ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2009-044

June 29, 2010

EDMONTON POLICE SERVICE

Case File Number F4403

Office URL: www.oipc.ab.ca

Summary: Pursuant to the *Freedom of Information and Protection of Privacy Act* (the "Act") the Applicant requested from the Edmonton Police Service (the "EPS") all records relating to a complaint against EPS members that had been investigated by the EPS. It was alleged in the complaint that EPS members had assaulted a handcuffed individual while in the process of arresting him ("the incident"). The EPS completed an internal investigation of the incident and determined that the EPS members should not be sanctioned or charged. The EPS responded to the Applicant's request by providing the Applicant with a copy of the internal investigation file relating to the investigation of the incident. Portions of the records were severed pursuant to sections 17, 24 and 27 of the Act. As well, some records were withheld pursuant to section 4(1)(a) of the Act.

The Adjudicator found that the records withheld by the EPS pursuant to section 4(1)(a) of the Act were information on a court file and therefore she had no jurisdiction to review the EPS' decision to withhold the records. The Adjudicator also found that the EPS properly applied section 17 of the Act to all of the third party personal information, including the personal information of the EPS members involved in the incident. As well, the Adjudicator found that the EPS properly applied sections 24 and 27 of the Act.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(h), 1(n), 4(1)(a), 6(2), 17, 21(1), 24(1), 27(1), 32(1), 72.

Orders Cited: AB: Orders 2000-029, 2000-032, 2001-001, F2002-001, F2003-017, F2004-026, F2006-014, F2006-018, F2007-021, F2008-009, F2008-017, F2008-020, F2008-028, F2009-010, F2009-018.

Court Decisions Cited: *Calgary Police Service v. Alberta (Information and Privacy Commissioner),* 2010 ABQB 82 Appeal as of right to the C.A. [May 5, 2010] 1001-0111 AC.

I. BACKGROUND

[para 1] On January 2, 2008, the Applicant, an organization, sent the EPS a letter enclosing an article from a local paper, and letters from the Applicant to a member of the Edmonton Police Commission. The article and the letters concerned an incident in which EPS police officers ("EPS members") allegedly punched and kicked a handcuffed man. The incident was witnessed by two individuals ("the witnesses"), one of whom wrote a letter to a local paper describing what she had seen. The other witness made a complaint to the EPS about the incident. This complaint resulted in the EPS conducting an internal investigation. Pursuant to the Act, the Applicant requested "all records relating to this complaint".

[para 2] On February 19, 2008, the EPS responded to the Applicant's request. It enclosed 18 pages of responsive records which were severed pursuant to section 17(1) and 17(4) of the Act. The EPS also stated that it was withholding 246 pages of responsive records were completely, pursuant to sections 4(1)(a), 17(1), 17(4), 21(1), 24(1) and 27(1) of the Act.

[para 3] On February 25, 2008, the Applicant wrote to the Office of the Information and Privacy Commissioner ("the Office") and requested a review of the EPS' response to its access request. Mediation was authorized but was not successful in resolving the issues between the parties, and, on April 18, 2008, the Applicant requested an inquiry.

[para 4] Since its initial response to the Applicant, and as a consequence of recent orders issued by this Office, the EPS has reviewed the responsive records which it completely withheld and released some of the information in the records to the Applicant, with the result that the greatest part of the information in the responsive records was provided to the Applicant, with the notable exception of the personal information of the EPS officers and other third parties. The Applicant indicated that it still wished to continue with the inquiry.

[para 5] The parties provided both initial and rebuttal submissions. I also received *in camera* submissions from the EPS, which were not shared with the Applicant. As well, I asked for and was given further submissions from both parties as to the application to this matter of a recent Court of Queen's Bench decision, *Calgary Police Service v. Alberta (Information and Privacy Commissioner).*

II. RECORDS AT ISSUE

[para 6] The records or information at issue are the severed or withheld portions of 264 pages of EPS IA file #02-0241. As well, in preparing for this inquiry, the EPS discovered an audio file and a video tape which are responsive to the Applicant's request. The EPS has provided a copy of the audio file to me and indicated that it will make the video available to me on request. I did not think it was necessary to view the video tape given the sworn affidavit evidence I was provided with as to the content and quality of the recording. The audio file and video have been withheld from the Applicant pursuant to section 17 of the Act.

III. ISSUES

[para 7] According to the Notice of Inquiry dated March 10, 2009, the issues are as follows:

Issue A

Are the records excluded from the application of the Act by section 4(1)(a) (information in a court file, etc.)?

Issue B

Does section 17(1) of the Act (invasion of a third party's personal privacy) apply to the records/information?

Issue C

Did the Public Body properly apply section 21(1) of the Act (intergovernmental relations) to the records/information?

Issue D

Did the Public Body properly apply section 24(1) of the Act (advice, etc.) to the records/information?

Issue E

Did the Public Body properly apply section 27(1) of the Act (privileged information) to the records/information?

Issue F

Does section 32 of the Act (disclosure in the public interest) require the Public Body to disclose the records?

[para 8] In its submissions, the EPS states that it is no longer relying on section 21(1) of the Act. Therefore, Issue C is moot, and I will not comment on it.

IV. DISCUSSION OF ISSUES

A. Are the records excluded from the application of the Act by section 4(1)(a) (information in a court file, etc.)?

[para 9] If a record is information in a court file as defined by section 4 of the Act, the Act does not apply to it, and beyond deciding that the record falls within the exclusion, this Office has no jurisdiction over such a record.

[para 10] Section 4(1)(a) of the Act states:

> *4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:*
>
> > *(a) information in a court file, a record of a judge of the Court of Appeal of Alberta, the Court of Queen's Bench of Alberta or The Provincial Court of Alberta, a record of a master of the Court of Queen's Bench of Alberta, a record of a sitting justice of the peace or a presiding justice of the peace under the Justice of the Peace Act, a judicial administration record or a record relating to support services provided to the judges of any of the courts referred to in this clause;*
>
> …

[para 11] Information in a court file includes copies of documents which originated in a court file (Order F2007-021 at para 25-26).

[para 12] The EPS withheld pages 57, 58 and 59 of the responsive records on the basis that those records were information in a court file. These pages are conviction records which originate from the Alberta Provincial Court. I find that these are records to which section 4(1)(a) applies. Therefore, I have no jurisdiction to review the EPS' decision to withhold the records.

B. Does section 17(1) of the Act (invasion of a third party's personal privacy) apply to the records/information?

i. Was the severed information personal information?

[para 13] Section 1(n) defines personal information as follows:

> *1(n) "personal information" means recorded information about*

an identifiable individual, including

- *(i) the individual's name, home or business address or home or business telephone number,*
- *(ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,*
- *(iii) the individual's age, sex, marital status or family status,*
- *(iv) an identifying number, symbol or other particular assigned to the individual,*
- *(v) the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,*
- *(vi) information about the individual's health and health care history, including information about a physical or mental disability,*
- *(vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,*
- *(viii) anyone else's opinions about the individual, and*
- *(ix) the individual's personal views or opinions, except if they are about someone else;*

[para 14] Information that was severed by the EPS pursuant to section 17 includes personal information that is specifically listed in section 1(n) of the Act. This includes names, addresses, criminal history, educational history, sex, dates of birth, family status and telephone numbers.

[para 15] In addition, information was severed which is not listed in section 1(n) of the Act but which has previously been held to be personal information. This information includes badge numbers (F2008-017 at para 102), an individual's image in a photograph or in a video (Order F2002-001 at paragraph 10 and Order F2006-018 at para 22), e-mail addresses (Order 2000-032 at para 28), a description of an individual (Order F2006-014 at para 31) and signatures (Order 2000-029 at para 22).

[para 16] The EPS also severed the patrol car numbers of the police cars that attended the scene of the incident. In the context of this matter, it would be known to the EPS who was using the specific patrol car. This would be akin to a license plate number that was registered to a particular individual. Presumably, an applicant could also make an access request for records that would reveal which EPS member was assigned to that patrol car on a particular date. Therefore, in the context of this file, the identifying numbers on the patrol cars would be information about an identifiable individual as the number of the car would be attributable to a specific person and, therefore, is personal information.

[para 17] Finally, the EPS withheld a voice recording. The recording is of three calls to the non-emergency line of the EPS. The first call is from an individual who was

phoning to report two individuals fighting around his building. The second and third calls are from one of the witnesses to the incident. The voices of EPS employees who answered the calls are also audible on the recording. The EPS employees on the recordings are performing their duties as employees of the EPS, in their representative capacities.

[para 18] The individuals who made the recorded calls are identifiable based on what they said in the recording, coupled with what was found in the subsequent investigation regarding the incident. Although, on the basis of voice alone, the general public would not be able to identify the individuals on the recording, this is not the test. I find that the voices paired with what the people in the recording said and the information in the file, would make these individuals identifiable to some other persons and therefore this information in the recordings is personal information.

[para 19] The Public Body severed general headings such as "address", "DOB", "height", "weight", "date", "time", "caution codes", "hair", "sex", "race", "mass" and "eye", which are not personal information and should not have been severed. However, except for these few minor exceptions, I find that the information severed pursuant to section 17 of the Act was personal information as defined by section 1(n) of the Act.

[para 20] As well, the EPS completely withheld duplicate records, apparently solely on the basis that the records were duplicate. This is not an exception to disclosure and these records ought to have been disclosed, subject to appropriate severing under section 17 of the Act.

ii. Would disclosure be an unreasonable invasion of a third party's personal privacy?

[para 21] The relevant portions of section 17 of the Act are as follows:

> *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,

…

(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,

…

[para 22] The EPS submits that sections 17(4)(b), 17(4)(d), 17(4)(g)(i) and 17(4)(g)(ii) of the Act apply to the severed information. If information falls under section 17(4) of the Act, there is a presumption that disclosing the information would be an unreasonable invasion of a third party's personal privacy.

[para 23] The information requested by the Applicant relates to a complaint made to the EPS about the conduct of three EPS members. According to the submissions of the parties, the EPS members were in the process of arresting two individuals when witnesses, allegedly, saw the EPS members punch and kick one of the individuals who was handcuffed. At the time of the incident, the EPS members were in the course of their employment with EPS. The complaint led to an internal investigation performed by the EPS in order to determine if there were sufficient grounds to charge the EPS members criminally.

[para 24] With respect to section 17(4)(b) of the Act, the EPS argues that this provision creates a presumption that disclosing the personal information of the EPS members involved in the incident would be an unreasonable invasion of their personal privacy because the information is part of an identifiable law enforcement record.

[para 25] Law enforcement is defined by section 1(h) of the Act. Under this definition, law enforcement includes, among other things:

> *1(h)(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…*

[para 26] The EPS cites Order F2008-020 in support of its submission that the responsive records in this matter (including the audio and video files) are an identifiable part of a law enforcement record. Specifically, the EPS states that there was a complaint that led to an investigation for alleged breaches of the *Criminal Code* and also for breaches of the *Police Act* and the *Police Service Regulation*.

[para 27] Order F2008-020 states:

> The investigation was a police and/or administrative investigation that could lead to a penalty or sanction under section 17 of the *Police Service Regulation*, which penalty or sanction could be imposed by the Public Body on the members involved. As the Report was in the context of and was the result of that law enforcement investigation, the Report is a law enforcement record under section 17(4)(b).
>
> I also find that the Video is a law enforcement record. It was used as a record for the purposes of the law enforcement investigation, and the investigating officer refers to it in the Report. It may also be said that it formed part of "the complaint that gave rise to the investigation" under section 1(h)(ii), as a copy of it was submitted to the Public Body in the context of the complaint that was made about the members involved.
>
> (Order F2008-020 at para 35-36)

[para 28] I find that the responsive records in this matter related to a police and/or administrative investigation which could lead to a penalty or sanction under section 17 of the *Police Service Regulation*. As well, based on the reasoning in Order F2008-020, the audio and video files that form part of the responsive records were used for the purposes of a law enforcement investigation. A portion of the audio file could also constitute the initial complaint. Therefore, I find that the responsive records are an identifiable part of a law enforcement record.

[para 29] The EPS also relied on section 17(4)(d) of the Act, which creates a presumption that disclosing a third party's information relating to employment history is

an unreasonable invasion of the third party's personal privacy. In orders F2008-009 and F2008-017, similar disciplinary records were found to be related to police officers' employment history. Order F2008-009 states:

> I agree that there is a presumption of an unreasonable invasion of personal privacy in respect of the cited officers under section 17(4)(d) of the Act. The term "employment history" describes a complete or partial chronology of a person's working life such as might appear in a personnel file, and this can include a record of disciplinary action (Order F2003-005 at para. 73). Further, the results or conclusions of an investigation may be part of a personnel file and therefore of a person's employment history (Order F2004-015 at para. 83). I take this to include the results or conclusions of a hearing, including results or conclusions that are favourable to the employee. In this inquiry, even where charges were not substantiated, I believe that the fact that a formal disciplinary hearing occurred (or began if later discontinued) would make it part of an individual's employment history.
>
> (Order F2008-009 at para 35)

[para 30] In this matter, I also find that section 17(4)(d) of the Act applies to the personal information of the EPS members involved in the incident.

[para 31] Finally, I find that the names of third parties, including the EPS members, appear with other personal information about them such as information about their employment history, criminal history, addresses, family history or another person's opinion of them. Therefore, section 17(4)(g)(i) of the Act would apply to the information, leading to a presumption that disclosing the third parties' personal information would be an unreasonable invasion of their personal privacy.

[para 32] Although, given my findings, there is a presumption that disclosing the personal information of third parties would be an unreasonable invasion of their personal privacy, the EPS must still weigh the presumption against the factors listed in section 17(5) of the Act, and any other relevant factors, before determining if the information ought to be disclosed.

[para 33] There are several groups of third parties whose personal information formed part of the records at issue. These are the EPS members who were involved in the incident, the EPS employees who were not involved in the incident, the witnesses to the incident, the individuals who were arrested by the EPS members as a result of the incident, and other third parties that had little or nothing to do with the incident. As different factors under section 17 of the Act apply to each of these groups, I will deal with each separately.

a. Personal Information of EPS members involved in the incident

[para 34] There are several factors to consider under section 17(5) of the Act relative to this group. A significant factor is the desire to subject the EPS to public scrutiny (section 17(5)(a) of the Act). However, this factor must be weighed against the

fact that the personal information may have been supplied in confidence (section 17(5)(f) of the Act), the potential unreliability or inaccuracy of the information (section 17(5)(g) of the Act) and the potential of unfairly exposing third parties to harm or unfairly damaging their reputations (sections 17(5)(e) and (h) of the Act).

[para 35] The relevant portion of section 17(5) of the Act state:

> *(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether*
>
> > *(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny…*
> >
> > *(e) the third party will be exposed unfairly to financial or other harm*
> >
> > *(f) the personal information has been supplied in confidence,*
> >
> > *(g) the personal information is likely to be inaccurate or unreliable,*
> >
> > *(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant…*

[para 36] In *Calgary Police Service v. Alberta (Information and Privacy Commissioner)* the Court of Queen's Bench of Alberta judicially reviewed Order 2008-009. In that matter, the issue before the Court was whether section 17(5)(a) of the Act weighed in favour of disclosing decisions from disciplinary hearings of police officers. Although Order 2008-009 dealt with all of the relevant factors under section 17(5) of the Act, the Court determined that the most significant factor, on which its decision would turn, was section 17(5)(a). The present matter deals with an investigation rather than with a disciplinary hearing. However, the Court's decision is potentially applicable. Therefore, I provided the decision to the parties so that they could make submissions as to how the Court's decision may affect this matter.

[para 37] In *Calgary Police Service v. Alberta (Information and Privacy Commissioner)* the Court stated that unless a complaint resulted in a charge for breaching a federal or provincial act, there was no need for public scrutiny beyond that provided by the processes in the Police Act and regulations. The Court stated:

> Given the public component provided by the *Police Act*, as reflected by the public membership on the LERB and the Calgary Police Commission, their authority to independently conduct inquiries and attend disciplinary hearings as well as the

> Minister's authority regarding any matters that may involve federal or provincial offences, I see no basis for concluding that additional public scrutiny of the process by the media is "desirable".
>
> (*Calgary Police Service v. Alberta (Information and Privacy Commissioner)* at para 94)

[para 38] The Court did not specifically address the need for public scrutiny of a police service's investigation of complaints, as the records from the investigation were not at issue. Therefore the decision in *Calgary Police Service v. Alberta (Information and Privacy Commissioner)* may be of limited applicability in matters involving a request for internal investigation files of the EPS which did not lead to hearing or decisions by the LERB or the Police Commission.

[para 39] That being said, this is not an issue that I need to address in this Order as I find that the information that was voluntarily disclosed by the EPS in this matter is sufficient to subject the EPS' investigation of the incident to public scrutiny. The EPS disclosed most of the information in the records with the exception of personal information of third parties. The EPS did sever the names and badge numbers of the EPS members involved in the incident; however, disclosing the personal information of the EPS member's involved would not further public scrutiny of the EPS' actions. The information disclosed details the allegations, the steps taken in the investigation (including the version of events told to the investigator by witnesses and EPS members) and the conclusion of the investigation. As a result, the actions of the EPS members involved and the basis for the EPS decision not to pursue charges or sanctions against those members is evident, even without the personal information of third parties, including the EPS members involved.

[para 40] I find that disclosing the personal information of the EPS members involved in the incident would risk unfairly damaging their reputation. As well, the factors listed at sections 17(5)(f) and 17(5)(g) of the Act weigh in favour of not disclosing this personal information. As there is no need for further public scrutiny of the EPS given the information already disclosed, I will not order that the personal information of the EPS members involved in the incident be disclosed.

b. Other EPS members not involved in the incident

[para 41] EPS members acting in the course of their employment are heard on the audio file that is a part of the responsive records. Based on the evidence provided to me by the EPS, there may also be EPS members not involved in the incident visible on the video recording. All other information regarding EPS members not involved in the incident has been disclosed by the EPS to the Applicant.

[para 42] Generally, information produced by an employee of a public body as part of his/her employment duties is not personal information (Order F2004-026 at para 111) and disclosing personal information of employees of a public body acting in the course of their employment is not an unreasonable invasion of their personal privacy (Order F2008-028 paras 51-58). However, the audio files contain personal information of third parties

who are not EPS members. Based on the evidence provided to me by the EPS, the video recordings also contain personal information of third parties who are not EPS members. The EPS has provided evidence that there is no way of severing the third party information from the audio record or the video record.

[para 43] Section 6(2) of the Act states:

> *6(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 44] As I will explain below, section 17 of the Act was properly applied to sever the third party information in the records. As the third party information cannot be severed from the personal information of the EPS members not involved in the incident, I find that it was proper for the EPS to withhold these records entirely.

c. Personal Information of the witnesses

[para 45] The Applicant argues that the witnesses to the incident do not have personal privacy issues because they "went public with their complaint". The Applicant did not expand on its argument relating to the witnesses' personal information, so I will simply comment generally on why I will not order the EPS to disclose the witnesses' personal information.

[para 46] It is true that one of the witnesses to the incident wrote a letter to a local paper wherein she revealed her name and what she saw. Articles from other media sources were provided to me by the Applicant and those articles reveal the name of the other witness to the incident. Although the witnesses' names were published by various media sources, the records contain other personal information of these witnesses including their addresses and information about their education and employment, which was not published.

[para 47] As well, simply because personal information was public at one time does not create a right to obtain the information under the Act. In Order 2001-001 the then Assistant Commissioner stated:

> I do not agree that once personal information is in the public domain it is inconsistent to sever the same or related personal information under the Act. Disclosure of personal information in the public realm that may or may not be accurate is not a decisive circumstance justifying disclosure. The privacy protections given to a person under the Act are not negated by the public exposure of personal information. There is a difference between having knowledge of information, and having a right to obtain that information under the Act
>
> (Order 2001-001 at para 65)

[para 48] I agree that the fact that information was previously in the public domain is, by itself, not necessarily a reason to disclose third party personal information.

[para 49] As I discussed above, there is a presumption that disclosing the witness' information would be an unreasonable invasion of their personal privacy pursuant to section 17(4)(b). I also find that section 17(4)(g)(i) applies to the witness' personal information.

[para 50] On review of the factors enumerated in section 17(5) of the Act, I do not see any factors in favour of disclosing the witness information that outweigh the presumption under section 17(4) of the Act. Disclosing this information would also not assist in public scrutiny of the EPS' actions in this matter. Therefore, I find that the EPS properly severed the witnesses' personal information.

d. The Complainant's personal information

[para 51] The records also contain the personal information of the individual who was allegedly assaulted by EPS members, and of his friend who witnessed the incident. The two individuals were arrested by the EPS members involved in the incident.

[para 52] Similar to its argument regarding the witnesses to the incident, the Applicant states, "…the Edmonton Police Service disclosed the names of [the individuals] to the media. Also, [the individuals] were charged and so the process relating to the charges would be public. Therefore, they cannot have a privacy interest."

[para 53] Just as with the witnesses, there is a presumption under section 17(4)(b) and 17(4)(g)(i) of the Act that disclosing these third parties' personal information would be an unreasonable invasion of their personal privacy. These third parties' names appear along with other personal information such as their ages, criminal history, family relationships and physical description. As with the witnesses I do not see any factors under section 17(5) of the Act that would outweigh the presumption under section 17(4) of the Act nor do I think that disclosing this information is necessary for public scrutiny of the EPS.

[para 54] As well, the point I have made with respect to the witnesses – that just because these third parties' personal information may have been public at one point does not mean that their personal information ought to be disclosed to the Applicant – applies to these individuals. Therefore, just as I found with respect to the witnesses, I find that the EPS properly severed these third parties' personal information.

e. Other third party information

[para 55] As discussed above in relation to the personal information of other EPS members not involved in the incident, the audio file and the video recording (based on the information provided to me by the EPS), contain personal information of other third parties. One third party is an individual who called the non-emergency number for the

EPS to advise of two individuals fighting near his residence. The identities of other third parties appearing on the video recording are unknown, and they do not appear to have been involved in the incident in any way. Finally, there are also third parties who were contacted as a result of the investigation but who were not involved in the incident.

[para 56] As I found above, the information of these third parties is part of a law enforcement record. As well, in the case of the individual who phoned the non-emergency line, his name appears with other personal information about him such as his employment and address. Therefore, there is a presumption that disclosing this personal information would be an unreasonable invasion of these third parties' personal privacy. I see no section 17(5) factors that would weigh in favour of disclosing these third parties' personal information. Their information would not add anything to the public scrutiny of the EPS. Therefore, this information should not be disclosed.

D. Did the Public Body properly apply section 24(1) of the Act (advice, etc.) to the records/information?

[para 57] Section 24 is a discretionary exemption that may be used by a public body. Therefore, in order to establish that section 24 was used properly, the EPS must show that section 24 applies to the information it wishes to sever, and that it properly exercised its discretion to sever in the circumstances.

[para 58] The EPS argues that both section 24(1)(a) and 24(1)(b) of the Act apply to a particular e-mail communication. Section 24(1) of the Act states:

> *24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*
>
> > *(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,*
> >
> > *(b) consultations or deliberations involving*
> > *(i) officers or employees of a public body,*
> > *(ii) a member of the Executive Council, or*
> > *(iii) the staff of a member of the Executive Council,*

[para 59] In order for information to fit under section 24(1)(a) of the Act, the advice, proposals, recommendations, analyses or policy must be:

1. sought or expected, or be part of the responsibility of a person by virtue of that person's position;

2. directed toward taking an action; and

3. made to someone who can take or implement the action.

(Order 2009-018 at para 28)

[para 60] The EPS argues that the information severed is advice or recommendations, provided to the Public Complaints Monitor of the Edmonton Police Commission by an EPS member in the Professional Standards Branch. With respect to the three requirements noted above the EPS states:

> a. The individuals involved in giving advice and recommendations were expected to do so as part of their role as a member of a public body and in particular because of their expected role in this type of investigation;
>
> b. The advice and recommendations contained in the Responsive Records were provided with a view that the public body would take action based on the advice and recommendations; and
>
> c. The advice and recommendations were for the review and consideration of those with the authority to make decisions and take action.

[para 61] More specifically, the EPS states that communications were, "…created in the context of investigating a public complaint…" and that, "…the advice or recommendations were given in an effort to determine what action would be taken with respect to a disciplinary investigation."

[para 62] The information severed was advice or a recommendation given by the Staff Sergeant in the Professional Standards Branch of the EPS to the Public Complaints Monitor of the Edmonton Police Commission. Based on the evidence provided to me by the EPS, I find that one of the Staff Sergeant's duties in his position is to communicate with the Public Complaints Monitor at the Edmonton Police Commission regarding the status of ongoing complaints. Although nothing on the face of the records conclusively indicates that the Edmonton Police Commission approached the Staff Sergeant for advice, I do find that the advice or recommendation from the Staff Sergeant was directed to the Public Complaints Monitor to advise on what action should be taken regarding a specific issue in the disciplinary investigation. I also find that this advice or recommendation was given to a person at the Edmonton Police Service who could implement the action. Thus, I find that section 24(1)(a) of the Act applies to this information.

[para 63] The EPS also provided evidence detailing the factors they considered in determining if section 24 of the Act should be applied to the information including:

> a. The impact the disclosure would reasonably be expected to have on the EPS's ability to carry out similar decision-making processes in the future;
>
> b. That the release of the information could make consultations and deliberations between the EPS and the Edmonton Police Commission less candid, open and

comprehensive in the future if members understood that such information would be made publicly available;

c. That the members of the EPS and the Edmonton Police Commission had a reasonable expectation that their deliberations, consultation, advice, analyses and recommendations would be kept confidential;

d. The objectives and purposes of the Act, including the Applicant's right of access; and

e. Whether the decision to release some information to the Applicant regarding the outcome of the disciplinary actions would satisfy the need for public scrutiny.

[para 64] I find that in considering the factors noted above, the EPS' exercise of discretion in applying section 24(1)(a) of the Act to the severed information was appropriate.

[para 65] As I have found that the EPS properly applied section 24(1)(a) of the Act to the severed information, I will not comment on section 24(1)(b) of the Act, which was also applied to the same information.

E. Did the Public Body properly apply section 27(1) of the Act (privileged information) to the records/information?

[para 66] The EPS argues that it properly applied section 27 to correspondence between itself and the Crown Prosecutor's Office. In accordance with this Office's solicitor-client privilege protocol, the EPS did not provide any of the information to me to which it applied section 27(1) of the Act. Therefore, I have not had the opportunity to review the information that was withheld from the Applicant pursuant to section 27(1)(a) of the Act.

[para 67] Section 27(1)(a) of the Act states:

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

[para 68] In order to establish that solicitor-client privilege applies to a record it must:

a. be a communication between a solicitor and a client;
b. entail the giving or seeking of legal advice; and
c. be intended to be confidential by the parties.

(Order F2003-017 at para 12)

[para 69] The EPS provided submissions and evidence, both openly and *in camera*, which establish all three of these criteria. I am satisfied on the basis of these submissions and evidence that the records to which section 27(1)(a) of the Act were applied were communications subject to solicitor-client privilege. I find that the evidence in which the affiant directly states the parties to the communication and describes the specific content of the communication, the purpose of the communication and the parties' beliefs regarding the confidentiality of the communication, to be the most compelling evidence. I did not find the evidence provided to me based solely on information and belief to be persuasive.

[para 70] The Applicant argues that, "The [Applicant] has repeatedly expressed concerns about the quality and integrity of reviews and opinions provided by Crown Prosecutors on complaints against police officers. In this case, it would be useful to see what type of review and feedback was provided by the Crown which resulted in the decision not to charge." This argument does not address whether the information severed was actually covered by section 27 of the Act. It appears as though the Applicant is arguing that this information ought to be disclosed because it is in public interest, which I will deal with below.

F. Does section 32 of the Act (disclosure in the public interest) require the Public Body to disclose the records?

[para 71] Section 32 of the Act states:

> *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.*

[para 72] The Applicant argues that there is a clear public interest in disclosing the names of the EPS members involved in the incident. In the introductory portion of its submissions, the Applicant states:

> It is likely that this is not an isolated incident of abuse by these officers. The [Applicant] believes that, if the officers are identified, more of their victims may come forward, serving the public interest.

> It will be important for the public to know whether these officers have been involved in other known case (*sic*) of abuse.

[para 73] The Applicant goes on to describe the ways in which it strives to protect the public interest by bringing allegations of misconduct of police officers to the Courts, the Law Enforcement Review Board, and the public.

[para 74] In its argument regarding the application of section 32 of the Act to the records at issue, the Applicant argues that the public interest exemption applies to the entire Act and that that test is whether disclosure is "clearly in the public interest", without balancing the public interest and "the exemption". Regarding the specific public interest in this matter, the Applicant states:

> It is submitted that the disclosure of the information sought by the [Applicant] is clearly in the public interest. It is acknowledged that this may appear to be contrary to Order F2008-020 but the [Applicant] submits that there is a clear or compelling case for disclosure, as explained above.

[para 75] In its rebuttal submissions, the Applicant also suggests that information that is subject to the solicitor-client privilege exception (section 27 of the Act) ought to be disclosed, presumably by applying section 32 of the Act.

[para 76] The EPS submits that the Applicant has not met its burden to prove why release of this information would be in the public interest, that the Applicant has no compelling need for the information, that there is no compelling public interest, and that there is a public interest in maintaining confidentiality.

[para 77] Recently the Adjudicator for Order F2009-010 examined section 32 of the Act. The Applicant and EPS were also parties in that matter and similar arguments were raised by the Applicant. The Adjudicator stated:

> 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.
>
> 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".
>
> 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.
>
> 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.
>
> (Order F2009-010 at para 54-57)

[para 78] I agree with the Adjudicator in Order F2009-010. I believe that the public interest in protecting third party privacy rights must be balanced with the section 32 exemption to allow disclosure where it is clearly in the public interest.

[para 79] I acknowledge that that the Applicant believes that disclosing the names of the EPS members involved in the incident would assist the Applicant in bringing misconduct of individual EPS members to the public's attention and shed light on EPS members who may be seen to be involved in misconduct frequently. However, in this matter, the EPS investigated the conduct of the EPS members involved and determined that there was no need to subject the EPS members involved in the incident to sanction. Therefore, the EPS members involved in the incident were, in the opinion of the EPS, not guilty of misconduct.

[para 80] I understand that the Applicant may take issue with the EPS investigation of its members' conduct and the EPS' determination that there was no misconduct worthy of any sanction; however I find that there is sufficient information already disclosed to the Applicant to scrutinize the EPS's investigation without disclosing the personal information of third parties, including the EPS members involved in the incident. I find that disclosing the personal information of the EPS members involved in the incident would not further serve the public interest.

[para 81] Therefore, I find that the EPS is not required to apply section 32 of the Act to the records.

V. ORDER

[para 82] I make this Order under section 72 of the Act.

[para 83] I order the EPS to disclose to the Applicant the information in the records that is not personal information in accordance with paragraph 19 above.

[para 84] I confirm the decision of the EPS to refuse access to the information severed from the records at issue pursuant to sections 4, 17, 24 and 27 of the Act, and its decision not to apply section 32 of the Act to the records at issue.

[para 85] I further order the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that it has complied with the Order.

_____
Keri H. Ridley
Adjudicator