ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2009-027

March 31, 2010

ALBERTA JUSTICE AND ATTORNEY GENERAL

Case File Number F4348

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Summary: The Applicant made a request to Alberta Justice and Attorney General (the Public Body) for a Crown prosecutor's file on November 20, 2007. The Public Body gave the Applicant access to 30 pages of records, but withheld the remainder of the records, on the basis of sections 17, (unreasonable invasion of a third party's personal privacy) 20(1)(g), (exercise of prosecutorial discretion), 21(1)(b), (supplied in confidence by a government), and 27(1)(a), (confidential police informer privilege), of the *Freedom of Information and Protection of Privacy Act* (the Act).

The Applicant requested review of the Public Body's decision to deny access to the remainder of the records.

The Adjudicator determined that the section 20(1)(g) applied to the information in the records; however, she found that the Public Body had not established that it had properly applied its discretion to withhold information under section 20(1)(g). In particular, she found that the Public Body had applied a policy by which it withholds information generated by the Royal Canadian Mounted Police (RCMP) from disclosure, rather than considering the purpose of section 20(1)(g), when it withheld the information in the records.

She found that section 21(1)(b) did not apply as the records at issue were not supplied by a government or an agent of a government listed in clause (a) of section 21. While a detachment of the RCMP had provided records to the Public Body, she found in this

instance that the RCMP was acting under the direction of both the Solicitor General and the Minister of Justice and Attorney General when the records were created and supplied. She therefore found that the information in the records was not supplied by an agency of the federal government for the purposes of section 21(1)(b).

The Adjudicator also found that confidential police informer privilege did not apply to the information in the records. Finally, she determined that the Public Body had not made a decision in relation to section 17.

She ordered the Public Body to reconsider its decision to withhold information under section 20(1)(g). In the event that it exercised its discretion in favor of disclosure, she ordered it to make decisions regarding the application of section 17.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 6, 17, 20, 21, 27, 71, 72; *Police Act* R.S.A. 2000, c. P-17, ss. 1, 2, 21

Authorities Cited: AB: Orders F2004-018, F2004-026, F2006-005, F2007-021, 2008-002, F2008-007, F2008-027 **BC:** Order 02-19

Sopinka, John et. al., *The Law of Evidence in Canada*, 2nd Edition Markam: Butterworths Canada Ltd. 1999

Cases Cited: *R. v. Power*, [1994] 1 S.C.R. 601; *R. v. Nixon* 2009 ABCA 269; *L'Heureux v. Unum Life Insurance Company of America*, 1998 ABQB 549; *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada*, [2008] 1 S.C.R. 383; *Named Person v. The Vancouver Sun* [2007] 3 S.C.R; *R. v. Gordon*, [1999] O.J. No. 1425; *University of Alberta v. Pylypiuk*, 2002 ABQB 22

I. BACKGROUND

[para 1] The Applicant made a request to Alberta Justice and Attorney General (the Public Body) for a Crown prosecutor's file on November 20, 2007. The Public Body gave the Applicant access to 30 pages of records, but withheld the remainder of the records, citing sections 17, 20(1)(g), 21(1)b), and 27(1)(a) of the *Freedom of Information and Protection of Privacy Act* (the Act).

[para 2] The Applicant requested review by the Commissioner of the Public Body's decision to deny access to information in the records. The Commissioner authorized mediation; however, as mediation was unsuccessful, the matter was scheduled for a written inquiry.

[para 3] The Public Body and the Applicant provided initial and rebuttal submissions. Following my review of the records at issue and the submissions of the parties, I asked the Public Body for further evidence and argument in relation to its application of sections 20 and 27 of the Act to the information in the records. The Public Body provided additional submissions and shared them with the Applicant.

[para 4] I also asked the Public Body and the Applicant to make additional submissions relating to *R. v. Nixon* 2009 ABCA 269, a recent decision of the Alberta Court of Appeal addressing the components of prosecutorial discretion, which was issued after the parties had provided their original submissions. I also asked the parties to provide submissions as to whether a decision by the Crown not to call evidence is a decision made in the exercise of prosecutorial discretion. The parties exchanged their additional submissions.

II. RECORDS AT ISSUE

[para 5] The records at issue are documents and DVDs from a Crown prosecutor's file. Throughout the order, references I make to the records include the DVDs.

III. ISSUES

Issue A: Did the Public Body properly apply section 20(1)(g) of the Act (information relating to or used in the exercise of prosecutorial discretion) to the records / information?

Issue B: Did the Public Body properly apply section 21 of the Act [harm to intergovernmental relations] to the records / information?

Issue C: Does section 27 of the Act (privileged information) apply to the records / information?

Issue D: Does section 17 of the Act (third party personal information) apply to the records / information?

IV. DISCUSSION OF ISSUES

Issue A: Did the Public Body properly apply section 20(1)(g) of the Act (information relating to or used in the exercise of prosecutorial discretion) to the information in the records?

[para 6] The duty to withhold information relating to the exercise of prosecutorial discretion is recognized and protected by section 20(1)(g) of the FOIP Act, which states:

> *20(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to…*
>
> *(g) reveal any information relating to or used in the exercise of prosecutorial discretion…*

[para 7] In Order F2006-005, I noted that section 20(1)(g) protects broad public interests:

> While I agree with the rationale provided for withholding the prosecutor's file, I would add that section 20(1)(g) protects even broader policy interests. As the Court noted in *Krieger, supra*:
>
> > The quasi-judicial function of the Attorney General cannot be subjected to interference from parties who are not as competent to consider the various factors involved in making a decision to prosecute. To subject such decisions to political interference, or to judicial supervision, could erode the integrity of our system of prosecution. Clearly drawn constitutional lines are necessary in areas subject to such grave potential conflict.

By creating an exception to disclosure for information that could reasonably be expected to reveal information relating to or used in the exercise of prosecutorial discretion, the legislature has ensured that the Attorney General's reasons for exercising prosecutorial discretion in a certain way are not subjected to interference.

Is a decision not to call evidence a decision made in the exercise of prosecutorial discretion?

[para 8] The Public Body applied section 20(1)(g) to information in the records on the basis that this information would reveal information used in or relating to a decision of a Crown prosecutor not to call evidence at a trial.

[para 9] After the parties made their initial submissions, the Alberta Court of Appeal released, *R. v. Nixon*, 2009 ABCA 269, which summarizes the case law regarding prosecutorial discretion. The court noted the following at paragraph 20:

> In *Krieger*, the Supreme Court drew a clear distinction between the exercise of the prosecutor's core functions and those decisions that merely govern a prosecutor's tactics or conduct before the court. Matters involving professional conduct, such as an alleged breach of ethical standards, are one example of the latter: *Krieger* at paras. 50-51. More specific examples include: a decision as to disclosure of relevant evidence (*Krieger* at para. 54); and a decision as to the order in which certain evidence may be called (*R. v. Felderhof* (2003), 235 D.L.R. (4th) 131, 68 O.R. (3d) 481 (ONCA) at paras. 53-54). Such decisions fall outside the scope of prosecutorial discretion, as they do not go to the nature and extent of a prosecution, and are properly subject to control by the court or regulation by law societies.

[para 10] I invited the parties to make submissions regarding the Court of Appeal's decision in *Nixon* as I was uncertain as to whether a decision not to call evidence is a decision made in the exercise of prosecutorial discretion, given that such a decision could also be construed, arguably, as conduct or tactics in court. I asked the parties the following question:

> Is a decision made by the Crown prosecutor not to call evidence a decision made in the exercise of prosecutorial discretion or does it constitute conduct or tactics in court?

The parties did not directly answer this question. However, I note that in *R. v. Power*, [1994] 1 S.C.R. 601, a majority of the Supreme Court of Canada held that a decision by a Crown prosecutor not to call further evidence, which led to a directed verdict of acquittal, was a decision made in the exercise of prosecutorial discretion and was not reviewable. While there may be reason to speculate that a decision not to call evidence could be considered a tactical decision, as opposed to a decision made in the exercise of

prosecutorial discretion, I find that *Power* continues to represent the law on this point. I therefore find that a decision not to call evidence is a decision made in the exercise of prosecutorial discretion.

Could the information in the records at issue be reasonably expected to reveal information relating to or used to the exercise of prosecutorial discretion; specifically, the decision not to call evidence?

[para 11] The Public Body made the following argument in relation to the application of section 20(1)(g) and the burden of proof in an inquiry.

> While she acknowledges it's possible the records were used to make a decision in the exercise of discretion, the Adjudicator claims she is unable to reasonably infer, without more evidence, that it is probable the records relate to or were used in the exercise of discretion.
>
> Respectfully, the Public Body asserts this "possible vs. probable" test is not required by section 20(1)(g).
>
> The test is this – would a reasonable person confronted with the same facts, information and circumstances, conclude that disclosure of the records could reveal information used in or relating to the exercise of prosecutorial discretion?

[para 12] Section 71 assigns the burden of proof in an inquiry. It states, in part:

> *71(1) If the inquiry relates to a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part of the record.*

[para 13] A public body has the burden of establishing that an exception to the right of access applies to information in records that an applicant has requested. A public body need not establish beyond a reasonable doubt that an exception applies, but on the balance of probabilities. In *The Law of Evidence in Canada*, 2nd Edition (Markam; Butterworths Canada Ltd. 1999), the authors describe this standard on page 155:

> The degree of probability required to discharge the burden of proof in a civil case has been defined by several leading jurists. Lord Denning defined it in these terms:
>
> > It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: "we think it more probable than not", the burden is discharged, but if the probabilities are equal it is not.
>
> Cartright J. in *Smith v. Smith*, articulated the test as follows:
>
> > … that civil cases may be proved by a preponderance of evidence or that a finding in such cases may be made upon the basis of a preponderance of probability and I do not propose to attempt a more precise statement of the rule. I wish, however, to emphasize that in every civil action before the tribunal can safely find the affirmative or an issue of fact required to be provided it must be reasonably be satisfied, and that whether or not it will be so satisfied must depend upon the totality of the circumstances on which its judgment is formed including the gravity of the consequences of the finding.

> Simply put, the trier of fact must find that "the existence of the contested fact is more probable than its nonexistence." Conversely, where a party must prove the negative of an issue, the proponent must prove its absence is more probable than its existence.

The burden of proof is not met if a public body establishes only that it is possible that there is a factual basis for applying an exception. Rather, a Public Body must establish that it is more likely than not that there is a factual basis for applying the exception.

[para 14] Section 20(1)(g) does not state that information need only be reasonably expected to have been used in, or relate to, the exercise of prosecutorial discretion. Rather, section 20(1)(g) states that it applies to information that would *reasonably be expected to reveal* any information relating to or used in the exercise of prosecutorial discretion. The phrase "could reasonably be expected," in section 20(1), modifies the verb "reveal" in clause (g), and not the phrases "used in" or "relating to". Consequently, a public body seeking to withhold information under this provision must establish the following facts on the balance of probabilities: (1) prosecutorial discretion was exercised, (2) there is information that relates to or was used in this exercise of that discretion, and (3) disclosure of the information in the records withheld under section 20(1)(g) could reasonably be expected to reveal this information.

[para 15] In my letter of March 27, 2009 to the Public Body, I requested that the Public Body provide further evidence and argument in support of its application of section 20(1)(g) to the information in the records. I said:

> There is a significant public interest in protecting prosecutorial discretion from interference and the right of access is subject to the exceptions in the Act. I am therefore providing the Public Body with the opportunity to provide further argument and evidence, such as the affidavit of an individual who has knowledge of the file and exercised prosecutorial discretion, to establish that prosecutorial discretion was exercised, and that disclosing the records would reveal information relating to or used in that exercise of discretion.

[para 16] In response, the Public Body supplied the following:

> The Crown's file contains relatively little material that is produced by the Crown. The material – essentially the fruits of the investigation - -comes to the Crown from a law enforcement agency, typically a police service.
>
> To this, the Crown adds case law reports [if legal research is done], copies of witness subpoenas, correspondence with investigators, other police, defense counsel, notes of meetings, and so on.
>
> These records and information form the bulk of the material the Crown Prosecutor has in order to make the decisions he has to make – that is, exercise his discretion. He may also have in mind certain intangibles such as his non-recorded recollection of conversations or interviews with witnesses, his knowledge of the law, and so on. All this "material" – written or otherwise – informs the decision he makes.
>
> …
>
> The Crown Prosecutor assigned conduct of the file proceeded in a time-honoured fashion. He read the material, worked on it in the appropriate manner, and after due consideration concluded

> there was no reasonable prospect of conviction. *Ipso facto*, he exercised his discretion based on the records he had available to him and from which he had accumulated sufficient insight to form an opinion.
>
> During this process, the Crown found too that the file was not littered with irrelevant or meaningless records. Even if such a record was present in the file, it would be non-responsive to the Applicant's request.
>
> It is the Public Body's assertion that as the record relates to the investigation and prosecution – in spite of the fact that the prosecution ended part way along --- their relationship to the prosecutor's discretion is established.

[para 17] I understand the Public Body to say that all information available to a Crown prosecutor, including information drawn from experience and memory, is information that either relates to or is used in the exercise of prosecutorial discretion. The Public Body therefore reasons that all information in a Crown prosecutor's file is subject to section 20(1)(g), as it is information available to the Crown prosecutor for the exercise of prosecutorial discretion. Consequently, the information in the records is the evidence on which the Public Body relies.

[para 18] In Order F2007-021, the Adjudicator said:

> However, I do not accept the Public Body's statements that "any information in a Crown prosecutor's file may reasonably be expected to relate to the exercise of prosecutorial discretion and therefore may be protected from disclosure" and that "the simple presence of records in the file that may contain such information engages the provisions of this exception." To accept these assertions would be to judge information by its location rather than its substance. While it may be the case that most or all information in a Crown prosecutor's file usually falls under section 20(1)(g) of the Act, information must still be reviewed on a record-by-record basis.
>
> The present inquiry illustrates the need to review records individually. Some of the documents (pages 622-638) are not ones routinely found in a Crown prosecutor's file. They are a letter of complaint, internal memoranda about that letter, and a briefing note. On review of the records, I agree with the Public Body that the records fall within the scope of section 20(1)(g) – but this is due to their content and not the fact that they are on the file. I can envisage the possibility of records making their way onto a Crown prosecutor's file but having nothing to do with prosecutorial discretion.
>
> In deciding that pages 622-638 of the Crown prosecutor's file fall within section 20(1)(g) of the Act, I have borne in mind the breadth of the section, in that information needs only to "relate to" the exercise of prosecutorial discretion. I have also borne in mind the B.C. definition cited above, which indicates that, in the context of access legislation, the exercise of prosecutorial discretion extends to the duty or power to conduct a hearing or trial.

[para 19] As can be seen from the passage above, previous orders of this office have held that information need only be reasonably expected to *relate* to exercise of prosecutorial discretion for section 20(1)(g) to apply. Order F2007-021 holds that if information was available to the Crown prosecutor when making the decision to exercise prosecutorial discretion, and is not extraneous, there is a relationship between the information and the exercise of prosecutorial discretion such that the information relates to the exercise of prosecutorial discretion. In addition, in orders F2008-002 and F2008-007, I held that information, the disclosure of which would have the effect of revealing

the reasons behind the exercise of prosecutorial discretion, is also information that relates to the exercise of prosecutorial discretion.

[para 20] In the present case, there are no records in the Crown prosecutor's file that are extraneous to the prosecution. Further, with the exception of record 7, all the information in the records was available to the Crown prosecutor at the time the decision not to call evidence was made. Record 7 documents the Crown prosecutor's reasons for not calling evidence at trial, and relates to the exercise of discretion for that reason. Consequently, all the information in the records "relates" to the Crown prosecutor's exercise of prosecutorial discretion.

Conclusion

[para 21] Following the reasoning of previous orders of this office, section 20(1)(g) applies to all the information in the records at issue.

Exercise of discretion

[para 22] I have found that section 20(1)(g) applies to the information in the records. I must therefore consider whether the Public Body has established that it properly exercised its discretion when it withheld the information in the records from the Applicant.

[para 23] The Public Body states in its submissions that it took notice of the broad immunity afforded prosecutorial discretion and the critical need to sustain the prosecutor's ability to collect, review, and protect information in order that they can make decisions impartially on questions of justice and public interest.

[para 24] The Public Body's letter of December 20, 2007 to the Applicant states the following:

> We are responding to your general information request, submitted on behalf of [the Applicant] under the Freedom of Information and Protection of Privacy (FOIP) Act. The request pertains to records in the Crown Prosecutor's file related to [an individual] involving [the Applicant] as the victim.
>
> We are pleased to provide a response to your information request. Enclosed is a copy of the records.
>
> 30 pages of records are being released. The remaining pages were exempted under section 17, 20, 21 and 27 of the FOIP Act. A detailed listing of the pages that were exempted in entirety is attached. We have included a copy of the relevant sections of the FOIP Act to explain the exemptions that were applied.
>
> Section 21 was applied to records that originated in a file maintained by the Royal Canadian Mounted Police (RCMP). Alberta Justice is unable to obtain the required consent to disclose RCMP records. To obtain access to information held in RCMP files you may make application to the following office:
>
> R.C.M.P. Access to Information and Privacy Branch

1200 Vanier Parkway
Ottawa, Ontario
K1A 0R2

[para 25] This letter implies that exceptions to disclosure under the Act were applied or not applied on the basis of the origin of records. The Public Body disclosed information in records that, by its own arguments, fall under section 20(1)(g) and withheld information in records under section 20(1)(g) on the basis of whether or not the RCMP created the information. While the Public Body cites sections 17, 20, and 27 of the FOIP Act, it is clear that it is prepared to release documents that were not generated by the RCMP and is not prepared to release documents generated by the RCMP.

[para 26] In its arguments relating to its application of section 21(1)(b), the Public Body provided further information regarding an agreement between Alberta's Solicitor General and the RCMP Departmental Privacy and Access to Information Coordinator regarding records created by the RCMP:

> The R.C.M.P. has long held the position that in order to remain fully in control of its own records, particularly those containing personal information, and as the R.C.M.P. is subject to federal access and privacy legislation, requests for access to records originally generated by the R.C.M.P. should be sent directly to them. This was articulated in a letter from the RCMP to the Alberta Solicitor General in 2002. [Tab 11]
>
> This procedure was agreed to and put into practice for all instances in which the Public Body received a request for access to records that originated with the R.C.M.P. At the relevant time[s]) Correctional Services was a Division of Alberta Justice and Attorney General, and this Public Body continues to subscribe to the Agreement.

Although the Public Body is not a party to this agreement, I understand it to state that it follows the terms of this agreement as a procedure in relation to making decisions regarding access to information.

[para 27] This agreement states:

> This is further to your letter with attachments dated June 27, 2002 provided to us via facsimile concerning a request by [redacted] for access to RCMP generated information contained within your files.
>
> Please be advised that in all such instances I would appreciate your denying access to RCMP generated information under your "received in confidence" provision o f the Act. This is not to say that this information is in-accessible as your client may make application direct to the RCMP for access to personal information held by us. This process will ensure that the RCMP remains in control of its records.

The Public Body withholds information generated by the RCMP in order to ensure that the RCMP remains in control of these records.

[para 28] The position of the RCMP is a consideration that is irrelevant to the exercise of discretion under section 20(1)(g). As the Commissioner has said in earlier orders, the exercise of discretion under a particular exception in the Act is to have regard to the purposes for the exception (Order F2004-026). The purpose of section 20(1)(g) is

to enable Crown prosecutors to exercise prosecutorial discretion free from interference, harassment, and second-guessing. There is nothing in the provision that extends to upholding the position on the question of disclosure of another body, such as the RCMP.

[para 29] I find that the letter of December 20, 2007 is a stronger indicator of the Public Body's purpose for withholding the record under section 20(1)(g) than the "standard-form" explanation that it gave in its initial submissions regarding section 20(1)(g). Thus I must require the Public Body to exercise its discretion without reference to the irrelevant consideration of the RCMP's position as to whether the information in the records should be disclosed.

[para 30] Therefore, it is reasonable to expect that in re-exercising its discretion, if inappropriate considerations are not taken into account, the Pubic Body will now exercise its discretion in favour of disclosure, or if it does not, that it will explain the inconsistencies in its account of its exercise of discretion and its response to the Applicant that I have found in the materials before me.

Issue B: Did the Public Body properly apply section 21 of the Act (harm to intergovernmental relations) to the information in the records?

[para 31] The Public Body applied section 21(1)(b) of the Act to records 35 – 102, 129, and 132 - 155 on the basis that they were provided by an RCMP detachment to the Crown in confidence. The heading of section 21 indicates that it creates an exception to disclosure for information that could harm intergovernmental relations. It states, in part:

> *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.*

[para 32] In Order F2004-018, the Commissioner stated that four criteria must be met before section 21(1)(b) applies to information:

> 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.

I will therefore consider whether the information in the records at issue meet these criteria.

[para 33] The Public Body argues that the RCMP is an agency of the Government of Canada and is subject to federal access and privacy legislation. It reasons that information supplied by the St. Albert RCMP detachment to Alberta Justice therefore meets the requirements of "supplied… by a government, local government body or an organization listed in clause (a) or its agencies".

[para 34] I find section 21(1)(b) does not apply to the information in the records at issue as it was not supplied by a government, local government body or an organization listed in clause (a) or its agencies. I make this finding for the following reasons.

[para 35] Section 21 of the *Police Act* R.S.A. 2000, c. P-17 states:

> *21(1) The Lieutenant Governor in Council may, from time to time, authorize the Minister on behalf of the Government of Alberta to enter into an agreement with the Government of Canada for the Royal Canadian Mounted Police to provide a provincial police service.*
>
> *(2) When an agreement referred to in subsection (1) is in force, the Royal Canadian Mounted Police are responsible for the policing of all or any part of Alberta as provided for in the agreement.*
>
> *(3) The Royal Canadian Mounted Police with respect to their duties as the provincial police service shall, subject to the terms of the agreement referred to in subsection (1), be under the general direction of the Minister in matters respecting the operations, policies and functions of the provincial police service other than those matters referred to in section 2(2).*

[para 36] Section 2 of the *Police Act* establishes the responsibilities and jurisdiction of the Solicitor General and the Minister of Justice and Attorney General.

> *2(1) The Minister is charged with the administration of this Act.*
>
> *(2) Notwithstanding anything in this Act, all police services and peace officers shall act under the direction of the Minister of Justice and Attorney General in respect of matters concerning the administration of justice.*

[para 37] A member of the RCMP is by definition, a police officer under the *Police Act*. The RCMP detachment in this case is a provincial police service within the meaning of the *Police Act*, and is responsible for policing the City of St. Albert, through the terms of the Provincial Police Services Agreement. Further, under the *Police Act*, the RCMP is under the direction of the Solicitor General when it carries out the operations, policies and functions of a provincial police service, and is under the direction of the Minister of Justice and Attorney General in matters concerning the administration of justice.

[para 38] I reject the idea that it follows from the fact that an RCMP officer's employer has a federal aspect that the information created or provided by an RCMP officer to the Minister of Justice and Attorney General has a federal aspect.

[para 39] I note that in *L'Heureux v. Unum Life Insurance Company of America*, 1998 ABQB 549, Murray J. found that when RCMP officers act under the authority of provincial legislation, they act as agents of the provincial government. He said:

> In this case the R.C.M.P. was conducting an investigation into a fatality pursuant to the *Fatality Inquiries Act*, R.S.A. 1980, c. F-6. The *Fatality Inquiries Act* establishes the "Fatality Review Board" which includes the Chief Medical Examiner and three other members appointed by the Lieutenant Governor in Council. The Board is charged with reviewing investigations under the *Fatality Inquiries Act* in order to determine if a public inquiry is required. It also reviews and investigates complaints into the misconduct of medical examiners.
>
> Section 6(5) of the *Fatality Inquiries Act* provides for the appointment of medical examiners' investigators, who can be full or part-time employees. Medical examiners are individual physicians appointed by the Minister of Justice and Attorney-General. According to the *Fatality Inquiries Act*, medical examiners' investigators work directly under the authority of the Chief Medical Examiner. The duties of medical examiners' investigators include assisting the medical examiner when requested. Other powers conferred upon medical examiners' investigators by the *Fatality Inquiries Act* include general search and seizure powers for the purposes of investigation if authorised by a medical examiner.
>
> Members of the R.C.M.P., members of municipal police services and peace officers responsible for policing within Alberta pursuant to the *Police Act* are deemed to have the powers and duties of medical examiners' investigators pursuant to s. 9(1) of the *Fatality Inquiries Act* The documents that are the subject of the present application were created by members of the Tofield R.C.M.P. acting as a medical examiners' investigator pursuant to the *Fatality Inquiries Act.* Thus at the relevant time there was no Federal Crown agency involvement. The Tofield R.C.M.P. members were conducting an investigation as directed by the Chief Medical Examiner and as such were agents of the Chief Medical Examiner.

[para 40] I also note that in *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada*, [2008] 1 S.C.R. 383, the Supreme Court of Canada

determined that the RCMP must comply with provincial language laws when acting as a provincial police force. The Court said at paragraphs 16 - 19:

> Section 2(2) of the *Police Act* provides that "[e]very member of the Royal Canadian Mounted Police . . . has all the powers, authority, privileges, rights and immunities of a peace officer and constable in and for the Province of New Brunswick". Since each RCMP member is authorized by the New Brunswick legislature to administer justice in the province, he or she performs the role of an "institution of the legislature or government" of New Brunswick and must comply with s. 20(2) of the *Charter*. Although New Brunswick continues to be responsible for administering justice in accordance with its constitutional language obligations despite the Agreement, this in no way changes the fact that the RCMP may have its own language obligations to meet in fulfilling its mandate in New Brunswick.
>
> In *Canada (Commissioner of Official Languages) v. Canada (Department of Justice)* (2001), 194 F.T.R. 181, 2001 FCT 239, the Federal Court—Trial Division held that a government may not adopt policies that would, as a result of agreements entered into, hinder the protection of guaranteed rights. In that case, the federal government had, by contract, effectively transferred the administration of certain criminal prosecutions to the province of Ontario. Under the agreement, the provincial language rights scheme, which provided less protection to francophones, became applicable to a federal matter. The court held that the federal government could not jettison its constitutional obligations in this way. However, it did not rule on the obligations of Ontario officers performing duties under the agreement with the federal government.
>
> In the instant case, there is no transfer of responsibility for the administration of justice in the province. Under the Agreement between the RCMP and New Brunswick, the New Brunswick Minister of Justice is responsible for setting "the objectives, priorities and goals of the Provincial Police Service" (art. 3.3). The Minister determines the level of service to be provided. The respondent acknowledges, at para. 62 of her factum, that — as the Federal Court observed (para. 39) — New Brunswick retains control over the RCMP's policing activities. The RCMP remains responsible for internal management only (art. 3.1(a)). What must be concluded from this situation is that the institution in question is an institution of the New Brunswick government, that is, its Minister of Justice, and that the Minister discharges his or her constitutional obligations through the RCMP members designated as New Brunswick peace officers by the provincial legislation. The provision of services by the RCMP must therefore be consistent with the obligations arising under s. 20(2) of the *Charter*.
>
> The RCMP does not act as a separate federal institution in administering justice in New Brunswick; it assumes, by way of contract, obligations related to the policing function. The content of this function is set out in provincial legislation. Thus, in New Brunswick, the RCMP exercises a statutory power — which flows not only from federal legislation but also from New Brunswick legislation — through its members, who work under the authority of the New Brunswick government.

I understand the Court to say that the Minister of Justice in that case controlled the policing activities of the RCMP. Further, legislative and constitutional obligations of the Minister of Justice are shared by the RCMP as the agents of the Minister of Justice when they carry policing duties under provincial legislation and under the direction of the province.

[para 41] In Order F2008-027, I determined that section 21(1)(b) applies to protect "intergovernmental" relations of the Government of Alberta, as opposed to

"intragovermental" relations, or intergovernmental relations of an entity other than the Government of Alberta. I said:

> 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 42] In this case, the information in the records at issue was created by RCMP officers, acting as police officers 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*. The authority to collect and exchange this information is provided by the *Police Act* and not by federal legislation. Further, under section 2 of the *Police Act*, a police service 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. Consequently, the exchange of information between an RCMP detachment and the Minister of Justice and Attorney General under the *Police Act* is intragovernmental in nature, rather than intergovernmental. I find that when the RCMP supplied information to the Public Body, it acted as an entity representing the Government of Alberta, and acted under the direction of the Government of Alberta.

[para 43] The question remains whether section 21(1)(b) encompasses information supplied by a representative of the Government of Alberta, as I have found the RCMP detachment to be. As discussed in Order F2008-027, the use of the phrase "a government, local government body, or organization *listed* in clause (a)" as opposed to a more general phrase such as "a government, local government body referred to in clause (a)," or simply "a government, local government body, or organization in clause (a)," means that a specific list in clause (a) is being referred to in clause (b). I interpret subclauses (i) – (v) in section 21(1)(a) as creating a 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. The Government of Alberta is not included in the list in subclauses (i) – (v), presumably because there is no need to protect the Government of Alberta's relations with itself.

[para 44] I find that the Government of Alberta it is not a government listed in clause (a) for the purposes of section 21(1)(b). As a result, information supplied by RCMP acting as agent for the Solicitor General or the Minister of Justice and Attorney General is not subject to section 21(1)(b).

[para 45] In making this finding, I arrive at a conclusion that is different than that of the Commissioner in Order F2004-018. In Order F2004-018, the Commissioner adopted the reasoning of the former Information and Privacy Commissioner of British Columbia

in Order 02-19 and found that information supplied by the RCMP to the Edmonton Police Service fell under section 21(1)(b). In Order 02-19, the former Information and Privacy Commissioner of British Columbia said:

> The provincial *Police Act* contemplates some provincial role, through the Canada-British Columbia agreement, in the RCMP's policing of the province. It could not seriously be suggested, however, that the *Police Act*, or any agreement under it, somehow makes the RCMP a provincial body or agency. The constitutionality of any attempt by British Columbia to do this would be, at its best, questionable. See, for example, *Attorney General (Quebec)*, above, and *Scowby et al.* v. *Glendinning* 1986 CanLII 30 (S.C.C.), (1986), 32 D.L.R. (4th) 161 (S.C.C.). Constitutional issues aside, I do not see any attempt on the part of British Columbia, through the *Police Act*, to turn the RCMP into a provincial agency. See, also, *Re Ombudsman for Saskatchewan* (1974), 46 D.L.R. (3d) 452 (Sask. Q.B.), where Bayda J. (as he then was) held that the RCMP was not a provincial government agency for the purposes of the Saskatchewan *Ombudsman Act*.

In determining that information supplied by the RCMP was information supplied in confidence by an agency of the federal government, the former British Columbia commissioner held that British Columbia's *Police Act* did not "turn the RCMP into a provincial agency." However, this case was decided before *Société des Acadiens*, which is clear that the RCMP act under the direction of the province when they act under provincial legislation. I draw from this case that while the RCMP maintains its status as a federal institution, and is in one sense an "agency" of the Government of Canada, the more important point to be drawn from the case is that when it is acting under provincial legislation as the provincial police service, it is policing for and under the control of the province. Thus the transfers of information between the RCMP detachment and the Public Body, are intra-governmental. Had the Commissioner had the benefit of *Société des Acadiens* when Order F2004-018 was decided, in which the Supreme Court of Canada found that an RCMP officer acting under provincial policing legislation acts as "institution of the legislature or government", the outcome may have been different.

[para 46] I also find that the Public Body has not established that the RCMP supplied the information in the records in confidence. The Public Body relies on the following passage from the letter from the FOIP Coordinator of the RCMP to the Solicitor General's office as establishing that the information in the records was supplied in confidence.

> … in all such instances, I would appreciate your denying access to RCMP generated information under your "received in confidence" provisions of the Act. This is not to say that this information is in-accessible as your client may make application direct to the RCMP for access to personal information held by us.

I am unable to conclude that this excerpt establishes that the RCMP supplied the information in the records to the Public Body with an expectation that the information would not be disclosed. First, I note that the excerpt refers to an agreement between the Solicitor General and the RCMP, which does not make reference to the Public Body. Second, I note that the excerpt does not state that information generated by the RCMP *is* necessarily supplied in confidence, only that the RCMP would appreciate it if the Solicitor General would deny access requests on this basis. Assuming that the letter of the

RCMP to the Solicitor General and Public Safety includes the Public Body, I find that this letter speaks to the withholding of permission under section 21(2). However, section 21(2) is not engaged unless it is first established that information has been supplied in confidence by an entity listed in section 21(1)(a). Third, as noted above, these records were given to the Public Body as part of the RCMP's duties to the administration of justice. It is not clear that the RCMP would have the authority to impose limits on the use the Minister of Justice and Attorney could put to records it supplies under the *Police Act*. Finally, the records were provided to the Minister of Justice and Attorney General so that they could form the basis of a prosecution. As prosecutions are public, it would be reasonable for the RCMP to expect that some of the information in the records could be disclosed at trial and become public information.

For all these reasons, I find that the Public Body has not established that the information in the records was supplied in confidence.

[para 47] For these reasons, I find that section 21(1)(b) does not apply to the information in the records at issue.

Issue C: Does section 27 of the Act (privileged information) apply to the records / information?

[para 48] The Public Body argues that confidential informer privilege applies to records 2 – 5, and 169 and 170 and that these records were withheld from the Applicant under section 27(1)(a) in their entirety for this reason, in addition to being withheld under sections 20(1)(g) and 21(1)(b). In its supplementary submissions, the Public Body argued that confidential informer privilege applies to all the witness statements in the records.

Records 2 – 5

[para 49] Records 2 – 5 are letters from the Crown prosecutor to the defence. These letters name the witnesses providing statements in the disclosure package. Records 169 – 170 are a letter to the Crown from a lawyer.

[para 50] Section 27(1)(a) authorizes a public body to withhold information that is subject to legal privilege. It states:

> *27(1) The head of a public body may refuse to disclose to an applicant*
>
> *(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege…*

Confidential informer privilege is a legal privilege. Therefore, section 27(1) applies to information subject to this privilege

[para 51] In *Named Person v. The Vancouver Sun* [2007] 3 S.C.R, the Supreme Court of Canada considered the purpose and scope of confidential informer privilege. The Court said at paragraph 16:

> Police work, and the criminal justice system as a whole, depend to some degree on the work of confidential informers. The law has therefore long recognized that those who choose to act as confidential informers must be protected from the possibility of retribution. The law's protection has been provided in the form of the informer privilege rule, which protects from revelation in public or in court of the identity of those who give information related to criminal matters in confidence. This protection in turn encourages cooperation with the criminal justice system for future potential informers. [emphasis mine]

Confidential informer privilege applies to protect the identities of those who provide information relating to criminal matters to the police in confidence. As the Supreme Court of Canada noted in *Named Person*, the privilege is absolute, subject only to the "innocence at stake" exception, and cannot be waived. Further, a court lacks discretion to disclose the identity of a confidential informer in any proceeding and must hold an *in camera* hearing to determine whether the privilege applies. However, the privilege does not extend to those who provide information to the police without a requirement of confidentiality. In *R. v. Gordon* [1999] O.J. No. 1425, a decision of the Ontario Court of Justice, the Court provided the following definition of an informer for the purposes of confidential informer privilege:

> In order to invoke and rely upon the principle of informer privilege, the person whose identity the Crown … seeks to protect must fit the definition of an informer. An informer is a person who provides the police relevant information useful in the prosecution of an offence whose identity the Crown seeks to keep confidential for one or more of several specific and justifiable reasons. Informer status is not available to a material witness to a crime nor to an agent provocateur acting under the direction of the police. [emphasis mine]

[para 52] Records 2 – 5 are cover letters to disclosure packages sent by the Crown prosecutor to the defence. The Crown prosecutor provided the names of the witnesses he intended to call at trial to the defence in these letters. In my view, the only reasonable interpretation of this action is that the individuals named in the letter were witnesses and not confidential police informers. While the Public Body appears to argue that the information in these records is subject to informer privilege because they contain a caution that the information in the materials was to be used only for the purpose of making full answer and defence, the fact remains that the disclosure package would not contain the names of those supplying information if the Crown prosecutor considered confidential informer privilege to apply to their identities.

[para 53] Similarly, the witness statements contain the names of witnesses and indicate that they were not obtained by the police in confidence. These records were also disclosed to the defence. I therefore find that confidential informer privilege does not apply to them.

Records 169 – 170

[para 54] Records 169 – 170 are records of a letter from a representative of a party to the Crown Prosecutor's Office. This letter does not provide information in confidence to the police regarding a criminal matter, but rather discusses the extent of the writer's involvement in the case as legal counsel. Further, it appears from the letter that the identity of the writer and his position as counsel was known to the accused. Consequently, confidential informer privilege does not apply to the information in this document.

[para 55] For these reasons, I find that records 2 – 5, records 169 – 170, and the witness statements in the records at issue are not subject to confidential informer privilege. As I find that the Public Body has not established that the records are privileged, it follows that I find that it has not established that section 27(1)(a) applies to the information in the records.

Issue D: Does section 17 of the Act (third party personal information) apply to the records / information?

[para 56] The Public Body submits that it withheld records 1, 6, 7, 9 -19, 35 - 87, 103 - 129, and 132 - 154 in their entirety under section 17(1).

[para 57] 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;*

[para 58] Personal information under the FOIP Act is information about an identifiable individual that is recorded in some form. However, an opinion held about another individual, is the personal information of that individual.

[para 59] 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) personal information is an identifiable part of a law enforcement record, except to the extent that the disclosure is necessary to dispose of the law enforcement matter or to continue an investigation,*
>
> *(g) 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 60] 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 61] 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 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). It is important to note that section 17(5) is not an exhaustive list and that other relevant circumstances must be considered.

[para 62] 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 63] Section 6 of the Act grants a right of access to applicants and requires public bodies to sever information where it is reasonable to do so. It states, in part:

> *6(1) An applicant has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.*
>
> *(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record.*

[para 64] The Public Body argues that the records contain third party personal information and that disclosure of this information would be an unreasonable invasion of the privacy of third parties. Further, it argues that any attempt to sever the personal information from the records would render the remaining information meaningless.

[para 65] The Public Body has not explained in its submissions or its response to the Applicant which information in the records it considers to be the personal information of third parties and how it would be an unreasonable invasion of their personal privacy to

disclose this information. While it has made general assertions and points to sections 17(4)(b) and (g), I do not have the benefit of its actual decision as to how these provisions were applied, or its reasons.

[para 66] My review of the witness statements indicates that some of the information they contain could be the personal information of the Applicant, given that the information can be characterized as the views or opinions of third parties about the Applicant. In addition, it is not obvious from the records that the names and identifying information of third parties could not be severed in some cases. However, as the Public Body has not documented its decisions in relation to severance or the basis for them, I am unable to review its decisions, if decisions were made, regarding severance.

[para 67] In addition, the Public Body has not explained why it considers disclosing the personal information of third parties appearing in records 1, 6, 7, 9 – 19, 35 – 87, and 114 – 154 would be an unreasonable invasion of their personal privacy, while disclosing their personal information as it appears in records 2 – 5 and 169 – 170 would not be.

[para 68] Having reviewed its submissions, I am not satisfied that the Public Body has made a decision in relation to section 17. While the Public Body, cited section 17 in its response, and indicated the records to which it applied section 17, it did not reveal in its submissions or response how it applied section 17 to the information it withheld from the records. If the Public Body made a decision in relation to section 17, I am unable to review it on the evidence before me.

[para 69] For these reasons, I find that the Public Body has not applied section 17 to the information in the records. Consequently, if the Public Body decides to exercise its discretion in favour of disclosure when it reconsiders its decision to apply section 20(1)(g) to the information in the records, it must make new decisions relating to the application of section 17 to the information they contain.

V. ORDER

[para 70] I make this Order under section 72 of the Act.

[para 71] I require the Public Body to exercise its discretion to either disclose the information it has withheld under section 20(1)(g), or to withhold under section 20(1)(g), without reference to the irrelevant consideration of the RCMP's position as to whether the information in the records should be disclosed.

[para 72] I require the Public Body, if it exercises discretion to withhold information from the records, to provide an explanation of the inconsistency in the Public Body's materials; that is, the inconsistency between its explanation as to how and why it applied section 20(1)(g) in its submissions in relation to section 21(1)(b), and in its letter of section December 20, 2007 to the Applicant.

[para 73] In the event that the Public Body exercises its discretion in favor of disclosure, I order the Public Body to meet its duty to the Applicant under section 12 of the Act by making decisions relating to the application of section 17 of the Act to the information in the records and communicating that decision and the reasons for it in a response to the Applicant.

[para 74] I order the Public Body to notify me, in writing, within 50 days of receiving a copy of this Order that it has complied with the Order.

_____

Teresa Cunningham
Adjudicator