ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2009-010

September 2, 2009

EDMONTON POLICE SERVICE

Case File Number F4405

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Summary: The Applicant made a request under the *Freedom of Information and Protection of Privacy Act* (the Act) to the Edmonton Police Service (the Public Body) for records relating to a disciplinary hearing. The Public Body identified five responsive records and provided two of these to the Applicant on the basis that they were public documents. The Public Body withheld the remaining three documents on the basis that they were not public and that it would be an unreasonable invasion of the personal privacy of individuals referred to in the documents to disclose the records.

The Adjudicator confirmed the decision of the Public Body to withhold the records. She found that it would be an unreasonable invasion of the personal privacy of the individual who was the subject of the disciplinary hearing to disclose his personal information. She also found that the public interest would not be served by disclosing the information in the records.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 6, 17, 21, 30, 31, 32, 40, 67, 72; *Police Act*, R.S.A. 2000 c. P-17 ss. 1, 3, 43; Police Service Regulation, Alberta Regulation 356/90 ss. 7

Authorities Cited: AB: Orders F2006-027, F2008-009, F2008-021, F2008-027, F2008-028 **ON:** Order 159

Cases Cited: *University of Alberta v. Pylypiuk*, 2002 ABQB 22; *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)* (2007), 86 O.R. (3d) 259

I. BACKGROUND

[para 1] On December 19, 2007, the Applicant, the Criminal Trial Lawyers Association, made a request to the Edmonton Police Service (the Public Body) for access to records relating to a scheduled disciplinary hearing that was begun but not completed. The charges against the member of the EPS which were the subject of the disciplinary hearing were dismissed due to loss of jurisdiction because the Edmonton Police Commission had not extended the time limit for commencing a hearing. In that decision, which the Public Body provided as an exhibit in its submissions, the presiding officer decided that the Edmonton Police Commission does not have authority to extend retroactively and said:

> While somewhat trite, the old saying Justice delayed is justice denied nevertheless fits. In the face of such clear statutory language addressing public interest, it is noteworthy indeed that the drafter of the Regulations omitted any type of a further provision that would allow retroactive application of subsection (4). This, I am prepared to say, was done on purpose. Otherwise, the entire section 7 becomes superfluous. If the Police Commission had an unfettered right to grant retroactive extension orders, might section 7 not just simply say that it falls to the Police Commission to decide what limitation periods apply in each and every case?
>
> I might be prepared to "soften" my view of retroactive extension orders in instances of applications that are made prior to the laying of charges (i.e. during the investigation of complaints), but I hasten to say that this eventuality was not fully argued before me and has, in any event, no application here. In the case at hand, the last extension order expired a full 20 days before the charge was formally laid. With the laying of the charge, [Party A] was put at a legal risk of having the charge proven. He had to get prepared to answer to the allegation. The least that he could expect was to have the disciplinary processes all squared away.
>
> …
>
> The McManus decision, somewhat indirectly I would suggest, stands for the proposition that the Police Commission may grant retroactive extensions to limitation periods. However, this leeway is of possible application only up to the laying of disciplinary misconduct contraventions. ..

The Public Body identified five responsive records. The Public Body decided that two of the records were a matter of public record and it disclosed these to the Applicant. These records are entitled "Notice and Record of Disciplinary Proceedings". The information in the remaining records was withheld under section 17 of the Act. The Public Body made this decision on February 20, 2008.

[para 2] On February 25, 2008, the Applicant requested review by the Commissioner of the decision to withhold the information in the three records under section 17. The Commissioner authorized mediation to resolve the issues between the parties. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

[para 3] Three parties potentially affected by the Applicant's request for review were given notice of the inquiry under section 67 of the Act. Two of these parties decided

to participate in the inquiry. I will refer to these parties in the order as Party A and Party B.

[para 4] The Applicant, the Public Body, Party A, and Party B provided initial submissions. The Applicant also provided rebuttal submissions.

II. RECORDS AT ISSUE

[para 5] There are three records at issue. The parties refer to these records as Attachments 1 and 2. As the parties note in their exchangeable submissions, these attachments are referred to in a Notice and Record of Disciplinary Proceedings dated April 13, 2006, which was provided to the Applicant. Attachment 1 consists of one page and is entitled "Particulars of the Alleged Misconduct." Attachment 2 consists of two pages and is entitled "Lists of Witnesses and Statements of their Evidence". The titles of both documents are referred to in the exchangeable submissions and in the records previously provided to the Applicant.

III. ISSUES

Issue A: Does Section 17(1) of the Act (invasion of a third party's personal privacy) apply to the information in the records?

Issue B: Does section 32 of the Act require the Public Body to disclose the information in the public interest?

IV. DISCUSSION OF ISSUES

Issue A: Does Section 17(1) of the Act (invasion of a third party's personal privacy) apply to the information in the records?

[para 6] The Public Body withheld all the information in the records under section 17.

[para 7] Section 1(1)(n) defines personal information under the Act:

> *(n) "personal information" means recorded information about an identifiable individual, including*
> *(i) the individual's name, home or business address or home or business telephone number,*
> *(ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,*
> *(iii) the individual's age, sex, marital status or family status,*
> *(iv) an identifying number, symbol or other particular assigned to the individual,*
> *(v) the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,*

(vi) information about the individual's health and health care history, including information about a physical or mental disability,

(vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,

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

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

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

[para 8] Section 17 states in part:

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

…

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

…

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

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

(g) the personal information consists of the third party's name when
(i) it appears with other personal information about the third party, or
(ii) the disclosure of the name itself would reveal personal information about the third party…

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

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

(b) the disclosure is likely to promote public health and safety or the protection of the environment,

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

> *(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,*
> *(e) the third party will be exposed unfairly to financial or other harm,*
> *(f) the personal information has been supplied in confidence,*
> *(g) the personal information is likely to be inaccurate or unreliable,*
> *(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and*
> *(i) the personal information was originally provided by the applicant.*

[para 9] Section 17 does not say that a public body is *never* allowed to disclose third party personal information. It is only when the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy that a public body must refuse to disclose the information to an applicant under section 17(1). Section 17(2) (not reproduced) establishes that disclosing certain kinds of personal information is not an unreasonable invasion of personal privacy.

[para 10] When the specific types of personal information set out in section 17(4) are involved, disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. To determine whether disclosure of personal information would be an unreasonable invasion of the personal privacy of a third party, a public body must consider and weigh all relevant circumstances under section 17(5), (unless section 17(3), which is restricted in its application) applies. It is important to note that section 17(5) is not an exhaustive list and that other relevant circumstances must be considered.

[para 11] In *University of Alberta v. Pylypiuk*, 2002 ABQB 22, the Court commented on the interpretation of what is now section 17. The Court said:

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

[para 12] Party A is a member of the EPS whose conduct was the subject of a disciplinary hearing. Party B is a member of an RCMP detachment who responded to a complaint made by a member of the public, in which Party A was involved. Statements she made for the purposes of the disciplinary hearing form part of the records at issue.

[para 13] The Public Body takes the position that all the information in the records at issue is the personal information of Party A. Further, it argues that while the personal information of witnesses is their personal information, it is also the personal information of Party A, as the personal information of the witnesses is primarily their opinions about Party A. The Public Body also argues that the presumptions in section 17(4)(b),(d) and

(g) apply to all the personal information in the records. It also argues that sections 17(5)(e) and (h) apply and weigh against disclosure. Further it argues that section 17(5)(a) does not apply, and relies on Order F2008-009 in support of this position.

[para 14] The Applicant argues that section 17(5)(a) applies to the personal information in the records and weighs in favor of disclosure on the basis that when jurisdiction is lost through clerical error, it is of great concern. The Applicant elaborates that clerical errors are a matter of public concern because other prosecutions may be jeopardized in the same way. The Applicant further argues that privacy interests do not apply to disciplinary proceedings in relation to police officers, and argues that the records at issue were referred to in a public hearing, and are therefore public records.

[para 15] Party A argues that the information in the records is his personal information, as it is information "about him" within the meaning of section 1(n) of the FOIP Act. Party A also argues that the Applicant has provided no basis for its position that section 17(5)(a) applies. Party A takes the position that the right to privacy is not outweighed by other factors under section 17(5) and that the personal information about Party A should not be disclosed on the balance.

[para 16] Party B notes that the "anticipated evidence" referred to in Attachment 2 was not actually entered as an exhibit in a public disciplinary hearing, and argues that none of the factors set out in section 17(5) apply so as to weigh in favor of disclosing her personal information in the records at issue.

Do the records at issue contain the personal information of Party A?

[para 17] As noted above, personal information is defined in the FOIP Act as "recorded information about an identifiable individual". In addition, under section 1(n)(ix) of the FOIP Act, cited above, an opinion held about another individual is the personal information of the individual about whom the opinion is formed. The records at issue contain the name of Party A, in addition to information about him, and information that meets the definition of opinions of other individuals about him, including the opinion of Party B. Having reviewed the records at issue, I find that all the information in the records is the personal information of Party A, as one can draw conclusions about him or learn facts about him from all the information in the records, including the headings.

Do the records at issue contain the personal information of Party B?

[para 18] Party B is a member of an RCMP detachment. She argues the following:

> The Office of the Information and Privacy Commissioner and the Attorney General of Alberta took the same position that the Information and Privacy Commissioner had no jurisdiction over the RCMP in disclosure of information…
>
> This must be borne in mind in assessing the release of this information. The undisclosed affected party's involvement in this matter is entirely as the result of her being an on-duty member of the RCMP when she dealt with [Party A]…

> The undisclosed affected party had been prepared to have her statement released to [Party A] when it would have been produced for the express and sole purpose of providing disclosure for him in defending allegations of discreditable conduct under the Police Service Regulation. That consent cannot be viewed as extending to the release of her personal information for an entirely different and inconsistent purpose.

[para 19] I understand Party B to argue that I lack jurisdiction over information about her in the records because she was acting in her official capacity as an RCMP member when she created the information. Further, Party B argues that information about her in the records cannot be disclosed without her consent.

[para 20] In this case, the Applicant made a request for access to information in the custody or under the control of the Edmonton Police Service, a public body under the FOIP Act. The information about Party B is contained in the records the Applicant requested. The Act does not exclude information from its application on the basis that it was provided by a person who is employed by an entity that has a federal aspect in addition to a provincial aspect, as Party B argues. Information supplied by the federal government that is in the custody or control of a public body is specifically addressed in section 21 of the Act. It is clear from this that such information is not *exempt from* the application of the FOIP Act. Thus any federal dimension to the information at issue that is in the hands of the Public Body cannot form the basis for an argument that I do not have jurisdiction over it.

[para 21] I also reject the idea that it follows from the fact that Party B's employer has a federal aspect that section 21 requires that the information created or provided by her be withheld. Section 21 addresses intergovernmental relations, or exchanges of information *between* the Government of Alberta and a government listed in section 21(1)(a), as discussed in Order F2008-027. In this case, the information in the records at issue was supplied by the RCMP officer, as a police officer within the meaning of section 1(k)(ii) of the *Police Act*, employed by a police service as defined under section 1(l)(iv) of the *Police Act*. Further, under section 3 of the *Police Act*, a police officer, such as Party B, acts under the direction of either the Solicitor General and Public Safety or the Minister of Justice and Attorney General when carrying out official duties.

[para 22] Party B's evidence establishes that the information in the records that is about her, including her statements and observations, is information about her acting in her official or representative capacity as a police officer, as opposed to her private or personal capacity. She made the following statement in her submissions:

> The undisclosed affected party's [Party B's] involvement in this matter is entirely as the result of her being an on-duty member of the RCMP when she dealt with [Party A].
>
> The purpose of [Party B] providing a statement to the internal affairs section of the Edmonton Police Service was in keeping with this.

The evidence of Party B is that the information about her in the records at issue is information about her in her official capacity as a police officer under the *Police Act*. Any statements made by Party B in carrying out her official duties as a police officer under the

Police Act and supplied to the Public Body were supplied under the authority of the province, rather than the federal government. Consequently, an information exchange contemplated by section 21 did not take place, and this provision does not apply. I will therefore consider whether section 17 applies to information about Party B in the records at issue.

[para 23] In Order F2008-028, the Adjudicator reviewed the decisions of this office addressing information about individuals acting in their official capacity, and said:

> In many of the records at issue, the Public Body applied section 17 of the Act to the names, job titles and/or signatures of individuals who sent or received correspondence, or who acted in some other way, in their capacities as politicians, employees of the Public Body, other government officials, or representatives of other bodies, businesses and organizations…
>
> I find that section 17 does not apply to the foregoing names, job titles and signatures. First, in the case of government officials and employees (although not individuals associated with other organizations and businesses), section 17(2)(e) indicates that disclosure of their job titles and positions (i.e., employment responsibilities) is expressly not an unreasonable invasion of their personal privacy (Order F2004-026 at para. 105). Second, many previous orders of this Office have made it clear that, as a general rule, disclosure of the names, job titles and signatures of individuals acting in what I shall variably call a "representative", "work-related" or "non-personal" capacity is not an unreasonable invasion of their personal privacy. I note the following principles in particular (with my emphases in italics):
>
> - Disclosure of the names, job titles and/or signatures of individuals is not an unreasonable invasion of personal privacy where they were acting in *formal* or *representative* capacities (Order 2000-005 at para. 116; Order F2003-004 at paras. 264 and 265; Order F2005-016 at paras. 109 and 110; Order F2006-008 at para. 42; Order F2008-009 at para. 89).
> - Disclosure of the names, job titles and/or signatures of individuals acting in their *professional* capacities is not an unreasonable invasion of personal privacy (Order 2001-013 at para. 88; Order F2003-002 at para. 62; Order F2003-004 at paras. 264 and 265).
> - The fact that individuals were acting in their *official* capacities, or signed or received documents in their capacities as public officials, weighs in favour of a finding that the disclosure of information would not be an unreasonable invasion of personal privacy (Order F2006-008 at para. 46; Order F2007-013 at para. 53; Order F2007-025 at para. 59; Order F2007-029 at paras. 25 to 27).
> - Where third parties were acting in their *employment* capacities, or their personal information exists as a consequence of their activities as *staff performing their duties* or as a *function of their employment*, this is a relevant circumstance weighing in favour of disclosure (Order F2003-005 at para. 96; Order F2004-015 at para. 96; Order F2007-021 at para. 98; Order F2008-016 at para. 93).
>
> I further note that the foregoing principles have been applied not only to the information of employees of the particular public body that is a party to the inquiry, but also to that of employees of other public bodies (Order F2004-026 at paras. 100 and 120), representatives of organizations and entities that are not public bodies (Order F2008-009 at para. 89; Order F2008-016 at para. 93), individuals acting on behalf of private third party businesses (Order 2000-005 at para. 115; Order F2003-004 at para. 265), individuals performing services by contract (Order F2004-026 at paras. 100 and 120), and individuals acting in a sole or independent capacity, such as lawyers and commissioners for oaths (Order 2001-013 at paras. 87 and 88; Order F2003-002 at para. 61). In my view, therefore, it does not matter who the particular individual is in order to conclude, generally, that section 17 does not apply to personal information that merely reveals that an

> individual did something in a formal, representative, professional, official, public or employment capacity.
>
> It has also been stated that records of the performance of work responsibilities by an individual is not, generally speaking, personal information about that individual, as there is no personal dimension (Order F2004-026 at para 108; Order F2006-030 at para. 10; Order F2007-021 at para. 97). Absent a personal aspect, there is no reason to treat the records of the acts of individuals conducting the business of government – and by extension other bodies and organizations – as "about them" (Order F2006-030 at para. 12). In other words, although the names of individuals are always their personal information [as it is defined as such in section 1(n)(i) of the Act], the fact that individuals sent or received correspondence – or conducted themselves in some other way in connection with their employment, business, professional or official activities, or as representatives of public bodies, businesses or organizations – is *not* personal information to which section 17 can even apply.
>
> The present inquiry provides a useful distinction. I concluded above that disclosure of the names, job titles and other identifying information of members of the general public – who wrote correspondence or otherwise interacted with the Public Body in their *private* or *personal* capacities – would be an unreasonable invasion of their personal privacy. By contrast, when the records at issue merely reveal that individuals acted in their *work-related* or *non-personal* capacities, or did something as *representatives* of a public body, business or organization, section 17 does not apply to their names, job titles or signatures.

[para 24] Applying the principles set out in order F2008-028, I find that section 17 does not apply to the information about Party B in the records as it is information about her in her official capacity as a police officer under the *Police Act*, and not about her in her personal capacity.

[para 25] Although Party A is also a police officer, I find that the information about him that appears in the records is not about him in an official or representative capacity. Rather, the information is about him as an individual, or in his personal capacity, in a disciplinary context, which has personal consequences for him. As noted above, I find all the information in the records is information about Party A, including the information about Party B acting in her official capacity. As noted above, opinions about identifiable individuals are the personal information of the individuals about whom the opinions are formed. Further the fact that Party B formed an opinion about Party A, and in what circumstances, is also information that reveals information of a personal nature about Party A.

Does section 17(4)(b) apply to Party A's information?

[para 26] The Public Body applied section 17(4)(b) to all the information it severed. As noted above, section 17(4)(b) states:

> *17(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if…*
>
> …
>
> *(b) the personal information is an identifiable part of a law enforcement record, except to the extent that the disclosure is*

necessary to dispose of the law enforcement matter or to continue an investigation…

[para 27] In Order F2006-027, the Commissioner considered the meaning of "law enforcement record". He said:

> The Public Body says the Section 17 Records contain personal information that is an identifiable part of a law enforcement record under section 17(4)(b) of FOIP. If so, the presumption that disclosure would be an unreasonable invasion of a third party's personal privacy would apply to the personal information. The definition of "law enforcement" in FOIP is:
>
> > 1(h) "law enforcement" means
> > (i) policing, including criminal intelligence operations,
> > (ii) a police, security or administrative investigation, including the complaint giving rise to the investigation, that leads or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the investigation or by another body to which the results of the investigation are referred, or
> > (iii) proceedings that lead or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the proceedings or by another body to which the results of the proceedings are referred.
>
> Orders issued from the Office under FOIP say that "law enforcement" includes activities of a public body that are directed towards investigation and enforcing compliance with standards and duties imposed by a statute or regulation (Order 96-006 (page 5)). "Law enforcement" exists where the legislation imposes sanctions and penalties for non-compliance and for breach of the applicable law (Order F2002-024 (para 31)). "Investigation" means "to follow up step by step by patient inquiry or observation; to trace or track; to examine and inquire into with care and accuracy; to find out by careful inquisition; examination; the taking of evidence; a legal inquiry" (Order 96-019 (para 15)).

As I noted in Order F2008-021, section 17(4)(b) is ambiguous because it is unclear what "except to the extent that the disclosure is necessary to dispose of the law enforcement matter or to continue an investigation" means in the context of section 17. However, as the disclosure of Party A's information would not dispose of the law enforcement matter, or continue an investigation, I need not consider what this exception to the application of section 17(4)(b) means in order to determine whether section 17(4)(b) applies. I find that section 17(4)(b) applies to Party A's information, as the personal information is contained in records that were created for proceedings that could potentially have led to a penalty or sanction, and the information is identifiable as forming part of such a record. Consequently, there is a presumption that disclosing the Party A's personal information is an unreasonable invasion of his personal privacy.

Does section 17(4)(d) apply to Party A's information?

[para 28] I find that section 17(4)(d), which states that there is a presumption that it is an unreasonable invasion of personal privacy to disclose personal information relating to employment or educational history, applies to the personal information of Party A contained in the records, as the personal information relates to his employment history. Consequently, there is a presumption that disclosing the personal information of Party A contained in the records is an unreasonable invasion of his personal privacy.

Does section 17(4)(g) apply to Party A's information?

[para 29] The records at issue contain the names of third parties in the context of other information about the third parties. Consequently, section 17(4)(g) presumes that disclosing the names of the third parties would be an unreasonable invasion of personal privacy.

[para 30] Given that the Applicant requested information about Party A specifically, severing Party A's name from Party A's other personal information in the records would not alter the fact that the remaining personal information is about Party A as an identifiable individual. Even if severed, Party A's name would continue to be associated with personal information about him in the records. Consequently, the presumption in section 17(4)(g) applies to all the personal information of Party A, which I have already found includes all the information in the records at issue.

[para 31] For the reasons above, I find that Party A's personal information subject to several presumptions that it would be an unreasonable invasion of personal privacy to disclose it to the Applicant. I must therefore consider whether disclosing the personal information in the records would constitute an unreasonable invasion of Party A's personal privacy under section 17(5).

Section 17(5)

[para 32] The Applicant argues that section 17(5)(a) applies and weighs in favor of disclosing Party A's personal information. The Applicant reasons that all the records at issue were referred to during a public hearing and are therefore public documents. The Applicant also made the following argument:

> Regarding the decision that was made by Presiding Officer [name of Presiding Officer] on April 13, 2006 where there was a loss of jurisdiction over the charge against [Party A] it is of great concern that through a clerical error jurisdiction was lost on this prosecution. There is also a concern that other prosecutions have been jeopardized in this way.

[para 33] The Public Body agrees that the disciplinary hearing was open to the public. As noted above, it disclosed two records containing Party A's personal information to the Applicant on the basis that these records had been entered into evidence at a public hearing. However, it argues that the records at issue were never entered as exhibits at the hearing and are therefore not public documents. The Public Body argues that the following factors are relevant to a determination as to whether disclosing personal information is desirable for the purposes of subjecting the activities of a Public Body to public scrutiny:

> (1) It is not sufficient for one person to have decided that public scrutiny was necessary; (2) the applicant's concerns had to be about the actions of more than one person within the public body' and (3) where the public [body] had previously disclosed a substantial amount of information or has investigated the matter in issue, the release of the personal information was not likely desirable for the purpose of subjecting the activities of the public body to scrutiny.

[para 34] Party A argues the following:

> The Applicant argues that it requires the records and will release them to the public because "it is of great concern that through clerical error jurisdiction was lost" and it is "concerned that other prosecutions have been jeopardized in this way". Yet the records contain details of allegations against [Party A], not details as to how and why jurisdiction was lost. Those details are contained in the Presiding Officer's decision.

He further argues that he has a reasonable expectation that his personal information will remain private and that it is not in the public interest to disclose the records to the Applicant.

[para 35] In Order F2008-009, on which both the Public Body and Party A rely, the Adjudicator reviewed decisions addressing section 17(5)(a) and said at paragraphs 64 and 65:

> A factor weighing in favour of disclosure of the personal information of third parties is that disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny, under section 17(5)(a) of the Act. For the section to apply, there must be evidence that the activities of the public body have been called into question, which necessitates the disclosure of personal information to subject the activities of the public body to public scrutiny (Order 97-002 at para. 94; Order F2004-015 at para. 88).
>
> In determining whether public scrutiny is desirable, the following may be considered: (1) whether more than one person has suggested that public scrutiny is necessary; (2) whether the applicant's concerns are about the actions of more than one person within the public body; and (3) whether the public body has previously disclosed a substantial amount of information or has investigated the matter in issue (Order 97-002 at paras. 94 and 95; Order F2004-015 at para. 88). However, it is not necessary to meet all three of the foregoing criteria in order to establish that there is a need for public scrutiny (*University of Alberta v. Pylypiuk* at para. 49). What is most important to bear in mind is that the reference to public scrutiny of government or public body activities under section 17(5)(a) requires some public component, such as public accountability, public interest or public fairness (*University of Alberta v. Pylypiuk* at para. 48; Order F2005-016 at para. 104).

[para 36] In *Pylypiuk*, *supra*, the Court commented on the first part of the test for public scrutiny:

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

The Court in *Pylypiuk* found that it was necessary to answer the question of why one person's decision that public scrutiny called for is sufficient to require disclosure. I do not interpret the Court as saying that it is automatically undesirable to subject personal information to public scrutiny if only one person has requested the information, or conversely, that it is automatically desirable to subject personal information to public scrutiny if more than one person requests the information. Rather, the Court means that

when determining whether section 17(5)(a) applies to personal information, one must consider whether disclosing the personal information would serve a public interest, such as promoting public fairness or accountability, as opposed to private interests only.

[para 37] I agree with Party A that disclosing his personal information would not have the effect of bringing to light a clerical error, as the personal information in the records at issue does not address, refer to, or relate in any way to clerical errors made by the Public Body or the Edmonton Police Commission. Further, no evidence was submitted by the Applicant to establish that clerical errors are a pervasive problem such that the need for public scrutiny of this problem outweighs individual privacy interests. In addition, there is no evidence that the loss of jurisdiction relating to the failure to extend time was the result of an error. Finally, the decision of the presiding officer, which provides details of the events leading to the dismissal of charges and his reasons for deciding that the time limit could not be retroactively extended in the case before him, turns on the interpretation of the Edmonton Police Commission's authority to extend time limits under section 7 of the Police Service Regulation. It is clear from that decision that the Edmonton Police Service advocated the view that the Edmonton Police Commission does have the authority to extend the time limit retroactively while Party A argued that it did not. The fact that the Edmonton Police Commission and the Edmonton Police Service had a different view of the Edmonton Police Commission's authority to extend time limits than did the presiding officer is not a clerical error, but a point of interpretation that the decision acknowledges is arguable.

[para 38] Further, I note that the Applicant provided a letter it received from the Chief of Police dated May 23, 2006 with its request for review. This letter explains the basis for the loss of jurisdiction in relation to the disciplinary hearing in the records at issue and explains the steps that were taken to ensure that loss of jurisdiction would not result in future cases. Both of these documents, which were provided to the Applicant, would serve the purpose of satisfying the public as to the cause of loss of jurisdiction and the steps taken to avoid this outcome in future. Disclosing Party A's personal information from the records at issue would not serve this purpose, as it does not reveal any information about the processes of the Public Body or the Edmonton Police Commission.

[para 39] I acknowledge that there is to some degree a parallel between this case and Order F2008-021, in which I found that the Applicant established a public interest in review of the operation of section 43(11) of the *Police Act*. In that case, I found that the personal information consisting of "opinions and views" provided a concrete example of the type of complaint being dismissed under section 43(11) and that it was desirable to disclose this personal information for the purpose of subjecting the activities of the Edmonton Police Service to public scrutiny. In contrast, in the present case, which also deals with records relating to a disciplinary hearing in which jurisdiction was lost, the Applicant has not established that the loss of jurisdiction was due to a clerical error, or that loss of jurisdiction due to such errors is a problem calling for public scrutiny.

[para 40] For these reasons, I find that disclosing Party A's personal information would not be desirable for the purposes of subjecting the activities of the Public Body to public scrutiny.

[para 41] The Applicant argues that the records at issue were referred to at a public hearing and that it could not, therefore, be an unreasonable invasion of personal privacy to disclose them. I interpret the Applicant as arguing that reference to personal information at a hearing open to the public is a factor weighing in favor of disclosure to be considered under section 17(5).

[para 42] An affidavit of a disclosure analyst of the Public Body dated April 28, 2009 states:

> In order to respond to the Applicant, I contacted [the presiding officer] who advised that the Notice was entered as an exhibit in the disciplinary proceeding and, as such, was part of the public record of the hearing. However, the Attachments to the Notice to which the Applicant is now requesting were not entered as exhibits in the disciplinary proceeding, and therefore not part of the public record. Attached hereto and marked as Exhibit "B" to this my Affidavit is a true copy of the e-mail from [the presiding officer] dated February 18, 2008.

[para 43] In response to a question from the disclosure analyst as to whether the records at issue were entered as exhibits and therefore publicly available, the email referred to in the affidavit states:

> Attachments are not entered. I don't get to see them because they could predispose me to view the case one way or the other so they stay out.

[para 44] The evidence of the Public Body satisfies me that the records at issue were not entered as exhibits at the disciplinary hearing. Even if these records had been entered as exhibits at the disciplinary hearing, I would not find that this fact alone made the records publicly available or weighed in for of disclosure, for the reasons that follow.

[para 45] The issue of whether information is publicly available is relevant for the purposes of section 40(1)(bb), which states that a public body *may* disclose personal information that is available to the public. However, this provision does not state that a public body must automatically disclose personal information available to the public. Further, this provision refers to the general authority of public bodies to disclose information, as opposed to the decisions they must make in relation to access requests. When making a determination as to whether personal information may be disclosed to an applicant who has made an access request under the FOIP Act, the head of a public body must consider and apply the provisions of section 17 and follow the processes set out in sections 30 and 31 of the FOIP Act. The public availability of personal information may reduce or negate an individual's expectation of privacy in that information in some cases, such as when the information is both widely reported and available; however, it will not have that effect in every case. Public availability of information is therefore a factor that may be weighed under section 17(5); whether the presumptions under section 17(4) are rebutted will depend on the extent to which the information is readily available to members of the public, and the existence or absence of other factors under section 17(5).

[para 46] In the present case, any exhibits at the disciplinary hearing would be public only in the sense that members of the public *could* have observed the hearing and members of the media *could* have reported on the exhibits entered at the hearing. However, there is no evidence that members of the public *did* attend or that the media *did* report the details of the evidence presented at the hearing. Rather, the evidence is that it was necessary to make an access request to obtain the information, which suggests that the personal information in the records at issue is not available to the public. The Applicant's stated purpose in requesting access to the records at issue is to release the information they contain to the public. This purpose, too, suggests that the information in the records at issue is not accessible by the public. In Order 159, the Assistant Commissioner of the Office of the Information and Privacy Commissioner of Ontario considered what it means for information to be "publicly available". He said:

> After carefully considering the representations of the appellant and the institution together with the information obtained from the Registrar's office, I am of the view that the unreported decisions requested are publicly available.
>
> Support for the position I have taken can be found in an analysis of the way in which the Federal and various Provincial access legislation deals with publicly available information, by McNairn and Woodbury in Government Information: Access and Privacy, De Boo, 1989. At page 2-24 the authors state:
>
> > Other information for which there is already a system of public access in place will be regarded as being available to the public. Someone who is seeking such information will normally be required to proceed in accordance with the rules of that system.

The Assistant Commissioner of Ontario found that information may be considered publicly available if there is a system of public access in place by which the information can be obtained, other than through an access request under freedom of information legislation. I agree with this reasoning.

[para 47] If there is no preexisting system of public access in relation to personal information, personal information is not in fact publicly available for the purposes of the FOIP Act. Consequently, considering public availability to be a factor weighing in favor of disclosure under section 17(5) in such circumstances would be improper. On the other hand, if there is a system of public access in place in relation to personal information, in addition to making an access request under the FOIP Act, then personal information is publicly available. However, when determining whether this information should be disclosed to an applicant who has made an access request under the FOIP Act, public availability would be only one factor to weigh under section 17(5) of the FOIP Act and could be outweighed by other factors weighing against disclosure.

[para 48] Had I found that the records at issue were entered as exhibits at the public hearing, I would also have found that at the time the access request was made, they were not available to the public because it has not been demonstrated that there is a system of public access in place in relation to the personal information in those records. While records used at the hearing are potentially available to members of the public attending

the hearing, the evidence does not establish that the records are available to the public afterward.

[para 49] The expectation of personal privacy that Party A has in relation to his personal information in the records at issue would not be negated simply by the fact that the information was contained in exhibits that were entered at a hearing open to the public.

[para 50] As I find that there are no factors weighing in favor of disclosure under section 17(5), I find that the presumptions created by sections 17(4)(b), (d), and (g) are not rebutted. I therefore find that the Public Body was correct to withhold Party A's personal information from the records at issue. In addition, as the personal information of Party A cannot be severed from the records under section 6 of the Act, I find that the Public Body was correct to withhold these records in their entirety.

Issue B: Does section 32 of the Act require the Public Body to disclose the information in the public interest?

[para 51] Section 32 establishes the situations in which the head of a Public Body must disclose information, even though an exception to disclosure may apply. It states, in part:

> *32(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people, to any person or to an applicant*
>
> *(a) information about a risk of significant harm to the environment or to the health or safety of the public, of the affected group of people, of the person or of the applicant, or*
>
> *(b) information the disclosure of which is, for any other reason, clearly in the public interest.*
>
> *(2) Subsection (1) applies despite any other provision of this Act.*
>
> *(3) Before disclosing information under subsection (1), the head of a public body must, where practicable,*
>
> *(a) notify any third party to whom the information relates,*
>
> *(b) give the third party an opportunity to make representations relating to the disclosure, and*
>
> *(c) notify the Commissioner.*

[para 52] As I have found that the Public Body is required to withhold the records at issue by the application of section 17, I will consider whether it is clearly in the public interest to disclose that information under section 32.

[para 53] The Applicant argues that the records at issue should be disclosed under section 32 as there is a public interest in assessing the EPS's methods of dealing with public complaints against its members.

[para 54] Party A argues that the use of the word "clearly" in section 32(1)b) indicates that the legislature intended that there be little doubt that disclosure must be in the public interest before the duty to disclose arises. Further, he argues that no public interest would be served in releasing the records, which contain allegations against a police officer, as opposed to details as to why jurisdiction was lost in the case. Party A also makes the point that the public interest would be served by maintaining the confidentiality of the records, which would have the effect of maintaining the integrity of the police discipline process and Party A's reputation.

[para 55] In *Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)* (2007), 86 O.R. (3d) 259, relied on by the Applicant, the Ontario Court of Appeal made the following comment regarding Alberta's legislation:

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

[para 56] I agree with the Ontario Court of Appeal that the test in section 32 is whether disclosure is "clearly in the public interest". However, in my view, the application of this test requires a balancing of the public interest in disclosure versus the public interest represented by the exceptions in the Act, in situations where an exception to disclosure applies, to determine whether disclosure is "*clearly* in the public interest". The right of access is subject to limited and specific exceptions. Each exception to disclosure in the Act reflects the decision of the legislature that a specific public interest in withholding the information may outweigh an individual's right of access. Consequently, one must balance the public interest in disclosure with the public interest in withholding information, in order to determine whether disclosing or withholding information best serves the public interest, or is clearly in the public interest.

[para 57] In the present case, I have found that section 17 requires the Public Body to withhold the personal information of Party A. Section 17 recognizes a public interest in protecting the personal information of individuals from an unreasonable invasion of personal privacy. Further, I have already found, in the analysis of section 17, above, that it has not been established that a public interest would be served by disclosing Party A's information. I therefore find that section 32 does not require the Public Body to disclose Party A's personal information.

V. ORDER

[para 58] I make this Order under section 72 of the Act.

[para 59] I confirm the decision of the Public Body to refuse access to the records at issue and require it to refuse access to those records.

_____
Teresa Cunningham
Adjudicator