's personal privacy under section 17 of FOIP, a public body has no choice and must deny the request for access. However, section 17 of FOIP does not say that a public body is never allowed to disclose personal information.

[para 11] Rather, a public body must refuse to disclose personal information when the disclosure is an unreasonable invasion of a third party's personal privacy. When certain types of personal information are involved, disclosure is presumed to be an unreasonable invasion of a third party's personal privacy under section 17(4) of FOIP. When determining whether section 17(1) or section 17(4) applies, a public body must consider and weigh all relevant circumstances including those set out in section 17(5) of FOIP. If the public body determines that the invasion of a third party's personal privacy is unreasonable after weighing all of the relevant circumstances, then a public body must refuse to disclose.

[para 12] The Public Body says that it is required to refuse to disclose the following information as there is third party personal information and disclosure of the third party personal information would be an unreasonable invasion of a third party's personal privacy under section 17 of FOIP ("Section 17 Records"):

- Pages severed:
 - Page #1: Briefing Note, page 1,
 - Page # 14: R-1 Report,
 - Page #16: R-2 Report, page 2, and
 - Page #17: R-2 Report, page 3.

- Pages withheld in their entirety:
 - Page #24-26: Letters,
 - Pages 27-29: Memorandum,
 - Pages 30-31: Letter, and
 - Pages 32-34: Memorandum.

Personal information

[para 13] There must be personal information in order for section 17(1) of FOIP to apply to the information. The relevant parts of the definition of "personal information" in section 1(n) of FOIP read:

- 1(n) "personal information" means recorded information about an identifiable individual, including
- (i) the individual's name, home or business address or home or business telephone number,
 - (iii) the individual's age, sex, marital status or family status,

- (vi) information about the individual's health and health care history, including information about a physical or mental disability,
- (vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,
- (ix) the individual's personal views or opinions, except if they are about someone else.

[para 14] I have carefully examined the records, and I accept the Public Body's argument that there is personal information as defined in section 1(n) of FOIP, in the Section 17 Records. In particular, I find that the:

- Names in pages #1, 16, 17, 24-26, 27-29, 30-31, 32-34 are the personal information of a third party under section 1(n)(i) of FOIP,
- Information about an individual's sex on page #14 is the personal information of a third party under section 1(n)(iii) of FOIP,
- Information about an individual's health within pages #27-29 and 32-34 is the personal information of a third party under section 1(n)(vi) of FOIP,
- Information about an individual's criminal history in pages #27-29 and 32-34 is the personal information of a third party under section 1(n)(vii) of FOIP, and that the
- Information about an individual's personal views or opinions in pages #27-29 and 32-24 is the personal information of a third party under section 1(n)(ix) of FOIP.

Presumptions

[para 15] When information falls under one of the provisions in section 17(4) of FOIP, disclosure of the personal information is presumed to be an unreasonable invasion of a third party's personal privacy. The Public Body says the presumptions pertaining to a law enforcement record in section 17(4)(b) and to a third party's name in section 17(4)(g) of FOIP, apply to the Section 17 Records.

Law enforcement record

[para 16] The Public Body says the Section 17 Records contain personal information that is an identifiable part of a law enforcement record under section 17(4)(b) of FOIP. If so, the presumption that disclosure would be an unreasonable invasion of a third party's personal privacy would apply to the personal information. The definition of "law enforcement" in FOIP is:

- 1(h) "law enforcement" means
 - (i) policing, including criminal intelligence operations,
 - (ii) a police, security or administrative investigation, including the complaint giving rise to the investigation, that leads or could lead to a

penalty or sanction, including a penalty or sanction imposed by the body conducting the investigation or by another body to which the results of the investigation are referred, or

- (iii) proceedings that lead or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the proceedings or by another body to which the results of the proceedings are referred.

[para 17] Orders issued from the Office under FOIP say that “law enforcement” includes activities of a public body that are directed towards investigation and enforcing compliance with standards and duties imposed by a statute or regulation (Order 96-006 (page 5)). “Law enforcement” exists where the legislation imposes sanctions and penalties for non-compliance and for breach of the applicable law (Order F2002-024 (para 31)). “Investigation” means “to follow up step by step by patient inquiry or observation; to trace or track; to examine and inquire into with care and accuracy; to find out by careful inquisition; examination; the taking of evidence; a legal inquiry” (Order 96-019 (para 15)).

[para 18] The Public Body says that the Section 17 Records pertain to investigating and enforcing compliance with standards and duties imposed by the *Criminal Code*, R.S.C. 1985, c. C-46, as the *Criminal Code* imposes sanctions and penalties for criminal breach of trust under section 122 and for obstruction of justice under sections 129 and 139 of the *Criminal Code*. The Public Body says that the investigation also pertains to whether section 9(2) of the *Radiocommunication Act*, R.S.C. 1985, c. R-2 was breached and whether the offence of interception of radiocommunication occurred, which is subject to penalties and sanctions under the *Radiocommunication Act*.

[para 19] I accept the argument of the Public Body that the information in the Section 17 Records that pertains to the criminal investigation falls under section 1(h)(ii) of FOIP as this is a police or administrative investigation that could lead to penalties or sanctions. I also accept that the investigation falls under section 1(h)(iii) of FOIP as the proceedings could lead to penalties or sanctions by the body conducting the proceedings or another body. Therefore, I find that the above investigations fall within the definition of “law enforcement” in section 1(h) of FOIP.

[para 20] I accept the Public Body’s argument that the above personal information in the Section 17 Records falls under the presumption that disclosure of the personal information would be an unreasonable invasion of a third party’s personal privacy, because the personal information is an identifiable part of a law enforcement record under section 17(4)(b) of FOIP.

Third party’s name

[para 21] The Public Body says that some of the personal information in the Section 17 Records includes the names of third parties that appear with other personal information about the third parties under section 17(4)(g)(i) of FOIP. Additionally, the

Public Body says that disclosure of the third party's name, in and of itself, would reveal personal information about the third party under section 17(4)(g)(ii) of FOIP.

Name with other personal information

[para 22] The Public Body says the presumption that disclosure would amount to an unreasonable invasion of a third party's personal privacy in section 17(4)(g)(i) of FOIP applies to information in the Section 17 Records. There are names of third parties throughout the information withheld and the names exist in conjunction with other personal information. For example, the memoranda on pages #27-29 and #32-34 contain a third party's name together with other personal information such as the individual's health, criminal history and personal views or opinions.

[para 23] I accept the argument of the Public Body that the third party names appear in the context of detailed descriptions of events and circumstances that together create identifying information that would reveal the identity of the individuals involved. Therefore, I accept the argument of the Public Body that disclosure of the third party names that exists together with the other personal information would amount to an unreasonable invasion of the third party's privacy.

Name itself reveals personal information

[para 24] The Public Body says that the presumption of an unreasonable invasion of privacy under section 17(4)(g)(ii) of FOIP applies to information in the Section 17 Records in the circumstances of this case. Some of the third parties are well known public figures and senior officials, whose name alone reveals personal information. The situation that gave rise to the Section 17 Records arose in the context of a media event that garnered a great deal of publicity and controversy and resulted in the investigations that became the subject of the Records at Issue.

[para 25] I accept the Public Body's argument that some of the information in the Section 17 Records falls under the presumptions that disclosure of the personal information would be an unreasonable invasion of a third party's personal privacy, because the information includes the names of third parties that appear with other personal information about the third parties under section 17(4)(g)(i) of FOIP and because disclosure of the third party's name, in and of itself, would reveal personal information about the third party under section 17(4)(g)(ii) of FOIP.

Circumstances

[para 26] In order to determine whether section 17(1) or section 17(4) of FOIP applies to the personal information, all relevant circumstances must be considered. Relevant circumstances are not limited to the circumstances that are listed in section 17(5) of FOIP. The Public Body says it considered and weighed relevant circumstances under section 17(5) of FOIP, as follows:

- *Disclosure is desirable to subject the activities of the public body to public scrutiny (section 17(5)(a) of FOIP).* The Public Body says that disclosure of the information is unlikely to contribute to public scrutiny of a public body because so much information has already been made public and because it is not sufficient for a single person to decide that public scrutiny is necessary (Order 96-020 (para 214)). In response, the Applicant said that he is a well known journalist, so the resulting published information would contribute to public scrutiny. However, the Public Body says there were no responsive records to the Applicant's original access request, so there is no further information to be made public on the specific issue raised by the Applicant. The Public Body said this factor weighs against disclosure. The Applicant's written initial submission concedes:

In this case, the police have already publicly released the fact that there was insufficient evidence to lay charges. The substantive information contained in the records has already been released by the public body itself. All that is left is more detail about why the evidence failed to meet the legal threshold.

- *Personal information is relevant to a fair determination of the applicant's rights (section 17(5)(c) of FOIP).* The Public Body says that this circumstance is not relevant because the Applicant does not have rights at stake, so this circumstance does not weigh in favour of disclosure.
- *Personal information supplied in confidence (section 17(5)(f) of FOIP).* The Public Body says that this circumstance weighs against disclosure, as much of the information in the Section 17 Records was provided in confidence, such as the law enforcement records. Protection of the third parties who provided the information in confidence is a key consideration in the circumstances of this case, in view of the publicity and sensitivity of the information. The Public Body referred to Order F2003-016, where the Adjudicator said:

In Order 98-007, the Commissioner held that the primary concern under section 17(5)(f) is to honour promises of confidentiality made to individuals providing personal information and to protect their privacy and the privacy of others to whom the information relates. The Commissioner found that the context in which information is recorded and the sensitivity of the events recorded are indicators of confidentiality under this section (para 35).

- *Disclosure may unfairly damage the reputation of any person referred to in the record requested (section 17(5)(h) of FOIP).* The Applicant raised this point, saying that the Public Body has already disclosed so much information about the third parties that it cannot now take the position of refusing to disclose in order to protect third party privacy. The Public Body said that whether information is already in the public domain is not a relevant circumstance or a decisive factor that justifies disclosure of third party personal information under section 17(5)(h) of FOIP. The Public Body said there is a difference between the knowledge that information exists and the right to obtain that information under FOIP (Order 2001-001 (para 65)). The Public Body said that this factor does not weigh in favour of disclosure.

[para 27] The Public Body also considered circumstances outside of section 17(5) of FOIP, saying that there is the circumstance of intertwined information. The Public Body says that the third party personal information in pages #27-29 and #32-34 is so intertwined with other information that all of the information on these pages must be withheld in its entirety. Order 96-008 dealt with personal information contained in a statement about the conduct of the applicant while on duty as a corrections officer, which resulted in an investigation and disciplinary action against the applicant.

[para 28] In Order 96-008, the third party personal information was found to be so intertwined with other information that the applicant was denied access to all of the information in the record, even though the request included the applicant's own personal information. In that Order, the former Commissioner stated:

Even though Alberta Justice correctly applied [then] section 16(2)(g) to the Record, in most cases this would result in simply severing names and other identifying information rather than refusing to disclose the entire record. This is particularly the case when the Record, as here, also contains the Applicant's personal information to which the Applicant would be entitled under [then] section 6(1).

I have carefully reviewed the Record to determine whether the third party personal information can be severed, as requested by the Applicant, so that the Applicant can be provided with the remainder of the Record that includes the Applicant's personal information. I find that the third party personal information is so intertwined with the contents of the statement that it cannot be severed without making the rest of the Record meaningless. Therefore, this presents an "all or nothing" proposition (page 6).

[para 29] The Public Body says that the information on pages #27-29 and #32-34 of the Section 17 Records relates to a third party public figure and is intertwined with other personal information that may only be known by one individual. I accept the Public Body's argument that this situation falls within the principle set out in Order 96-008, where a third party's personal information is so intertwined with other personal information that the third party's personal information cannot reasonably be severed without making the rest of the information in the record meaningless. I also accept the Public Body's argument that this is a circumstance that weighs against disclosure.

[para 30] The Applicant's submissions focus on alleged inadequacies in the EPS investigation rather than on whether disclosure of personal information would be an unreasonable invasion of a third party's personal privacy under section 17 of FOIP. In my view, the Applicant did not discharge the Applicant's burden of proof under section 71(2) and section 71(3)(a) of FOIP to show that disclosure of a third party's personal information would *not* amount to an unreasonable invasion of the third party's personal privacy under section 17(1) of FOIP.

[para 31] In my view, all of the information in the Section 17 Records falls under section 17 of FOIP and disclosure would be an unreasonable invasion of a third party's personal privacy. This means that the Public Body must not disclose any of the information in the Section 17 Records to the Applicant. I intend to order the Public Body

not to disclose to the Applicant any of the information that falls under the Section 17 Records, pursuant to section 17 of FOIP.

ISSUE B: DID THE PUBLIC BODY PROPERLY APPLY SECTION 24(1)(a) AND SECTION 24(1)(b) OF FOIP (ADVICE FROM OFFICIALS) TO THE RECORDS/INFORMATION?

[para 32] The relevant parts of section 24(1) of FOIP read:

24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal

- (a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,
- (b) consultations or deliberations involving
 - (i) officers or employees of a public body.

[para 33] The Public Body says that section 24(1)(a) and section 24(1)(b) of FOIP apply and allow it to refuse to disclose the following information in the Records at Issue ("Section 24 Records "):

- Pages severed:
 - Pages #1-2: Briefing Note, pages 1 and 2, and
 - Page #17: R-2 Report, page 3.

[para 34] Section 24(1) of FOIP is a "may" or discretionary provision. This means that if section 24(1) of FOIP applies, a public body *may* refuse to disclose the information to an applicant. However, even if section 24(1) applies, a public body has the choice of whether or not to disclose the information. If a public body properly determines that section 24(1) of FOIP applies, a public body may still choose to disclose the information.

[para 35] Section 24(1) of FOIP protects the free flow of recommendations and advice within the deliberative process of government decision and policy-making (Order 96-006 (page 8); Order upheld in Action No. 9603-16335). In order for section 24(1) of FOIP to apply, the information must fall within one of the categories of advice from officials under section 24(1) of FOIP. When a public body decides to refuse to disclose information to an applicant under the authority of section 24(1) of FOIP, it must also properly exercise its discretion.

[para 36] In order for section 24(1)(a) of FOIP to apply, there must be advice, proposals, recommendations, analyses or policy options ("advice"). The advice under section 24(1)(a) of FOIP must fulfill three criteria, in that the advice must be:

- Sought or expected, or be part of the responsibility of a person by virtue of that person's position,
- Directed toward taking an action; and
- Made to someone who can take or implement the action (Order F2002-002 (para 76); 96-006 (page 9)).

[para 37] The Public Body says that disclosure of the above information could reasonably be expected to reveal advice, proposals, recommendations, analyses and policy options developed for a public body. Additionally, the Public Body says that the above three criteria are met as the information pertains to advice that is sought and expected from the investigator who had a duty to provide advice, proposals and recommendations., the advice is directed towards taking an action as recommendations are made and the advice is given directly to a senior official who can implement the action.

[para 38] I find that the Public Body satisfied the three criteria that exist under section 24(1)(a) of FOIP, and therefore, that section 24(1)(a) of FOIP applies to all of the information in the Section 24 Records. I will now consider whether the Public Body properly exercised its discretion in refusing to disclose the information under section 24(1)(a) of FOIP.

[para 39] A public body that exercises its discretion to withhold information under section 24(1) of FOIP has the burden of proof to show that it properly exercised its discretion. The proper exercise of discretion means that a public body has considered the objects and purposes of FOIP, including the right of access to information and did not exercise its discretion for an improper or an irrelevant purpose access (Order 98-016 (para 32); Order 97-014 (para 22)).

[para 40] The Public Body says that it complied not only with the letter but also with the spirit of FOIP in its response to the Applicant's request. The Applicant's request for review, which is in Tab 3 of the Public Body's written initial submission, concedes that the Public Body provided access when it could have responded by merely saying there that were no responsive records. The Applicant states:

By way of background, my original request refers specifically to [name of newspaper]. The police service's FOI coordinator, [name of individual], kindly called me and told me that there were no documents responsive to that specific request but there were others which she suggested would generally fulfill the intent of my request. I agreed and received a package containing 14 pages of documents.

[para 41] In my view, the Public Body's response to the Applicant shows that the Public Body considered the objects and purposes of FOIP, which include the purpose of providing individuals with the right of access to information. This weighs in favour of a finding that the Public Body considered the objects and purposes of FOIP, including the

right of access, and took these factors into account when exercising its discretion to refuse access.

[para 42] I note the amount of information that the Public Body disclosed to the Applicant, notwithstanding the application of section 24(1)(a) of FOIP. There is no evidence before me to suggest that the Public Body exercised its discretion for an improper or irrelevant purpose or improperly exercised its discretion in any way. Therefore, I find that the Public Body properly exercised its discretion under section 24(1)(a) of FOIP when refusing to disclose the information in the Section 24 Records.

[para 43] In my view, the Public Body discharged its burden of proof under section 71(1) of FOIP to show that section 24(1)(a) of FOIP applies to the information and also to show that it properly exercised its discretion when refusing access to the Section 24 Records under section 24(1)(a) of FOIP. For all of the above reasons, I find that the Public Body properly applied section 24(1)(a) of FOIP to the Section 24 Records.

[para 44] Having found that section 24(1)(a) of FOIP applies to all of the information in the Section 24 Records, I do not find it necessary to consider whether the Public Body is also allowed to refuse to disclose the same information under an additional category of advice, under section 24(1)(b) of FOIP. There is no information remaining to be considered under section 24(1)(b) of FOIP.

ISSUE C: DID THE PUBLIC BODY PROPERLY APPLY SECTION 27(1)(a), SECTION 27(1)(b) AND SECTION 27(1)(c) OF FOIP (PRIVILEGED INFORMATION) TO THE RECORDS/INFORMATION?

[para 45] The relevant parts of section 27(1) of FOIP read:

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

(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

(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.

[para 46] The Public Body says that section 27(1) of FOIP applies and allows it to refuse to disclose the following information in the Records at Issue (“Section 27 Records”):

- Pages severed:
 - Pages #1: Briefing Note, page 1, and
 - Pages #16-17: R-2 Report, pages 2 and 3.

- Pages withheld in their entirety:
 - Pages #3-5: Letter,
 - Pages #6-7: Memorandum,
 - Page #18: Letter,
 - Pages #20-23: Email, and
 - Pages #35-36: Letter.

[para 47] Some of the information that the Public Body withheld under section 27 of FOIP is the same information that I said must be withheld under section 17 of FOIP. Due to my finding that the information must be withheld under section 17, I do not find it necessary to consider whether the same information could also be withheld under section 27 of FOIP. Therefore, when considering the Section 27 Records, I will only consider whether the Public Body properly applied section 27(1) of FOIP to the balance of the information.

[para 48] Section 27(1) of FOIP is a “may” or discretionary provision. This means that a public body *may* refuse to disclose the information to an applicant. A public body has the choice of whether to disclose and may choose to disclose the information. In order for section 27(1) of FOIP to apply, the information must fall within one of the categories of privilege under section 27(1) of FOIP. When a public body decides to refuse to disclose information under section 27(1) of FOIP, it must also properly exercise its discretion.

[para 49] I will first consider whether section 27(1)(c) of FOIP applies. In order for section 27(1)(c) of FOIP to apply, the following two criteria must be met:

- The record must be correspondence between an agent or lawyer of the Minister of Justice and Attorney General or a public body and any other person; and
- The information in the correspondence must be in relation to a matter involving the provision of advice or other services by the agent or lawyer (Order 98-016 (para 17)).

[para 50] When considering the application of section 27(1) and section 27(1)(c) of FOIP in an external adjudication, Justice McMahan stated:

As can be seen from the foregoing, the exemptions and exceptions are very wide and have the potential to sweep in a number of government documents. In addition, the head of a public body has discretion in many cases to release documents or not. Despite the noble sentiments often expressed in support of this kind of legislation, the reality is

that a government's desire for secrecy too often trumps the nominal objective of "freedom of information". ... [O]ne need only look to s. 27(1) to see the crafted impediments. Subsection 27(1)(b) permits the public body to refuse disclosure of information prepared by or for an agent or a lawyer of the public body that merely relates to a matter involving the provision of legal services. The information need not involve the provision of actual legal services. Even more sweeping is subsection 27(1)(c). It permits non-disclosure of information in any correspondence between a lawyer of a public body ... (which would extend to the non-legal staff ...) on the one hand, and anyone else. The information need merely relate to a matter involving the provision of any kind of advice or any kind of service by the agent or lawyer. It would be difficult to draft a more general or exclusionary clause (OIPC External Adjudication Order #4, October 3, 2003, *Hugh MacDonald, M.L.A. v. Alberta Justice and The Globe and Mail* (paras 12-13)).

[para 51] The Public Body says that all of the information in the Section 27 Records pertains to legal opinions, legal advice or legal services. In my view, the information in the Section 27 Records is in correspondence between an agent or a lawyer of a public body and another person. Also in my view, the information in the Section 27 Records is in correspondence in relation to a matter involving the provision of advice or other services by the agent or lawyer. Therefore, I find that section 27(1)(c) of FOIP applies to the Section 27 Records.

[para 52] A public body that exercises its discretion to withhold information under the discretionary provision in section 27(1) of FOIP has the burden of proof to show that it properly exercised its discretion. I note the amount of information that the Public Body disclosed to the Applicant, notwithstanding the application of section 27(1)(c) of FOIP. There is no evidence before me to suggest that the Public Body exercised its discretion for an improper or irrelevant purpose or improperly exercised its discretion in any way. Therefore, I find that the Public Body properly exercised its discretion under section 27(1)(c) of FOIP when refusing to disclose the Section 27 Records.

[para 53] In my view, the Public Body discharged its burden of proof under section 71(1) of FOIP to show that section 27(1)(c) of FOIP applies to the Section 27 Records and also to show that it properly exercised its discretion when refusing access to the Section 27 Records. For all of the above reasons, I find that the Public Body properly applied section 27(1)(c) of FOIP to the Section 27 Records.

[para 54] Having found that section 27(1)(c) of FOIP applies to the Section 27 Records, I do not find it necessary to consider whether the Public Body is also allowed to refuse to disclose the same information under another category of privilege, under section 27(1)(a) or section 27(1)(b) of FOIP. There is no information remaining to be considered under section 27(1)(a) or section 27(1)(b) of FOIP.

VI. ORDER

[para 55] I make this Order under section 72 of FOIP:

- I find that section 17 of FOIP (personal information) applies to the Section 17 Records. In particular:
 - When section 17(1) of FOIP applies, a public body *must* refuse to disclose the personal information because disclosure of the personal information would be an unreasonable invasion of a third party's personal privacy;
 - In determining whether section 17(1) of FOIP applies, the relevant presumptions under section 17(4) must be considered and all of the relevant circumstances including the circumstances under section 17(5) of FOIP must be considered and weighed;
 - I find that after considering all of the presumptions in section 17(4) and all of the relevant circumstances including those in section 17(5) of FOIP, that the disclosure of personal information in the circumstances of this case would be an unreasonable invasion of a third party's personal privacy under section 17(1) of FOIP;
 - I find that the Public Body discharged its initial burden of proof to show that there is personal information of a third party under section 17(1) of FOIP;
 - I find that the Applicant did not discharge the burden of proof to show that disclosure of the third party personal information would *not* be an unreasonable invasion of the third party's personal privacy under section 17(1) of FOIP;
 - I find that section 17(1) applies and that disclosure of the information in the Section 17 Records would constitute an unreasonable invasion of a third party's personal privacy under section 17(1) of FOIP; and
 - Consequently, I confirm the Public Body's decision and require the Public Body to refuse access to the Section 17 Records, pursuant to section 17 of FOIP.

- I find that the Public Body properly applied section 24(1)(a) of FOIP (advice from officials) to the Section 24 Records. In particular:
 - When section 24(1) of FOIP applies, a public body *may* refuse to disclose as it has the discretion to decide to either disclose or refuse to disclose the information;
 - When a public body refuses access under section 24(1) of FOIP, the public body has the burden of proof to show that section 24(1) applies to the information and that it properly exercised its discretion when refusing to disclose the information;

- I find that the Public Body discharged its burden of proof to show that section 24(1)(a) of FOIP applies and to show that it properly exercised its discretion when refusing access under section 24(1)(a) of FOIP, and therefore, I find that the Public Body properly applied section 24(1)(a) of FOIP to the Section 24 Records;
 - Consequently, I confirm the decision of the Public Body to refuse to disclose the Section 24 Records, pursuant to section 24(1)(a) of FOIP; and
 - Due to my finding under section 24(1)(a) of FOIP, there is no information remaining to be considered under section 24(1)(b) of FOIP.
- I find that the Public Body properly applied section 27(1)(c) of FOIP (privileged information) to the balance of the Section 27 Records. In particular:
 - When section 27(1) of FOIP applies, a public body *may* refuse to disclose, because it has the discretion to decide to either disclose or refuse to disclose the information;
 - When a public body refuses access under section 27(1) of FOIP, the public body has the burden of proof to show that section 27(1) applies to the information and that it properly exercised its discretion when refusing to disclose the information;
 - I find that the Public Body discharged its burden of proof to show that section 27(1)(c) of FOIP applies and to show that it properly exercised its discretion when refusing access under section 27(1)(c) of FOIP, and therefore, I find that the Public Body properly applied section 27(1)(c) of FOIP to the Section 27 Records;
 - Consequently, I confirm the decision of the Public Body to refuse to disclose the balance of the Section 27 Records, pursuant to section 27(1)(c) of FOIP; and
 - Due to my finding under section 27(1)(c) of FOIP, there is no information remaining to be considered under section 27(1)(a) or section 27(1)(b) of FOIP.

Frank Work, Q. C.
Information and Privacy Commissioner

VII. APPENDIX: SUMMARY OF RESPONSIVE RECORDS

Pages at issue - severed

PAGE #	# OF PAGES	DESCRIPTION	FOIP EXCEPTION
1	1	Briefing Note, page 1	17, 24, 27
2	1	Briefing Note, page 2	24
14	1	R-1 Report	17
16	1	R-2 Report, page 2	17, 27
17	1	R-2 Report, page 3	17, 24, 27
Total	5		

Pages at issue - withheld in their entirety

PAGE #	# OF PAGES	DESCRIPTION	FOIP EXCEPTION
3-5	3	Letter	27
6-7	2	Memorandum	27
18	1	Letter	27
20-23	4	Email	27
24-26	3	Letters	17
27-29	3	Memorandum	17
30-31	2	Letter	17
32-34	3	Memorandum	17
35-36	2	Letter	27
Total #	23		

Pages not at issue

PAGE #	# OF PAGES	DESCRIPTION
8-9	2	Letters
10-13	4	Letter
15	1	R-2 Report, page 1
19	1	Email
37-69	33	EPC Policy & Procedure Manual
70	1	Schedule 1, 2, & 3 of the <i>Police Act</i>
71-89	19	<i>Radiocommunication Act</i>
90-96	7	Newspaper Articles
Total #	68	