ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2008-021

July 15, 2009

EDMONTON POLICE COMMISSION

Case File Number F3782

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Summary: The Applicant made a request for access to records about dismissals of disciplinary charges under section 43(11) of the *Police Act*. The Edmonton Police Commission (the Public Body) responded to the Applicant's request for access, but withheld information under sections 17 (unreasonable invasion of a third party's personal privacy), 20 (harm to law enforcement), 24 (advice from officials) and 27 (privileged information) of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act).

The Applicant requested review of the Public Body's decision to withhold records. The Adjudicator found that it would be an unreasonable invasion of the personal privacy of third parties to disclose personal information about them, such as their names and other personally identifying information. However, she found that disclosure of the personal information consisting of opinions and views, which illustrates the circumstances under which the Edmonton Police Service (EPS) has dismissed complaints of police misconduct under section 43(11) of the *Police Act,* was desirable for the purpose of subjecting this matter to public scrutiny, and that this public interest outweighed the privacy interests of third parties.

She ordered the Public Body to sever the personal information of third parties from the records, save for the information it had severed as opinions and views, and to provide the remainder to the Applicant. She found that sections 20(1)(c) and (d), did not apply to the information in the records. She found that section 27 did not apply to the information in the records, except for an excerpt from statements made by a Crown prosecutor, to which she found that section 27(1)(b) applied. However she found that the Public Body had not

established how it had exercised its discretion to withhold information under section 27(1)(b) and ordered it to reconsider this decision.. She found that section 24(1)(a) applied to three records and confirmed the decision of the Public Body to withhold those records.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 6, 12, 17, 20, 24, 27, 32, 40, 59, 72; *Police Act* R.S.A. 2000, c. P-17 ss. 20, 43; Police Service Regulation Alberta Regulation 356/90 s. 16 **BC:** *Freedom of Information and Protection of Privacy Act* R.S.B.C. 1996, c. 165 s. 22 **ON:** *Freedom of Information and Protection of Privacy Act* R.S.O. 1990, c. F.31 s. 21

Authorities Cited: AB: Orders 96-006, 97-002, 97-007, 98-016, 2000-005, 2000-021; F2002-007, F2003-005, F2006-008, F2006-027, F2007-013, F2007-014, F2008-009, F2008-020 Decision F2008-D-003 **BC:** Order 13-1994

Cases Cited: *Engel v. Edmonton (City) Police*, 2008 ABCA 152; *University of Alberta v. Pylypiuk*, 2002 ABQB 22; *Maranda v. Richer*, [2003] S.C.J. 69; *R. v. Campbell*, [1999] 1 S.C.R. 565; *Stevens v. Canada (Prime Minister)*, [1998] 4 F.C. 89(C.A.); *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)* (2005), 251 D.L.R. (4th) 65; *Canada v. Solosky* [1980] 1 S.C.R. 821; *Histed v. Law Society of Manitoba*, 2005 MBCA 106; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44; *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)* (2007), 86 O.R. (3d) 259; *Carey v. Ontario* [1986] 2 S.C.R. 637

Resources Cited:

Access and Privacy Branch, Alberta Government Services. *Freedom of Information and Protection of Privacy Guidelines and Practices Manual 2005*. Edmonton: Government of Alberta, 2005.

I. BACKGROUND

[para 1] In April 2006, the Applicant made a request to the Edmonton Police Commission (the Public Body) for access to records containing information relating to dismissals of complaints against police officers by the Chief of Police (the Chief) under sections 43(7),(10), and (11) of the *Police Act* for the years 2005 and 2006.

[para 2] The Public Body determined that there was one complaint responsive to the Applicant's access request. The Public Body located 30 records containing information relating to this complaint. It responded to the Applicant's access request on June 19, 2006. The Public Body granted access to the information contained on record 11, but withheld the remaining information from the 30 records it identified as responsive under sections 17 (personal information), 20(1)(d) (confidential source of law enforcement information), 24 (advice from officials), and 27 (privileged information).

[para 3] On November 9, 2006, the Applicant requested review by this office of the Public Body's decision to withhold records. The Commissioner authorized mediation to resolve the dispute. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

[para 4] I identified three persons affected by the request for review and provided them with a copy of the request for review and the opportunity to make submissions. In addition, the Edmonton Police Service (EPS) asked to be considered a person affected by the request for review. In Decision F2008-D-003, I decided that EPS was a person affected by the request for review and provided EPS with a copy of the request for review and the opportunity to make submissions.

[para 5] The Public Body, the Applicant, an affected party and EPS provided initial submissions. The Public Body, the Applicant and EPS provided rebuttal submissions.

II. RECORDS AT ISSUE

[para 6] Records 1- 2 are a letter from EPS to the Public Body.
Records 3 – 10 are emails between employees of EPS and the Public Body. Record 11 was disclosed to the Applicant. Record 12 is a letter from EPS to the Public Body. Records 14 – 16 consist of notes. Records 17 – 18 are a letter from EPS to a member who is the subject of a complaint. Records 19 – 22 are a letter from EPS to a complainant. Records 23 – 25 consist of notes. Records 26 – 28 are a letter from an employee of EPS to another employee of EPS. Records 29 – 30 are a memorandum from EPS to a member of EPS who was the subject of a complaint.

III. ISSUES

Issue A: Did the Public Body properly apply section 17 of the Act (personal information) to the records / information?

Issue B: Did the Public Body properly apply section 20(1)(d) of the Act (confidential source of law enforcement information) to the records / information?

Issue C: Did the Public Body properly apply section 24(1)(a) and (b) of the Act (advice from officials) to records / information?

Issue D: Did the Public Body properly apply section 27 of the Act (privileged information) to the records / information?

[para 7] The Applicant raised the argument that in the event the exceptions to disclosure apply, section 32 (disclosure in the public interest) requires disclosure of the records. The Public Body made submissions responding to this argument. I will therefore address the following issue:

Issue E: Does section 32 of the Act require disclosure of the records at issue?

IV. DISCUSSION OF ISSUES

Issue A: Did the Public Body properly apply section 17 of the Act (personal information) to the records / information?

[para 8] The Public Body withheld all the records under section 17, in addition to applying other exceptions to disclosure.

[para 9] Section 1(1)(n) defines personal information under the Act:

> *(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;*

Personal information under the FOIP Act is information about an identifiable individual that is recorded in some form.

[para 10] Section 17 states in part:

> *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…*
> *…*
> *(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…

(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
(b) the disclosure is likely to promote public health and safety or the protection of the environment,
(c) the personal information is relevant to a fair determination of the applicant's rights,
(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,
(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
(i) the personal information was originally provided by the applicant.

[para 11] Section 17 does not say that a public body is *never* allowed to disclose third party personal information. It is only when the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy that a public body must refuse to disclose the information to an applicant under section 17(1). Section 17(2) (not reproduced) establishes that disclosing certain kinds of personal information is not an unreasonable invasion of personal privacy.

[para 12] When the specific types of personal information set out in section 17(4) are involved, disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. To determine whether disclosure of personal information would be an unreasonable invasion of the personal privacy of a third party, a public body must consider and weigh all relevant circumstances under section 17(5), (unless section 17(3), which is restricted in its application, applies). It is important to note that section 17(5) is not an exhaustive list and that other relevant circumstances must be considered.

[para 13] In *University of Alberta v. Pylypiuk*, 2002 ABQB 22, the Court commented on the interpretation of what is now section 17. The Court said:

> In interpreting how these sections work together, the Commissioner noted that s. 16(4) lists a set of circumstances where disclosure of a third party's personal information is presumed to be an unreasonable invasion of a third party's personal privacy. Then, according to the Commissioner, the relevant circumstances listed in s. 16(5) and any other relevant factors, are factors that must be weighed either in favour of or against disclosure of personal information once it has been determined that the information comes within s. 16(1) and (4). In my opinion, that is a reasonable and correct interpretation of those provisions in s. 16. Once it is determined that the criteria in s. 16(4) is (sic) met, the presumption is that disclosure will be an unreasonable invasion of personal privacy, subject to the other factors to be considered in s. 16(5). The factors in s. 16(5) must then be weighed against the presumption in s. 16(4).

[para 14] The Public Body and EPS argue that the presumption in section 17(4)(b) applies to all the personal information severed under section 17. They also argue that the factors in section 17(5) weigh against disclosure of the personal information in the records. The Public Body also raised the argument that the presumption in section 17(4)(g) applies to the personal information in the records.

[para 15] An affected party provided submissions which I accepted *in camera.* The affected party argues that disclosing personal information in the record would be an unreasonable invasion of personal privacy.

[para 16] The Applicant argues that the public interest weighs in favour of disclosing any personal information in the records. He further argues that the records engage important issues involving the way in which the Edmonton Police Service investigates complaints against itself and also contains very important information that the Solicitor General should be aware of in relation to his ongoing review of the *Police Act*, particularly in relation to section 43(11).

[para 17] The records contain the personal information of three third parties. This personal information includes the names of the third parties and other information about them. Section 17(4)(g) raises a presumption that disclosure of personal information is an unreasonable invasion of personal privacy when personal information consists of a third party's name appearing with other personal information about them, or the name itself would reveal other personal information about them. I find that section 17(4)(g) applies to the personal information of the affected third parties severed by the Public Body, as their names appear in the context of other personal information about them. Consequently, there is a presumption that disclosing the names of the third parties that appear in the records would be an unreasonable invasion of their personal privacy.

Section 17(4)(b)

[para 18] The Public Body applied section 17(4)(b) to all the information it severed. As noted above, section 17(4)(b) states:

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…

[para 19] In Order F2006-027, the Commissioner considered the meaning of "law enforcement record". He said:

> 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.
>
> 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)).

Section 17(4)(b) is ambiguous, as it is not clear what "except to the extent that the disclosure is necessary to dispose of the law enforcement matter or to continue an investigation" means in the context of section 17. Given that there is no question of the exception in section 17(4)(1)(b) applying in this matter, for the purposes of this order I need not decide the meaning of the provision in the context of the statute definitively, as the presumption in section 17(4)(b) applies. However, the difficulties this provision presents for interpretation warrant discussion. Section 17 addresses the circumstances when the head of a public body may disclose, or must refuse to disclose, personal information to an applicant who has made an access request. It is difficult to envision circumstances in which disclosing personal information to an applicant would have the effect of disposing of a law enforcement matter or continuing an investigation. In the present circumstances, some of the personal information in the records was included in the records for the purpose of dismissing a complaint or continuing an investigation; however, providing the personal information in the records to the applicant would not have the effect of disposing of a law enforcement matter or continuing an investigation.

[para 20] The *Freedom of Information and Protection of Privacy Guidelines and Practices Manual 2005* suggests the following interpretation on page 119:

> Disclosure to an applicant of the personal information of a third party in a law enforcement record is not presumed to be a unreasonable invasion of privacy if disclosure is necessary to dispose of the law enforcement matter or to continue the investigation. Section 17(4)(b) recognizes that a public body that is in possession of evidence relating to a law enforcement matter must have the power to disclose that evidence to the police, another law enforcement agency and to Crown counsel or other persons responsible for prosecuting the offence or imposing a penalty or sanction.

Section 40 of the Act already recognizes that public bodies may disclose personal information for law enforcement purposes. Interpreting section 17(4)(b) as serving this same purpose renders the exception it creates redundant, or alternatively, narrows the scope of section 40(1)(g) and 40(1)(q), which address information exchanges between law enforcement agencies, public bodies, the Crown and the courts. Further, the police, courts, Crown prosecutors and other law enforcement agencies do not obtain personal information for law enforcement or prosecution purposes by making access requests under the FOIP Act. Rather, their powers to obtain this information arise from their enabling statutes and the common law. Finally, under this interpretation, "the disclosure" in section 17(4)(b) has a different meaning than it does in section 17(1).

[para 21] It appears that this provision was adapted from British Columbia's legislation, which states, in part:

> *22 (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…*
>
> *(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if…*
>
> > *(b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation…*

[para 22] This provision in turn appears to have been adapted from Ontario's legislation, which states, in part:

> *21. (1) A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except…*
>
> *…*
>
> > *(f) if the disclosure does not constitute an unjustified invasion of personal privacy…*
>
> *…*

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information…

…

(b) was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

"Disclosure" in Ontario's section 21 applies to disclosure to any person, other than the subject of the personal information, while "disclosure" in Alberta and British Columbia's corresponding provisions applies to disclosure to an applicant who has made an access request. Interpreting "disclose" in section 17(4)(b) as meaning "disclose to an applicant" as it does in section 17(1), would render the exception in the provision nugatory, as providing personal information under the FOIP Act to an applicant who has made an access request would never have the effect of disposing of a law enforcement matter or of permitting an investigation to continue. However, interpreting "disclose" in section 17(4)(b) as meaning "disclose to any person other than the subject of the personal information" could have the effect of rendering the exception in section 17(4)(b) as redundant, given that sections 40(1)(g),(q), and (r) already ensure that public bodies may disclose personal information for law enforcement purposes. Alternatively, if this provision does refer to "any person other than the subject of the information" and the exception is not redundant, it may be that section 17(4)(b) serves to narrow the scope of sections 40(1)(g), (q), and (r).

[para 23] As noted above, I find that section 17(4)(b) applies to the personal information of third parties withheld by the Public Body from the records at issue, as this personal information is an identifiable part of a law enforcement record.

Section 17(4)(d)

[para 24] I find that section 17(4)(d), which states that there is a presumption that it is an unreasonable invasion of personal privacy to disclose personal information relating to employment or educational history, applies to the personal information of the members contained in the records, as the personal information relates to their employment history. Consequently, there is a presumption that disclosing the personal information of the members contained in the records is an unreasonable invasion of their personal privacy.

Section 17(4)(g)

[para 25] The records at issue contain the names of third parties in the context of other information about the third parties. Consequently, section 17(4)(g) presumes that disclosing the names of the third parties would be an unreasonable invasion of personal privacy.

[para 26] For the reasons above, I find that the personal information in the records is subject to a presumption that it would be an unreasonable invasion of personal privacy to disclose it to an applicant. I must therefore consider whether disclosing the personal

information in the records would constitute an unreasonable invasion of personal privacy under section 17(5).

Section 17(5)
Public Scrutiny

[para 27] The Applicant argues that the personal information severed by the Public Body engages important issues involving the way in which the EPS investigates complaints and also contains very important information that the Solicitor General should be aware of in relation to the ongoing review of the *Police Act*. I interpret the Applicant as arguing that the records should be disclosed as it would have the effect of subjecting both the activities of EPS in the way it investigates complaints about the conduct of members, and the way the *Police Act* operates to restrict those activities, to public scrutiny.

[para 28] The Applicant in this inquiry is the Criminal Trial Lawyers Association. The Applicant referred to the following passage from *Engel v. Edmonton (City) Police*, 2008 ABCA 152, in which the Court said:

> We are not persuaded that the review judge erred in his conclusion that the time limitation period in s. 43(11) of the Police Act applied to the appellant's complaints, even assuming that he was unaware of the alleged misconduct. That is the effect of the legislation. The appeal must be dismissed.
>
> Nevertheless, we are driven to question whether the Legislature's aim of ensuring effective and accountable policing in Alberta is served by the limitation period set out in s. 43(11)… Nonetheless, there is merit in the appellant's position that the running of the limitation period despite lack of discoverability, coupled with the comparatively short limitation period in s. 43(11) diminishes the ability of the victims of surreptitious police conduct to complain about that conduct to near the vanishing point. Routinized freedom of information inquiries to ascertain if such intrusions have occurred are hardly an efficient substitute for the more realistic incentive of knowing that misconduct of this sort, when discovered, will result in real consequences. Moreover, we do not think that the Legislature intended to crimp the ability and desire of the chief of police to meet his own statutory duties, and to maintain high standard of conduct by service personnel, by preventing even the chief from being able to proceed against misconduct that is willfully concealed from him for as short a period as one year.

In my view, this passage from the *Engel* case demonstrates that the Alberta Court of Appeal has identified a public interest in possible legislative review of the functioning of section 43(11) of the *Police Act* because of its impact on the ability of the Chief to investigate and address misconduct of members, which in turn could affect the effectiveness and accountability of policing in Alberta. Through its application and the reasons for its application, I find that the Applicant has demonstrated that members of the Criminal Trial Lawyers Association consider it to be in the public interest to learn the impact of section 43(11) on the accountability of the police in addressing complaints of misconduct and in ensuring that the police maintain high standards of conduct. Further, the passage from the Engel case demonstrates that the Alberta Court of Appeal has similar concerns.

[para 29] The Public Body argues that because it has received an access request only from the Applicant, and no one else, for information relating to section 43(11) dismissals, the test for meeting the requirements of section 17(5)(a) set out in Order F2003-002 has not been met. I disagree with the Public Body as to the application of this test to the facts in this inquiry. As noted in Order F2008-020, at paragraph 51:

> The Public Body argues that only the Applicant has called the activities of the Public Body into question. However, section 17(5)(a) can still be relevant where only one person believes that public scrutiny is necessary, if the activity that has been called into question, though arising from a specific event and known only to those immediately involved, is such that it would be of concern to a broader community had its attention been brought to the matter (Order 2004-015 at para. 89; Order F2006-030 at para. 23). This reasoning holds if an allegation of impropriety has a credible basis (Order F2006-030 at para. 23). Here, I believe that the Public Body's decision as to whether and how to proceed with a matter involving serious allegations against police officers would be of concern to the broader community. While the allegations may or may not be true, they have a credible basis, given the complaint that was reported by a member of the public to the Public Body and the existence of video footage that allegedly captures some form of wrongdoing.

The manner in which the EPS handles and dismisses complaints of police misconduct under section 43(11) of the *Police Act* may be of concern to the broader community, even though only one applicant has requested information that sheds light on this question from the Public Body. That this is so in the present case is borne out by the fact that the Applicant is not an individual, but is the Criminal Trial Lawyers Association, a body representing criminal lawyers in Alberta. Further, the passage from *Engel*, *supra*, suggests that the Alberta Court of Appeal considers the operation of section 43(11) to be problematic.

[para 30] In *Pylypiuk*, the Court commented on the first part of the test for public scrutiny:

> In addition, having referred to no evidence or analysis regarding why the University's activities should be subject to public scrutiny, the Commissioner then moved on to his three part test. Pylypiuk did not meet the first part of that test. While it may not be necessary to meet all three parts of the test, the analysis should demonstrate some rationale as to why one person's decision that public scrutiny is necessary is sufficient to require disclosure, particularly where that person's rights are not affected by the disclosure under s. 16(5)(c).

The Court found that it was more important to answer the question as to why one person's decision that public scrutiny is sufficient to require disclosure and that it was unnecessary to meet all three parts of the test. In the present inquiry, an association of criminal lawyers has requested the information, and has established that the issue to which the information in the records relates -- the manner in which EPS handles and dismisses complaints under section 43(11) of the *Police Act* -- is of concern to the broader community. Consequently, I find that the factors the Court considered in *Pylypiuk* to be relevant to the application of section 17(5)(a) are present in this case.

[para 31] I turn to whether disclosure of the records is desirable to subject these activities to scrutiny. In my view, disclosure of the records will ensure that the public may consider what effect section 43(11) of the *Police Act* had on the activities of EPS in

the circumstances reflected in the records. The records provide a tangible example of the operation of a provision that creates a limitation period that runs even though the facts have not been discovered. By illustrating the kinds of circumstances in which applying the provision leads to dismissal of a complaint, the records can help to focus and inform the discussion as to whether the provision reflects sound policy. In other words, the records can serve to highlight the problems with the provision remarked on by the Court in the *Engel* case.

[para 32] With respect to the personal information in the records, disclosure of the information withheld by the Public Body as "opinions and views" would have the effect of subjecting the activities of the Public Body to public scrutiny, as these views and opinions constitute the conduct complained of in the complaint that was subsequently dismissed under section 43(11). However, I find that the Applicant has not established that disclosing the names of third parties and other information that would serve to identify the third parties would have the effect of exposing to scrutiny the operation of section 43(11).

[para 33] EPS brought to my attention Order 13-1994, a decision of the former Information and Privacy Commissioner of British Columbia. EPS notes that in this Order, the former Commissioner of British Columbia confirmed that municipal police officers have a privacy interest in their disciplinary files. He decided that until an allegation against a police officer has been proven through a formal legal process, disclosure of the purpose of subjecting the activities of a public body to scrutiny does not outweigh the privacy interests of officers. In Order 13-1994, the former Commissioner of British Columbia ordered the information in the records to be disclosed, with names and identifying information severed. Consequently, this Order should not be interpreted as standing for the proposition that information about complaints cannot be disclosed unless they have been proven. The former Commissioner of British Columbia said:

> On balance, I intend to order disclosure of the complaint records to the Vancouver Sun, subject to whatever detailed severances the Police Commission might decide it has to apply in light of the various exceptions in the Act… Thus I do not believe that the name of a complainant or the name of an officer complained about should normally be disclosed. The desire to avoid unjust stigmatization of police officers is an important consideration. However, if a complaint is found to be substantiated after a legal process has taken place (such as would occur in any event during a public inquiry), I think the presumption should be in favor of disclosure of police officers' names. The intelligent application of severance, as the Act requires, should ensure that the "glare of publicity" is normally directed at the substance of the complaint rather than the specifics of who is complaining and about whom.
>
> In my view, the public has a right, under the *Freedom of Information and Protection of Privacy Act,* to know more and in greater detail about the functioning of the current system of making complaints against the police. If the media receive access to the basics of complaint records, they can decide what is newsworthy. But the media will have the benefit of making their own judgment rather than depending solely on the views of the Police Commission, the Complaints Commissioner, the Federation of Police Officers, or the Chiefs of Police. Greater disclosure of records about the process should, under the theory of this Act, promote enhanced perceptions of accountability to the public and hence confidence in the municipal policing system and the conduct of individual officers. The public will also learn, for example, whether or not a significant

> number of complaints are dismissed because there is no evidence to substantiate allegations of police misconduct beyond the testimony of a complainant.
>
> The public will learn more about complaints that do not reach a hearing for whatever reason. The public may also learn that the current system is resulting in the early resolution of problems between police and citizens. Those are matters worth knowing because of the situation of considerable power imbalance between the police and individual residents of a community. The public similarly has a need to know basic information about cases that do not reach the stage of a hearing or a public inquiry, because, for example, they are dropped or disposed of informally.

[para 34] EPS submits that the complaint detailed in the records at issue was pursued through appropriate disciplinary investigations and was appropriately investigated and responded to. Further, it argues that there is no demonstrated need to scrutinize the proper application of the discipline process in this instance. EPS also argues that the public is best served by maintaining the confidential character of discipline proceedings. I do not interpret the former Privacy Commissioner of British Columbia as saying in Order 13-1994 that the public interest is served by keeping all aspects of complaints or disciplinary hearings confidential. Rather, he found that there is a strong public interest in disclosing information about how complaints about the police are handled and resolved, but that disclosing the names of complainants and police officers would not normally serve that purpose.

Personal information supplied in confidence

[para 35] EPS argues that section 17(5)(f) applies to the personal information in the records. Section 17(5)(f) weighs against disclosure of personal information if the personal information was supplied by a third party in confidence. However, none of the records contain information *supplied* by the third parties to the EPS or the Public Body as required by section 17(5)(f). The information about the third parties contained in the records was created or gathered by the EPS as a result of its inquiries and investigations, but was not provided or given by the third parties to the EPS. In addition, even if I am wrong in my view that section 17(5)(f) is met only if a third party supplies personal information, and that the personal information was not supplied by a third party in this instance, the evidence does not establish any conditions or requirements of confidence were imposed on the EPS by third parties, or that they had any reasonable expectation of confidentiality.

Personal information that is likely to be inaccurate or unreliable

[para 36] EPS also argues that section 17(5)(g) applies to the personal information in the records. Section 17(5)(g) weighs against disclosing personal information if personal information is likely to be inaccurate or unreliable. EPS makes the argument that "information collected in an investigation report may be inaccurate or unreliable". It also argues that "allegations pertaining to members of the EPS have not been challenged by members through the hearing process". Other than the broad statement that information in investigation reports is inaccurate or unreliable, EPS has not provided reason to conclude that the personal information in the records is likely to be inaccurate or

unreliable. Even if there were a presumption that investigation reports are inherently unreliable, the records at issue do not contain an "investigation report".

[para 37] The names and identifying information of third parties in the records appears in correspondence prepared by senior officials of EPS. I have no reason to assume that the names and identifying information in the records they prepared are not accurate, or that the facts which they discuss are not accurate or reliable. With respect to the personal opinions and views severed by the Public Body, these statements are taken from emails created by two third parties. There is no reason to conclude that these statements are not accurately recorded in the records at issue.

[para 38] I agree with the Adjudicator in Order F2008-020 when he said at paragraph 80:

> In my view, the Public Body should have explained what particular personal information in the Report is likely to be inaccurate or unreliable, and for what reasons. It is not sufficient to assert, very generally, that information is wrong or that allegations are unproven.

I find that EPS has similarly not pointed to the information it considers likely to be unreliable or inaccurate, or provided any evidence or explanation to found its assertion that the information in the records is likely to be inaccurate or unreliable. I find that EPS has not established that section 17(5)(g) applies to the personal information in the records.

Unfair damage to reputation

[para 39] Finally, EPS argues that section 17(5)(h) applies to the personal information in the records. It is important to note that section 17(5)(h) applies to personal information that may unfairly damage the reputation of any person referred to in the records requested by an applicant. This factor weighs against the disclosure of personal information. However, for section 17(5)(h) to apply, it is not enough to establish that damage to reputations would result. Rather, it must be established that any damage to the reputations of third parties resulting from disclosure of personal information would be unfair. EPS argues that complaints against police officers are considered to be highly sensitive matters and that the *Police Act* contemplates private investigations and proceedings. It also argues that unproven allegations of misconduct or incompetence would impair reputations and that maintaining the privacy of investigations that do not result in sanction protects against this result. I am not satisfied that complaints against police officers are necessarily highly sensitive matters, simply because they are about police officers. The complaint processes in the records attracts the presumption in section 17(4)(d), and, in relation to records 17 – 22, section 17(4)(b); however, the mere fact that complaint is about a police officer does not, in and of itself, mean that section 17(5)(h) applies. Further, I disagree with EPS that the *Police Act* requires private investigations and proceedings. The only reference I find in the *Police Act* to private proceedings is section 20(1)(m), which indicates that the Law Enforcement Review Board (LERB) may conduct an appeal or inquiry in private if it first concludes that it is in the public interest to do so. Similarly, section 16 of the Police Service Regulation allows the Chief of Police

to conduct a portion of a hearing in private, but only if he first determines that it is in the public interest to do so. Consequently, I am unable to agree that the *Police Act* requires all other kinds of investigations and proceedings to be held in private, given that it is necessary to create a specific power for the LERB and the Chief of Police to conduct appeals, inquiries, and hearings in private, and only if certain conditions are met.

[para 40] In essence, EPS argues that disclosing allegations that have not been tested is unfair. I agree with EPS that disclosing unproven allegations has the potential to damage reputation unfairly. This point was made in Order 97-002 and again in Orders F2008-009 and F2008-020. In the case before me, the complaint about the conduct of members did not proceed to a formal hearing under the *Police Act*.

[para 41] Given that section 59(3) of the FOIP Act prohibits me from disclosing information that the head of a public body would be authorized or required to withhold, I cannot provide detailed information regarding my findings that the personal information in the records at issue was sufficiently tested. However, the information in records 2, 7, 8, 29 and 30 lead me to conclude that the evidence was tested in this case. I find that while a formal hearing was not held in relation to the allegations against the members, the substance of the complaint was dealt with through an informal process. I therefore find that the allegations in this case are not untested or unsubstantiated. I therefore find that section 17(5)(h) does not apply.

Conclusion regarding the application of section 17(1)

[para 42] I find that disclosing the personal information severed by the Public Body as documented in tab 10 of its submissions, save for the personal information of members it refers to as opinions and views, is unnecessary for the purpose of subjecting the activities of EPS to public scrutiny, and therefore, disclosure of this personal information would not be desirable within the terms of section 17(5)(a). If this personal information is severed from the records, the remainder of the information in the records would demonstrate the way in which section 43(11) affects the ability of the EPS to enforce discipline. As disclosing information such as names, identifying numbers, pronouns, rank, and job opportunities is unnecessary to subject the activities of the EPS to public scrutiny, and, as there are no factors that weigh in favor of disclosure of this personal information, the relevant presumptions in section 17(4) are not rebutted. I will therefore order the Public Body to sever the personal information in accordance with its decision in tab 10 of its submissions from the records, except the information that is severed as "views and opinions".

[para 43] I find that section 17(5)(a) applies to the personal information the Public Body severed as "anyone else's opinion" and "personal views". The opinions and personal views severed by the Public Body are the contents of the emails that became the basis of complaints which were dismissed under section 43(11) of the *Police Act*. In weighing the factors under section 17(5), I find that the Applicant has established that it is necessary to subject to public scrutiny the personal information characterized by the

Public Body as "views and opinions". The Public Body severed views and opinions from the following records:

Record 1 – lines 24, 25, and 26
Record 2 – lines 1, 2, 3, 7, 8, 14, and 15
Record 3 – lines 23, 24, 25, and 27
Record 7 – line 38
Record 8 – lines 3, 10, 12, 14, 20, 21, 24, 25,
Record 10 – lines 23, 24, 25, and 27
Record 12 – lines 1019, 21, 23, 24, 25, 29, 30
Record 13 – line 9
Record 14 – lines 25 – 29, 31, 35 – 38
Record 17 – lines 24 – 34
Record 19 – lines 15 – 32
Record 20 – lines 1-2, 23 – 26, 28 – 31, 4 – 5, 11 – 36
Record 21 – lines 1 – 31, 8 – 19, 25 – 26
Record 22 – lines 8 – 21
Record 23 – lines 21, 22, 24, 40
Record 24 – lines 2, 4, 11 – 14, 20 – 22, 26
Record 29 – lines, 9, 13, 14, 22, 28, 29
Record 30 – lines 1 - 5

[para 44] I find that the factors weighing in favor of disclosing the personal information that the Public Body characterizes as personal opinions outweigh the presumptions against disclosure. As noted above, I intend to require the Public Body to sever such information as names and other similar personally identifying information from the records, which will, in effect, mean that the names of third parties will not be associated with views and opinions held by them or by others about them. However, the possibility remains that even if personally identifying information is severed from the records, other individuals familiar with the circumstances of the records might be able to "re-identify" the third parties. This is because an order to disclose information to an applicant, who is a member of the public, does not contain any restrictions on the ability of the applicant to make use of the information. As a result, the information could become available to other parties who might be to identify the third parties and learn more personal information.

[para 45] As noted above, I find that the Applicant has shown that it is desirable to subject to public scrutiny personal information that reveals the types of alleged misconduct that are dismissed under section 43(11) of the *Police Act.* The Applicant has done so based on the credible possibility that complaints about police misconduct are not necessarily resolved in a way that serves the interest of the public. The Applicant has also established the presence of a public interest in the application of section 43(11) by the EPS and the desirability for EPS to be publicly accountable in its resolution of cases involving allegations of police wrongdoing. As noted above, I acknowledge that disclosure of the opinions of third parties may potentially result in the identification of third parties, even though personal identifiers are severed from the information. Despite

this, I find that the desirability of subjecting to public scrutiny the way that section 43(11) of the *Police Act* operates in the complaint investigation process and affects the accountability and effectiveness of policing to public scrutiny outweighs the presumptions in section 17(4)(b) and (d) in relation to the information characterized by the Public Body as views and opinions (described in paragraph 43, above).

[para 46] For the reasons above, I find that the Public Body was correct to sever the names and identifying information it severed, as documented in tab 10 of its submissions, but not personal information it describes as personal views and opinions. I find that the Public Body did not properly apply section 17(1) to the views and opinions in the records at issue.

Issue B: Did the Public Body properly apply section 20(1)(c) (investigative techniques and procedures) and (d) (confidential source of law enforcement information) of the Act to the records / information?

[para 47] The Public Body withheld records 1 – 10 and 12 - 30 under section 20(1)(c) and (d). Neither the Public Body nor EPS made submissions in relation to the application of section 20 to the records at issue.

[para 48] Sections 20(1)(c) and (d) state:

> *20(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*
>
> *(c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement,*
> *(d) reveal the identity of a confidential source of law enforcement information,*

[para 49] The information in the records at issue does not contain any obvious reference to investigative techniques and procedures used in law enforcement, or to the identity of a confidential source of law enforcement information. In the absence of evidence or argument to establish that disclosing the records at issue would result in the harms contemplated by sections 20(1)(c) or (d), I find that neither section 20(1)(c) nor section 20(1)(d) applies to records 1 – 10 and 12 – 30.

Issue C: Did the Public Body properly apply section 24(1)(a) and (b) of the Act (advice from officials) to records and information?

[para 50] The Public Body withheld Records 1 – 10, 12 –18, and 23 – 30 on the basis of section 24(1)(a) and (b).

[para 51] Section 24 creates an exception to the right of access in relation to "advice from officials". It states, in part:

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,

(c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Alberta or a public body, or considerations that relate to those negotiations,…

(2) This section does not apply to information that…

(b) is a statement of the reasons for a decision that is made in the exercise of a discretionary power or an adjudicative function…

[para 52] In Order 96-006, the former Commissioner established a test to determine whether information is advice, recommendations, analyses or policy options within the meaning of section 24(1)(a) He said:

> Accordingly, in determining whether section 23(1)(a) [now section 24(1)(a)]will be applicable to information, the advice, proposals, recommendations, analyses or policy options ("advice") must meet the following criteria.
>
> The advice should:
> 1. be sought or expected, or be part of the responsibility of a person by virtue of that person's position,
> 2. be directed toward taking an action,
> 3. be made to someone who can take or implement the action.

The three part test adopted by the former Commissioner in Order 96-006 recognizes that the purpose of section 24(1)(a) is to protect public bodies from interference, harassment and second-guessing when they make decisions. The three-part test emphasizes that information that is advice, proposals, recommendations, analyses and policy options must be directed toward actions of public bodies before section 24(1)(a) apples.

[para 53] In Order 97-007, the former Commissioner considered the meaning of "analyses" in section 24(1)(a), and said:

> While there is some discretion exercised in choosing which facts are gathered, without more, a compilation of facts is not an analys[i]s. Gathering pertinent factual information is only the first step that forms the basis of an analys[i]s. It is also the common thread of "advice, proposals, recommendations, or policy options" because they all require, as a base, a compilation of pertinent facts.

> In Order 96-012, I stated that I took section 23(1)(a) [now 24(1)(a)] to contemplate the protection of information generated during the decision-making process. There is nothing in the information to indicate a decision or a pending decision. The second criteri[on] has not been met.

[para 54] In Order 96-006, the former Commissioner considered the meaning of "consultations and deliberations" in section 24(1)(b). He said:

> When I look at section 23 as a whole, I am convinced that the purpose of the section is to allow persons having the responsibility to make decisions to freely discuss the issues before them in order to arrive at well-reasoned decisions. The intent is, I believe to allow such persons to address an issue without fear of being wrong, "looking bad" or appearing foolish if their frank deliberations were to be made public. Again, this is consistent with Ontario and British Columbia. I therefore believe 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 the 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.

[para 55] I agree with the definitions of "consultations" and "deliberations" adopted by the former Commissioner and find that they promote the purpose of protecting the free flow of information in planning and decision making from undue or untimely interference or second-guessing.

[para 56] Section 24(2) removes the ability of the head of a public body to apply section 24(1) to certain types of information. For example, information that is a statement of the reasons for a decision that is made in the exercise of a discretionary power or an adjudication function within the meaning of section 24(2)(b) cannot be withheld under section 24, even if the information otherwise meets the requirements of section 24(1). Before a public body applies section 24(1) to information, it is necessary to consider whether a provision of section 24(2) also applies.

[para 57] While not binding on me, I note that the *Freedom of Information and Protection of Privacy Guidelines and Practices Manual 2005*, published by the Government of Alberta, states on page 174 that section 24(2)(b) applies when a decision has already been made and is not merely contemplated. It suggests that "reasons for a decision" means the motive, rationale, justification or facts leading to a decision, while "exercise of discretionary power" is considered to refer to making a decision that cannot be determined to be right or wrong in an objective sense. Further, its suggests that "adjudicative function" means a function conferred upon an administrative tribunal, board or other non-judicial body or individual that has the power to hear and rule on issues involving the rights of people and organizations. I find that this analysis is a reasonable interpretation of section 24(2)(b) and is in keeping with the purpose of the provision, which is to ensure transparency in decision-making and accountability of individuals when they make decisions in the exercise of statutory or discretionary authority.

[para 58] The sequence of events relating to the decision to dismiss a complaint relating to the conduct of two members under section 43(11) of the *Police Act* is set out under paragraph 56 of the Public Body's submissions.

1. A decision is made under section 43(11) of the *Police Act* to dismiss a complaint about two members and the two members were notified of the decision.

2. EPS sends a letter to the Public Body to notify it that a complaint has been dismissed under section 43(11).

3. The Public Body sends an email to request clarification of the reasons for dismissing the complaints under section 43(11).

4. A letter is sent to the Public Body clarifying the reasons for applying section 43(11) to the complaint about the two members.

[para 59] EPS argues that the information withheld by the Public Body under section 24(1)(a) can be characterized as advice or recommendations, and that the advice or recommendations "involved those empowered to pursue the disciplinary investigation into EPS members."

[para 60] The Public Body also argues the following:

> Under section 43(13) of the *Police Act*, the EPC was required to provide written notification of the dismissal to the complainant and the officer who was the subject of the complaint. In an earlier letter, the EPS had advised the EPC that the particular complaint was time barred. On receipt of that earlier letter, the EPC asked for clarification… Therefore, these various letters between the EPS and the EPC clearly constitute deliberations between officials of the two organizations to determine if in fact the complaint was time barred and the appropriateness of undertaking certain actions pursuant to section 43(13) [of] the *Police Act*.

[para 61] Section 43(11) of the *Police Act* states:

> *43(11) The chief of police, with respect to a complaint under subsection (1), or the commission, with respect to a complaint under subsection (2) or section 46(1), shall dismiss any complaint that is made more than one year after the events on which it is based occurred.*

[para 62] Section 43(13) of the *Police Act* states:

> *(13) If the chief of police or the commission dismisses a complaint under subsection (11), the commission shall notify the complainant and the police officer who is the subject of the complaint, if any, of the decision in writing.*

Records 1 – 2

[para 63] The Public Body argues that records 1 and 2 contain an analysis and an explanation of an investigation and that the information in these records is therefore subject to section 24(1)(a).

[para 64] I find that section 24(1) does not apply to the information in records 1 and 2. These records are a letter dated April 4, 2006, from EPS to the Chair of the Public Body communicating the reasons for the decision of February 28, 2006, which held that a complaint was subject to section 43(11) of the *Police Act*.

[para 65] The decision to dismiss the complaint on the basis of the time limit was not automatic or a simple matter of "screening" the complaint, but required as assessment and weighing of the facts of the case and the application of legal principles to those facts. The decision to dismiss the complaint decided the rights of individuals, in particular, the members who were the subject of the complaint. It also decided the right of EPS to proceed with the complaint. The discussion of the employees that took place subsequent to the decision to dismiss the complaint, documented in emails 3 – 10, and referred to by both EPS and the Public Body in their submissions, indicates that more than one theory of the application of section 43(11) to the facts had been possible. Further, *Engel v. da Costa*, 2008 ABCA 152 indicates that there was uncertainty as to how section 43(11) applied to misconduct taking place prior to the coming into force of the legislation and uncertainty as to whether discoverability was a factor to be considered in the application of section 43(11). I therefore find that the Chief was also required to interpret section 43(11) and make factual findings when applying it. For these reasons, I find that the decision to dismiss the complaint under section 43(11) was an adjudicative decision, as discussed above, and that the information severed by the Public Body as "advice and recommendations" is a statement for the reasons for a decision made in the exercise of an adjudicative function under section 24(2)(b). Consequently, this information cannot be withheld under section 24(1).

[para 66] In any event, other than paraphrased statements made by a Crown prosecutor, I find that records 1 and 2 do not contain information that could be construed as "advice, proposals, recommendations, analyses, or policy options developed by or for a public body". Further, the information in records 1 and 2 is not directed at taking an action, but is intended to explain why an action was taken in the past.

[para 67] While records 1 and 2 paraphrase statements made by a Crown prosecutor which I find to be "legal advice" in my analysis of the Public Body's application of section 27 to records 3 – 10 and 29 – 30 below, I find that the paraphrasing of these statements was included in records 1 and 2 for the purpose of providing reasons for the Chief's decision in the exercise of an adjudicative function. Consequently, I find that section 24(2)(b) applies to the paraphrased statements. As a result, section 24(1)(a) does not apply to the paraphrased statements made by the Crown prosecutor.

Records 3 - 10

[para 68] The Public Body characterizes the emails on records 3 – 10 as deliberations between employees of the Public Body and EPS about a decision to be made under section 43(11) of the *Police Act*. EPS characterizes the employees who authored the emails as "those empowered to pursue the disciplinary investigation into EPS members". However, I note that the complaint had been dismissed prior to the emails in records 3 – 10 being sent. Consequently, these employees had no power to pursue disciplinary investigations into the members complained of or make decisions in relation to investigations of that nature, given that the matter had been concluded.

[para 69] I find that records 3 – 10 contain a request for clarification of reasons for a decision made under section 43(11) (records 4, 5, 6, 10) and the provision of those reasons (records 3, 5). In my view, record 9 contains a request to confirm that notification of the decision had been sent, and records 7 and 8 are confirmation that notification was sent. Records 7, 8, and 9 contain the 43(11) decision and were provided to confirm that a member had been notified of that decision.

[para 70] There is no evidence that the Public Body requested clarification for the purpose of making a decision or taking an action, as the Chief, and not the employee of the Public Body who sought clarification, had the statutory authority to apply section 43(11). The emails in response to the request clarify the reasons for a decision that had already been made, as does the letter that forms records 1 and 2. Further, the responses from the EPS are effectively a statement of reasons made in the exercise of a discretionary power or adjudicative function within the meaning of section 24(2)(b), as they explain the reasons for determining that section 43(11) of the *Police Act* applied. For these reasons, I find that section 24(1)(a) or (b) does not apply to the responses from the EPS staff sergeant contained in records 3 and 5, as I find that section 24(2)(b) applies to this information.

[para 71] As with records 1 and 2, statements made by a Crown prosecutor are paraphrased and quoted in records 3 – 10. As with records 1 and 2, I find that these are incorporated into the records to provide the reasons for a decision in the exercise of a discretionary power or adjudicative function. As a result, I find that section 24(2)(b) applies to the statements made by a Crown prosecutor in these records. As a result, section 24(1) does not apply to these statements.

[para 72] I find that sections 24(1)(a) and (b) do not apply to the requests from the Public Body in records 4 – 10, as these are requests for clarification rather than requests for advice, proposals, recommendations, analyses or policy options. Further these requests for clarification cannot be construed as consultations or deliberations. As the Public Body notes, Order 96-006 defined "deliberation" as meaning "a discussion of the reasons for and against a possible future action", while a "consultation" was defined as "seeking the opinions of employees as to the appropriateness of a particular proposal or suggested action". In my view, records 3 – 10 do not contain information meeting this definition. In my view, a request for reasons for a decision that has already been made is not a "consultation" or "deliberation".

[para 73] Record 7 contains three emails and a letter attachment. The letter attachment extends to record 9. I find that the information in the emails is not a discussion of the reasons for and against an action, nor are the views of the employees sought for the purpose of doing something. Instead, the author of an email of March 23, 2006 inquires as to whether an action has been taken. The responding email, also dated March 23, 2006, confirms that the action was taken on February 28, 2006. I find that sections 24(1)(a) and (b) do not apply to these records, as the information in the records does not reveal advice, proposals, recommendations, analyses or policy options, and the information cannot be construed as a consultation or deliberation.

[para 74] Records 7, 8, and 9 contain a copy of a section 43(11) decision, which was emailed to the employee of the Public Body seeking clarification to establish that action had been taken to notify members of the decision. I find that this letter cannot be construed as revealing advice, proposals, recommendations, analyses or policy options or as revealing information of this nature.

[para 75] Further, I find that the decision appearing on records 7, 8, and 9 is not a consultation or deliberation of a future decision, but is the decision itself. Lines 15 – 23 contain the reasons for a decision made in the exercise of an adjudicative function, and section 24(2)(b) applies to them. Further, the decision on records 7, 8, and 9 does not contain information that would reveal consultations or deliberations.

Records 12 and 13

[para 76] The Public Body applied sections 24(1)(a) and (b) to records 12 and 13. These records consist of a letter from an employee of EPS to an employee of the Public Body. The information in this letter is a statement of the reasons for a decision made under section 43(11) of the *Police Act*, and is therefore statement of the reasons for a decision made in the exercise of a discretionary power or an adjudication function. Consequently, sections 24(1)(a) and (b) cannot apply to the information in records 12 and 13.

Records 14 - 16

[para 77] The Public Body withheld records 14 – 16 on the basis of section 24(1)(a) and (b). The Public Body characterizes the information it withheld as "particulars relative to two investigations." The Public Body argues that the information in these records "identifies actions taken" and the "reasons for decisions" of EPS. I find that records 14 – 16 do not contain information that would reveal information falling under either section 24(1)(a) or (b) for the reasons that follow.

[para 78] In Order 97-007, the former Commissioner found that a compilation of facts without more, does not reveal information falling under section 24(1)(a). He said:

> Upon reviewing the briefing notes, I note that there is no reference to a possible course of action for the Minister. In short, the briefing notes appear to be a narration or a status report. The authors

> of the briefing notes were not advising the Minister as to what he should do or not do, nor were they providing an analys[i]s of the events using their expertise. "Analys[i]s" is defined in the *Concise Oxford Dictionary*, 9th edition, (New York: Oxford, 1995) as: *a detailed examination of the elements or structure of a substance etc.; a statement of the result of this.*
>
> While there is some discretion exercised in choosing which facts are gathered, without more, a compilation of facts is not an analys[i]s. Gathering pertinent factual information is only the first step that forms the basis of an analys[i]s. It is also the common thread of "advice, proposals, recommendations, or policy options" because they all require, as a base, a compilation of pertinent facts.
>
> In Order 96-012, I stated that I took section 23(1)(a) [now 24(1)(a)] to contemplate the protection of information generated during the decision-making process. There is nothing in the information to indicate a decision or a pending decision. The second criteri[on] has not been met.

[para 79] I find that records 14 – 16 are a compilation of facts and data, as described by the former Commissioner in order 97-007 and do not reveal information falling under either section 24(1)(a) or (b). Even if "identifying actions taken" and "reasons for decisions" met the definition of advice, proposals, recommendations, analyses, policy options, consultations, or deliberations, I would not find that records 14 – 16 contained information revealing actions taken or reasons for decisions.

Records 17 and 18

[para 80] The Public Body withheld records 17 and 18 under section 24(1)(a) and (b). Records 17 and 18 are a letter written to communicate a decision to an employee of EPS and to give notice that an investigation would begin. The Public Body characterizes these records as communicating advice and recommendations from a senior officer to the officer who is the subject of the complaint. I do not find that the information in this letter can be construed as advice or recommendations. This letter conveys a decision and the reasons for a decision. Further, it is intended to give the recipient party notice of further proceedings. There is nothing in this letter to suggest that the author of the letter provided information for the purpose of advising or recommending to the recipient party the course of action he should take. Instead, the letter is intended to meet the requirements of fairness, by informing the individual of his right to be heard and the case to be met. In addition, I do not find that the information in the letter can be construed as "consultations or deliberations" within the meaning of section 24(1)(b), as the letter does not contain a proposal or a discussion of the reasons for or against an action to be taken.

Records 23 - 25

[para 81] The Public Body withheld records 23 – 25 on the basis of sections 24(1)(a) and (b); however, the Public Body did not provide submissions to explain why it considered these provisions to apply. I find that records 23 - 25 are a compilation of facts and data, as described by the former Commissioner in order 97-007, and do not reveal information falling under either section 24(1)(a) or (b). I find that the information in these records does not contain advice, proposals, recommendations, analyses, policy options, consultations or deliberations and does not reveal information of this nature. I find that sections 24(1)(a) and (b) do not apply to records 23 and 25.

Records 26 - 28

[para 82] The Public Body argues that records 26 to 28 contain analyses prepared by an EPS official pertaining to an incident and the recommendations as to what actions, if any, ought to be taken. Records 26 – 28 consist of a memo between employees of EPS. I agree with the Public Body that records 26 – 28 contain analyses and recommendations. The analyses in the memo were provided to support the recommendations, which are directed at taking an action. Further, the analyses and recommendations are made by someone with authority to make recommendations, and are made to someone who could act on the recommendations on behalf of the Public Body. I find that section 24(1)(a) applies to records 26 – 28.

Records 29 - 30

[para 83] Records 29 – 30 contain a memorandum from EPS to an employee member. This memo communicates the nature of a complaint against the employee member, the reasons for making it, and the decision to dismiss it under section 43(11) of the *Police Act*. The memorandum includes the reasons for dismissing the complaint. The Public Body argues that these records contain advice from one EPS member to another. I find that these records do not contain advice, as argued by the Public Body. I find that lines 6 – 9 on record 30 are a statement of the reasons for a decision to dismiss a complaint. I have already found that the decision to dismiss the complaint was made in the exercise of an adjudication function. Consequently, I find that section 24(2)(b) applies to lines 6 – 9 on record 30. I find that the remainder of the information in records 29 – 30 does not reveal advice, proposals, recommendations, analyses or policy options, or consultations or deliberations, other than lines 1 – 5 on record 30, which contains advice from a Crown prosecutor. The information in the records 29 – 30 is not directed at taking an action, as established in Order 96-006, but communicates a decision that has already been made.

[para 84] Lines 1 – 5 on record 30 contain an excerpt from statements made by a Crown prosecutor, which I find to be legal advice in my analysis of the Public Body's application of section 27 to the information in the records at issue. However, I find that the statements made by the Crown prosecutor as they appear in records 29 – 30 are included for the purpose of providing reasons to a member for a decision to take certain steps under the *Police Act*. This particular decision would be a decision made in the exercise of a discretionary power. As a result, I find that section 24(2)(b) applies to the statements made by the Crown prosecutor and that, as a result, section 24(1)(a) applies.

Conclusion

[para 85] I find that the Public Body properly applied section 24(1)(a) to records 26 – 28. However, I find that section 24 does not apply to records 1 – 10, 12 – 25 and 29 – 30. Consequently, I find that the Public Body did not properly apply section 24 to the records and information.

Issue D: Did the Public Body properly apply section 27 of the Act (privileged information) to the records / information?

[para 86] The Public Body withheld records 3 –10 and 26-30 on the basis of sections 27(1)(a), (b) and (c). However, as I have found that section 24(1)(a) authorizes the Public Body to withhold records 26 – 28, I will only consider whether section 27 applies to records 3 – 10 and 29 – 30.

Section 27(1)(a)

[para 87] Section 27(1)(a) authorizes a public body to withhold privileged information. It states:

> *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,*

[para 88] The Public Body argues that records 4, 5, 10, and 27 - 30 contain legal advice requested by EPS and provided by a Crown prosecutor and that solicitor-client privilege necessarily attaches to statements made by the Crown prosecutor appearing in these records for that reason. It argues that section 27(1)(a) applies to these quotes. It notes that it expects EPS to argue that sections 27(1)(b) and (c) apply to the remaining information in records 3 – 10 and 26 – 30. However, it does not provide argument that sections 27(1)(b) or (c) apply or explain to what information these provisions were applied. As its response to the Applicant of October 30, 2006 indicates that it applied sections 27(1)(b) and (c) to withhold these records in their entirety, I will consider whether these sections apply.

[para 89] EPS argues that these records contain the name of a Crown prosecutor and the substance of the Crown prosecutor's opinion. EPS argues that all the information in these records falls under section 27(1)(a), (b) and (c). As I have found that section 24(1)(a) applies to the information in records 26 – 28, I need not consider whether sections 27 also applies to the information in these records.

[para 90] As noted above, I requested evidence from EPS in relation to the arguments that solicitor-client privilege applies to records 3 – 10. In particular, I asked for evidence that the individuals whose emails are contained in these records are solicitors, clients, or Crown prosecutors. I asked EPS, rather than the Public Body, for evidence, as the records originated from EPS, and it was therefore in a better position to provide evidence on this point than the Public Body.

[para 91] EPS provided an affidavit from an employee of EPS dated February 12, 2009 to the effect that the employee has been informed by EPS's solicitor, and therefore believes, that EPS obtained legal opinions from Crown prosecutors in either 2003 or 2004 and then again in 2005. The affiant also states that the records contain references to these

legal opinions. EPS also provided the affidavit of an employee dated December 17, 2008, that states that he is informed by his solicitor and for that reason believes that the legal opinions were provided by the Crown as legal advice between solicitor and client and that they could not be disclosed without the permission of the Chief Crown Prosecutor.

[para 92] At the outset, I note that the affidavit evidence submitted by EPS is of limited value. In general, it is a desirable practice to confine affidavits to statements of facts within the knowledge of the affiant. A decision maker can attach little or no weight to affidavits such as the affidavits referred to in the preceding paragraph, which establish only that the affiant has heard information from counsel, but do not establish that the affiant has independent knowledge of the facts to which he swears.

[para 93] In this case, I will accept that the emails between EPS and Public Body employees appearing on records 3 – 10 include a quotation from statements provided by a Crown prosecutor, as the information contained in the emails supports this conclusion.

[para 94] The affidavit of December 17, 2008 states:

> I am informed by [name of counsel] and do believe that the Responsive Records contain references to legal opinions provide by the Office of the Chief Crown Prosecutor to the Professional Standard Branch of the EPS (the "Legal Opinions").
>
> The Legal Opinions were required by the EPS in order that the Professional Standard Branch conduct an investigation into complaints brought against an EPS member.
>
> The Legal Opinions involve the Office of the Chief Crown Prosecutor providing the EPS with a legal opinion about a legal issue, including advice regarding a recommended course of action based on legal considerations.
>
> This type of legal opinion is provided to the EPS by the Office of the Chief Crown Prosecutor with an expectation that it will remain confidential.
>
> This type of legal opinion is provided by the Office of the Chief Crown Prosecutor, and received by the EPS, on the condition that it is subject to solicitor/client privilege and that it is not to be disclosed without permission of the Chief Crown Prosecutor.
>
> The Chief Crown Prosecutor has not provided the EPS with permission to disclose the legal opinions.

I reject these statements for the following reasons. First, the affiant establishes that he does not have knowledge of the facts, but knows only the information his counsel has provided to him. This information is about a general practice that may or may not have been in place when the Crown prosecutor provided the statements, and is not about the specific understanding of the Crown prosecutor and EPS when the statements at issue were made. Second, privilege belongs to the client, rather than the solicitor. While a solicitor must refuse to disclose information that is the subject of solicitor-client privilege, unless the client authorizes the solicitor to disclose the information, the client may waive privilege. If EPS's characterization of the Crown prosecutor's statements is correct, EPS would be the client and Alberta Justice the solicitor. Third, the EPS disclosed the quotation from the Crown prosecutor's statements to the Edmonton Police

Commission and to the members complained of. There is no evidence that EPS requested permission to disclose the Crown prosecutor's statements to the members whose conduct was the subject of the opinion, or to the Edmonton Police Commission. Consequently, I attach no weight to the statements in the affidavit that EPS could only disclose the Crown prosecutor's statements with the consent of the Chief Crown Prosecutor.

[para 95] In *R. v. Campbell*, [1999] 1 S.C.R. 565, the Supreme Court of Canada determined that a solicitor-client relationship existed between the RCMP and Department of Justice Lawyers. While the Court noted that the RCMP could not give the Department of Justice directions, as a client normally would, it found that the relationship was still that of solicitor and client. The Court said at paragraph 49:

> The solicitor-client privilege is based on the functional needs of the administration of justice. The legal system, complicated as it is, calls for professional expertise. Access to justice is compromised where legal advice is unavailable. It is of great importance, therefore, that the RCMP be able to obtain professional legal advice in connection with criminal investigations without the chilling effect of potential disclosure of their confidences in subsequent proceedings.

This rationale could also apply also to legal advice provided by Crown counsel to EPS. The original document provided by Crown counsel does not form part of the records and only an excerpt is quoted in the records. The quotation appears in lines 7 and 8 on record 4, lines 43 and 44 on record 5, lines 16 and 17 on record 10, lines 31 – 35 on record 27, lines 2 – 4 on record 28, lines 27 – 28 on record 29, lines 1 – 5 on record 30. (The quotation is also referred to in records 1 and 2; however, the Public Body did not apply section 27 to this information.)

[para 96] EPS argues that the quotations from the Crown prosecutor's statements are subject to solicitor-client privilege, and that consequently, the records in which the quotation is contained are therefore subject to solicitor-client privilege in their entirety. EPS relies on Order F2002-007 for this position. Order F2002-007 addressed lawyers' bills of account. In that order, the Commissioner stated the following:

> Despite what the Applicant argues, the case law is clear that solicitor-client privilege applies to solicitors' statements of account, including the detailed billing information and the amounts billed: see Stevens v. Canada (Prime Minister), [1998] 4 F.C. 89 (C.A.), affirming [1997] 2 F.C. 759 (T.D.), a case cited by both the Applicant and the Public Body. The Public Body also provided evidence that the courts in Alberta have followed the *Stevens* case: see *Matthison v. Odishaw*, 1999 ABQB 207 (Tab 9 of the Public Body's submission).
>
> I find that each of the Records meets the criteria for solicitor-client privilege because it is a communication between a solicitor and client, which entails the seeking or giving of legal advice, and which is intended to be confidential by the parties. Therefore, section 27(1)(a) [previously section 26(1)(a)] applies to the Records.

[para 97] However, the Commissioner decided F2002-007 without the benefit of the Supreme Court of Canada's decision in *Maranda v. Richer* [2003] S.C.J. 69 which effectively overturns *Stevens v. Canada (Prime Minister)* [1998] 4 F.C. 89(C.A.), on which the Commissioner relied, and holds that lawyers' bills of account are subject to a presumption of solicitor-client privilege. In *Ontario (Ministry of the Attorney General) v.*

Ontario (Assistant Information and Privacy Commissioner) (2005), 251 D.L.R. (4th) 65, the Ontario Court of Appeal held that the presumption of privilege in legal bills is rebuttable. Further, the Court determined that information that did not reveal privileged information could be severed from communications between a solicitor and a client, such as legal bills. The Ontario Court of Appeal said:

> We are in substantial agreement with the reasons of Carnwath J. Assuming that *Maranda v. LeBlanc*, *supra*, at paras. 31-33 holds that information as to the amount of a lawyer's fees is presumptively sheltered under the client/solicitor privilege in all contexts, *Maranda* also clearly accepts that the presumption can be rebutted. The presumption will be rebutted if it is determined that disclosure of the amount paid will not violate the confidentiality of the client/solicitor relationship by revealing directly or indirectly any communication protected by the privilege.

[para 98] In Order F2007-014, I adopted and applied the reasoning from these cases to find that the total amounts of a lawyer's bill could be severed from a record if it did not reveal information subject to solicitor-client privilege. I also note that in Order F2002-007, the Commissioner found that the entire record was a communication between a solicitor and a client, which led him to conclude that the entire record was subject to solicitor-client privilege. However, the records before me are not communications between a solicitor and a client. Rather, the evidence of the Public Body is that they are communications between employees of EPS and employees of the Public Body. In response to my request for evidence that the persons involved in the email exchanges were solicitors, clients, or crown prosecutors, EPS provided an affidavit of an employee dated February 12, 2009. This provides the names and positions of EPS members and the Edmonton Police Commission as of March 2006. It states that the employees involved in the email exchanges were a staff sergeant, a manager, and a second staff sergeant. Further, the Edmonton Police Commission employees took part in the email exchange in their roles as public complaint director and chair. Neither EPS nor the Public Body argued or suggested that any of the participants in these email exchanges were lawyers. In view of the arguments and evidence before me, I cannot conclude that any of these employees acted as a solicitor in the email exchanges.

[para 99] The email discussions include a quotation of statements made by a Crown prosecutor, but the primary purpose of the emails is to discuss the decision to dismiss a complaint under section 43(11) of the *Police Act*. I find that the Crown prosecutor's statement is quoted, but not discussed or analyzed in the emails on records 3 - 10. In effect, while I accept that a quotation from a Crown prosecutor's opinion could potentially be subject to solicitor-client privilege, disclosing the information other than the excerpt from correspondence from the Crown prosecutor would not, in this case, reveal the substance of the excerpt, and is not subject to solicitor-client privilege.

[para 100] I will now consider whether the statements attributed to the Crown prosecutor are subject to solicitor-client privilege. The test to establish whether communications are subject to solicitor-client privilege is set out by the Supreme Court of Canada in *Canada v. Solosky* [1980] 1 S.C.R. 821. Speaking for the Court, Dickson J. (as he then was) said:

> … privilege can only be claimed document by document, with each document being required to meet the criteria for the privilege--(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties.

Relying on *Campbell*, I find that the statements are a communication between a solicitor and client. I find that the statements attributed to the Crown prosecutor are legal advice, as they provide advice in relation to the bringing of charges.

[para 101] However, in relation to the issue of whether the communications were intended to be kept confidential, I have no evidence as to the understanding of EPS and the Crown prosecutor when the Crown provided the statements that appear in the records. It may be that the statements made by the Crown were intended to be kept confidential; equally, they may not have been. The only evidence to which I can attach weight in relation to the intent of the parties are the actions of the EPS in relation to the statements. Records 7 and 8 and 29 and 30 were written to communicate the decision under section 43(11) regarding the complaints to the members complained of. Lines 18 – 23 of record 8, and lines 1 – 5 of record 30 are direct quotes from the statements made by the Crown prosecutor. The information in these records leads me to conclude that the EPS provided the statements of the Crown prosecutor to members who were adverse in interest to EPS in relation to the matters requiring the Crown prosecutor's advice. The statements of the Crown prosecutor were provided to the members without restriction on the use that the members could make of them or limitation as to the extent to which the members could distribute them. I therefore find that the evidence before me supports a finding that the excerpts from the statements of the Crown prosecutor were not intended to be kept confidential by the parties

[para 102] Given that I find that the parties did not intend that the statements of the Crown prosecutor to be kept confidential, it follows that I find that the quotations do not meet the test for solicitor-client privilege set out in *Solosky*.

[para 103] EPS argues that it cannot waive solicitor-client privilege in relation to the Crown's prosecutor's legal opinion but that only Alberta Justice may do so. I have already found that the Crown prosecutor's statements were not privileged because they do not meet the *Solosky* test, but I will nonetheless address this argument. EPS argues as follows:

> Information in the nature of a legal opinion provided by the Crown prosecutor is a classic example of solicitor-client privilege and is clearly caught under s. 27(1)(a) of FOIPPA. The legal opinions are communications between the Office of the Chief Crown Prosecutor and the EPS, which give legal advice that the parties intend to be confidential.
>
> The Crown legal opinions are provided to the EPS with the understanding that the privilege in the opinions be maintained. The Crown legal opinions are provided to the EPS on the condition that they are subject to solicitor/client privilege and are not to be disclosed without the permission of the Chief Crown Prosecutor. The EPS cannot waive this privilege. Should the Commissioner be considering ordering the release of Crown opinions in this matter, the EPS submits that the Chief Crown Prosecutor (and/or Alberta Justice) should be considered an Affected Party and should be provided with an opportunity to make additional submissions.

The argument that a client cannot waive solicitor-client privilege and that the privilege belongs to the solicitor, is contrary to jurisprudence. For example, the Manitoba Court of Appeal noted at paragraph 25 of *Histed v. Law Society of Manitoba*, 2005 MBCA 106: "[Solicitor-client] privilege is that of the client, and once waived, the privilege is lost." Similarly, in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44, Binnie J. noted: "The privilege belongs to the client not the lawyer." If the statements of the Crown prosecutor were legal advice provided to EPS, and this advice was subject to solicitor-client privilege, then the privilege attaching to those communications would belong to EPS, and not Alberta Justice, and could be waived by EPS.

[para 104] It may be that EPS is thinking of statements relating to the exercise of prosecutorial discretion when it argues that, as a client, it cannot waive privilege in relation to legal opinions provided by the Crown. The Crown's right to withhold information relating to the exercise of prosecutorial discretion is an immunity, or duty, rather than a privilege, and as such, cannot be waived. However, EPS has made no reference to the exercise of prosecutorial discretion in its arguments, nor has the Public Body applied section 20(1)(g) to the excerpt from the statements of the Crown prosecutor. As the Public Body has not applied section 20(1)(g) to the records at issue, the application of section 20(1)(g) is not before me.

[para 105] For these reasons, I find that the information in records 3 – 10 and 29 – 30, is not subject to solicitor-client privilege. As no other legal privilege was argued, it follows that I find that section 27(1)(a) does not apply to the information in records 3 – 10 and 29 - 30.

Sections 27(1)(b) and (c)

[para 106] Sections 27(1)(b) and (c) state:

> *27(1) The head of a public body may refuse to disclose to an applicant*
> …
> *(b) information prepared by or for*
> *(i) the Minister of Justice and Attorney General,*
> *(ii) an agent or lawyer of the Minister of Justice and Attorney General, or*
> *(iii) an agent or lawyer of a public body,*
> *in relation to a matter involving the provision of legal services, or*
>
> *(c) information in correspondence between*
> *(i) the Minister of Justice and Attorney General,*
> *(ii) an agent or lawyer of the Minister of Justice and Attorney General, or*
> *(iii) an agent or lawyer of a public body,*

> *and any other person in relation to a matter involving the provision of advice or other services by the Minister of Justice and Attorney General or by the agent or lawyer.*

[para 107] The Public Body notes the following in relation to the application of sections 27(1)(b) and (c):

> The EPC further expects that the EPS may also assert that the remaining information contained on pages H-3 to H-10 and H-26 to H-30 is protected from disclosure pursuant to sections 27(1)(b) an (c) of the Act. Specifically, section 27(1)(b) protects information prepared by or for an agent or lawyer of a public body in relation to a matter involving the provisions of legal services. Section 27(1)(c) is even broader in scope in that it protects information in correspondence between 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 agent or lawyer.

[para 108] EPS argues the following:

> The Crown legal opinions are provided to the EPS with the understanding that the privilege in the opinions be maintained. The Crown legal opinions are provided to the EPS on the condition that they are subject to solicitor/client privilege and are not to be disclosed without the permission of the Chief Crown Prosecutor…
>
> As the information is caught squarely under s. 27(1)(a) of FOIPPA , it also satisfies the broader tests for the exemption from disclosure under s. 27(1)(b)(iii) and s. 27(1)(c)(iii). Specifically, because it is information prepared by an agent or lawyer of the Minister of Justice and Attorney General or for an agent or lawyer of a public body in relation to a matter involving the provision of legal services, s. 27(1)(b)(ii) and (iii) apply. The privileged Crown opinions are also information in correspondence between 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 agent or lawyer and thus s. 27(1)(c)(iii) applies to these portions of the Responsive Records.

Section 27(1)(b)

[para 109] Section 27(1)(b) refers to information prepared by an agent or lawyer of the Minister of Justice and Attorney General, or an agent or lawyer of a public body. "Agent" is a term with many meanings. In broad terms, an agent can be a representative or a person who acts on behalf of, or at the direction of, another. However, in the context of the FOIP Act, "agent" cannot mean any representative of a public body, such as an employee. I say this because "employee" is defined in the FOIP Act and the definition includes both employees and those acting under an agency relationship with a public body, which suggests that the FOIP Act does not consider employees and agents to be the same thing unless the term "employee" is used. If a broad definition of "agent" had been intended, the legislature could have incorporated the already defined term, "employee" into the provision to better serve this purpose. In the facts before me, neither the Public Body nor EPS has argued or provided evidence to suggest that the employees who created records 3 – 10 and 29 – 30 were acting under an agency relationship with a public body or as lawyers of a public body when the information was created.

[para 110] In the context of "information in relation to a matter involving the provision of legal services", I read "matter involving the provision of the legal services" such that the "matter" is constituted by, or consists of, the provision of legal services. The other potential interpretation of this part of the provision – that the phrase is met for any matter to which legal services have been provided at some time – is implausible. It would have the provision take into account a factor (that the matter happens to have involved the provision of legal services) that may be coincidental and have no relevance to the information that is being prepared and which requires the protection of the provision. I interpret the phrase "information prepared in relation to" as referring to information compiled or created for the purpose of providing the services, in contrast to merely touching or commenting upon the provision of the services. The use of the term "prepared" – which the *Canadian Oxford Dictionary* defines as "to make ready for use" - carries the suggestion that the information is necessary for the outcome that legal services be provided.

[para 111] It follows, then, that the person contemplated by the provision who is preparing the information, is doing so for the purpose of providing legal services, and therefore must be either the person providing the legal service or a person who is preparing the information on behalf of, or, at a minimum, for the use of, the provider of legal services.

[para 112] It also follows that section 27(1)(b) does not cover the situation where a person, even a person who is one of the persons listed in subclauses i – iii, creates information that is connected in some way with the provision of legal services but is not created for that purpose. For example, section 27(1)(b) does not apply to information that merely refers to or describes legal services without revealing their substance.

[para 113] Turning to the records, I find that section 27(1)(b) does not apply to the information in records 3 – 10 and 29 – 30, except for the excerpt from the statements made by the Crown prosecutor. Employees of the Public Body and EPS prepared the information for the purpose of discussing the reasons for a decision, (records 3 – 10), and to communicate a decision, (records 29 – 30). The information in these records was not prepared for the purpose of the provision of legal services and the evidence does not establish that the information in these records was prepared by a lawyer or agent of a public body or the Minister of Justice and Attorney General.

[para 114] With respect to the excerpts from statements made by the Crown prosecutor, who is an agent or lawyer of the Minister of Justice and Attorney General, the statements were made to provide advice. The wording of section 27(1)(c) makes it clear that providing advice is a service for the purposes of the FOIP Act. Further, I have found that the advice provided was legal advice, although lacking the element of confidentiality necessary to attract solicitor-client privilege. It therefore follows that the statements of the Crown prosecutor were prepared for the purpose of providing legal services to EPS, and consequently, section 27(1)(b) applies to them.

Section 27(1)(c)

[para 115] Turning to section 27(1)(c), for information to fall under this section, the information must be "in 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 at para. 17; Order F2007-013 at para. 61). In my view, section 27(1)(c) does not protect information that was contained in or may have appeared in other correspondence between an agent or lawyer and another person; rather, for section 27(1)(c) to apply, the information about which a decision to grant or deny access is being made must be in correspondence between the agent or lawyer and another person.

[para 116] I have already found that the Crown prosecutor's statement which is quoted in records 3 – 10 and 29 - 30, was created to provide reasons for a decision to the EPS. However, the presence of the quotation does not transform the information in the email between employees of EPS and the Public Body into information *in correspondence between* the Crown prosecutor and the employees of EPS and the Public Body for the purposes of section 27(1)(c). Rather, the quotation from the Crown prosecutor in records 3 – 10 appears in correspondence between employees of the Public Body and employees of EPS. As already noted, I have nothing on which to base a conclusion that these employees were acting as agents or lawyers of EPS or the Public Body. Similarly, the appearance of the excerpt in a letter from EPS to a member does not transform this correspondence in records 29 - 30 into correspondence between the Crown prosecutor and the member.

[para 117] Records 3 – 10 contain a request for clarification as to why a decision was made, the reasons for the decision, and a discussion of the process that was followed. The evidence does not establish that any of the participants in this email exchange are agents or lawyers. These emails are not "correspondence between" an agent or lawyer of a public body and any other person.

[para 118] Records 29 – 30 contain correspondence between EPS as employer to a member as an employee. I find that section 27(1)(c) does not apply to the information in this record because it is not "in correspondence between" an agent or lawyer of a public body and any other person", as the evidence does not establish that either the sender or the recipient acted as an agent or lawyer.

Conclusion

[para 119] For the reasons above, I find that section 27 does not apply to records 3 – 10, or to records 29 – 30, with the exception that I find that section 27(1)(b) applies to the excerpts from the Crown prosecutor's statements that appear in records 3 – 10 and 29 – 30.

Exercise of Discretion

[para 120] I note that the Public Body made no argument in relation to the application of section 27(1)(b), even though it applied this provision to the information in records 3 – 10 and 29 – 30 in its response to the Applicant. Further, I note that it did not apply section 27 to records 1 and 2, although the statements of the Crown prosecutor also appear in those records. I therefore lack the benefit of the Public Body's reasons for applying section 27(1)(b) to the excerpts from the Crown prosecutor's opinion as it appears in records 3 – 10 and 29-30. In Order 2000-021, the former Commissioner said at paragraph 51:

> A delegate's rationale for exercising his or her discretion in a particular way must be both demonstrable and reasonable. A delegate cannot abuse his or her discretion by making an arbitrary or irrational decision. In Order 96-002 I catalogued five types of abuse of discretion: 1) where a delegate exercises his or her authority with an improper intention in mind, which includes acting for an unauthorized purpose, in bad faith, or on irrelevant considerations; 2) where a delegate acts on inadequate evidence or without considering relevant matters; 3) where the decision is unreasonable or discriminatory, creating an improper result; 4) where the delegate exercises his discretion on an erroneous view of the law; and 5) where a delegate fetters his discretion by rigidly adopting a policy which precludes a consideration of the individual merits of the case. Abuse of discretion deprives a delegate of his or her jurisdiction in the case, and renders the delegate's decision a nullity.

Previous orders of this office have stated that in some circumstances, the reasons for withholding legal advice are self-evident, as legal advice must be confidential to be effective. However, in this case, the statements in question were shared with the persons complained about, and so the reasons for withholding information under section 27(1)(b) are not self-evident. I find that the Public Body's reasons for applying section 27(1)(b) to the excerpts from the Crown prosecutor's statements are neither demonstrable or reasonable, as required by the former Commissioner in Order 2000-021. I will therefore direct the Public Body to reconsider its decision to withhold the excerpts from the Crown prosecutor's statements from records 3 – 10 and 29 – 30 on the basis of section 27(1)(b).

Issue E: Does section 32 of the Act (public interest) require disclosure of the records at issue?

[para 121] Section 32 establishes the situations in which the head of a Public Body must disclose information, even though an exception to disclosure may apply. It states, in part:

> *32(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people, to any person or to an applicant*
>
> *(a) information about a risk of significant harm to the environment or to the health or safety of the public, of the affected group of people, of the person or of the applicant, or*
>
> *(b) information the disclosure of which is, for any other reason, clearly in the public interest.*
>
> *(2) Subsection (1) applies despite any other provision of this Act.*

(3) Before disclosing information under subsection (1), the head of a public body must, where practicable,

(a) notify any third party to whom the information relates,

(b) give the third party an opportunity to make representations relating to the disclosure, and

(c) notify the Commissioner.

[para 122] As I have found that the Public Body is required to withhold personally identifying information from the records pursuant to section 17, and authorized to withhold records 26 – 28 under section 24, I will consider whether it is clearly in the public interest to disclose that information under section 32.

[para 123] The Applicant argues that the records at issue should be disclosed under section 32 as there is a public interest in assessing the EPS's methods of dealing with public complaints against its members.

[para 124] The Public Body argues that the Applicant is "attempting to circumvent the protections provided by section 17 of the Act by arguing that the public has a significant interest in all matters concerning the oversight of the police."

[para 125] At the outset, I disagree with the Public Body's characterization of the Applicant's argument as an attempting to circumvent section 17. Section 32 clearly contemplates that the public interest in disclosure can outweigh the interests protected by section 17, as it creates a notice process for affected third parties and applies despite any other provision of the FOIP Act.

[para 126] In *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)* (2007), 86 O.R. (3d) 259, the Ontario Court of Appeal made the following comment regarding Alberta's legislation:

> I would first note that the public interest overrides in those two statutes apply to the entire Act. There are, however, two other substantive differences between those provisions and the public interest override in the Ontario Act that are also worth noting:
>
> (i) The lack of a need for an application: the head of a public body "must" disclose information "whether or not a request for access is made".
>
> (ii) There is no balancing between the public interest and the exemption: the test is whether disclosure is "clearly in the public interest".

[para 127] I agree with the Ontario Court of Appeal that the test in section 32 is whether disclosure is "clearly in the public interest". However, in my view, the application of this test may require a balancing of the public interest in disclosure versus the public interest represented by the exceptions in the Act, in situations where an exception to disclosure applies, to determine whether disclosure is "*clearly* in the public interest".

[para 128] As noted above, the right of access is subject to limited and specific exceptions. Each exception to disclosure in the Act reflects the decision of the legislature that a specific public interest in withholding the information may outweigh an individual's right of access.

[para 129] In the present case, I have found that section 17 requires the Public Body to withhold the names, identifying numbers and employment history of third parties. Section 17 protects a public interest in protecting the personal information of individuals from an unreasonable invasion of personal privacy. I have also found that section 24(1)(a) applies to three records. As noted above, the purpose of section 24 is to protect public bodies from interference, harassment, and second-guessing when they make decisions regarding potential courses of action. The public interest in protecting the government decision making process from such interference is acknowledged and discussed in *Carey v. Ontario* [1986] 2 S.C.R. 637. In that case, the Court said at paragraphs 49 – 50:

> In both the *Gagnon* and *Conway* cases, however, Cabinet documents were looked upon in a different light than lower level official documents, and in the latter case the Law Lords dealt with the issue at some length. Most of them looked at these, we saw, as requiring a similar degree of protection as documents relating to national security and diplomatic relations. Production of Cabinet correspondence, they asserted, would never be ordered. For them this was simply obvious. Given the general attitude at the time, this is not surprising. The best explanation is that of Lord Reid. For him it was not candour but the political repercussions that might result if Cabinet minutes and the like were disclosed before such time as they were of historical interest only. He put it this way at p. 952:
>
> I do not doubt that there are certain classes of documents which ought not to be disclosed whatever their content may be. Virtually everyone agrees that Cabinet minutes and the like ought not to be disclosed until such time as they are only of historical interest. But I do not think that many people would give as the reason that premature disclosure would prevent candour in the Cabinet. To my mind the most important reason is that such disclosure would create or fan ill-informed or captious public or political criticism. The business of government is difficult enough as it is, and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind. And that must, in my view, also apply to all documents concerned with policy making within departments including, it may be, minutes and the like by quite junior officials and correspondence with outside bodies. Further it may be that deliberations about a particular case require protection as much as deliberations about policy. I do not think that it is possible to limit such documents by any definition.
>
> While some of these remarks may seem somewhat dated, I would agree that the business of government is sufficiently difficult that those charged with the responsibility for running the country should not be put in a position where they might be subject to harassment making Cabinet government unmanageable.

[para 130] I interpret the Applicant as arguing that disclosing the records at issue would have the effect of holding EPS to account as to the way in which it manages complaints against its members. I agree with the Applicant that there is a public interest in ensuring the accountability of this aspect of police services. However, I find that in the present case, the public interest in withholding the information to which sections 17 and 24(1)(a) apply outweighs any public interest in disclosing it, particularly as I have found

that the remainder of the information in the records, to which the Applicant will be given access, will have the effect of subjecting the activities of the Public Body to public scrutiny.

V. ORDER

[para 131] I make this Order under section 72 of the Act.

[para 132] I order the Public Body to give access to the opinions and views severed from:

Record 1 – lines 24, 25, and 26
Record 2 – lines 1, 2, 3, 7, 8, 14, and 15
Record 3 – lines 23, 24, 25, and 27
Record 7 – line 38
Record 8 – lines 3, 10, 12, 14, 20, 21, 24, 25,
Record 10 – lines 23, 24, 25, and 27
Record 12 – lines 10, 19, 21, 23, 24, 25, 29, 30
Record 13 – line 9
Record 14 – lines 25 – 29, 31, 35 – 38
Record 17 – lines 24 – 34
Record 19 – lines 15 – 32
Record 20 – lines 1-2, 23 – 26, 28 – 31, 4 – 5, 11 – 36
Record 21 – lines 1 – 31, 8 – 19, 25 – 26
Record 22 – lines 8 – 21
Record 23 – lines 21, 22, 24, 40
Record 24 – lines 2, 4, 11 – 14, 20 – 22, 26
Record 29 – lines, 9, 13, 14, 22, 24, 26, 28, 29
Record 30 – lines 1 - 5

[para 133] I order the Public Body to withhold the remainder of the personal information severed from the records, as documented in tab 10 of its submissions.

[para 134] I order the Public Body to reconsider its decision to withhold the excerpts from the statements of the Crown prosecutor that appear in records 3 – 10 and 29 – 30. The new decision must be communicated to the Applicant and comply with the requirements of section 12 of the FOIP Act.

[para 135] I confirm the decision of the Public Body to withhold records 26 – 28 under section 24(1)(a).

[para 136] I order the Public Body to give access to the Applicant to the remaining information contained in records 1 – 25, and 29 -30.

[para 137]] I order the Public Body to notify me, in writing, within 50 days of receiving a copy of this Order that it has complied with the Order.

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Teresa Cunningham
Adjudicator