ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2008-017

December 23, 2008

EDMONTON POLICE SERVICE

Case File Number F3918

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* ("the Act" or "the FOIP Act") for an internal affairs investigation file in the custody and control of the Public Body ("EPS"). The EPS initially refused any access to the internal affairs file pursuant to section 17 of the Act. Eventually the EPS disclosed most of the file, but severed some information applying sections 17 and 24 of the Act. The EPS also argued that this Office lost jurisdiction over this matter by operation of section 69(6) of the Act. The EPS members whose personal information had been severed were named as Affected Parties and provided submissions.

The Adjudicator found that this Office retained jurisdiction over this matter.

As well, the Adjudicator found that the EPS improperly applied section 17 of the Act to some of the severed information as it was not personal information, but found that the EPS properly severed personal information of the complainant, witnesses, reporter and Affected Parties. The Adjudicator also found that the EPS properly applied section 24(1)(b) of the Act.

Statutes Cited: AB: *Administrative Procedures and Jurisdiction Act*, R.S.A. 2000, c. A-3, s. 11; *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss.1, 7, 24, 69, 71; *Personal Information Protection Act*, S.A. 2003, c. P-6.5, ss. 50(5), 54(5); *Police Act*, R.S.A. 2000, c. P-17; **CANADA:** *Canadian Charter of Rights and Freedoms*, s. 2, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11; *Criminal Code*, R.S.C., 1985 c. C-46.

Authorities Cited: AB: Orders 96-006, 97-002, 97-011, 99-028, F2000-023, 2000-032, F2002-024, F2003-016, F2004-028, F2005-018, F2006-031, F2007-021, F2008-009, F2008-013 **BC:** Order 13-1997

Cases Cited: *Bridgeland-Riverside Community Association v. City of Calgary*, [1982] A.J. No. 692 (C.A.); *Vialoux v. Registered Psychiatric Nurses Assn. of Manitoba*, [1983] M.J. No. 215 (C.A.); *Ivik Enterprises Ltd. v. Whitehorse (City),* [1986] Y.J. No. 62 (QL), citing *Harelkin v. University of Regina,* [1979] 2 S.C.R. 561; *Spence v. Prince Albert (City) Commissioners of Police*, [1987] S.J. No. 724 (Q.B.); *Cameron v. Law Society of British Columbia*, [1991] B.C.J. No. 2283 (C.A.); *Petherbridge v. City of Lethbridge*, [2000] A.J. No. 1187(Q.B.); *Rahman v. Alberta College and Assn. of Respiratory Therapy*, [2001] A.J. No. 343 (Q.B.); *Symington v. Halifax (Regional Municipality) Police Service*, [2002] N.S.J. No. 65 (S.C.); *Kellogg Brown and Root Canada v. Alberta (Information and Privacy Commissioner)*, [2007] ABQB No. 499, [2008] ABCA 384; *R v. McNeil*, [2006] O.J. No. 4746 (C.A.).

Article Cited: *Unpacking Access to Police Disciplinary Records* 46 CR-ART 227.

I. BACKGROUND

[para 1] On November 8, 2006, the Applicant made an access request pursuant to the *Freedom of Information and Protection of Privacy Act* ("the Act" or "the FOIP Act") to the Public Body, the Edmonton Police Service ("EPS") for, "all records relating to this complaint." The Applicant enclosed letters between himself and the Chief of Police regarding an incident in which EPS members were accused of transporting several individuals from the Whyte Avenue area of Edmonton to a neighbourhood in the northeast of Edmonton and dropping them off there. This incident resulted in an internal affairs investigation.

[para 2] On December 5, 2006, the EPS responded to the Applicant's access request for, "…all records relating to Internal Affairs complaint IA2006-0179." The EPS provided the Applicant with 13 responsive pages which had been partially severed pursuant to section 17 of the Act.

[para 3] On December 8, 2006, the Applicant sent a letter to the EPS clarifying that he was requesting records related to Internal Affairs file IA2005-0173. In a reply letter dated December 7, 2006, the EPS stated:

> In Chief Boyd's letter to you of 2006 February 28, he stated that IA2005-0173 has been resolved to the satisfaction of the complainant, and that no further information can be provided due to the FOIPP Act. Specifically, sections 17(1), 17(4)(b), 17(4)(d), and 17(4)(g)(i)(ii) of the FOIPP Act apply…

[para 4] As a result, the EPS withheld all responsive records in file IA2005-0173 in their entirety from the Applicant. In its response, there is no mention of section 24 of the Act.

[para 5] By way of a letter dated December 14, 2006, the Applicant requested that the Office of the Information and Privacy Commissioner ("this Office") review the response of the EPS to his access request. The Applicant's request for review was received by this Office on December 19, 2006. Although not specifically stated by the Applicant, it appears as though the request for review related to file IA2005-0173, and that there are no issues raised regarding file IA2006-0179.

[para 6] On December 20, 2006, the Information and Privacy Commissioner ("the Commissioner") sent a letter to the EPS notifying the EPS that a review of this matter had been requested by the Applicant. The letter said this matter was to be referred to a Portfolio Officer in this Office for investigation, that the anticipated date for completion of the investigation was March 20, 2007 and that if more time was needed, the EPS would be advised.

[para 7] According to the Affidavit of the EPS, on February 14, 2007, the Portfolio Officer mistakenly requested file IA2006-0179 from the EPS and on June 15, 2007, the Portfolio Officer from this Office requested file IA2005-0173. Both files were provided within days of being requested. According to the EPS' submissions, in June or July 2007, the FOIP Coordinator for the EPS had at least one other conversation with the Portfolio Officer from this Office.

[para 8] According to the submissions of the EPS, on July 31, 2007, the EPS provided the Applicant with 61 pages of responsive records which had been partially severed pursuant to sections 17(1), 17(4)(b), 17(4)(g)(i)(ii) and 24(1)(b) of the Act.

[para 9] On August 1, 2007, the Commissioner sent a letter to the EPS advising that the time for completing the review of this matter would be extended to November 1, 2007, to allow time for the mediation to be concluded.

[para 10] According to the Affidavit provided by the EPS, its FOIP Coordinator had at least one further conversation with the Portfolio Officer in August of 2007 and also received her recommendations via e-mail on August 17, 2007.

[para 11] According to the Affidavit provided by the EPS, on August 20, 2007, in response to the Applicant's request to continue with the review, the EPS reviewed and revised its July 31, 2007 response to the Applicant and provided him with the responsive records again, apparently with less information severed. The EPS relied on the same exclusions as it had in its July 31, 2007 response.

[para 12] By way of a letter dated August 22, 2007, the Applicant advised this Office that he still wished to proceed with the mediation/investigation as no further "meaningful information" had been provided by the EPS.

[para 13] According to the submissions of the EPS, the Portfolio Officer's investigation results were provided to the parties on September 17, 2007. In a letter dated September 26, 2007 to this Office, the Applicant requested an inquiry into this matter.

[para 14] On October 3, 2007, the Portfolio Officer sent a letter to the EPS advising that the Applicant had requested an inquiry into this matter. The Portfolio Officer advised that the possible issues for the adjudication of this matter would be whether the EPS had properly applied sections 17 and 24 to the responsive records. The Portfolio Officer also advised that this matter had been transferred to the Adjudication Unit of this Office, and provided contact information to the EPS should there be any questions.

[para 15] On October 4, 2007, the Director of Adjudication sent a letter to the EPS advising that this matter had been received by the Adjudication Unit and that inquiries were being scheduled in the summer of 2008. The letter provided information as to this Office's general procedure. It also advised the EPS that if an inquiry is held, the Notice of Inquiry would be sent to the parties approximately two and a half to three months before the date of inquiry, and that an order is normally issued 6 to 12 months following the inquiry. Finally, the letter advised that the anticipated date of completion of the inquiry for this matter is June 30, 2009.

[para 16] On March 7, 2008, the EPS requested that the issue of whether this Office lost jurisdiction over this matter pursuant to section 69(6) of the Act be added as an issue to this inquiry.

[para 17] During the course of reviewing this file prior to setting the inquiry date, three Affected Parties ("Affected Parties" or "EPS members") were identified. These parties were EPS members who were accused of wrong doing, which resulted in investigation file IA2005-0173 ("Internal Affairs file").

[para 18] On August 20, 2008, all parties, including the Affected Parties, were sent a copy of the Notice of Inquiry. As the disclosure of the Affected Parties' names was an issue in the inquiry, this Office did not disclose their names to the Applicant or the EPS. Initial submissions were due to this Office by noon September 29, 2008.

[para 19] On September 22, 2008, counsel for the three Affected Parties wrote to this Office and advised that he had recently been retained in this matter and requested an extension to file his clients' initial submissions. He advised that the Applicant did not oppose the extension and that the EPS indicated, "…that they would agree to an extension of time, provided the extension applies to the Edmonton Police Service as well."

[para 20] As all the parties agreed or were not opposed to the extension, I granted an extension to all parties to October 29, 2008 for providing their initial submissions to this Office. This Office received initial submissions from the Applicant and EPS by that date. The Affected Parties missed the deadline and requested a further extension to November

5, 2008. As the Affected Parties' submissions were not to be disclosed to the Applicant or the EPS, I granted this extension, but meanwhile exchanged the Applicant's and EPS' submissions between them in order to facilitate rebuttal submissions. When counsel for the Affected Parties provided this Office with their initial submission, I provided the Affected Parties with the other parties' submissions. The Affected Parties consented to releasing their submissions to the Applicant and the EPS, which this Office did. All parties were to provide their rebuttal submissions by November 12, 2008.

[para 21] I was provided with initial and rebuttal submissions from the Applicant, the EPS and the Affected Parties.

II. RECORDS AT ISSUE

[para 22] The records at issue in this inquiry are the severed portions of Internal Affairs file #IA2005-0173, which total 61 pages.

III. ISSUES

[para 23] As outlined in the Notice of Inquiry dated August 20, 2008, the issues in this inquiry are as follows:

Issue A:

Did the Commissioner or his delegate lose jurisdiction on the basis of alleged non-compliance with section 69(6) of the Act?

Issue B:

Did the Public Body properly apply section 17 to the records and/or information?

Issue C:

Did the Public Body properly apply section 24 to the records and/or information?

IV. DISCUSSION OF ISSUES

Preliminary matter:

[para 24] Following the exchange of rebuttal submissions, the Affected Parties requested that they be permitted to submit further argument to respond to arguments made by the Applicant in his rebuttal submission. Their main concern seems to have been with how section 2 of the *Canadian Charter of Rights and Freedoms* ("*Charter*") impacts the Act.

[para 25] The Applicant did provide me with argument and materials regarding the application of section 2 of the *Charter* and how it should impact privacy legislation. In

particular, he relied heavily on an Ontario case which is currently being appealed to the Supreme Court of Canada on a *Charter* challenge to Ontario's privacy legislation.

[para 26] While I agree with the Affected Parties that this is a new argument that was raised by the Applicant in his rebuttal, and therefore, the EPS and the Affected Parties have not had the chance to address it, I also note that it is an argument based on the *Charter*.

[para 27] 27.] Section 11 of the *Administrative Procedures and Jurisdiction Act* states:

> *11 Notwithstanding any other enactment, a decision maker has no jurisdiction to determine a question of constitutional law unless a regulation made under section 16 has conferred jurisdiction on that decision maker to do so.*

[para 28] No jurisdiction over questions of constitutional law has been conferred on the Commissioner. Therefore, I do not have jurisdiction as his delegate to determine if the Act violates the *Charter* or any other *Charter* related questions which the Applicant raises. For this reason, I saw no need to grant the Affected Parties' request to make further submissions.

Issue A: Did the Commissioner or his delegate lose jurisdiction on the basis of alleged non-compliance with section 69(6) of the Act?

[para 29] The EPS is the only party that provided detailed submissions relating to Issue A. The Affected Parties agreed with the EPS' position and the Applicant disagreed, based on recent orders issued by this Office, which will be discussed below. Therefore, I will refer to the EPS' arguments regarding this issue.

[para 30] The EPS' argument relies primarily on the finding of Justice Belzil in *Kellogg Brown and Root Canada v. Alberta (Information and Privacy Commissioner)* [2007] ABQB No. 499, [2008] ABCA 384 ("*KBR*"). Justice Belzil's decision in *KBR* was appealed to the Alberta Court of Appeal, where it was found that the appeal was moot. The Court of Appeal did not make a finding on the merits of the appeal.

[para 31] The decision in *KBR* dealt with whether this Office had lost jurisdiction by operation of section 50(5) of the *Personal Information Protection Act* ("PIPA"), which states:

> *50(5) An inquiry into a matter that is the subject of a written request referred to in section 47 must be completed within 90 days from the day that the written request was received by the Commissioner unless the Commissioner*

> *(a) notifies the person who made the written request, the organization concerned and any other person given a copy of the written request that the Commissioner is extending that period, and*
>
> *(b) provides an anticipated date for the completion of the review.*

[para 32] The EPS requested that this jurisdictional issue be added as an issue in several inquiries being dealt with by this Office. Although not all EPS matters in which jurisdiction is an issue have been heard by this Office, several Orders on this issue have been issued. The first was Order F2006-031, which was issued on September 22, 2008 by the Commissioner. The EPS has referred to this Order in its submissions. Although there are distinctions that can be drawn between the facts before the Commissioner in Order F2006-031 and the ones in this matter, to which the EPS has drawn my attention, many of the arguments raised by the EPS in Order F2006-031 are similar to those it raised in this matter. Therefore, I will be referring to the reasoning of the Commissioner in Order F2006-031 where appropriate, while taking into consideration the specific facts of this matter, and addressing the EPS' arguments regarding the factual distinctions.

Was there a breach of section 69(6) of the FOIP Act?

[para 33] Section 69(6) of the FOIP Act reads:

> *69(6) An inquiry under this section must be completed within 90 days after receiving the request for the review unless the Commissioner*
>
> *(a) notifies the person who asked for the review, the head of the public body concerned and any other person given a copy of the request for the review that the Commissioner is extending that period, and*
>
> *(b) provides an anticipated date for the completion of the review.*

[para 34] Pursuant to section 69(6) of the FOIP Act, the Commissioner must complete a review within the 90 days following receipt of the request for review. This time can be extended by the Commissioner if he gives notice of the extension to the Applicant, the Public Body and any other person given a copy of the request for review, and provides these parties with an anticipated date for completion of the review.

[para 35] The initial request for review by the Applicant was received by this Office December 19, 2006, which means the initial 90-day timeline expired on March 19, 2007.

[para 36] On December 20, 2006, this Office advised the parties that the anticipated date of completion of the review was March 20, 2007, a date outside the initial 90-day timeline. The letter of December 20, 2006 gave a contact name for the Portfolio Officer who would be conducting an investigation into this matter, and enclosed a summary of review procedures.

[para 37] The review of this matter was not completed by March 20, 2007. However, it was clear that the process was continuing. On February 14, 2007, the Portfolio Officer requested a copy of file IA2006-0179, apparently believing that these were the records at issue. The EPS provided that file to the Portfolio Officer on February 15, 2007. On June 15, 2007 the Portfolio Officer wrote to the EPS requesting a copy of file IA2005-0173 as she only had file IA2006-0179 in her possession.

[para 38] According to the Affidavit of the EPS, there was at least one other conversation with the Portfolio Officer in June or July, 2007.

[para 39] On July 31, 2007 the EPS provided severed, responsive records to the Applicant, hoping this would resolve this matter.

[para 40] On August 1, 2007, the Commissioner advised the parties that he was extending the time for completing the review to November 1, 2007 to allow for the completion of the mediation which had been undertaken by the Portfolio Officer. The letter from this Office dated August 1, 2007 stated:

> As required by section 69(6) of the *Freedom of Information and Protection of Privacy Act*, I am extending the time for completing the review of the above case file….
>
> The anticipated date for completion of the review is November 1, 2007…

[para 41] According to the Affidavit provided by the EPS, its FOIP Coordinator had at least one other conversation with the Portfolio Officer in August, 2007 and on August 17, 2007, the Portfolio Officer sent an e-mail to the EPS' FOIP Coordinator with recommendations.

[para 42] The EPS continued to participate in the mediation process and provided further information from the responsive records to the Applicant on August 20, 2007. The Applicant was still not satisfied, and by way of letter dated August 22, 2007, requested that the mediation/investigation continue. According to the Affidavit of the EPS, on September 17, 2007, the Portfolio Officer provided the results of her investigation to the parties, following which, by letter dated September 26, 2007, the Applicant requested an inquiry into this matter.

[para 43] The Portfolio Officer advised the EPS on October 3, 2007 that the Applicant had requested an inquiry.

[para 44] On October 4, 2007, this Office sent a letter to all parties stating:

> This file…has been received by the Adjudication Unit. Inquires are currently being scheduled in the summer of 2008.

[para 45] This letter went on to give the EPS an outline of the procedures that would be followed, and stated that the anticipated date of completion of the review is June 30, 2009.

[para 46] The EPS states that it did not participate in setting dates for the inquiry beyond the initial 90-day period, as had been the case in Order F2006-031. Further, the EPS argues that it did not receive notice that the timeline would be extended within 90 days from the date that the initial request for review was provided to this Office.

[para 47] The EPS concedes that the form of the August 1, 2007 and October 4, 2007 letters meet the requirements of section 69(6) of the FOIP Act. However, the EPS argues that since these letters were sent after the initial 90-day time period had expired, they do not meet the requirements under section 69(6) of the FOIP Act.

[para 48] From the information I have, it appears to be correct that the EPS did not participate in setting dates for the inquiry beyond the initial 90 days timelines. Although this distinguishes this matter from that in Order F2006-031, I still find that the requirements of section 69(6) of the Act were met in this matter.

[para 49] The letters dated August 1, 2007 and October 4, 2007 were sent to the parties outside 90 days from the date the request for review was received by this Office. However, there is no requirement in section 69(6) of the FOIP Act that a notice of extension be sent to the parties prior to the expiry of the 90-day timeline, an issue that was not dealt with by Justice Belzil in *KBR*. This issue was addressed by the Commissioner in Order F2006-031, where he found that, based on his interpretation of section 69(6) of the FOIP Act, the timeline could be extended outside of the original 90-day period. He stated:

> In my view, the placement of the phrase "within 90 days" indicates that the 90 days refers only to my duty to complete the inquiry, and does not refer to my power to extend the 90-day period in section 69(6)(a) and section 69(6)(b). To the extent that there is any ambiguity, by interpreting section 69(6) purposively as I will do below, the provision allows me to extend the time after the 90-day period expires.
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> (Order F2006-031 at paragraph 54)

[para 50] The EPS states that the Commissioner may not extend his jurisdiction retroactively by extending the timeline following its expiry. As well, the EPS argues that had the Legislature intended the Commissioner to be able to extend this timeframe following its expiry, it would have explicitly given him this power, as was done in section 54(5)of PIPA.

[para 51] In support of its position that the Commissioner can extend after the initial 90-day timeline has expired only if expressly permitted by the FOIP Act, the EPS cites the Nova Scotia Supreme Court case of *Symington v. Halifax (Regional Municipality) Police Service* [2002] N.S.J. No. 65 (S.C.). In that case, the Court was faced with a prohibition application regarding a police disciplinary hearing. The *Police Act*, which was the enabling legislation, and its Regulations, allowed for an investigation to be extended on application before or after the expiry of 60 days following the filing of written allegations. The Court found that the legislation was clear and that because there was an application for an extension granted, there was no loss of jurisdiction by the tribunal. The Court in *Symington* did not state any requirement that in order for a post-expiry extension to be valid, the legislation must expressly state that a timeline can be extended after its expiry. As well, *Symington* dealt with a police disciplinary matter with a possible outcome of a loss of livelihood. As well, the provisions of the relevant legislation relate to the initiation of a disciplinary proceeding, rather than completing a process that has already begun. Therefore, *Symington* is distinguishable from this matter.

[para 52] As well, in support of its argument, the EPS cited a Manitoba Court of Appeal case, *Vialoux v. Registered Psychiatric Nurses Assn. of Manitoba* [1983] M.J. No. 215. In that case the applicant was subject to a disciplinary hearing which resulted in him not being allowed to practice as a psychiatric nurse in Manitoba. The hearing was conducted outside of the timelines established by the governing legislation. The Court found that this meant that the respondent lost jurisdiction because the timeline was absolute. In coming to this conclusion the Court noted that it had been found previously that a provision regarding a timeline is always obligatory unless there is a power to extend that timeline. In section 69(6) of the FOIP Act the Commissioner has the power to extend the timeline; therefore, this case is irrelevant to this matter. As well, in the *Vialoux* case, the respondent had a choice as to whether to conduct an inquiry. Under the FOIP Act, the Commissioner is obligated to conduct an inquiry except in specific cases.

[para 53] The EPS also raised the case of *Cameron v. Law Society of British Columbia* [1991] B.C.J. No. 2283 in support of its position that the Commissioner cannot extend the timeline in section 69(6) of the FOIP Act after it has expired. This case was also put before the Commissioner by the EPS in Order F2006-031. The Commissioner distinguished *Cameron* given the significant differences between the purpose of the FOIP Act and that of the statutes and rules with which the court in *Cameron* was dealing. I agree with the distinctions made by the Commissioner and accept his reasoning as to why the *Cameron* case is not applicable to matters involving the FOIP Act (Order F2006-031 at paragraphs 64-67).

[para 54] As well, as pointed out by the EPS, section 54(5) of PIPA states that a court may extend the time period for an application for judicial review when asked to do so, either before or after the expiry. While it is true that this explicit language makes it clear what the Court is allowed to do and when, I do not think that it is necessary for this language to be present in section 69 of the FOIP Act in order for the Commissioner to be able to extend the timeline in section 69(6) of the FOIP Act following the expiry. I find that section 69(6) of the FOIP Act as it is currently worded allows the Commissioner to extend the timeline. In Order F2006-031, the Commissioner took into account not only the wording of section 69(6) of the FOIP Act but its place in the context of the entire FOIP Act, including the Commissioner's duty to perform inquiries into matters.

[para 55] As well, there is a significant point of distinction between the two provisions. Section 54(5) of PIPA enables a post-expiry application for initiation of a proceeding rather than the extension of the time for the completion of a proceeding that has already begun. There is less to be said in favour of permitting a post-expiry initiation of a proceeding than for permitting a proceeding that has been commenced to continue, especially as bringing the application for judicial review is within the control of the party who is to do so. This may be why the legislature thought it necessary to be express on this point in section 54(5) of PIPA. Therefore I feel that the Commissioner's interpretation of his ability to extend the timeline in section 69(6) of the FOIP Act is justified.

[para 56] I also do not agree with the submission of the EPS that the Commissioner "retroactively" extended his jurisdiction in this matter by sending these letters after the initial 90-day timeline had expired. I find that the Commissioner complied with section 69(6) of the FOIP Act and, therefore, at no point during the process was jurisdiction over this matter lost.

[para 57] I adopt the reasoning of the Commissioner in Order F2006-031 and find that the letters of August 1, 2007 and October 4, 2007 properly extended the timeline under section 69(6) of the FOIP Act.

Is section 69(6) of the FOIP Act mandatory or directory?

[para 58] In the alternative, if I am incorrect in my findings regarding the August 1, 2007 and October 4, 2007 letters, it is necessary to examine whether section 69 of the FOIP Act is mandatory or directory.

[para 59] Although the EPS relies on the finding in *KBR* in support of its argument that section 69(6) of the FOIP Act is mandatory, as I mentioned above, the Court in *KBR* was dealing with PIPA and not the FOIP Act. As the Commissioner decided in Order F2006-031, the analysis of the purpose provision in the FOIP Act leads to an interpretation of section 69(6) of the FOIP Act that is different from Justice Belzil's interpretation of section 50(5) of PIPA.

[para 60] The Commissioner closely examined section 69(6) of the FOIP Act in Order F2006-031. He stated:

> …when section 69(6) is considered independently of the Court's interpretation of section 50(5) of PIPA, the emphasis on the rights of individuals for both aspects of the FOIP Act (personal information protection as well as access) leads to the conclusion that section 69(6) should not be interpreted so as to allow the frustration of these central purposes – protecting the rights of individuals – by a failure to meet timelines.
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> (Order 2006-031 at paragraph 120)

[para 61] The Commissioner then went on to state:

> …the meaning that I assign and have historically assigned to section 69(6) is that it permits me to take control of the process and move the matter forward. Section 69(6) sets up an initial short time frame within which, should the matter be concluded, there is no need for the process to be managed in terms of its timing. If the 90 days is likely to expire before completion, or has expired and the matter has not been completed, it is then up to me to take steps to ensure that the process moves forward by setting dates for further required steps. The purpose and terms of the provision are fulfilled so long as I apprise the parties of developments and the steps they are to take in an ongoing way.
>
> (Order 2006-031 at paragraph 124)

[para 62] The Commissioner concluded that section 69(6) of the FOIP Act is a directory provision and not a mandatory one (Order F2006-031 at paragraphs 106-127). Therefore, if there was a breach of section 69(6) of the FOIP Act by this Office, I find that the breach did not result in a loss of jurisdiction

Application of KBR:

[para 63] The EPS argues that not only is section 69(6) of the FOIP Act mandatory but that if this Office failed to comply with the mandatory provision, a loss of jurisdiction automatically results. The EPS cites cases which it claims stand for the principle that if a tribunal does not comply with a mandatory requirement, the tribunal's actions are void.

[para 64] In Order F2006-031 the Commissioner noted that the law in relation to whether jurisdiction is lost when a statutory provision is not met has evolved such that it is necessary to examine if the legislature intended a loss of jurisdiction to result from a breach of a mandatory requirement (Order F2006-031 at paragraphs 151-184). I agree with the Commissioner on this point. The Alberta Court of Appeal has also made note of

this evolution in *Bridgeland-Riverside Community Association v. City of Calgary* [1982] A.J. No. 692 (C.A.) ("*Bridgeland*"), and subsequent decisions following that decision. In *Bridgeland*, the Court said, at paragraphs 27 and 28:

> In my view, no concept is more sterile than that which says that a proceeding is a nullity for failure of compliance with a procedural rule and without regard to the effect of the failure. …
>
> I would put aside the debate over void or voidable, irregularity or nullity, mandatory or directory, preliminary or collateral. These are only ways to express the question shall or shall not a procedural defect (whether mandated by statute or common law) vitiate a proceeding. In my view, absent an express statutory statement of effect, no defect should vitiate a proceeding unless, as a result of it, some real possibility of prejudice to the attacking party is shown, or unless the procedure was so dramatically devoid of the appearance of fairness that the administration of justice is brought into disrepute.
>
> (*Bridgeland* at paragraphs 27 and 28)

[para 65] The Alberta Court of Queen's Bench revisited the evolved analysis more recently in *Petherbridge v. City of Lethbridge* [2000] A.J. No. 1187 (Q.B.), and stated:

> This case [*Bridgeland*] provides, at 368, that a procedural defect, whether contrary to statute or common law, does not vitiate a proceeding unless:
>
> (a) a statute prescribes such an effect;
> (b) a real possibility of prejudice to the attacking party is shown; or
> (c) the procedure was so dramatically devoid of the appearance of fairness that the administration of justice is brought into disrepute.

[para 66] Therefore, in the event that my findings above are incorrect, I will apply the specific facts of this matter to the factors considered by Justice Belzil in *KBR* and those set out in the *Bridgeland* decision, in order to determine if, given these facts, the legislature intended there to be a loss of jurisdiction.

Wording and context of the legislation:

[para 67] Justice Belzil began by reviewing the purpose of PIPA and the wording of section 50(5) of PIPA. His conclusion was that the intent of PIPA was to balance the rights of the individuals and organizations and to encourage timely resolution of complaints while maintaining a level of flexibility for the Commissioner in dealing with matters before him. This led Justice Belzil to the conclusion that section 50(5) of PIPA is mandatory.

[para 68] I have already found that section 69(6) of the FOIP Act is directory and not mandatory. However, for the purposes of discussion, I will proceed under the assumption that the wording of section 69(6) of the FOIP Act makes the provision obligatory, and

examine if the remaining factors cited in *KBR* lead to the conclusion that the Legislature intended this Office to lose jurisdiction if section 69(6) of the FOIP Act was breached in this matter (Order F2006-031 at paragraph 150).

Operational impact:

[para 69] The third factor considered by the Court in *KBR* was the impact that a finding that section 50(5) of the PIPA was mandatory would have on the operation of PIPA. Justice Belzil found that compliance with section 50(5) PIPA could easily be achieved by the Commissioner and would, therefore, not result in a negative operational impact on PIPA. The EPS argues that the impact would be the same with regard to FOIP.

[para 70] In Order F2006-031, the Commissioner described the operational impact that a finding that section 69(6) of the FOIP was mandatory as follows:

> A finding that section 69(6) is mandatory has the potential to leave me without jurisdiction on all FOIP Act cases and inquiries in my Office, and render all FOIP Act orders of my Office a nullity, which would have a significant negative operational impact on the FOIP Act.
>
> (Order F2006-031 at paragraph 174)

[para 71] The negative operational impact that a finding that section 69(6) of the FOIP Act is mandatory would have is significant. I therefore find that the negative operational impact weighs in favour of a finding that the Legislature would not have intended a loss of jurisdiction to result from a breach of section 69(6) of the FOIP Act.

Impact on the complainant and affected organizations

[para 72] Justice Belzil next considered the impact on each of the parties by examining the possible prejudice to both parties. The Court acknowledged that if section 50(5) of PIPA is mandatory, the complainant would be denied an inquiry under PIPA, through no fault of his own. However, the Court found that if section 50(5) of PIPA were found to be directory, organizations would not have any means to force a timely resolution of a complaint. Therefore, "…the result is neutral in terms of prejudice between the complainant and affected organization…" (*KBR* at paragraph 75).

[para 73] The EPS argues that although this matter deals with section 69(6) of the FOIP Act, the impact on the parties is still neutral. In Order F2006-031, the Commissioner found that the greater prejudice would be suffered by the Complainant who would lose his ability to complain under the FOIP Act through no actions or inactions of his own.

[para 74] This matter deals with an access request, which can be made at any time. Therefore, it could be argued that should this Office lose jurisdiction over this matter,

there is no prejudice suffered by the Applicant, as the Applicant could start the process over again. This will cost the Applicant, the EPS and this Office time and money but, ultimately, these costs, would be borne by all parties.

[para 75] However, I do not know if the Applicant's access request is time-sensitive. So, while the EPS will simply have to start a process that it does routinely over again, the Applicant may suffer actual prejudice at having to wait for another access request to be processed. The Applicant made no argument to this effect.

Alternative remedies available to the complainant:

[para 76] In *KBR*, the Court found that there were alternate remedies available to the complainant, specifically, a human rights complaint or a grievance through his union. This weighed in favour of the finding that section 50(5) of PIPA was mandatory.

[para 77] The EPS argues that this is not a deciding factor. However, I believe it is appropriate to apply the factors outlined by Justice Belzil in their totality to this matter, and find that this factor must be considered by me in order to determine legislative intent.

[para 78] In the alternative, the EPS also notes that the Applicant has an alternate remedy in that he can simply request access to the records again.

[para 79] This was the same argument put forward by the EPS in Order F2008-013. The Adjudicator in that matter stated:

> It has been stated that a Supreme Court of Canada decision "makes it clear that the test for an adequate alternative remedy involves consideration of any alternate procedure before another tribunal" [*Ivik Enterprises Ltd. v. Whitehorse (City),* [1986] Y.J. No. 62 (QL), citing *Harelkin v. University of Regina,* [1979] 2 S.C.R. 561]…Given the Supreme Court's evaluation of a remedy before *another* tribunal, I do not find that the Applicant's ability to re-initiate the access request under the *FOIP Act* constitutes an alternative remedy. Rather, it would be the same remedy, sought a second time.
>
> (Order F2008-013 at paragraph 39)

[para 80] Starting the same process over again, under the same act, to obtain the same result, is not an "alternate" remedy. It is the same remedy. The EPS provided no further evidence of an alternate remedy available to the Applicant. I therefore find that this weighs in favour of the Legislature not intending that this Office lose jurisdiction for a breach of section 69(6) of the FOIP Act in this matter.

Public interest:

[para 81] Finally Justice Belzil considered whether finding that section 50(5) of PIPA is mandatory is in the public interest. The Court found that it was in the public interest to promote timely complaint resolution. As well, the Court found that allowing section 50(5) of PIPA to be directory would undermine the public's confidence in PIPA.

[para 82] The EPS argues that in previous orders from this Office, the Commissioner and other Adjudicators have required public bodies to strictly comply with the timelines set out in the FOIP Act regarding access requests in order to adhere to the goals of the FOIP Act of accountability and openness. The EPS claims that failure by this Office to comply with the timelines in section 69(6) of the FOIP Act may also frustrate these goals, but does not explain how. In my view, this Office losing jurisdiction over a matter by virtue of a technical breach of section 69(6) of the FOIP Act would severely harm the goals of promoting openness and accountability of public bodies. It would deny applicants the right to a review under the FOIP Act by virtue of the actions of this Office, over which applicants have little or no control.

[para 83] In *KBR*, the Court considered the case of *Rahman v. Alberta College and Assn. of Respiratory Therapy* [2001] A.J. No. 343 ("*Rahman*"), in which the Court interpreted as directory a provision requiring a disciplinary hearing to be held within 90 days. The Court distinguished this case because in *Rahman* the Court had found that there was no prejudice to the respondent resulting from the delay, and also there was no ability under the statute in *Rahman* to extend time.

[para 84] In Order F2006-031, the Commissioner found that *Rahman* applied. The Commissioner found that the balance of prejudice favoured the complainant, and because completion dates were not accurately predictable given the variables in each matter, the ability to extend the time under section 69(6) of the FOIP Act did not make compliance easily achievable. Therefore, the Commissioner found, based on the principle in *Rahman*, that the public interest is best served where a decision maker, whose role includes performing a public duty, fulfills that role. I adopt the Commissioner's reasoning on the "public interest" factor and find that in this matter it weighs in favour of retaining jurisdiction.

Seriousness of the breach:

[para 85] In addition to the factors examined by Justice Belzil, in Order F2006-031, the Commissioner considered the seriousness of the breach as a factor. This point was not addressed by the EPS in its submissions.

[para 86] In this matter, as detailed above, the EPS was aware of how the review was proceeding throughout. The longest delay in correspondence between this Office and the EPS prior to the August 1, 2007 time extension was approximately four months.

[para 87] As well, this matter was explicitly extended by way of letter dated August 1, 2007, only five months following the expiry of the initial 90-day timeline. During these five months, the parties and this Office were involved in the mediation and investigation

of this matter, and, given the correspondence between the parties, appear to have been working toward a resolution.

[para 88] When it was clear that this matter could not be resolved by way of mediation, this matter was referred to the Adjudication Unit. Within days, a letter was sent to the parties by the Director of Adjudication advising of approximate dates and who to contact with questions regarding the process. As well, the parties were informed that the anticipated date of completion of the review is June 30, 2009.

[para 89] There were no substantial delays in this matter. This Office has been and continues to be in contact and available to the parties during the entire review process, and therefore, there is compliance with the intention of section 69(6) of the FOIP Act.

[para 90] Given what I have outlined above, I do not believe that the Legislature intended to have such a trivial breach lead to the loss of jurisdiction of this Office over this matter.

The factors set out in the Bridgeland:

[para 91] Finally, the Alberta Court of Appeal in *Bridgeland* set out the following factors to be considered when determining if non-compliance with a procedural provision will have a vitiating effect:

1. a statute prescribes such an effect;
2. a real possibility of prejudice to the attacking party is shown; or
3. the procedure was so dramatically devoid of the appearance of fairness that the administration of justice is brought into disrepute.

[para 92] The FOIP Act does not prescribe the consequence that jurisdiction should be lost. As well, I do not believe that the EPS has suffered any prejudice nor would there be a real possibility that it would suffer prejudice. Finally, as I decided above, if there was a breach of section 69(6) of the FOIP Act, it was not serious and certainly not so serious as to deprive the procedure of the appearance of fairness to such an extent as to bring the administration of justice into disrepute. On the basis of the factors set out in the *KBR* and *Bridgeland*, I find that any failure to meet the terms of section 69(6) should not be held to vitiate these proceedings.

Conclusion on Jurisdiction:

[para 93] I find that there was no breach of section 69(6) of the Act in this matter. In the alternative, if there was a breach, I find that section 69(6) of the Act is directory, and therefore the breach did not lead to a loss of jurisdiction by this Office. Finally, in the alternative, if there was a breach and section 69(6) of the Act is mandatory, I find that it would be contrary to legislative intent for this Office to lose jurisdiction in the circumstances of this matter.

Issue B: Did the Public Body properly apply section 17 to the records and/or information?

[para 94] The EPS' initial response to the Applicant stated that it was withholding the entirety of the responsive records pursuant to sections 17 of the Act. Since its initial response, the EPS has revised its position and provided records to the Applicant that have been severed pursuant to sections 17 and 24 of the Act, disclosing more of the information in the records. The EPS did provide more information on multiple occasions, most recently as part of its submissions to this Office.

[para 95] I have been provided with both the unsevered and severed responsive records at issue. I assume that the severed records I have been provided are the records most recently provided to the Applicant. I will therefore comment on this version of the responsive records for the purposes of this inquiry.

[para 96] The EPS argues that the responsive records contain personal information of third parties that it is obligated to withhold from the Applicant by virtue of the mandatory exemption found in section 17 of the Act.

[para 97] Section 17(1) of the Act states:

> *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.*

[para 98] Therefore, there are two criteria to be met. First the information withheld must be personal information and second, the disclosure of the information must be an unreasonable invasion of a third party's personal privacy.

[para 99] Pursuant to section 71(1) and 71(2)of the Act, the EPS must first prove that the information severed is personal information, and then the Applicant must prove that it is not an unreasonable invasion of the third party's personal privacy to disclose the information (see Orders 99-028 at paragraph 12, 2000-032 at paragraph 25, F2002-024 at paragraph 17).

Personal information:

[para 100] Personal information is defined in section 1(n) of the Act which states:

> *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,*

(ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,

(iii) the individual's age, sex, marital status or family status,

(iv) an identifying number, symbol or other particular assigned to the individual,

(v) the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,

(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,

(viii) anyone else's opinions about the individual, and

(ix) the individual's personal views or opinions, except if they are about someone else;

[para 101] From my review of the unsevered responsive records provided to me *in camera*, most of the information which the EPS severed pursuant to section 17 of the Act consisted of names, addresses, a signature and phone numbers, of the following: the individual who made the complaint to the EPS that resulted in the Internal Affairs investigation, other witnesses who were interviewed by EPS Internal Affairs in relation to the complaint, and a reporter who contacted the EPS in relation to the complaint. (I will refer to all of these persons collectively as "private citizens"). The EPS also severed the names, contact information and badge numbers of EPS members who were accused of wrong doing and were the subject of the Internal Affairs investigation.

[para 102] All of the information which I have outlined above is personal information as defined by section 1(n) of the Act, including the badge numbers of the EPS members (Order F2008-009 at paragraph 25).

[para 103] However, there is information which was severed by the EPS which does not appear to be personal information. Generally this information consists of notes of what witnesses said to investigating officers from internal affairs, and a handwritten statement of the complainant relating to the investigation.

[para 104] As I will discuss later in this Order, I uphold the EPS' decision to sever the names of witnesses and the complainant from the records and therefore, I find that none of the information in the notes referred to in the preceding paragraph is about an

identifiable individual, and therefore does not fall under the definition of personal information. It contains no information listed in section 1(n) of the Act.

[para 105] As well, pages 47 and 58 of the responsive records contain information about a theft which occurred on May 21, 2005. There is a description of the suspect and the events of the theft. All of this information was severed. Both descriptions of the suspect have a different approximate age and ethnic origin detailed. Therefore, there is a question as to whether the description is even accurate. Although the descriptions of the suspect involves a general description, including an approximate age, possible ethnic origin, and physical description, given the general information about the suspect and the fact that multiple individuals could fit this description, I find that this is not information about an identifiable individual and is not personal information.

[para 106] Therefore, section 17 does not apply, and the EPS ought to disclose the severed information on pages 3, 4, 5, 6, 7, 8, 11, 13, 19, 21, 22, 25, 35, 47, 48, 58, 61. For clarity, I will provide the EPS with a copy of pages of the responsive records in which both personal and non-personal information appears, severed in accordance with my findings. I order that the information which I do not sever on these pages, be disclosed to the Applicant as it is not personal information.

Unreasonable invasion of third parties' privacy:

[para 107] Given my finding above, the only information severed by the EPS which needs to be examined further under section 17 is the names, addresses, phone numbers, and signatures of the complainant, witnesses, reporter and the names, addresses, phone numbers, signatures and badge numbers of the EPS members involved. In order for section 17 to apply to this information, the Applicant must prove that it is not an unreasonable invasion of these third parties' personal privacy to disclose the information to the Applicant.

[para 108] The Applicant makes the same argument with regard to all of the severed personal information. He argues that the information in the records is not confidential, and the records relate to a matter of "high public interest and the need for public scrutiny is, accordingly, high". Although his initial submissions were brief, the Applicant expands this argument in his rebuttal submissions. The gist of his argument, as I read it, is that public interest and public scrutiny ought to outweigh the exception to disclosure in section 17.

[para 109] The EPS states that the severed information is contained in either a law enforcement record or an employment record and thus in either case by reference to section 17(4) of the Act, there is a presumption that there is an unreasonable invasion of third parties' personal privacy. It also argues that the factors in section 17(5) of the Act as well as other factors previously considered by this Office weigh in favour of non-disclosure. The Affected Parties concur with the EPS' arguments regarding section 17 of the Act, but focus their submissions on the disclosure of the Affected Parties' personal information.

[para 110] Section 17(4) lays out several examples of when disclosure of a third party's personal information would be presumed to be an unreasonable invasion of that person's personal privacy. The relevant portions of section 17(4) read as follows:

> *(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,*
>
> *…*
>
> *(d) the personal information relates to employment or educational history,*
>
> *…*
>
> *(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…*

[para 111] I will first consider how section 17 of the Act applies to the names, phone numbers, addresses and signature of the private citizens. In all cases where a private citizen's name appears, it is accompanied by other personal information about the private citizen, such as a phone number, address or employment history. Therefore, I find that section 17(4)(g)(i) applies to the information about the private citizens.

[para 112] In relation to the information about the EPS members, the EPS and the Affected Parties argue that this information is in a law enforcement record as contemplated by section 17(4)(b) of the Act, relates to employment history as defined by section 17(4)(d), or that section 17(4)(g) applies.

[para 113] The EPS provided extensive submissions regarding section 17(4)(d) of the Act. The majority of the cases cited concern an accused individual's application for third party records in the course of a criminal proceeding. The third party records requested were usually police disciplinary records. The EPS also cited section 278.1 of the

Criminal Code, which defines records as including employment records to which a reasonable expectation of privacy attaches, as evidence of the privacy and confidentiality attaching to employment records. The case law cited by the EPS indicates that the Courts have adopted the view that there is a "reasonable expectation of privacy" attached to disciplinary records which are employment records.

[para 114] In his rebuttal submission, the Applicant cited an Ontario case, *R v. McNeil* [2006] O.J. No. 4746 ("*McNeil*"), in support of his argument that the responsive records are not employment records. In *McNeil* the Court decided, in the context of disclosure in criminal proceedings, that records that were created in the course of a criminal investigation, which may result in disciplinary action against a police officer, are not employment records but are records of a criminal investigation. The Court also noted that there is conflicting case law on whether police disciplinary records are employment records to which a reasonable expectation of privacy applies.

[para 115] The Applicant states that this matter involved a criminal investigation followed by a *Police Act* investigation. I do not know what criminal investigation the Applicant is referring to. I have reviewed the responsive records and find that all of the information on the Internal Affairs file was collected in response to a complaint which was being investigated under the *Police Act*. According to an article provided to me by the Applicant, *Unpacking Access to Police Disciplinary Records* 46 CR-ART 227, Internal Affairs investigations are most likely employment records to which a "reasonable expectation of privacy" attaches.

[para 116] I agree with the EPS and the Affected Parties that there is an interest in protecting employment history from disclosure. However, I need not look any further than section 17(4)(d) of the Act for evidence of this interest. Therefore, I find the cases cited by the parties, relating to the "reasonable expectation of privacy" attaching to employment records in the context of proper disclosure in a criminal proceeding, of limited assistance for determining whether disciplinary investigation files are employment history as contemplated by section 17(4)(d) of the Act. However, these cases may be of some limited assistance when determining if the personal information was provided in confidence, which I will deal with below.

[para 117] In Order F2008-009, the Adjudicator was faced with a similar fact scenario. The applicant in Order F2008-009 made a request for disciplinary decisions involving Calgary Police Service members over a defined period of time. The public body refused access and relied on section 17(4)(d) of the Act. The Adjudicator found that records of a disciplinary investigation can relate to employment history. He stated:

> I agree that there is a presumption of an unreasonable invasion of personal privacy in respect of the cited officers under section 17(4)(d) of the Act. The term "employment history" describes a complete or partial chronology of a person's working life such as might appear in a personnel file, and this can include a record of disciplinary action (Order F2003-005 at para. 73). Further, the results or conclusions of an investigation may be

> part of a personnel file and therefore of a person's employment history (Order F2004-015 at para. 83). I take this to include the results or conclusions of a hearing, including results or conclusions that are favourable to the employee. In this inquiry, even where charges were not substantiated, I believe that the fact that a formal disciplinary hearing occurred (or began if later discontinued) would make it part of an individual's employment history.
>
> (Order F2008-009 at paragraph 35)

[para 118] I agree with the reasoning of the Adjudicator in Order F2008-009 and find that it is applicable to this matter. I find that the responsive records, an Internal Affairs file, relate to the EPS members' employment history. It follows, then, that there is a presumption that disclosing the EPS members' names and badge numbers would be an unreasonable invasion of their personal privacy.

[para 119] If I am incorrect and the EPS members' personal information does not relate to their employment history, I find that section 17(4)(g)(i) applies, as the EPS members' names appear with other personal information: their badge numbers.

[para 120] Section 17(2) of the Act lists several exceptions to section 17(1), under which the disclosure of a third party's personal information is not an unreasonable invasion of that individual's personal privacy. No parties argued that section 17(2) of the Act applies to any part of the responsive records. On my review of the severed information, I believe that section 17(2)(e) of the Act, regarding the "third parties' classification", could arguably apply to EPS members' ranks. I, therefore find that disclosing the EPS members' ranks would not be an unreasonable invasion of their personal privacy. However, I do not believe that section 17(2) applies to any of the remaining severed information.

[para 121] Given my findings above, it is not necessary for me to comment on whether the responsive records are also an identifiable part of a law enforcement record under section 17(4)(b) of the Act, and, I will not make any findings in that regard.

Section 17(5) factors:

[para 122] Section 17(4) creates a presumption only. The EPS must still apply section 17(5) of the Act to the information in order to determine whether third party personal information should be disclosed. The portions of section 17(5) of the Act applicable to this matter state:

> *(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,*
>
> *…*
>
> *(e) the third party will be exposed unfairly to financial or other harm,*
>
> *(f) the personal information has been supplied in confidence,*
>
> *(g) the personal information is likely to be inaccurate or unreliable,*
>
> *(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and*
>
> *…*

[para 123] The EPS argues that this is not an exhaustive list and there are several other factors that are appropriate to take into consideration in this matter when determining whether it should have disclosed third party personal information to the Applicant. I will examine each of the factors above, as well as any raised by the parties.

Public scrutiny (section 17(5)(a)):

[para 124] In the Applicant's submissions, he relied heavily on the need for public scrutiny in support of his argument that third party information should be released. The EPS argues that although this is a relevant factor to consider in this matter as far as the EPS members' information is concerned, there is no need to release witnesses' and complainant's names for public scrutiny purposes. Further, the EPS states that the Applicant cannot meet the test for "the public scrutiny factor" articulated by this Office in prior orders for any of the third party information in the responsive records.

[para 125] Order 2008-009 cited the test for determining if public scrutiny is desirable as follows:

> …the following may be considered: (1) whether more than one person has suggested that public scrutiny is necessary; (2) whether the applicant's concerns are about the actions of more than one person within the public body; and (3) whether the public body has previously disclosed a substantial amount of information or has investigated the matter in issue (Order 97-002 at paras. 94 and 95; Order F2004-015 at para. 88). However, it is not necessary to meet all three of the foregoing criteria in order to establish that there is a need for public scrutiny (*University of Alberta v. Pylypiuk* at para. 49). What is most important to bear in mind is

> that the reference to public scrutiny of government or public body activities under section 17(5)(a) requires some public component, such as public accountability, public interest or public fairness (*University of Alberta v. Pylypiuk* at para. 48; Order F2005-016 at para. 104).
>
> (Order 2008-009 at paragraph 65)

[para 126] Although the Applicant is only one person, he did provide several newspaper articles which seem to suggest that it was more than just one person who felt that the actions of the EPS officers required public scrutiny. There was a call for an independent investigation and apparently the RCMP was asked to perform such an investigation. I have no evidence as to what happened with the RCMP investigation, but it seems that based on the Applicant's submissions, there was more than one person who felt that this incident was worthy of public scrutiny.

[para 127] From the review of the responsive records, it is clear that more than one member of the EPS was involved in this incident and therefore, the Applicant's concerns are about the actions of more than one EPS member.

[para 128] Finally, I note that although the EPS did not release any information in response to the Applicant's first request, by the time of this inquiry it had released most of the Internal Affairs file, and had performed an Internal Affairs investigation of the matter, the scope and results of which are apparent from the information already disclosed to the Applicant.

[para 129] In order for section 17(5)(a) of the Act to apply, the disclosure of the third party personal information must be desirable to subject the EPS to public scrutiny. I note that although the complaint involved individual EPS members acting in the course of their employment with the EPS, the Applicant alludes to concerns he has regarding EPS policy and the method by which the EPS resolved this matter, in addition to problems he has with individual EPS members' activities. There may be instances where it is necessary, in order to put allegations in context, to disclose third party personal information in order to subject the public body to public scrutiny even where its procedures and policies are called into question generally (Order F2008-009 at paragraph 70).

[para 130] The EPS argues that it may actually be in the public's best interest to maintain confidentiality in police disciplinary proceedings. This argument was not elaborated on except to cite the case of *Spence v. Prince Albert (City) Commissioners of Police* [1987] S.J. No. 724 (Sask. Q.B.). In this decision the court stated that police officers work in a highly sensitive environment, and that police officers' effectiveness depends largely on their reputations, which could be harmed by making disciplinary proceeding public, whether or not the officer was exonerated.

[para 131] I do not accept this argument in this matter. I agree that EPS members must have good reputations in order to effectively perform their duties. However, I believe

that just as strong an argument can be made that disclosing the results of a formal disciplinary hearing in which the officer was found to have committed some misconduct strengthens the public's belief in the police service by showing that the police officers are not above the law and that the internal disciplinary process works to protect the public.

[para 132] Therefore, I find that the desirability for public scrutiny in this matter weighs in favour of disclosing the personal information of the EPS members in the responsive records.

Unfair exposure to harm (Section 17(5)(e)):

[para 133] The EPS members argue that disclosing their personal information in the responsive records would cause stress, anxiety and embarrassment for both themselves and their families. As a result the EPS members could lose time from work, need to seek medical or psychological treatment, and even lose their careers, as a result of disclosure of their personal information in connection with a complaint. I note that these arguments were put forward generally, and not in relation to the particular EPS members in question.

[para 134] I agree that psychological harm can be a type of harm contemplated under section 17(5)(e) of the Act (Order F2008-009 at paragraph 45). However, as pointed out in Order F2008-009, "…the test under this section is whether disclosure would result in *unfair* harm to a third party." (Order F2008-009 at paragraph 45)

[para 135] From my review of the responsive records, there was an Internal Affairs investigation into the conduct of the EPS members, that did result in their being "counselled" by their sergeant in charge, and asked to make sure they were familiar with the policies of the EPS regarding transport of intoxicated individuals. However, there was no formal hearing. I have no indication in the records or in the submissions of the EPS members that would indicate that they were guilty or pleaded guilty to some sort of misconduct. Therefore, I find that given the untested evidence, and the lack of a formal investigation and hearing, this is a factor which I will considered as weighing against disclosure of the EPS members' personal information.

[para 136] In regards to the personal information of the private citizens, I was not provided with any submissions as to how or whether release of their personal information could cause them unfair harm.

Personal information has been supplied in confidence (section 17(5)(f)):

[para 137] The EPS argues that individuals involved in disciplinary matters under the *Police Act* have a "reasonable expectation" that their personal information will be used, collected or disclosed only in connection to that process. The EPS further argues that there are indications that this information is confidential, such as the context in which the information was gathered, and the sensitivity of the event recorded. It also argues that the release of this personal information may compromise future investigations by limiting frank discussions with individuals who had been promised confidentiality, and that individuals (both inside and outside the EPS) will be less candid in general if they know that their personal information could be disclosed.

[para 138] The EPS cited Order F2003-016 in support of its position. In that Order a request had been made for records relating to a harassment and unfair employment practices complaint made by the Applicant. The records included transcripts of interviews with Affected Parties in which they were told that the investigation report and process would be confidential. No such assurances were made in this matter.

[para 139] Interestingly, in their submission, the EPS members did not raise this issue and did not claim that they provided their personal information in confidence. They would, presumably, be in the best position to claim that they reasonably thought that personal information that was recorded in the course of the Internal Affairs investigation would be kept confidential. On the evidence that is before me, I cannot find that the EPS members supplied their personal information in confidence. Given the evidence before me, I am also not persuaded by the EPS' argument that disclosing the EPS members' names will compromise the investigation process by discouraging the officers from being candid when under internal investigation.

[para 140] However, as far as the complainant and the witnesses are concerned, I find that, given the nature of their contact with the investigating officers, they did not expect that their personal information would be disclosed. This factor weighs in favour of withholding the complainant's and witnesses' personal information from the Applicant.

Information likely to be inaccurate or unreliable (section 17(5)(g)):

[para 141] The EPS argues that the personal information is likely to be inaccurate or unreliable, as the allegations relating to the EPS members was not challenged by the members through a hearing process, and has, therefore, not been proven.

[para 142] The EPS did not make it clear what personal information would be likely to be inaccurate or unreliable. I do not believe that it is likely that the EPS members' names or badge numbers are inaccurate as those appear to have been supplied by the EPS members themselves. The same is true of the personal information of the private citizens.

[para 143] The EPS' submissions seem to indicate that it feels that the allegations are inaccurate. This may well be true. In any event, most of the allegations have been released to the Applicant. Therefore, I find that this factor does not weigh in favour of withholding the information from the Applicant.

Disclosure harmful to reputation (section 17(5)(h)):

[para 144] Both the EPS and the EPS members argue that disclosure could lead to harm to the EPS members' reputations, and that this factor weighs in favour of non-disclosure of the EPS members' personal information. Both point out that police officers' reputations are extremely important to allow them to perform their duties and that the allegations in this matter are untested as there was no formal hearing.

[para 145] While it is true that an EPS members' reputations are important, section 17(5)(h) requires that a third party's reputation might be *unfairly* damaged. In Order F2008-009, the Adjudicator pointed out that if there has been a formal hearing and a finding of misconduct, then the question becomes whether releasing this information may unfairly damage the reputation of the police officer. Certainly the officer's reputation will be damaged, but given the finding of misconduct, this would not be unfair (Order F2008-009 at paragraph 48). The Adjudicator went on to state:

> I note that unfair damage to reputation may be shown where an investigation has found that the person did not violate any legislation or regulations, the person was exonerated, and no formal action was or would be taken (Order 97-002 at para. 81, citing Ontario Order P-634). In other words, the disclosure of unsubstantiated allegations may unfairly damage reputation (Order 97-002 at para. 85, citing B.C. Order 71-1995). There may also be unfair damage to reputation where allegations are contained in a "preliminary" or "interim" report, as opposed to a final one following an opportunity for the affected individual to make a defence (Order 97-002 at paras. 86 and 87).
>
> (Order F2008-009 at paragraph 49)

[para 146] The Adjudicator further found:

> …I distinguish situations in which allegations are unsubstantiated, because they have not been formally addressed, from situations where they are *proven* to be unsubstantiated following a formal proceeding. In the latter situation, there is much less damage, if any, to reputation because the allegations have been shown to be unfounded. The individual has had the opportunity to make a defence and has been successful.
>
> (Order F2008-009 at paragraph 50)

[para 147] Here, there were no formal disciplinary hearings and no findings that the allegations against the EPS members were proven. In this matter, there was an Internal Affairs investigation in which the complainant believed her concerns were adequately addressed. There was no calling of evidence and no independent finding that the EPS members had engaged in any misconduct. I think this is a significant distinction between Order F2008-009 and this matter, such that I find that disclosure of the EPS members' personal information in this case may unfairly damage their reputations. Therefore, this factor weighs against disclosure of the EPS members' personal information.

Refusal to consent to disclosure:

[para 148] The EPS members state that they do not consent to providing the Applicant with their personal information contained in the responsive records, particularly their names and badge numbers. I was not provided with evidence from the EPS that it contacted the EPS members to inquire as to whether they consented to the disclosure of their personal information following the Applicant's initial request. However, the Affected Parties' submissions make it clear that they do not consent to the disclosure of their personal information that was severed.

[para 149] This is not an enumerated factor under section 17(5) of the Act; however, it is an appropriate factor to consider (Order 97-011 at paragraph 50, Order F2004-028 at paragraph 32 and Order F2008-009 at paragraph 42). I find that the EPS members' refusal to consent to disclosure of their personal information is a factor that weighs in favour of not disclosing this information to the Applicant.

[para 150] The private citizens whose personal information was withheld by the EPS were not asked to participate in this inquiry, nor is there any indication in the materials I have read that they were asked by the EPS if they would consent to the disclosure of their personal information. Therefore, I cannot make a finding regarding this factor in relation to these individuals.

Pressing need for third party information:

[para 151] The EPS argues that another relevant factor to consider under section 17 of the Act is whether or not the Applicant has a pressing need for the third party personal information. It cites Order F2000-023 to support consideration of this factor.

[para 152] The comment regarding pressing need for the third party information was not elaborated on in Order F2000-023, and I am not certain whether this was considered as a separate factor by the Adjudicator in that matter.

[para 153] In addition, the Applicant did not make an argument that he had a pressing need for the severed information. Therefore I do not think that this factor weighs in favour of either disclosing or withholding the third party personal information contained in the responsive records.

Nature of privacy interest:

[para 154] The EPS members argue that another factor to be considered is the nature of their privacy interest in the responsive records. They provide evidence that EPS members are subject to hundreds of complaints a year and may, therefore, be exposed to an invasion of their personal privacy and harm to their reputation on multiple occasions, and not in just one isolated incident.

[para 155] I do not think that this is a relevant factor to consider. While it may well be true that by virtue of their position, EPS members will be subject to complaints and Internal Affairs investigations multiple times throughout their careers, what is important to consider in each individual case is if the invasion of privacy is unreasonable, which includes an analysis of whether the EPS member's reputation will be unfairly damaged. The volume of the possible exposures does not matter, but only whether, in a specific case, considering the factors in section 17(5) and all other relevant factors, the invasion of a third party's privacy is unreasonable.

Weighing section 17(5) factors:

[para 156] There are two categories of third party personal information to be considered. The first is the third party personal information of the private citizens. The second consists of the names and badge numbers of the EPS members that were the subject of the complaint.

[para 157] I do not find that there is justification for disclosing the personal information of the private citizens. The only possible factors weighing in favour of disclosure is for public scrutiny. In this matter, I do not think that disclosing this information is necessary for or will add to the public scrutiny of the EPS.

[para 158] On the other hand, I do note disclosing this information may unfairly cause harm to these individuals or damage their reputations. As well, based on the context in which the information was supplied, I can and do infer that the personal information of at least one of the witnesses was supplied in confidence. These factors weigh against disclosing these individuals' personal information. These factors, coupled with the fact that there is a presumption that disclosing this personal information of private citizens will be an unreasonable invasion of their personal privacy by virtue of section 17(4)(g)(i) of the Act, lead me to find that the EPS ought not disclose the personal information of the private citizens to the Applicant. This presumption was not outweighed by the desirability for public scrutiny, and therefore, the Applicant failed to meet his burden to prove that disclosing the private citizens' personal information would not be an unreasonable invasion of their privacy.

[para 159] The issue of the EPS members' personal information is far more complex to determine. I find that there is a strong public scrutiny element to be considered in this matter that weighs in favour of disclosure of the EPS member's names, as was ordered in Order F2008-009.

[para 160] That being said, I think a key factor in determining if the personal information of the EPS members involved in this incident ought to be disclosed to the Applicant is the informality of the proceedings. This factor, which I will discuss more fully below, greatly affects if the EPS members could unfairly suffer harm or unfairly suffer damage to their reputations by disclosure of their personal information. These two factors, along with the EPS officers' refusal to consent to the disclosure of their personal information, weigh heavily in favour of not disclosing the personal information to the Applicant.

[para 161] As just noted, the facts of this matter are distinguishable from those in Order 2008-009 because in Order F2008-009, the police officers involved were subject to a formal disciplinary hearing in which evidence was called and tested. That is not the case here. In this matter, the EPS members were subject to only an informal investigation in which a few witnesses were spoken to, and the EPS members themselves were interviewed, though it is not clear by whom and to what extent. EPS Internal Affairs dealt with this incident very quickly and to the satisfaction of the complainant, and then closed its file. There was no hearing, no evidence called, and no indication that the EPS members were allowed to test the evidence or formally defend themselves. The matter was not documented, and possibly not explored to a sufficient degree such as would ensure that all relevant facts would come to light from disclosure of the requested records. Therefore, I find that the disclosure of the EPS members' personal information could unfairly harm them or unfairly damage their reputations.

[para 162] These factors must be weighed against the desirability for public scrutiny, which I have found exists in this matter. The Applicant argues that the need for public scrutiny is high in this matter and so the personal information ought to be disclosed.

[para 163] In this matter, I disagree. In instances where unfair harm and damage to a third party's reputation are factors weighing against disclosure, I must still factor in the nature of the allegation raised, the type of records at issue, and the position occupied by the individual whose conduct was being questioned (Order F2008-009 at paragraph 78 and Order 97-002 at paragraph 81). In this matter, the allegations are serious; however, it bears noting that in so far as the *Police Act* allegations are concerned, the possible breach of EPS policy was quite minor. Put another way, if the allegations against the EPS officers were true, their violation of EPS policy was actually that they did not verify the address where they were dropping the individuals off. This behavior on the part of the EPS officers appears not to have been sufficiently egregious to require a criminal investigation or public hearing.

[para 164] Given the information already disclosed, in my view nothing more will be gained, for the sake of public scrutiny, from releasing the EPS members' personal information.

[para 165] My reasoning for not ordering a disclosure of the EPS members' personal information is supported by Order F2008-009 (at paragraphs 87-88). As well, it is

supported by Order 13-1997 of the former British Columbia Commissioner, where the Commissioner found that damage to a police officer's reputation would have significantly less weight when the complaint reaches a hearing and is substantiated after a legal process. Neither criminal proceedings nor a formal hearing happened in this matter. Therefore, I find that although there is a need for public scrutiny of the EPS, this need is not served by releasing the EPS members' personal information in this case, nor does the need to scrutinize the EPS members' conduct outweigh the possible harm to their reputations.

Conclusion on Section 17 of the Act:

[para 166] I find that some of the severed information on pages 3, 4, 5, 6, 7, 8, 11, 13, 19, 21, 22, 25, 35, 47, 48, 58, 61 is not personal information and may not be withheld by the EPS pursuant to section 17.

[para 167] I find that the remaining information, consisting of the names, addresses, badge numbers, contact information and signatures of the EPS members and private citizens is personal information, with the exception of the EPS members' ranks.

[para 168] Release of the private citizens' personal information is presumed to be an unreasonable invasion of their personal privacy pursuant to section 17(4)(g)(i) of the Act, and there are no factors under section 17(5) of the Act that weigh strongly in favour of disclosing their personal information to the Applicant.

[para 169] Release of the personal information of the EPS officers is presumed to be an unreasonable invasion of their personal privacy pursuant to section 17(4)(d) of the Act. Although public scrutiny in this matter is desirable to some degree, as the allegations against them were not proven in a formal legal process, this is not outweighed by the possible unfair harm and unfair damage to the EPS officers' reputations caused by releasing their personal information.

Issue C: Did the Public Body properly apply section 24 to the records and/or information?

[para 170] Only the EPS made submissions regarding its application of section 24 of the Act to the responsive records. The EPS argues that it properly applied section 24(1)(a) and 24(1)(b) of the Act to information on pages 17, 22 and 26 of the responsive records.

[para 171] Section 24 of the Act states:

> *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,*
>
> *(ii) a member of the Executive Council, or*
>
> *(iii) the staff of a member of the Executive Council.*

[para 172] Under section 24(1)(b) of the Act, the consultation or deliberations must be:

> (i) sought or expected, or be part of the responsibility of a person by virtue of that person's position,
> (ii) directed toward taking an action, and
> (iii) made to someone who can take or implement the action.
>
> (Order F2007-021 at paragraph 67)

[para 173] For the purposes of section 24(1)(b) of the Act, consultation and deliberation are defined as follows:

> …a "consultation" occurs when the views of one or more officers or employees is sought as to the appropriateness of particular proposals or suggested actions. A "deliberation" is a discussion or consideration, by the persons described in the section, of the reasons for and against an action. Here again, I think that the views must either be sought or be part of responsibility of the person from whom they are sought and the views must be sought for the purpose of doing something, such as taking an action, making a decision or a choice.
>
> (Order 96-006 at page 10)

[para 174] I find that the information on pages 17, 22 and 26 are consultations or deliberations as defined above. I also find that the three criteria noted above were met, and therefore, the EPS properly severed the information on pages 17, 22 and 26 of the responsive records in accordance with section 24(1)(b) of the Act, with the exception of the final sentence in the second severed paragraph on pages 17 and 26 beginning with "I checked with…". I find that that was not a consultation, or deliberation, nor does the information in that sentence fit under section 24(1)(a) of the Act, and therefore, it ought to be disclosed to the Applicant.

[para 175] In addition to proving that the information severed falls under section 24 of the Act, the EPS must also prove that it properly exercised its discretion, taking into account the purposes of the Act, to withhold the information (Order F2005-018 at paragraph 19).

[para 176] I was provided with evidence from the FOIP Coordinator of the EPS stating that he took into consideration the impact of disclosure on the disciplinary process, balancing that with the Applicant's right of access and the need for public scrutiny. I find that the EPS properly exercised its discretion. It did not exercise its discretion for an improper or irrelevant purpose, and it took into consideration the objects of the Act. Therefore, I find that the EPS properly applied section 24(1)(b) of the Act to the severed portions on pages 17, 22 and 26 of the responsive records, with the exception of the last sentence of the second paragraph on pages 17 and 26, noted above.

V. ORDER

[para 177] I make this Order under section 72 of the Act.

[para 178] I find that this Office has not lost jurisdiction over this matter.

[para 179] I find that the EPS improperly applied section 17 of the Act to information on pages 3, 4, 5, 6, 7, 8, 11, 13, 19, 21, 22, 25, 35, 47, 48, 58, 61of the responsive records, including the severing of the EPS members' rank and I will provide the EPS with copies of pages 3, 4, 5, 6, 7, 8, 11, 13, 19, 21, 22, 25, 35, 47, 48, 58, 61severed in accordance with my findings. I order it to provide the Applicant with these records, severed in the same manner.

[para 180] I uphold the EPS' decision to withhold the third party personal information of the complainant, witnesses, and reporter and EPS members, pursuant to section 17 of the Act.

[para 181] I find the EPS properly applied and exercised its discretion under section 24(1)(b) of the Act, with the exception of the final sentence of the second severed paragraph on pages 17 and 26 beginning with, "I checked with…". I order the EPS to disclose the final sentence of the second severed paragraph on pages 17 and 26.

[para 182] I further order the Public Body to notify me, in writing and within 50 days of receiving a copy of this Order that it has complied with the Order.

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Keri H. Ridley
Adjudicator