ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2008-027

June 9, 2009

EDMONTON POLICE SERVICE

Case File Number F3855

Office URL: www.oipc.ab.ca

Summary: The Applicant requested a copy of the Professionalism Committee Final Report (the Report) from the Edmonton Police Service (the Public Body). The Public Body refused to provide the report on the basis of section 24 of the *Freedom of Information and Protection of Privacy Act* (the Act), but provided details of recommendations from the Report to the Applicant. The Public Body later decided that it would not rely on section 24 to withhold the Report from the Applicant and provided the Report. It relied on section 21(1)(b) (information supplied in confidence by a government) to information in the Report that it argued had been supplied by Alberta Justice and Attorney General (Alberta Justice), the Edmonton Police Commission, the Vancouver Police Department, and the Toronto Police Department. The Public Body also challenged the jurisdiction of the Commissioner to conduct the inquiry.

The Adjudicator determined that she had jurisdiction to conduct the inquiry. She found that section 21(1)(b) did not apply to the information withheld by the Public Body. She found that section 21(1)(b) presumes harm to the relations of the Government of Alberta if information supplied in confidence by an entity listed in section 21(1)(a) is disclosed.

She found that section 21(1)(b) did not apply to the information supplied by Alberta Justice as the Government of Alberta is not an entity listed in section 21(1)(a). She also found that the evidence did not establish that Alberta Justice supplied the information in confidence.

She found that section 21(1)(b) did not apply to information that the Public Body argued was supplied by the Edmonton Police Commission, as she found that the Edmonton Police Commission did not supply the information in confidence.

In relation to the information supplied by the Vancouver and Toronto Police Departments, she found that as extra-provincial municipal governments, or agencies of extra-provincial municipal governments, they were not governments listed in section 21(1)(a) for the purposes of section 21(1)(b). However, she found that it was possible that these police departments were acting as agents of their provinces when they supplied information, as they are created by, and were arguably performing functions under, the applicable provincial police acts. She found that section 21(1)(b) did not apply to the information supplied by these police departments as the evidence did not establish that the information had been supplied in confidence.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 2, 6, 7, 21, 24, 32, 53, 69, 72; *Personal Information Protection Act* S.A. 2003, c. P-6.5 ss. 3, 50; *Interpretation Act* R.S.A. 2000 c. I-8 ss. 10, 12; Police Act R.S.A. 2000 c. P-17; Police Service Regulation 356/1990 s. 7; Municipal Government Act R.S.A. 2000, c. M-26 **CA:** *Access to Information Act* R.S.C. 1985, c. A-1 s. 13; **BC:** *Police Act* R.S.B.C. 1996, c. 367

Authorities Cited: AB: Orders 99-018, F2004-018, F2006-031, F2007-022, F2007-031 **BC:** Orders. 01-36, 02-19

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Cases Cited: *Kellogg Brown and Root v. Alberta (Information and Privacy Commissioner)*, 2007 ABQB 499; *Manyfingers v. Calgary (City) Police Service*, 2006 ABCA 162; *Society Promoting Environmental Conservation v. Canada (Attorney General)* (2003) 228 DLR (4th) 693; *Blencoe v. British Columbia (Human Rights Commission)* [2000] S.C.J. No. 43; *Bridgeland-Riverside Community Association v. City*

of Calgary [1982] A.J. 9692; *R. v. Lohnes* [1992] 1 S.C.R. 167; *Sherman v. M.N.R.*, 2003 FCA 202;

I. BACKGROUND

[para 1] On April 24, 2006, the Public Body received the Applicant's access request. The Applicant requested the Professionalism Committee Final Report (the Report)

[para 2] On October 11, 2006, the Public Body responded to the Applicant's request. The Public Body withheld the report on the basis of section 24(1)(a), (b), (d) and (g) of the Act. On October 16, 2006, the Chair of the Committee who produced the Report wrote to the Applicant and outlined 14 recommendations that had been adopted by the Public Body contained in the Report.

[para 3] On October 23, 2006, the Commissioner received the Applicant's request for review of the Public Body's decision to withhold the Report.

[para 4] On October 24, 2006, the Commissioner advised the parties that he anticipated completing review of the Applicant's request by January 22, 2007; however, he would advise the parties if that date was extended. In the same letter, the Commissioner authorized mediation to assist the parties to resolve the dispute.

[para 5] As mediation was unsuccessful, the matter was set down for a written inquiry. On August 2, 2007, the parties received letters from this office advising them that the Commissioner's jurisdiction for extending the 90-day period for conducting an inquiry had been exercised and the inquiry would be conducted by February 1, 2009.

[para 6] On September 6, 2007, the Public Body wrote the Office of the Information and Privacy Commissioner to advise that it had applied section 21(1)(b) to the record at issue and intended to rely on this provision at the inquiry, in addition to section 24.

[para 7] Both parties provided initial and rebuttal submissions in relation to these issues.

[para 8] On February 12, 2008, as Adjudicator assigned to conduct the written inquiry with the Commissioner's delegated authority, I wrote to the Public Body to advise that I had decided not to accept the affidavits it had provided *in camera*. The Public Body agreed to share the affidavits with the Applicant on February 21, 2008. The Applicant was given until March 25, 2008 to make submissions in relation to the affidavits; however, he did not provide any submissions about the affidavits.

[para 9] On March 18, 2008, the Public Body requested that the jurisdiction of the Commissioner or the Commissioner's delegate to conduct the inquiry be added as an issue. It requested further time to prepare submissions on this issue. The issue was added

to the inquiry, and an amended Notice of Inquiry was sent to the parties on April 10, 2008. The parties were given until April 24, 2008 to make submissions on the jurisdictional issue.

[para 10] The parties provided submissions on the jurisdictional issue on April 24, 2008.

[para 11] I reviewed the submissions and evidence of the parties and determined that I had further questions of the Public Body. I also decided that the Edmonton Police Commission and Alberta Justice were affected parties and gave them the opportunity to make submissions in relation to information that appears in the Report that the Public Body argues was supplied by these parties in confidence. I also decided that the Public Body should be given the opportunity to provide additional evidence to establish that sections 21(1)(b) and 24(1) apply to the records. I advised the parties in my letters of January 19, 2009 and January 29, 2009 of these decisions and provided the Public Body, Alberta Justice and the Edmonton Police Commission until March 31, 2009 to provide evidence and submissions.

[para 12] On March 31, 2009, the Public Body decided that it would no longer rely on section 24(1) to withhold the records at issue. The Public Body decided that it would continue to rely on section 21(1)(b) in relation to portions of records ii, 4, 54 – 57, 59 – 65, 120 – 121, and 125. The Public Body disclosed those records to which it considered section 21(1)(b) did not apply.

[para 13] In its new submissions, the Public Body identified the Vancouver Police Department (VPD) as a potentially affected party. VPD requested the opportunity to participate and I agreed that it could make submissions and provide evidence in relation to the application of section 21(1)(b) to the information it supplied the Public Body.

[para 14] On April 7, 2009, I put the following question to the Public Body and VPD: *Can information supplied by the Vancouver and Toronto police departments be considered information supplied by a government, local government body or an organization listed in clause (a) or its agencies as contemplated by section 21(1)(b)?*

[para 15] Both the Public Body and VPD provided submission in relation to this question.

II. RECORDS AT ISSUE

[para 16] Records ii, 4, 54 – 57, 59 – 65, 120 – 121, and 125 of the Report are at issue.

III. ISSUES

Preliminary Issue: Did the Commissioner or his delegate lose jurisdiction on the basis of alleged non-compliance with section 69(6) of the *Freedom of Information and Protection of Privacy Act*?

Issue A: Did the Public Body properly apply section 21(1)(b) of the Act (intergovernmental relations) to the records and information?

[para 17] In his submissions, the Applicant argued that the Public Body should have disclosed the record at issue under section 32 of the Act. In turn, the Public Body counters that this issue was raised for the first time in the Applicant's submissions and is not properly before me. I will address these arguments under the following issue:

Issue B: Did the head of the Public Body meet the duty under section 32 of the Act to disclose information clearly in the public interest?

IV. DISCUSSION OF ISSUES

Preliminary Issue: Did the Commissioner or his delegate lose jurisdiction on the basis of alleged non-compliance with section 69(6) of the *Freedom of Information and Protection of Privacy Act*?

[para 18] The interpretation of the legislation in this Order as it relates to the issue of jurisdiction is consistent with that in a number of other Orders that are being issued at approximately the same time as this one, all of which decide challenges to the Commissioner's jurisdiction based on an alleged failure to comply with section 69(6) of the Act. In each case, the Commissioner or Adjudicator is responding to the same or very similar arguments that challenge jurisdiction. I will, for convenience, refer to some of the reasoning in Order F2006-031, as it is the first of these orders. Although Order F2006-031 precedes the present one in terms of its release date, I have decided that it is unnecessary to provide F2006-031 to the parties for comment, because both Order F2006-031 and this Order respond to the same legal arguments.

[para 19] Section 69 establishes the Commissioner's authority to conduct an inquiry and the process to be followed during an inquiry. It states:

> *69(1) Unless section 70 applies, if a matter is not settled under section 68, the Commissioner must conduct an inquiry and may decide all questions of fact and law arising in the course of the inquiry.*
>
> *(2) An inquiry under subsection (1) may be conducted in private.*
>
> *(3) The person who asked for the review, the head of the public body concerned and any other person given a copy of the request for the review must be given an opportunity to make representations to the Commissioner during the inquiry, but no one is entitled to be present during, to have access to or to comment on representations made to the Commissioner by another person.*

(4) The Commissioner may decide whether the representations are to be made orally or in writing.

(5) The person who asked for the review, the head of the public body concerned and any other person given a copy of the request for the review may be represented at the inquiry by counsel or an agent.

(6) An inquiry under this section must be completed within 90 days after receiving the request for the review unless the Commissioner

(a) notifies the person who asked for the review, the head of the public body concerned and any other person given a copy of the request for the review that the Commissioner is extending that period, and
(b) provides an anticipated date for the completion of the review.

[para 20] The Public Body argues that the Commissioner or his delegate has lost jurisdiction to conduct this inquiry. It takes the view that inquiries must be completed within 90 days after receiving a request for review unless the Commissioner extends the 90-day period within that time frame. Further, it contends that the Commissioner did not extend the 90-day period for completing the inquiry within the 90-day period. The Public Body relies on *Kellogg Brown and Root v. Alberta (Information and Privacy Commissioner)*, 2007 ABQB 499 as authority for the position that the Commissioner has lost jurisdiction.

[para 21] The Public Body also brought to my attention a number of cases, in addition to *Kellogg Brown and Root,* in which courts have found provisions to be mandatory or directory.

[para 22] The Applicant argues that failure to meet the time limit in section 69(6) is at most a technical delay, as there is nothing in the Act to prevent the Applicant from making another request for the information. He argues that failing to conduct the inquiry would bring the process into disrepute. He relies on *Manyfingers v. Calgary (City) Police Service*, 2006 ABCA 162.

[para 23] An important distinction between *Kellogg Brown and Root* and the present case, other than that *Kellogg Brown and Root* is a decision interpreting section 50(5) of the *Personal Information Protection Act*, rather than section 69(6) of the FOIP Act, is that the Commissioner did not formally extend the time to complete the inquiry in that case. In the present case, the Commissioner formally provided notice to the parties that he was extending the time to complete the inquiry and provided an anticipated date of completion for the inquiry. The issue for me to decide, therefore, is whether the Commissioner complied with section 69(6) when he extended the 90-day period.

[para 24] In *Manyfingers v. Calgary (City) Police Service*, 2006 ABCA 162, on which the Applicant relies, the Court of Appeal considered whether the Calgary Police Commission could extend the time limit for laying charges after the statutory time limit had expired. Section 7(4) of the Police Service Regulation is silent as to whether a commission is required to extend the time limit before or after the expiry of the time limit in section 7(1).

[para 25] Section 7 of the Police Service Regulation states, in part:

> *7(1) A police officer shall not be charged with contravening section 5 at any time after 6 months from the day that a complaint is made in accordance with section 43 of the Act…*
>
> *(4) Notwithstanding that time limits are prescribed under this section, the commission may, if it is of the opinion that circumstances warrant it, extend any one or more of those time limits.*

[para 26] The Court of Appeal found that an overly technical approach to limitation periods did not accord with section 10 of the *Interpretation Act* RSA 2000 c. I-8, which states:

> *10 An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.*

[para 27] Côté J.A. noted:

> The question is whether the power in the Regulations to extend the time to lay charges can be exercised after the time has expired. The appellant submits that it cannot. The Regulation is silent on the question, saying nothing about the time of such an application or decision.
>
> The appellant urges upon us the decision of the British Columbia Court of Appeal in *Cameron v. Law Society of British Columbia* (1991) 3 B.C.A.C. 35, 81 D.L.R. (4th) 484. We have two problems with it. The first is that the facts there were much more complex, and therefore we have some trouble extracting from it the propositions suggested by the appellant here. The one possibly applicable general proposition in it which we can find is its suggestion that strict, even technical construction, be given to penal statutes, citing an older English textbook. We do not believe that that is the proper approach to statutory interpretation in Canada today, particularly when the topic is a police discipline proceeding. It is also very hard to reconcile that technical approach with s. 10 of the Alberta *Interpretation Act*, especially its first eight words and its last eight words.

[para 28] The Court of Appeal found that interpreting section 7(4) as preventing a commission from extending the time limit in section 7(1) after the six-month period had expired would bring the police discipline process into disrepute. I adopt the reasoning of the Court of Appeal in *Manyfingers* to the extent that it found it appropriate to consider section 10 of the *Interpretation Act* and to adopt a purposive approach when interpreting a statutory provision that enables an administrative body to extend a limitation period.

[para 29] Section 69(6) states that an inquiry must be completed within 90 days of receiving the request for review unless the Commissioner extends the 90-day period with

notice to the parties and provides an anticipated date for completion of the review. As the Commissioner notes in Order F2006-031, the provision does not explain what form notice of the extension of the 90-day period is to take, or, more importantly, *when* the Commissioner is to extend the 90-day period. The placement of the phrase "within 90 days" in the provision indicates that it refers to the completion of the inquiry, and not to the Commissioner's power to extend the 90-day period in subsections 69(6)(a) and (b). I find that there is no express requirement in the legislation for the Commissioner to extend the 90-day period within 90 days of receiving an applicant's request for review. I therefore find that it was open to the Commissioner to extend the time for completing the review and to provide an anticipated date of completion on August 2, 2007.

[para 30] Applying the reasoning of *Manyfingers*, any ambiguity in relation to when the Commissioner may extend the time to complete the inquiry under section 69(6) should be resolved in a way as to ensure the attainment of the objects of the Act, as required by section 10 of the *Interpretation Act*. The objects of the Act are set out in section 2, which states, in part:

> *2 The purposes of this Act are…*
>
> *(e) to provide for independent reviews of decisions made by public bodies under this Act and the resolution of complaints under this Act.*

As a purpose of the Act is to provide for independent reviews of decisions made by public bodies under this Act, an interpretation of section 69(6) that ensures that this object is attained is to be preferred over one that does not. Section 69(6) is silent as to when the Commissioner must extend the 90-day period and reading into the provision a requirement to extend the 90-day time period within 90 days would have the effect of defeating a purpose of the legislature in enacting the Act.

[para 31] In addition, provisions cannot be read in isolation, but in the context of an enactment as a whole. As the Commissioner noted in Order F2006-031, reading a requirement into section 69(6) that the 90-day period must be extended within 90 days would render the Commissioner's duty to conduct an inquiry in section 69(1) nugatory. Section 69(1) states:

> *69(1) Unless section 70 applies, if a matter is not settled under section 68, the Commissioner <u>must</u> conduct an inquiry and may decide all questions of fact and law arising in the course of the inquiry. (Emphasis mine)*

[para 32] The Commissioner said in paragraph 120 of Order 2006-031:

> If the effect of section 69(6) is to deprive me of jurisdiction if I do not complete an inquiry within 90 days and do not extend the time, I can avoid my duty by failing to do those things. A duty to conduct an inquiry becomes potentially meaningless if it can be defeated by the decision maker simply failing to conduct the inquiry or failing to extend the time. This leads to the conclusion that

> my duty to conduct an inquiry under the FOIP Act remains, whether or not the time limit in section 69(6) has been exceeded.

Interpreting section 69(6) as empowering the Commissioner to extend the 90-day period after the expiry of the 90-day period avoids conflict with section 69(1) and is supported by the wording of the provision.

[para 33] The Commissioner extended the time limit for completing the inquiry on August 2, 2007 and I find that the Act authorized the Commissioner to do so. Consequently, I have jurisdiction to conduct this inquiry.

[para 34] Further, the parties were advised on October 24, 2006 that the Commissioner anticipated that the inquiry would be completed on January 22, 2007, which is 91 days after October 23, 2006, the date the request for review was received. I note that in *Kellogg Brown and Root*, Belzil J. said:

> The wording of s. 50(5) clearly signifies that the section was designed to give the Commissioner maximum flexibility and has a built-in saving provision in that if the inquiry cannot be completed within 90 days, the Commissioner merely has to give notice of an anticipated completion date. Not only does the Commissioner control the timing, there is no need to set a definite response time but only an anticipated response time, which provides even more flexibility.

The Commissioner provided an anticipated date of completion within 90 days of receiving the request for review. Consequently, I find that the Commissioner complied with the requirement set out by the Court in *Kellogg Brown and Root*.

[para 35] I have found that the requirements of section 69(6) have been met. However, if I am wrong on my factual finding that the requirements of section 69(6) have been met in this case, or if section 69(6) imposes a duty on the Commissioner that has not been met, then I adopt the reasoning of the Commissioner in Order F2006-031.

[para 36] In that order, the Commissioner decided that if section 69(6) imposes a duty on the Commissioner that has not been met, that section 69(6) is directory rather than mandatory for the following reasons:

> The Legislature has entrusted me with the authority to protect those who deal with public bodies by ensuring that public bodies comply with the FOIP Act. There is a public interest at stake, as demonstrated by the stated objective of section 2(b) and the other objectives set out in section 2 of the FOIP Act. A decision that renders me without jurisdiction as a result of a breach of a technical timing requirement frustrates much of the intended purpose of the FOIP Act. It is difficult to imagine how the Legislature could have intended such a result. In my view, it would be contrary to the public interest to allow the purpose in section 2(b) and the other purposes in section 2 to be defeated by finding that section 69(6) is mandatory and that I lose jurisdiction if I do not comply with it.
>
> Furthermore, although the Supreme Court of Canada in *Dagg* has not yet elevated the protection of privacy to constitutional status, the Supreme Court of Canada has recognized that it is worthy of constitutional protection (see above). In my view, it would be contrary to the public interest on this ground as well to allow the protection of privacy to be defeated by a finding that section 69(6) is mandatory.

[para 37] In the case before me, sections 2(a) and (e) of the Act are relevant. These provisions state:

> *2 The purposes of this Act are*
>
> *(a) to allow any person a right of access to the records in the custody or under the control of a public body subject to limited and specific exceptions as set out in this Act…*
>
> *(e) to provide for independent reviews of decisions made by public bodies under this Act and the resolution of complaints under this Act.*

Two purposes in enacting the legislation are to grant a right of access to information and to provide independent reviews of decisions in relation to the right of access. These purposes, in addition to the Commissioner's authority under 53, suggest that the legislature did not intend the Commissioner to lose jurisdiction as a consequence of non-compliance with any requirement to extend the time limit within 90 days of receiving the request for review. Further, given that section 69(1) of the Act creates a duty for the Commissioner to conduct an inquiry, I do not find that any delay in extending the time limit under section 69(6) is sufficient to relieve the Commissioner of his statutory duty under section 69(1). Consequently, I find that the legislature intended section 69(6) to be directory.

[para 38] In *Kellogg Brown and Root*, Belzil J. decided that all the circumstances must be considered, including the particular circumstances of the case in determining whether jurisdiction is lost. In applying this approach, the Commissioner considered *Society Promoting Environmental Conservation v. Canada (Attorney General)* (2003) 228 DLR (4th) 693 in paragraphs 148 and 149 of Order F2006-031:

> The court ... set out a non-exhaustive list of factors to be considered in determining whether non-compliance with an obligatory provision invalidates administrative action. Among these, the following factors are relevant in the present case:
>
> > ii) The seriousness of the breach of the statutory duty: a technical violation is an indicator that the court should not intervene, while a public authority that flouts the statutory requirement can expect judicial intervention.
> >
> > iv) …, the more serious the public inconvenience and injustice likely to be caused by invalidating the resulting administrative action, including the frustration of the purposes of the legislation, public expense and hardship to third parties, the less likely it is that a court will conclude that legislative intent is best implemented by a declaration of invalidity.
>
> In view of these developments in the law, if I am wrong in my conclusions that the requirements of section 69(6) of the FOIP Act were met in this case and that section 69(6) is directory rather than mandatory, I have no hesitation in applying the part of the reasoning in *Kellogg* that the circumstances of the particular case come into play in deciding whether jurisdiction would be lost by reason of a breach of section 69(6). I will, accordingly, analyze the case-specific circumstances,

> to decide whether the Legislature intended that jurisdiction should be lost by non-compliance in this case.

[para 39] In the present case, I find that if there has been a breach of statutory duty, it is technical in nature. The Applicant's request for review was received by this Office on October 23, 2006. As noted above, on October 24, 2006, the Commissioner advised the parties that he anticipated completing review of the Applicant's request by Monday, January 22, 2007, which is 91 days after October 23, 2006. In the same letter, the Commissioner also advised the parties that he would formally extend the date for conducting the inquiry at a later date if it were necessary.

[para 40] The Commissioner formally extended the time for completing the inquiry on August 2, 2007 and notified the parties that the anticipated date of completion was February 1, 2009. On September 6, 2007, the Public Body requested that the issue of whether section 21 applied to the records and information be added to the inquiry. The Notice of Inquiry was sent to the parties with the additional issue on November 6, 2007. Arguments and evidence were exchanged by the parties following this notice. On March 18, 2008, the Public Body added the additional issue of whether the Commissioner has lost jurisdiction to conduct this inquiry.

[para 41] The parties were advised in advance by the letter of October 24, 2006 that the inquiry would take longer than 90 days to complete and that the Commissioner would extend the time for conducting the inquiry if necessary. As the inquiry was not completed by January 22, 2007, the parties had notice that the Commissioner intended to extend the time. Given that the parties were apprised that the inquiry would take longer than 90 days, and given that they had notice that the Commissioner intended to extend the time limit if necessary, I do not find that the fact that the Commissioner extended the time on August 2, 2007, rather than on January 21, 2007 (the ninetieth day following receipt of the request for review) anything more than a technical breach.

[para 42] The Public Body provided the affidavit of an employee in support of its jurisdictional argument. The author of the affidavit presents the opinion that it is important for the Commissioner to extend the time for completing an inquiry within the 90 day period so that the Public Body will be better able to allocate its resources. He explains that the potential detriment to the Public Body resulting from failure to receive notice of the extension within 90 days is uncertainty as to whether the inquiry will proceed, uncertainty in relation to the timing of written submissions, uncertainty as to whether the Public Body has correctly interpreted the Act, stress and uncertainty for members, and delay of parallel proceedings. The Public Body also submitted the following:

> Whether or not there are any alternative remedies available is not a proper factor to consider, since an examination of this factor is not helpful in clarifying legislative intent. Moreover, a consideration of this factor may lead to a situation where a legislative provision is found to be mandatory in one case, and directory in another. The legislature surely could not have intended such an absurd result.

> Although EPS submits that this is not a proper factor to consider, in the present case, there is an alternative remedy available to the Applicant. In particular, if the Commissioner determines that the Commissioner has lost jurisdiction to proceed with the inquiry in this case, there is nothing precluding the Applicant from submitting another request for access the Report in question.

[para 43] In turn, the Applicant argues that a loss of the Commissioner's jurisdiction would result in increased delay, as the Applicant would be required to make his access request again, submit a new request for review, and cause all parties and the Commissioner to recommence the inquiry process.

[para 44] The Public Body appears to argue that I am bound by the result of *Kellogg Brown and Root*, but not by the application of legal principles in that case. I disagree with that approach to applying precedent. Rather, when applying precedent, it is important to consider the legal reasoning of the decision maker and the application of that reasoning to the issues and facts in the new case.

[para 45] In paragraphs 76 – 78 of *Kellogg Brown and Root*, Belzil J. said:

> It is also necessary to inquire as to whether alternative remedies are available to the complainant and affected organizations if the provision is interpreted to be mandatory.
>
> While the complainant would lose his right under *PIPA* to have an inquiry proceed, it must not be overlooked that the complainant originally raised this issue as a human rights complaint, which can still be pursued. Moreover, as a union member, this matter could be pursued through grievance proceedings.
>
> In contrast, KBR and Syncrude have no alternative remedies if the Commissioner's arguments are accepted in that on his interpretation of s. 50(5), they must simply wait, not knowing if they are in jeopardy and should be altering policies and procedures or creating them to avoid that jeopardy.

[para 46] Belzil J. found it necessary to consider whether there were alternative remedies available if he were to interpret section 50(5) of PIPA as mandatory. He determined that as the complainant in that case was entitled to have his complaint heard by a human rights tribunal, or alternatively, to have a grievance on the same issue decided by an arbitrator, this was a factor weighing in favor of a finding that the provision was mandatory. In addition, he found that the organizations in that case did not have an alternative remedy, as they would have to continue to wait, not knowing whether their drug testing practices put them in jeopardy. He considered that this factor also weighed in favor of finding the provision mandatory.

[para 47] I do not consider reinitiating an access request to be an "alternative remedy." Rather, it is the same remedy. In addition, review of the Public Body's decision by this Office is the only remedy contemplated by the Act and is the only remedy available to the Applicant in this case. The Applicant has made a request for access to information under section 7 of the Act. There is no other means available to the Applicant to obtain the records he seeks. In contrast, the Court in *Kellogg Brown and Root* found that the complainant in that case had the opportunity to have the same complaint addressed under human rights legislation and through the grievance process.

[para 48] The fact that the same process remains available in the event of loss of jurisdiction speaks to the difficulty in adopting the Public Body's narrow interpretation of section 69(6). Little would be gained by requiring the parties to duplicate their initial requests and decisions and go to further labour and expense through repetition of the access request and inquiry processes.

[para 49] The Court in *Kellogg Brown and Root* found that the delay suffered by the organizations in that case had put those organizations in jeopardy. Jeopardy, in law, is the risk of being convicted or punished in some way. An order of the Commissioner under the FOIP Act is not punitive in nature. While delay under the Act may prolong uncertainty as to whether a Public Body has made the right decision to withhold information when responding to an access request, this uncertainty does not amount to jeopardy in the legal sense. In the non-legal sense, jeopardy means "danger of harm or loss". I am equally unable to conclude that a period of uncertainty as to whether the Commissioner will uphold or overturn a decision made by the head of a Public Body amounts to harm or loss.

[para 50] Applying the reasoning in *Kellogg Brown and Root*, I find that the Applicant lacks an alternative remedy to obtain the records he seeks, while any uncertainty experienced by the Public Body does not amount to jeopardy, whether in the legal or non-legal sense of the word.

[para 51] While the Public Body challenges this office's jurisdiction on the basis that the Commissioner did not extend the time to complete the inquiry within 90 days of receiving the request for review, the affidavit evidence it supplied in support of its position indicates that the delay in proceedings, rather than a failure to extend the 90 day period within 90 days, is the basis of its jurisdictional challenge. I note that in *Blencoe v. British Columbia (Human Rights Commission)* [2000] S.C.J. No. 43, the Supreme Court of Canada considered the situations in which administrative delay could prejudice a party to the extent that the principles of procedural fairness necessitated loss of jurisdiction. The Court said at paragraph 133:

> There must be more than merely a lengthy delay for an abuse of process; the delay must have caused actual prejudice of such magnitude that the public's sense of decency and fairness is affected.

I find that the uncertainty referred to by the Public Body does not amount to actual prejudice, nor do I find that even if this amounted to prejudice, that the public's sense of decency and fairness would be affected by it. While some of the delay in this inquiry is attributable to this office's processes, the remainder of the delay is attributable to the Public Body's raising and withdrawal of issues and my own decision to give the Public Body an additional opportunity to provide evidence in support of its case and to identify third parties and provide them the opportunity to make submissions. None of the delay in this inquiry is attributable to the Applicant. Consequently, I find that the public sense of decency and fairness would more likely to be offended by removing the Applicant's right to request review, than it would by continuing the inquiry.

[para 52] In Order F2007-031, the Commissioner considered the Alberta Court of Appeal decision in *Bridgeland-Riverside Community Association v. City of Calgary* [1982] A.J. 9692 and noted:

> I note that the 'evolved' analysis finds strong support in a decision of the Alberta Court of Appeal, *Bridgeland-Riverside Community Association v. City of Calgary* [1982] A.J. No. 9692, and subsequent decisions following that decision. In Bridgeland, the Court said, at paras 27 and 28:
>
>> In my view, no concept is more sterile than that which says that a proceeding is a nullity for failure of compliance with a procedural rule and without regard to the effect of the failure…
>>
>> I would put aside the debate over void or voidable, irregularity or nullity, mandatory or directory, preliminary or collateral. These are only ways to express the question shall or shall not a procedural defect (whether mandated by statute or common law) vitiate a proceeding. In my view, absent an express statutory statement of effect, no defect should vitiate a proceeding unless, as a result of it, some real possibility of prejudice to the attacking party is shown, or unless the procedure was so dramatically devoid of the appearance of fairness that the administration of justice is brought into disrepute.

[para 53] I agree with the reasoning of the Commissioner and agree that *Bridgeland-Riverside Community Association v. City of Calgary* [1982] A.J. No. 9692 is on point. Applying the reasoning in *Bridgeland,* I find that section 69(6) does not prescribe loss of jurisdiction in the event that the Commissioner does not extend the time for completing the inquiry within 90 days. In addition, as noted above, I do not find that the Public Body has established that it suffered a real possibility of prejudice. Finally, I do not find that extending the time to complete the inquiry outside the 90-day period can be said to be so dramatically devoid of the appearance of fairness that the administration of justice would be brought into disrepute.

[para 54] In the present circumstances, the parties have provided submissions and evidence to advance their cases. They have raised new issues and presented arguments in relation to them. The parties have participated at the inquiry, which is the only process set out in the Act for reviewing the decision of the head of a public body. If the Commissioner were to lose jurisdiction for failing to extend the time for completing the inquiry within the 90-day period, the resources the parties expended in preparing their cases would be wasted and the parties would be required to restart the process. A finding that there is a mandatory requirement to extend the 90-day period within the 90-day period would result in a dramatic increase in the time and resources expended by the Applicant, the Public Body, and this Office. Consequently, if section 69(6) imposes a duty on the Commissioner to extend the 90-day period within the 90-day period, I find that the Legislature would not have intended a loss of jurisdiction to result from any failure to meet this requirement.

[para 55] For all these reasons, I conclude that the Legislature did not intend non-compliance with any requirement in section 69(6) to result in loss of jurisdiction in these circumstances.

Issue A: Did the Public Body properly apply section 21(1)(b) of the Act (intergovernmental relations) to the records and information?

[para 56] The Public Body withholds a portions of records ii, 4, 54 – 57, 59 – 65, 120 – 121, and 125 under section 21(1)(b).

[para 57] Section 21 states:

> *21(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*
>
> *(a) harm relations between the Government of Alberta or its agencies and any of the following or their agencies:*
>
> *(i) the Government of Canada or a province or territory of Canada,*
> *(ii) a local government body,*
> *(iii) an aboriginal organization that exercises government functions, including*
>
> *(A) the council of a band as defined in the Indian Act (Canada), and*
> *(B) an organization established to negotiate or implement, on behalf of aboriginal people, a treaty or land claim agreement with the Government of Canada,*
>
> *(iv) the government of a foreign state, or*
> *(v) an international organization of states, or*
>
> *(b) reveal information supplied, explicitly or implicitly, in confidence by a government, local government body or an organization listed in clause (a) or its agencies.*
>
> *(2) The head of a public body may disclose information referred to in subsection (1)(a) only with the consent of the Minister in consultation with the Executive Council.*
>
> *(3) The head of a public body may disclose information referred to in subsection (1)(b) only with the consent of the government, local government body or organization that supplies the information, or its agency.*
>
> *(4) This section does not apply to information that has been in existence in a record for 15 years or more.*

[para 58] The purpose of clause (a) is clearly to protect information that could be reasonably expected to harm relations between the Government of Alberta and other

governments. However, the purpose of clause (b) is less clear, as the provision does not expressly state to whom information must be supplied before it applies, does not refer to harm to relations between governments, and, as the Public Body notes, the provision does not expressly state that it applies to relations between governments at all.

[para 59] In Order F2004-018, the Commissioner stated that four criteria must be met before section 21(1)(b) applies:

> There are four criteria under section 21(1)(b) (see Order 2001-037):
> a) the information must be supplied by a government, local government body or an organization listed in clause (a) or its agencies;
> b) the information must be supplied explicitly or implicitly in confidence;
> c) the disclosure of the information must reasonably be expected to reveal the information; and
> d) the information must have been in existence in a record for less than 15 years.

This test does not address whether the supplier of the information can be the Government of Alberta, or to whom the information is to be supplied; clause (b) on its own is ambiguous in this regard. The text of clause (b) does not conclusively indicate whether the supplier of the information is to be one of the entities listed in subclauses (i) to (v), or whether it can also be the Government of Alberta, which is named in clause (a). As a result, the following questions arise: What does clause (b) protect? Does this provision protect only intergovernmental or also intragovernmental information exchanges? Who must receive the information and who must supply it before clause (b) applies?

[para 60] As these questions have not yet been considered in an order of this office, I asked the parties to provide submissions as to the purpose and application of section 21(1)(b). The Applicant, the Public Body, the Edmonton Police Commission and the Vancouver Police Department provided submissions in relation to these questions.

[para 61] For the reasons set out below, I find that the purpose of section 21 is to enable public bodies to withhold information harmful to the intergovernmental relations of the Government of Alberta with other governments and that clause (b) also serves this purpose. In my view, clause (b) presumes harm to the intergovernmental relations of the Government of Alberta if information supplied in confidence by an entity listed in clause (a) to a public body representing the Government of Alberta, is disclosed. I also find that the Government of Alberta, or an entity representing the Government of Alberta, cannot supply information for the purposes of clause (b) because it is not an entity listed in clause (a). In determining the purpose of section 21, I have considered standard drafting conventions, the heading, and the language and context of the provision.

[para 62] All access to information legislation in Canada contains provisions protecting information supplied by or received from other governments in confidence. The *Report of the Commission on Freedom of Information and Individual Privacy* (The Williams Commission Report) recommends on page 306 that such an exception should be introduced into Ontario's legislation to protect provincial government relations:

> Nonetheless, instances may arise in which information is supplied by another government on the understanding that it not be disclosed to the public by *representatives of the government of*

> *Ontario*. It is our view that an Ontario freedom of information law should expressly exempt from access material or information obtained on this basis from another government. Failure to do so might result in the unwillingness of other governments to supply information *that would be of assistance to the government of Ontario in the conduct of public affairs*. [emphasis mine]

This passage suggests that exceptions for information supplied in confidence by other governments are created in freedom of information legislation to ensure that the persons acting on behalf of provinces may receive information of assistance in the conduct of public affairs.

Sections in enactments should express related ideas

[para 63] Guideline 22 of the Drafting Conventions of the Uniform Law Conference of Canada states that "a section should deal with a single idea or with a group of closely related ideas". (See Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes* (Markham: Butterworths 2002) p. 619) If clause (b) were to apply to the relations of an entity other than the Government of Alberta with entities listed in clause (a), then clause (b) would be expressing an idea that is different and unrelated to that expressed in clause (a). In addition, this clause would be much broader in application than clause (a), and would arguably be outside the jurisdiction of the legislature to enact, given that the Act is provincial in scope.

[para 64] In *Sherman v. M.N.R.*, 2003 FCA 202, the Federal Court of Appeal interpreted section 13(1)(a), a provision in the *Access to Information Act* R.S.C. 1985, c. A-1, equivalent to section 21(1)(b) of the FOIP Act, as presuming harm. The Court said:

> However, if the Judge meant also to cover statistics generated by the Canadian government from the confidential information it received from the IRS, then I believe the conclusion is too encompassing and, in order to be sustained, requires a liberal interpretation of the mandatory exemption in paragraph 13(1)(*a*). Yet, as previously mentioned, exemptions, especially mandatory class exemptions like this one, which presume disclosure of the information to have a detrimental effect, are to be specific and narrowly construed and interpreted… [emphasis mine}

If clause (b) is a mandatory class exemption presuming that harm will result from disclosure of information, then the context of this provision suggests that the harm that is presumed is harm to governmental relations. Further, as noted by the Federal Court of Appeal in *Sherman*, such a provision requires a narrow construction, given that it is an exception to the right of access created by the Act. The proximity of clause (b) to clause (a), and the interrelationship of clauses (a) and (b), would suggest that clause (b) is intended to protect the same relations protected by section clause (a): relations between the Government of Alberta and the entities listed in subclauses (i) – (v) of clause (a)

[para 65] If clause (b) presumes harm to the relations of the Government of Alberta with the governments, local government bodies and organizations listed in clause (a), then section 21 addresses a single idea, or certainly closely related ideas, and conforms to standard drafting conventions. As Ruth Sullivan notes on page 155:

> The courts also presume that the legislature is a skillful crafter of legislative schemes and provisions and that legislation has been drafted in accordance with standard drafting conventions.

Given that legislatures are presumed to follow drafting conventions, it is reasonable to assume that section 21 conforms to standard drafting conventions and addresses one idea or closely related ideas. As a result, I find it likely that clause (b) operates to presume the harm contemplated by clause (a) when information supplied in confidence is disclosed.

Headings as evidence of legislative intent

[para 66] Section 12(2)(c) of the *Interpretation Act* states that headings do not form part of the provision; however, jurisprudence establishes that headings can be evidence of legislative intent when a provision is ambiguous, despite provincial interpretation acts.

[para 67] Pierre-André Côté notes the following on page 63 of his work*, The Interpretation of Legislation in Canada*:

> It is accepted today that headings and subheadings are part of a statute and thus relevant to its construction. Headings may help to situate a provision within the general structure of the statute: they indicate its framework, its anatomy. Headings may also be considered as preambles to the provisions they introduce. The heading is a key to the interpretation of the sections ranged under it.
>
> How much weight should headings be accorded? Some authorities maintain that headings may be looked at only where there is ambiguity in the enacting words. If these cases are meant to suggest that headings may be ignored, such a method of statutory interpretation is no longer followed. Because they are part of the statute, they must be taken into consideration as part of the context, even where the enactment itself is clear.

[para 68] Similarly, Ruth Sullivan notes on pages 305 – 6 of *Sullivan and Driedger on the Construction of Statutes* that courts do rely on the headings to resolve ambiguity in some circumstances. She states:

> … To any person reading legislation, headings appear to be as much a part of the enactment as any other component. There is no apparent reason why they should be assigned an inferior status.
>
> The judicial response to headings is varied. Some courts, in deference to the applicable Interpretation Act, refuse to rely on headings as a tool of interpretation. Others resort to a heading only if the language of the provision is ambiguous. The following passage from the judgment of Kellock J. in *Canada (A.G.) v. Jackson* is often quoted:
>
>> Where the language of a section is ambiguous, the title and the headings of the statute in which it is found may be resorted to to restrain or extend its meaning as best suits the intention of the statute, but neither the title nor the headings may be used to control the meaning of enacting words in themselves clear and unambiguous.
>
> The view favoured in recent judgments from the Supreme Court of Canada is that for purposes of interpretation headings should be considered part of the legislation and should be read and relied on like any other contextual feature. In *Law Society of Upper Canada v. Skapinker (Joel)*, speaking of headings in the Charter, Estey J. wrote:

> The Charter, from its first introduction into the constitutional process, included many headings including the heading now in question… It is clear that these headings were systematically and deliberatively included as an integral part of the Charter for whatever purpose. At the very minimum, the Court must take them into consideration when engaged in the process of discerning the meaning and application of the provisions of the Charter.

This approach to headings in the Charter has been applied to ordinary federal legislation and, despite the *Interpretation Acts*, to provincial legislation as well. These cases make it clear that headings are a valid indicator of legislative meaning and should be taken into account in interpretation...

The chief use of headings, however, is to cast light on the meaning or scope of the provisions to which they relate…

[para 69] In *R. v. Lohnes* [1992] 1 S.C.R. 167 the Supreme Court of Canada found that the heading was evidence of the intent of the legislature in enacting the provision. McLachlin J. said:

> Third, interpretative aids suggest that s. 175(1)(a) is directed at publicly exhibited disorder. As noted in *Skoke-Graham*, supra, headings and preambles may be used as intrinsic aids in interpreting ambiguous statutes. Section 175(1)(a) appears under the section "Disorderly Conduct". Without elevating headings to determinative status, the heading under which s. 175(1)(a) appears supports the view that Parliament had in mind, not the emotional upset or annoyance of individuals, but disorder and agitation which interfere with the ordinary use of a place.

[para 70] The fact that the heading of section 21 is "Disclosure harmful to intergovernmental relations," is evidence that the legislature intended the entire provision to address harm to *inter*governmental relations arising from disclosure of information, and not harm to *intra*governmental relations.

[para 71] If one considers the heading to be evidence of legislative intent, and considers that the legislature is presumed to follow standard drafting conventions, then it would appear that the purpose of section 21(1)(b) is similar to that of section 21(1)(a): it protects information harmful to the intergovernmental relations of the Government of Alberta from disclosure.

Is the Government of Alberta listed in clause (a)?

[para 72] Clause (a) creates a dichotomy between the Government of Alberta and the entities listed in subclauses (i) – (v). This provision does not protect information harmful to the relations of a local government body with a foreign government, but protects only the Government of Alberta's relations with either of these entities. Clause (a) is clearly unconcerned with the relations of the entities in subclauses (i) – (v) with one another; only with the Government of Alberta's relations with them. Consequently, if clause (b) presumes harm to government relations, it is logical to assume that it presumes harm to the Government of Alberta's relations, and not to the relations of a foreign government or a local government body.

[para 73] I interpret the phrase *listed in clause (a) or its agencies* as modifying not only "an organization" but also the phrase "a government, local government body" in clause (b) as well. Otherwise, governmental relations with agencies of governments and local government bodies that are protected by clause (a) would be excluded from clause (b), without any obvious policy reason for this exclusion. It would be an absurd result for clause (a) to protect the relations between the Government of Alberta and an agency of the federal government, for example, and clause (b) fail to protect that same relationship from harm. In my view, the better reading is to consider the phrase "listed in clause (a) or its agencies" as applying to "government, local government body, or organization". Consequently, I find that a government not listed in clause (a), unless acting as a representative of an entity listed in clause (a), cannot supply information for the purposes of clause (b).

[para 74] I consider the legislature's intention in using the word "*listed*" in clause (a)," as opposed to a more general word such as "referred to" or "mentioned" in clause (a)," is to imply that a specific list in clause (a) is being referred to. "Listed" is a more precise word than "mentioned" or "referred to" - a list is "a number of connected items written or printed, usually consecutively, to form a record", (*Canadian Oxford Dictionary*) or "a series (of names, words, numbers, etc.) set forth in order" (*Webster's*). Clause (a) contains a list: the items in subclauses (i) to (v) are "connected" in the sense that each of them has the same relation to the opening words in the clause. The Government of Alberta is not included in the list, but is part of the opening words preceding the list to which every item in the list bears the same relation.

[para 75] Subclauses (i) – (v) create an exhaustive list of entities belonging to a single, identifiable class: those entities with whom the Government of Alberta's' relations are to be protected from harm. Consequently, the Government of Alberta is, by implication, not included in subclause (i), and, as it is not listed in clause (a), cannot be the supplier of confidential information in clause (b). I find that the Government of Alberta is not an entity listed in clause (a) for the purposes of clause (b). Even though Alberta is a province of Canada, context indicates that it is not included in subclause (i). As noted above, clause (a) creates a dichotomy between the Government of Alberta and the entities listed in subclauses (i) – (v). The provinces referred to in subclause (i) are those with which the Government of Alberta has governmental relations.

[para 76] Section 21 addresses harm to the intergovernmental relations of the Government of Alberta. It therefore follows that the information supplied in clause (b) must be supplied *to* a public body representing the Government of Alberta, before this provision applies. If information is supplied to any entity other than a representative of the Government of Alberta, it would be illogical to presume that harm would result to the intergovernmental relations of the Government of Alberta from disclosure of that information. Similarly, it would be absurd to presume that harm would result to the intergovernmental relations of the Government of Alberta through the disclosure of information it supplies to itself.

[para 77] I will now consider the information withheld by the Public Body under section 21(1)(b).

Information supplied by Crown prosecutors

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

[para 78] For the reasons set out above, I find that the Government of Alberta is not a government listed in clause (a) for the purposes of section 21(1)(b). As a result, information supplied by Alberta Justice as an agency of the Government of Alberta is not subject to section 21(1)(b).

Was the information supplied in confidence?

[para 79] In Order No. 01-36, the Privacy Commissioner of British Columbia considered the following factors in determining whether a third party had supplied information to a public body in confidence:

> To establish confidentiality of supply, a party must show that information was supplied under an objectively reasonable expectation of confidentiality, by the supplier of the information, at the time the information was provided ... The cases in which confidentiality of supply is alleged to be implicit are more difficult. This is because there is, in such instances, no express promise of, or agreement to, confidentiality or any explicit rejection of confidentiality. All of the circumstances must be considered in such cases in determining if there was a reasonable expectation of confidentiality. The circumstances to be considered include whether the information was:
>
> 1. communicated to the public body on the basis that it was confidential and that it was to be kept confidential;
> 2. treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the public body;
> 3. not otherwise disclosed or available from sources to which the public has access;
> 4. prepared for a purpose which would not entail disclosure.

This test is the same as that adopted by the previous Commission in Order 99-018. I will therefore consider these factors in determining whether the information supplied by Alberta Justice was supplied in confidence.

[para 80] I find that the information was not supplied by Alberta Justice in confidence for the following reasons.

[para 81] The affidavit of a former employee of the Public Body dated November 21, 2007 states:

> When I met the Crown prosecutors I advised them:
> 1. The project’s success was dependent upon there being an honest and frank discussion;
> 2. This consultative process was in confidence; and
> 3. Their identities would be protected and would not be included in any report.

This affidavit indicates that the consultation *process* was confidential and that the names of the contributing crown prosecutors would not be disclosed. However, the phrase "the consultation process was in confidence" is ambiguous and can be interpreted as signifying only that the identities of contributing Crown prosecutors would be kept confidential. I note that the names of the Crown prosecutors do not appear in the Report and that there is no information in the Report that would enable a reader to determine the identities of the Crown prosecutors. Neither the affidavit nor the Report states that the information the Crown prosecutors supplied was supplied by Alberta Justice in confidence. This affidavit is silent as to what the Crown prosecutors were told in relation to the scope of distribution of the information they provided or what restrictions, if any, they themselves placed on disclosure of the information they supplied, other than their individually identifying personal information. The evidence of the affidavit and the Report does not support a finding that the information supplied by the Crown prosecutors, other than their own individually identifying personal information, was supplied in confidence.

[para 82] In view of the ambiguity in the affidavit, I decided to give Alberta Justice the opportunity to provide evidence and make submissions in relation to this issue, given that it supplied the information. I asked Alberta Justice the following questions:

1. Was the information supplied by Crown prosecutors for the Professionalism Committee Final Report supplied on behalf of Alberta Justice or on their own account?

2. If the information was supplied by the Crown prosecutors on behalf of Alberta Justice, was Alberta Justice advised that the information supplied would be kept confidential, or that the names of contributing members would be kept confidential? To what extent did Alberta Justice understand that the information supplied would be distributed?

[para 83] Alberta Justice provided the affidavit of a Crown prosecutor dated March 11, 2009. This affidavit states:

> In my career I have had countless meetings or encounters with police officers of virtually all ranks and in every major police service in Alberta. I am well familiar with many aspects of the business of policing, particularly when it interacts with the business of prosecuting allegations of crime.
>
> I have read an Affidavit in this matter, apparently sworn to by one [name of former employee of the Public Body] a member of the Edmonton Police Service in 2006…
>
> I have also recently… read a seven-page extract of an EPS document dated April 6, 2006. The document appears to be entitled "Professionalism Committee Final Report"; the extract is Part E, "Consultation with Crown Prosecutors."
>
> Based upon my experience, I am of the firm belief that Crown Prosecutors would not have been as frank and candid in their discussions with [a former employee of the Public Body] unless they received assurances of confidentiality, i.e. that their individual identities would not be disclosed, and that the informational content of their remarks would be disclosed only to management-level personnel within EPS. In particular, I am of the belief that prosecutors would not have wanted their comments disseminated in public, or even to rank-and-file members of EPS.
>
> It is my belief that any disclosure of the material in Part E as referenced above would cause harm to the relationship between the EPS and the Edmonton Crown Prosecutors Office.

The affiant does not suggest any first-hand knowledge of the terms under which Alberta Justice supplied information. Rather, he swears that he has formed the view, based on his career experience, that the Crown prosecutors would have required that their identities not be disclosed and that their remarks be given only to management level personnel within EPS. As the Report was also provided to the entire Edmonton Police Commission, in addition to EPS management, I am unable to give any weight to the assertion that the Crown prosecutors were likely to have required that the information they supplied be confined to EPS management. In addition, as the affiant does not have actual knowledge of the terms under which Alberta Justice supplied information to the Public Body for the Report, I am unable to assign any weight to his belief that it would have been supplied in confidence.

[para 84] Alberta Justice also provided an *in camera* affidavit from a Crown prosecutor who provided information for the Report and has knowledge of the terms under which the information was supplied. This affidavit was accepted *in camera* as it refers to the contents of the Report to a certain extent. I will therefore refer to this affidavit where it would not reveal the information in the Report to do so. This affidavit states:

> It was clearly understood in this meeting that these views would be kept in confidence, *at the very least to the extent that our individual identities as prosecutors would not be revealed*, and that our views were being offered in an effort to assist EPS management in assessing the "court-readiness" of their officers, in order to improve the quality of EPS service to the Crown and the Courts. It was never intended that these views be shared even with rank-and-file members of EPS, or with the general public. [emphasis mine]
>
> … For myself, I would not have disclosed the specific information related in the manner I did, or at all in some instances, had I been concerned that my identity would become known… I believe that all of the prosecutors who shared their views as I did would have a similar point of view.

[para 85] In my view, these statements in the affidavit speak most clearly by reference to what they fail to say. The statement is unequivocal only as to the understanding about the confidentiality of identity: there was an understanding that at the very least identities would not be disclosed, as the affiant states that he would not have made the same statements had he thought his identity would become known. There is no assertion that there was a parallel understanding about the substantive content. That which is over and above what is necessarily true "at the very least" is merely a possibility, and cannot form the basis for a factual finding. While the affiant says that "it was never intended: that the information would be shared with the general public, and while he may have had no such intention, he says nothing to suggest that this was communicated either by him or by the interviewer at the time, nor does he say that he believed it would not be shared, or that he had any basis for such a belief. The test established by this office inquires into "an objectively reasonable expectation of confidentiality", which can be based either on express communication or other objective criteria that ground the expectation. I find nothing in the statements in the affidavit that suggests either.

[para 86] Moreover, I note that the Applicant provided an Edmonton Sun article entitled, "Write'em up! Cops taken to task for incomplete reports to Crown prosecutors," dated October 18, 2006. This article contains an interview with the affiant in which he reveals details of a recommendation and a comment about EPS made by the Crown prosecutors during the consultation. This recommendation and the comment appear in the Report. As the statements in the newspaper have the effect of making some of the Crown prosecutors' views public, I do not accept the affiant's statement that it was never intended that the Crown prosecutors' views would be shared with the public.

[para 87] The affidavit evidence provided by Alberta Justice confirms that the participating Crown prosecutors were assured that they would not be identified. However, the evidence does not establish that the information provided by Crown prosecutors was provided in confidence nor does it establish that the Crown prosecutors imposed limits on the distribution of the information they provided. I find that the only condition imposed was that of anonymity, which the authors of the Report took steps to maintain.

[para 88] As noted above, I asked Alberta Justice the following questions:

> If the information was supplied by the Crown prosecutors on behalf of Alberta Justice, was Alberta Justice advised that the information supplied would be kept confidential, or that the names of contributing members would be kept confidential?
>
> To what extent did Alberta Justice understand that the information supplied would be distributed?

I also invited Alberta Justice to comment on the interpretation of section 21 to the information it supplied. Alberta Justice did not comment on the interpretation of section 21.

[para 89] As I have found that Alberta Justice is not a government, local government body, or organization or its agencies listed in clause (a), and as I have found that it did not supply information in confidence, it follows that I find that section 21(1)(b) does not apply to the information it provided to the Public Body. I therefore find that section 21(1)(b) does not apply to the information relating to Crown prosecutors appearing on Records ii, 4, and 59 – 66 of the Report.

Information supplied by members of the Edmonton Police Commission

[para 90] The Edmonton Police Commission, is, by definition a local government body. However, the authority for a municipality to establish a police commission lies in the *Police Act*, and the powers and duties of police commissions are also established by that legislation. Consequently, when the Edmonton Police Commission supplies information for the benefit of a police service or policing, it could also be considered to be doing so as the Government of Alberta. As noted above, I have found that the Government of Alberta cannot supply information for the purposes of clause (b).

[para 91] Similarly, the Public Body is also by definition a local government body. The authority to establish a municipal police service also lies in the *Police Act*, and the

powers and duties of a provincial police service are established by the legislation. Consequently, when a government, local government body or organizations listed in clause (a) of its agencies supplies information to it in order for it to perform its policing function, it can be argued that the Public Body receives the information on behalf of the Government of Alberta. As noted above, information only information supplied to a public body representing the Government of Alberta is protected by clause (b).

[para 92] However, I do not need to decide whether the Edmonton Police Commission supplied information as a local government body or as an agent of the Government of Alberta, or whether the Public Body received information as a local government body or as an agent of the Government of Alberta, given that I find, for the reasons below, that the evidence does not establish that the information was supplied in confidence.

Was the information supplied in confidence?

[para 93] The Public Body argues that section 21(1)(b) applies to information on records ii, 4, 54 - 57 on the basis that it would reveal information supplied in confidence by the Edmonton Police Commission.

[para 94] The affidavit of an employee of the Public Body dated December 5, 2007 states:

> The EPS FOIPP Coordinator and I consulted with the chair of the Professionalism Committee, members of the Committee, and the Manager in charge of Legal Services and Risk Management for the EPS. I believe that the information obtained from the Edmonton Police Commission (the EPC) as part of the external consultation process was provided by the EPC in confidence. It was decided that it would not be appropriate to exercise our discretion to release the Report.

[para 95] This affidavit does not explain the basis for the affiant's belief that the Edmonton Police Commission supplied information in confidence. Neither does it suggest that when the Edmonton Police Commission conveyed the information, it explicitly imposed any limit on its distribution. The Report itself does not contain a confidentiality caution, nor do records 54 – 57 (which the Public Body severed in their entirety under section 21(1)(b)).

[para 96] Further, it was unclear from the evidence whether the Edmonton Police Commission supplied the information or whether its employees supplied the information on their own behalf. Record 53 of the Report indicates that members of the Edmonton Police Commission took the surveys home to complete, which raised the question as to whether they supplied the information on behalf of themselves, or the Edmonton Police Commission.

[para 97] I decided to give the Edmonton Police Commission the opportunity to provide evidence and make submissions in relation to these questions and to the application of section 21 to the information provided by its staff members for the Report. I asked:

1. Was the information supplied by members of the Edmonton Police Commission for the Professionalism Committee Final Report supplied on behalf of the Edmonton Police Commission or on their own account?

2. If the information was supplied by the Edmonton Police Commission, was the Edmonton Police Commission advised that the information supplied would be kept confidential, or that the names of contributing members would be kept confidential? To what extent did the Edmonton Police Commission understand that the information supplied would be distributed?

[para 98] The Edmonton Police Commission providing the following submissions in response to the first question:

> Each of the Commission members and staff decided on their own if they wished to respond to the survey. The Commission had no role in this process. As well, the Commission did not vet or have any role to play in how the various questions were answered by these individuals who chose to complete the survey.
>
> The responses provided by the 9 individuals represented their own personal views and opinions. These views and opinions would likely have been influenced to some degree by the fact that the individuals who responded were either members of the Commission or employed by the Commission.
>
> In reviewing the OIPC's publication "Conducting Surveys – A Guide to Privacy Protection," the OIPC states that public bodies should qualify any promise of confidentiality by reminding participants that any information they provide is subject to the Act.
>
> The publication goes on to state that "[if participants] express concern, [they] could be informed that all information in the custody of or under the control of a public body may be subject to an access request under the Act and that they will be contacted if a request is received for their personal information and the public body is considering disclosure.
>
> Insofar as the Commission is aware, none of the individuals who were Commission members or staff in the fall of 2005 have been contacted by the Service or the OIPC in connection with this inquiry.
>
> Had the Commission been contacted in connection with this matter at the outset, the Commission would have referenced subparagraph 24(1)(b)(i) of the Act which provides that the head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal consultations or deliberations involving officers or employees of a public body.
>
> If a public body wishes to improve the quality or delivery of its services, it should come as no surprise that from time to time it needs to ask "tough" questions and it needs people to respond as openly and as candidly as possible.
>
> The possible disclosure of this type of information will only serve to limit the number and / or frankness of the responses provided. This in turn will only serve to undermine and impede the public body's desire to improve the quality and the delivery of its services.

[para 99] The Edmonton Police Commission made the argument that section 24(1)b)(i) applies to the information supplied by its employees. However, the Report presents their responses in the form of a statistical survey. By operation of section 24(2)(d) of the Act, section 24(1) cannot be applied to withhold statistical surveys. In any

event, the Public Body made a decision not to apply section 24 to the records at issue and the issue of the application of section 24(1) is not before me.

[para 100] The answer provided by the Edmonton Police Commission in response to the question as to whether employees supplied information on their own behalf or on behalf of the Edmonton Police Commission is the passage from its submissions, above. This passage implies that participants provided their own views, as the Edmonton Police Commission suggests that it had no role in the process and that individual employees should have been contacted regarding the information they supplied for the purposes of providing notice of the access request. However, the Edmonton Police Commission's argument that responses to the survey questions were a consultation among its employees for the purposes of improving services, suggests that it considered the information to have been supplied by employees on behalf of the Edmonton Police Commission. Therefore, I will consider whether the information was supplied in confidence.

[para 101] The Edmonton Police Commission provided the affidavit of an employee to establish its understanding of the terms under which it supplied information to the Public Body. The affiant describes the process by which Edmonton Police Commission employees were consulted as follows:

> As part of the Professionalism Committee's consultation task team, it was my responsibility to meet with the 9 Commission members and the commission staff. I met with these individuals in the fall of 2005.
>
> At that time, I provided the Commission members and staff with a questionnaire which consisted of a number of questions. I advised the commission members and staff that the survey was to be completed anonymously and that their responses would be kept confidential and would only be used by the Professionalism Committee to assist it in achieving its mandate.
>
> I encouraged the Commission members and staff to be as candid as possible with their comments, opinions and perceptions. The Commission member and staff each took away a copy of the Professionalism Committee's questionnaire. Sometime later, 9 of these individuals returned their completed questions to me. I in turn handed over the 9 completed questionnaires to the Professionalism Committee.

[para 102] The Police Commission employee who provided this affidavit was also a member of the Professionalism Committee. The affidavit indicates that members of the Edmonton Police Commission provided him with the responses for submission to the Professionalism Committee and that he provided the responses to the Professionalism Committee. Record 13 of the Report establishes that the affiant is the author of the portion of the Report entitled "External Consultation Edmonton Police Commission Survey Report", which is comprised of records 53 – 57. Records 53 – 57 do not contain 9 individual responses to a survey questionnaire, but a compilation of responses into tables, so that no one response can be attributed to a particular individual. Further, this portion of the Report interprets the survey data and arrives at conclusions based on percentages of responses. Consequently, it is possible that records 53 – 57 were supplied by the affiant on behalf of the Edmonton Police Commission to the Professionalism Committee by way of the tables and conclusion that are contained in the Report, rather than by way of the

responses themselves. In other words, when the affiant refers to "handing the responses over to the Professionalism Committee" in paragraph 11, it may be that he is referring to compiling the data from the responses into statistical tables, and interpreting the survey results and providing that information to the Professionalism Committee.

[para 103] In any event, the affidavit establishes that the responding Edmonton Police Commission members were assured anonymity. As well, record 53 of the Report indicates that Edmonton Police Commission members and employees were asked to participate in a survey anonymously, and the Report itself complies with this assurance in that it does not associate the responses with particular participants.

[para 104] I begin by considering the significance of the assurance of anonymity. The idea that names would be undisclosed implicitly suggests that the substance of the information would be distributed further. This idea is supported by the fourth paragraph on record 57 of the Report, which indicates that Edmonton Police Commission members considered anonymity to be an issue and were reluctant to participate or to provide comments for that reason. Again, the "reluctance to participate" suggests an apprehension that that the information they supplied would be distributed and that they might thereby be identified as holding specific opinions, and that the assurance of anonymity was meant to resolve this concern. Thus, in my view, the assurance of anonymity does not advance the idea that the information was supplied in confidence, but rather, except with regard to the names themselves, suggests the opposite.

[para 105] I turn to the assertion in the affidavit that the Commission members and staff were advised "that their responses would be kept confidential and would only be used by the Professionalism Committee to assist in achieving its mandate". I note first that in its particular context the term "confidential" is ambiguous because it might refer only to the anonymity of the names. In any event, the sentence continues to the effect that the responses "would only be used by the Professionalism Committee to assist it in achieving its mandate. This assertion does not establish any particular limitation on the further distribution of the substantive information; rather it suggests that the responses would be distributed to the extent considered necessary by the Professionalism Committee to meet its mandate.

[para 106] The mandate of the Professionalism Committee is set out in the second paragraph on record 1 of the Report:

> The mandate of the EPS Professionalism Committee was to increase the public trust and confidence in the EPS through the enhancement of ethics and professionalism. A part of this process included trying to find out where the EPS was and where it needed to go to meet these objectives.

The mandate itself does not impose any restrictions on the distribution of information in the Report. If the Professionalism Committee considered that making the Report public would increase public trust and confidence in the Public Body, it would be in keeping with its mandate to make the Report public. The Public Body did not provide me with evidence as to the actual extent to which the Report was ultimately distributed. It has told

me that the management of the Public Body and the Edmonton Police Commission received copies of the Report. However, it has not told me that distribution of the Report was limited to only these persons. Consequently, I find that the statement that the responses would only be used for the purposes of the Professionalism Committee in achieving its mandate does not amount to an assurance that information would be received by the Public Body in confidence and not distributed further without consent.

[para 107] As noted above, in Order 99-018, the former Commissioner considered the following factors in determining whether information has been implicitly supplied in confidence:

> In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:
>
> (1) Communicated to the institution on the basis that it was confidential and that it was to be kept confidential.
> (2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the Third Party prior to being communicated to the government organization.
> (3) Not otherwise disclosed or available from sources to which the public has access.
> (4) Prepared for a purpose which would not entail disclosure.

I will apply these criteria to the evidence I have just reviewed.

[para 108] First, although I am satisfied that survey participants were assured that their responses would be kept anonymous, assuring participants of anonymity is not the same thing as assuring them that the information they supply will be held in confidence and not distributed without their consent. The Edmonton Police Commission has not established that it communicated to the Public Body that it was supplying information on the basis that it was confidential or was to be kept confidential.

[para 109] In addition, as the information was supplied for a report, which would suggest that the information would be reported to someone, and with the understanding that it would be used by the Professionalism Committee to fulfill its mandate, it would seem likely that the information was supplied on the understanding that the Professionalism Committee would disclose it at its discretion to further its own purposes. There is no evidence that the Edmonton Police Commission imposed limits on the Professionalism Committee's discretion to distribute the Report. The Edmonton Police Commission did not answer the question I posed to it as to what extent it understood that the information it supplied would be distributed by the Public Body.

[para 110] For the purposes of the second factor, the Edmonton Police Commission has not established that it took steps to protect the information gathered from staff members, or created by its employee, prior to communicating it to the Professionalism Committee.

[para 111] For the purposes of the third factor, I infer from the arguments of the Public Body and the Edmonton Police Commission that they take the position that the

information is not available to the public; however, as I have not been told how many copies of the Report were distributed, or the steps taken by the Public Body and the Edmonton Police Commission to protect the Report and its contents from distribution, I cannot conclude that the contents of the Report are not publicly available.

[para 112] Finally, I find that the survey responses, or records 54 – 57, do not contain information that was clearly prepared for purposes that would not entail disclosure. While there may be some kinds of information that by their nature, necessitate a finding that such information could only have been supplied in confidence, this type of information is not present on records 54 – 57. Neither the Public Body nor the Edmonton Police Commission pointed to anything about the information that they consider sensitive and would necessitate a finding that the information would more likely have been supplied in confidence than not.

[para 113] For these reasons, I find that the information supplied is the responses to survey questions completed by its members and employees, or alternatively, records 54 – 57 of the Report, written by one of its employees, were not supplied in confidence, implicitly or explicitly, to the Public Body.

[para 114] For all these reasons, I find that section 21(1)(b) does not apply to the information severed by the Public Body from records ii, 4, and 54 – 57.

Information Supplied by the Vancouver Police Department

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

[para 115] The Public Body withheld information under section 21(1)(b) from records 120 – 121 on the basis that it revealed information supplied by the Vancouver Police Department (VPD) in confidence.

[para 116] As the VPD expressed interest in participating at the inquiry, I asked it questions in relation to its understanding of the terms under which it provided information to the Public Body for the Report. In addition, I asked the following question:

> How can information supplied by the Vancouver and Toronto police departments be considered information supplied by a government, local government body or an organization listed in clause (a) or its agencies as contemplated by section 21(1)(b)?

[para 117] The Public Body argues that because a police service is an agency of a municipal government, and a municipal government is a government, that this is sufficient to attract section 21(1)(b). The Public Body points out that the term "government" is undefined in the FOIP Act and reasons that as a municipal government from another province is a government, information supplied by a municipal government in confidence must be withheld under clause (b). Finally, the Public Body argues that because information supplied by the R.C.M.P. has been held to fall under section

21(1)(b), on the basis that the R.C.M.P. is an agency of the federal government, it would be consistent to consider a municipal police service or municipal government a "government" for the purposes of section 21(1)(b).

[para 118] As noted above, I interpret the phrase "listed in clause (a)" as applying to "a government, local government body, or organization or its agencies". Consequently, for clause (b) to apply, VPD must have supplied information on behalf of an entity listed in clause (a).

[para 119] VPD argues that the information it supplied was supplied as an agent of the Municipality of Vancouver, or alternatively, as an agent of the Government of British Columbia. VPD argues that section 21(1)(b) contemplates that local government bodies may supply information to municipalities in confidence. It argues that it would be counterintuitive to interpret section 21(1)(b) as not applying to information shared between municipal police services across provincial borders.

[para 120] Section 21(1)(b) applies to information supplied in confidence by a government, local government body or organization listed in clause (a) or its agencies. "Local government body" is defined in section 1(i) of the FOIP Act, which states, in part:

> *1(i) "local government body" means*
> *(i) a municipality as defined in the Municipal Government Act,*
> *...*
> *(x) any*
> *(A) commission,*
> *(B) police service, or*
> *(C) policing committee,*
> *as defined in the Police Act…*

VPD is not a police service as defined by Alberta's *Police Act* nor is the City of Vancouver a municipality defined in Alberta's *Municipal Government Act.* As a result, VPD and the City of Vancouver are not local government bodies under the FOIP Act. Section 21(1)(a) does not list municipal governments or police services outside Alberta as entities with whom the Government of Alberta's relations are to be protected from harm. Subclauses 21(1)(a)(i) – (v) contain an exhaustive list; consequently, it is not open to me to interpret this provision as including other entities that appear to be similar to those enumerated in section 21(1)(a).

[para 121] In the alternative, VPD argues that it supplied information on behalf of the Province of British Columbia. VPD relies on Order 02-19, an order of the Information and Privacy Commissioner of British Columbia, which finds that entities such as VPD can act as agents for other government entities. In Order F2004-018, the Commissioner adopted the reasoning of the Privacy Commissioner of British Columbia in Order 02-19. The Commissioner said at paragraph 50:

> In B.C. Order 02-19, the B.C. Commissioner referred to the test for agency set out in *Westeel-Rosco Ltd.* v. *Board of Governors of South Saskatchewan Hospital Centre* [1977] 2 S.C.R. 238

> which held that whether a particular body is an agent of the Crown depends on the nature and degree of control which the Crown exercises over it. The B.C. Commissioner held that the RCMP's functions and duties under the *Royal Canadian Mounted Police Act,* R.S.C. 1985, c. R-10 (the "RCMP Act") show that the RCMP is an agent of the Federal Government for the purposes of section 16(1)(b) of the B.C. FOIP Act. I agree with and adopt the reasoning within that order.

[para 122] VPD does not explain how it acted as an agent of the Government of British Columbia when it supplied information to the Public Body for the Report. For the sake of argument, I will accept that VPD supplied information as part of its policing responsibilities under British Columbia's *Police Act* R.S.B.C. 1996, c. 367, given that the information was likely obtained through its statutory policing duties. Consequently, it is possible that it supplied information through the delegated authority of the Government of British Columbia, making it an agent of that government for the purposes of section 21(1)(b). I will therefore consider whether it supplied information in confidence.

Was the information supplied in confidence?

[para 123] The affidavit evidence supplied by VPD states:

> In supplying this information, it was my intention and understanding that information that I provided relating to the specific issues at the Vancouver Police Department would remain confidential. This information was supplied voluntarily, and specifically to the Professionalism Committee of the Edmonton Police Service. I expected that this information would be treated confidentially by the Edmonton Police Service and used only in conjunction with the Professionalism Committee of the Edmonton Police Service.
>
> I supplied this information in my capacity as Inspector of the Vancouver Police Department. At the time that I provided the information, in confidence, the information was not publicly available information and I have not at any time made this information publicly available.
>
> From time to time, communication and information is exchanged between the Vancouver Police Department and other government agencies or police agencies regarding the ethical administration of justice and regarding training issues facing agencies involved in the administration of justice.
>
> When specific information is exchanged with other governmental or police agencies relating to concerns regarding training issues, it is done with an expectation of confidentiality between the Vancouver Police Department and the other governmental or police agency. Confidentiality is expected and required because of the sensitive nature of the information discussed.
>
> When specific information is exchanged with other governmental or police agencies because of concerns regarding training issues, it is shared with the expectation that it will be used only to the extent necessary for the training purposes for which it was provided.

The affidavit evidence of VPD does not state that the information was supplied in confidence. Consequently, I must consider whether it was implicitly supplied in confidence by considering the factors set out in Order 99- 018.

[para 124] The affiant states that he had an expectation that the information he supplied on behalf of VPD would be treated confidentially. However, the affiant does not explain what steps he took to communicate that he was supplying information in

confidence or to ensure that the information he supplied would be kept in confidence. From the affidavit, it appears that the affiant did not tell the Public Body that he was supplying information in confidence. As noted above, a key factor considered by both the Information and Privacy Commissioners of British Columbia and Alberta when determining whether information has been supplied in confidence is whether information was communicated to the Public Body on the basis that it was confidential and that it was to be kept confidential. However, I have not been told what limits VPD put on the distribution of information, or how it protected the information it supplied prior to supplying it to the Public Body.

[para 125] Turning to the submissions of the Public Body, the Public Body did not submit evidence in relation to whether the information supplied by VPD was supplied to it in confidence. Rather, it argues that the sensitivity of the information in the Report points to its confidential nature. The actions of the Public Body suggest that it did not understand that VPD had supplied information in confidence and that the information was only to be used for training purposes. As noted above, the information was compiled into a report and presented to the management of EPS and to the management of the Edmonton Police Commission, an external body. Further, the Public Body did not originally apply section 21(1)(b) to the information supplied by VPD in its initial response, or suggest that it applied in its initial or rebuttal submissions. In its supplemental submissions, it does not refer to an understanding that the information was supplied in confidence, but argues only that the information is sensitive. The Public Body was apparently unaware that it had received information in confidence, which argues against the affiant's assertion that police services always exchange information about training issues in confidence.

[para 126] On review of the information in the Report, I am not satisfied that it is sensitive, such that it could only have been supplied in confidence. Certainly, neither VPD nor the Public Body has explained to me what is particularly sensitive about the information and which pieces of information are not publicly available. For example, statements indicating the institute where municipal police members in British Columbia receive training and references to the curriculum do not appear to be sensitive or not publicly available. In addition, references to labour shortage issues are not necessarily sensitive. The specific incident referred to in the Report on page 120 – 121 was discussed in the national media, and the information does not appear to contain any details that are not publicly known. I am therefore not prepared to infer from the information that it is sensitive or that it could only have been supplied in confidence.

[para 127] For these reasons, I find that the section 21(1)(b) does not apply to the information withheld by the Public Body from records 120 – 121.

Information supplied by the Toronto Police Service

[para 128] The Public Body withheld information supplied by the Toronto Police Service from record 125 under section 21(1)(b). The Public Body argues that the Toronto

Police Service is a government on the basis that it is an agency of a municipal government.

[para 129] I will assume for the sake of argument that the Toronto Police Department supplied the information on record 125 on behalf of the Government of Ontario.

[para 130] The Public Body has not provided any evidence to suggest that the Toronto Police Department supplied the information in confidence. Certainly, there is nothing about the information that would enable me to draw an inference that it must necessarily have been supplied in confidence.

[para 131] For these reasons, I find that section 21(1)(b) does not apply to the information withheld by the Public Body from record 125.

[para 132] I note that the interpretation of section 21(1)(b) that I have adopted in this order is contrary to Order F2007-022, in which I found that section 21(1)(b) could be applied to a letter supplied by a Minister of the Government of Alberta to a local public body. Order F2007-022 was in error to the extent that it stands for the proposition that section 21 applies to information supplied by the Government of Alberta.

Issue B: Did the head of the Public Body meet its duty under section 32 of the Act to disclose information clearly in the public interest?

[para 133] As I have found that section 21 does not apply to the records at issue, I need not answer this question.

V. ORDER

[para 134] I make this Order under section 72 of the Act.

[para 135] I order the head of the Public Body to disclose records ii, 4, 54 – 57, 59 – 65, 120 – 121, and 125 in their entirety to the Applicant.

[para 136] I further order the Public Body to notify me, within 50 days of being given a copy of this Order, that the Public Body has complied with this Order.

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Teresa Cunningham
Adjudicator