ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2010-017

July 22, 2011

EDMONTON POLICE SERVICE

Case File Number F4929

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Summary: The Applicant was accused of sexual assault but no charges were laid. Under the *Freedom of Information and Protection of Privacy Act* (the "Act"), he asked the Edmonton Police Service (the "Public Body") for information pertaining to himself, which included information in the police case file, a polygraph file, and a video recording of his polygraph interview and examination. The Public Body withheld some of the information in the files, relying on sections 17(1), 20(1)(a), 20(1)(c), 20(1)(f), 24(1)(a) and 24(1)(b) of the Act. It withheld all of the video recording under section 20(1).

The Adjudicator found that the Public Body did not meet its duty to assist the Applicant under section 10 of the Act, in that it failed to conduct an adequate search for a particular record. He ordered the Public Body to conduct another search, and to provide a better explanation to the Applicant if the record could still not be located.

The Adjudicator found that section 17(1) applied to some of the personal information of third parties in the records at issue, as disclosure would be an unreasonable invasion of their personal privacy. He therefore confirmed the Public Body's decision to withhold the information from the Applicant. The Adjudicator found that other information that the Public Body withheld under section 17(1) did not fall under that provision, and ordered its disclosure.

The Adjudicator found that the Public Body did not properly apply section 20 to the information at issue under that section, including the video recording of the Applicant's

polygraph interview and examination, as disclosure could not reasonably be expected to harm a law enforcement matter under section 20(1)(a), harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement under section 20(1)(c), or interfere with or harm an ongoing or unsolved law enforcement investigation under section 20(1)(f). He therefore ordered disclosure of most of the information that the Public Body withheld under section 20(1) to the Applicant.

There was an exception regarding the video recording of the Applicant's polygraph interview and examination, in that the Adjudicator found that disclosure of the names of particular third parties would be an unreasonable invasion of personal privacy under section 17(1). He therefore ordered the Public Body to determine whether the names could reasonably be severed from the video recording under section 6(2) of the Act, and to respond to the Applicant accordingly.

The Adjudicator found that the Public Body did not properly apply section 24 of the Act to the information at issue under that section, as the information did not constitute advice, proposals, recommendations, analyses or policy options under section 24(1)(a), or consultations or deliberations under section 24(1)(b). He therefore ordered disclosure of the information that the Public Body withheld under section 24(1) to the Applicant.

Statutes and Regulations Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(h), 1(h)(i), 1(h)(ii), 1(n), 6(2), 10, 10(1), 17, 17(1), 17(2)(a), 17(4), 17(4)(a), 17(4)(b), 17(4)(g), 17(4)(g)(i), 17(4)(g)(ii), 17(4)(h), 17(5), 17(5)(a), 17(5)(c), 17(5)(e), 17(5)(f), 17(5)(h), 17(5)(i), 20, 20(1), 20(1)(a), 20(1)(c), 20(1)(f), 21(1)(a), 21(1)(b), 21(3), 24, 24(1), 24(1)(a), 24(1)(b), 71(1), 71(2), 72, 72(2)(a), 72(2)(b), 72(3)(a), 72(4) and 84(1)(e); *Freedom of Information and Protection of Privacy Regulation*, Alta. Reg. 186/2008, ss. 7(3) and 7(4). **CAN:** *Criminal Code*, R.S.C. 1985, c. C-46.

Authorities Cited: AB: Orders 96-003, 96-006, 96-019, 97-007, 98-003, 98-008, 99-001, 99-013, 99-027, 2000-019, 2000-021, 2000-029, 2001-016, 2001-027, F2002-024, F2002-028, F2003-001, F2003-016, F2004-023, F2004-026, F2005-009, F2005-019, F2006-006, F2007-005, F2007-013, F2007-029, F2008-020, F2008-031, F2009-001, F2009-018, F2009-027 and F2009-040; *Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner)*, 2006 ABQB 515.

I. BACKGROUND

[para 1] In March 2004, the Applicant was accused by a child of sexually assaulting her. The Edmonton Police Service (the "Public Body") conducted an investigation and laid no charges.

[para 2] In November 2005, the Applicant consented to a security clearance check by the Public Body for the purpose of employment. He was cleared, as indicated by a stamp dated November 10, 2005.

[para 3] In December 2008, the Applicant consented to a police information check by the Public Body for the purpose of employment. The Police Information Check Certificate, dated December 3, 2008, indicated that the Applicant had been the subject of the sexual assault investigation in March 2004.

[para 4] In a form dated February 2, 2009, the Applicant made a request to correct his personal information under the *Freedom of Information and Protection of Privacy Act* (the "Act"). He asked the Public Body to issue a new Police Information Check Certificate showing that he was cleared, consistent with the November 2005 security clearance. By letter dated February 24, 2009, the Public Body denied the Applicant's correction request. He requested a review of that decision in a form dated March 3, 2009, and the Commissioner authorized a portfolio officer to investigate and try to settle the matter. Following that investigation, the Applicant did not request an inquiry.

[para 5] In a form dated March 3, 2009, the Applicant made an access request to the Public Body under the Act. He asked for any and all electronic and written information contained in or pertaining to the March 2004 police case file, and a February 2009 report by a staff sergeant concerning his correction request. He also asked for any and all other information concerning him that was created by the Public Body between March 1, 2004 and February 28, 2009.

[para 6] By letter dated March 19, 2009, the Public Body gave the Applicant access to some of the information that he had requested, but withheld other information, citing sections 17(1), 17(4)(b), 17(4)(g)(i), 17(4)(g)(ii), 20(1)(a), 20(1)(c), 20(1)(f), 24(1)(a) and 24(1)(b) of the Act.

[para 7] In correspondence dated May 1, 2009, the Applicant requested a review of the Public Body's response to his access request. The Commissioner authorized a portfolio officer to investigate and try to settle the matter.

[para 8] In his request for review, the Applicant noted that he had not received copies of videotapes. The Public Body then located a video recording of the Applicant's interview with a detective on April 16, 2004, and a video recording of the Applicant's polygraph interview and examination by another detective on April 21, 2004. By letter dated June 8, 2009, the Public Body granted the Applicant access to the first interview, but withheld the video recording of the polygraph interview and examination in its entirety, citing sections 20(1)(a), 20(1)(c) and 20(1)(f) of the Act.

[para 9] Mediation of issues relating to the access request was not successful, so the Applicant requested an inquiry by letter dated August 18, 2009. A written inquiry was set down.

[para 10] In the course of the inquiry, the Public Body located additional information responsive to the Applicant's access request, which consists of a separate polygraph file of the detective who had conducted the polygraph interview and examination. At the same time that it made its initial inquiry submissions, the Public Body disclosed some of the information in that file to the Applicant. It withheld the remainder, citing sections 17(1), 17(4), 20(1)(a), 20(1)(c) and 20(1)(f) of the Act.

II. RECORDS AT ISSUE

[para 11] The records at issue consist of portions of the police case file, portions of the polygraph file, and all of the video recording of the polygraph interview and examination.

[para 12] Having said this, I find that the records at issue no longer include certain information to which the Public Body applied section 20(1) of the Act. In his submissions, the Applicant states that he is not interested in obtaining records of police methods and techniques used during his interview and polygraph test, and during interviews with third parties, except for the actual questions asked and answers given. The records at issue therefore do not include the instructions and guidelines to the interviewer, and interview questions that do not have accompanying answers, on various Child Interview Sheets and a Subject Interview Sheet. This information is found on all or part of pages 12-15, 21-24, 33-37 and 49-62. The information at issue also does not include the polygraph examiner's notes and records used in designing or analyzing the polygraph examination. This information appears on pages 71-72 and 76-81.

[para 13] For clarity, there are no records at issue corresponding to the Applicant's access request for information relating to his correction request. The Public Body gave him a copy of an internal briefing note from a staff sergeant addressing the Applicant's concerns about the December 2008 police information check, which I take to be the February 2009 report that he was seeking.

[para 14] Finally, in the Public Body's response of March 19, 2009 to the Applicant, it noted responsive records pertaining to a different investigation file involving him. These records are not at issue, as the Public Body granted the Applicant access, subject to payment of the required fee.

III. ISSUES

[para 15] The Notice of Inquiry, issued September 22, 2010, set out the following issues:

> Did the Public Body meet its duty to assist the Applicant, as provided by section 10 of the Act?
>
> Does section 17(1) of the Act (disclosure harmful to personal privacy) apply to the records/information?

Did the Public Body properly apply section 20 of the Act (disclosure harmful to law enforcement) to the records/information?

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

[para 16] The Applicant submits that the central issue in this inquiry relates to the Public Body's decision to note his involvement in the sexual assault file at the time of the police information check in December 2008, when it had earlier issued a security clearance in November 2005. Because the Applicant understands that nothing has changed regarding his situation with police and his accuser, he questions why the Public Body has reversed its position regarding the clearances. I have no jurisdiction to address this issue. My jurisdiction is limited to reviewing the Applicant's concerns about the Public Body's response to his access request, and its decisions to withhold information from him.

[para 17] To the extent that the foregoing concern relates to the Public Body's decision to refuse to correct the Applicant's personal information relating to the police information check, which the Applicant made on February 2, 2009, the concern is nonetheless outside the scope of this inquiry. The Applicant's correction request was the subject of a different request for review by him, dated March 3, 2009, which was addressed separately by this Office in the context of Case File Number F4835. In a letter dated March 19, 2009, the portfolio officer authorized to investigate that matter set out her findings and asked the Applicant whether he wished to proceed to an inquiry, but he did not request one.

[para 18] The Applicant notes that that this Office has authority to review decisions regarding correction requests, and that I can raise any further issues during this inquiry that I deem appropriate. However, I can only add issues that are within my jurisdiction insofar as they fall within the scope of the present inquiry. The Applicant's concerns about his denied correction request and the police information check in December 2008 are not within this inquiry's scope. I reviewed the Applicant's request for an inquiry into the present matter, Case File Number F4929, to see whether it might also be characterized as a request for an inquiry into Case File Number F4835, or otherwise in relation to his correction request. I find that it cannot. The Applicant did not raise any concerns about his correction request in his request for an inquiry of August 18, 2009.

[para 19] The Applicant submits that a corollary issue in this inquiry relates to the fact that the Public Body is now claiming that its file with him is "suspended" pending further investigation, when he says that the investigating detective verbally informed him in April 2004 that he had been cleared and his file would be "closed". The Public Body responds that I have no jurisdiction to determine why the Public Body did not close its investigation file. While this is true, I do have jurisdiction to determine whether the status of the file does or does not mean that disclosure of information in it would harm law enforcement within the terms of section 20(1) of the Act. In other words, the

Applicant's submissions about his file being suspended or closed have some bearing on the inquiry, as I will discuss below.

IV. DISCUSSION OF ISSUES

A. Did the Public Body meet its duty to assist the Applicant, as provided by section 10 of the Act?

[para 20] Section 10(1) of the Act reads as follows:

> *10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.*

[para 21] The Notice of Inquiry stated that the issue under section 10 of the Act would be whether the Public Body conducted an adequate search for records responsive to the Applicant's access request. A public body's duty to assist an applicant under section 10 includes the obligation to conduct an adequate search (Order 2001-016 at para. 13; Order F2007-029 at para. 50). The Public Body has the burden of proving that it conducted an adequate search, as it is in the best position to provide evidence of the adequacy of its search and to explain the steps that it has taken to assist the applicant within the meaning of section 10 (Order F2005-019 at para. 7; Order F2009-027 at para. 46). An adequate search has two components in that every reasonable effort must be made to search for the actual records requested, and the applicant must be informed in a timely fashion about what has been done to search for them (Order 2001-016 at para. 13; Order F2009-001 at para. 14).

[para 22] Section 10 requires that a public body make every reasonable effort to locate responsive records, which does not require perfection (Order 2000-021 at para. 68). The decision as to whether an adequate search was conducted must be based on the facts relating to how a public body conducted a search in the particular case (Order 98-003 at para. 37). In general, evidence as to the adequacy of a search should cover the following points: who conducted the search; the specific steps taken by the public body to identify and locate records responsive to the applicant's access request; the scope of the search conducted (e.g., physical sites, program areas, specific databases, off-site storage areas, etc.); the steps taken to identify and locate all possible repositories of records relevant to the access request (e.g., keyword searches, records retention and disposition schedules, etc.); and why the public body believes that no more responsive records exist than the ones that have been found or produced (Order F2007-029 at para. 66; Order F2009-001 at para. 15).

[para 23] The issue regarding the Public Body's duty to assist and its search for records was included in this matter because, in his request for review and request for inquiry, the Applicant alleged that certain information that he had requested was missing or unaccounted for, as opposed to being withheld or "blanked out". Further, the whereabouts of a set of pages noted in the index prepared by the Public Body became a

question in the course of the inquiry. These are pages 41-45, which I discuss further below.

[para 24] In his request for review, the Applicant noted that the Public Body had not accounted for the video recording of his interview on April 16, 2004, and the video recording of his polygraph interview and examination on April 21, 2004. As explained earlier, the Public Body accounted for these video recordings in June 2009, granting access to the first and withholding the second. The Applicant's outstanding concern is that the polygraph interview and examination has been withheld from him, which I address later in this Order.

[para 25] In his request for review, the Applicant noted that the Public Body gave him a copy of Monitor Sheets from his interview on April 16, 2004, but that page 11 was missing. The Public Body provided a copy of page 11 to the Applicant and me when making its initial inquiry submissions.

[para 26] The Applicant is concerned that he is missing a copy of a letter of April 13, 2004 from a doctor to the Public Body, in which the doctor found that there was no evidence that the child who accused the Applicant had been sexually assaulted. This letter, from Capital Health, is noted in the index prepared by the Public Body and is in the package of records submitted to me. The issue is therefore whether the letter was properly withheld from the Applicant, which I address later.

[para 27] Because I find that there are no outstanding issues between the parties regarding the adequacy of the Public Body's search for the responsive records just discussed, I make no related finding or order as to whether the Public Body complied with section 10 of the Act in relation to those records.

[para 28] The index prepared by the Public Body refers to a Child Interview Sheet at pages 41-45 of the records, but those pages were not included in the package provided to me. When asked about the oversight, the Public Body advised, in a letter dated July 5, 2011, that those pages do not exist. While I note that both a Child Interview Sheet and Monitor Sheet exist for the Public Body's interviews with other children, the Public Body explains that there was only a Monitor Sheet for this one particular interview. According to the investigating detective, it is not uncommon for the Monitor Sheet to also function as the Interview Sheet, and he says that it did so in this particular instance.

[para 29] In response, the Applicant says that he is skeptical of the Public Body's explanation regarding pages 41-45. He does not see how these pages, which were noted in the index, now mysteriously do not exist, and apparently never existed.

[para 30] I, too, have outstanding concerns regarding the existence or whereabouts of pages 41-45. The Public Body explains that they were noted in the index due to an administrative oversight. However, it seems odd to me that a person preparing an index of records could mistakenly note pages that do not actually exist, not to mention identify those pages in the index as a Child Interview Sheet and indicate the sections of the Act

under which information was withheld. Likewise, I find it odd that the person numbering the set of records provided to me would inadvertently jump from page 40 to page 46.

[para 31] In fairness to the Public Body, the foregoing does not necessarily mean that the particular Child Interview Sheet actually exists. It does mean, however, that the Public Body has provided an insufficient explanation regarding its search for those pages. While the Public Body provided some information about its search for other records requested by the Applicant, as set out in an affidavit of its disclosure analyst, the information there does not address the search for pages 41-45, given that these pages were noted to be missing later in the inquiry. As for the Public Body's letter of July 5, 2011 regarding pages 41-45, it fails to adequately explain the search for those pages and why they do not exist, if that is indeed the case.

[para 32] It occurred to me that a Child Interview Sheet relating to a different child might once have appeared at pages 41-45, meaning that this Interview Sheet was a duplicate of one appearing elsewhere. However, this is not what the Public Body has said. Given that a package of records prepared by the Public Body once contained pages 41-45, it was incumbent upon the Public Body, in my view, to try to locate a copy of that package in order to determine what record once appeared at pages 41-45 and more fully explain the administrative oversight to which the Public Body refers.

[para 33] I conclude that the Public Body failed to conduct an adequate search for the Child Interview Sheet in question, and therefore did not, in this respect, meet its duty to assist the Applicant under section 10 of the Act. I intend to order the Public Body to conduct another search for the Child Interview Sheet and, if it still cannot be located, to provide a better explanation to the Applicant about the search that has been conducted and why there is no additional responsive record corresponding to pages 41-45. If the Public Body is able to locate another Child Interview Sheet, I draw its attention to my findings below in relation to the Child Interview Sheets that are before me. The Public Body might extrapolate from those findings when deciding whether to disclose additional information to the Applicant.

B. Does section 17(1) of the Act (disclosure harmful to personal privacy) apply to the records/information?

[para 34] Section 17 of the Act reads, in part, 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.*
>
> *(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if*
>
> > *(a) the third party has, in the prescribed manner, consented to or requested the disclosure,*

…

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

> *(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,*
>
> *(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,*
> *…*
>
> *(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,*
> > *or*
>
> *(h) the personal information indicates the third party's racial or ethnic origin or religious or political beliefs or associations.*

(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,*
> *…*
>
> *(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,*
> *…*
>
> *(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 35] In the context of section 17, the Public Body must establish that the severed information is the personal information of a third party, and may present argument and evidence to show how disclosure would be an unreasonable invasion of the third party's personal privacy. If a record does contain personal information about a third party, section 71(2) states that it is then up to the Applicant to prove that disclosure would not be an unreasonable invasion of the third party's personal privacy.

1. Do the records contain the personal information of third parties?

[para 36] Section 1(n) of the Act 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 37] The records at issue contain the personal information of third parties. These parties include the child who accused the Applicant of sexually assaulting her, an individual who completed a Witness Statement Form, children who were interviewed by the investigating detective or a child welfare worker, and individuals mentioned by the

foregoing individuals in their statements or interviews. The records contain names, addresses, telephone numbers, indications of race, ethnic origin, age and family status, information about health and health care history, information about educational history, opinions about individuals, and the personal views or opinions of individuals that are not about someone else. There is also other recorded information about identifiable individuals, such as information about events that they have experienced and their activities.

[para 38] I note that the Public Body generally did not withhold non-personal information under section 17, as was proper (e.g., headings and dates). I also note that, in the Monitor Sheets and Child Interview Sheets, the Public Body generally did not withhold information provided by third parties about the Applicant, as this is the Applicant's own personal information.

[para 39] The Public Body withheld all of the substantive content of the Witness Statement Form. This record contains statements about the Applicant, which constitute his own personal information, but the statements would also serve to identify the witness as a result of the context, not to mention the handwriting. Where an applicant's personal information (such as views and opinions about him or her) is intertwined with the personal information of a third party (including contextual information that identifies that third party), it becomes necessary to decide whether some or none of the applicant's personal information can be disclosed (Order 2000-019 at para. 76; Order F2006-006 at para. 112). A public body must make this decision regarding disclosure by weighing the applicant's right of access to information against the third party's right to protection of privacy (Order 98-008 at para. 35; Order 99-027 at para. 134). I have borne this principle in mind when reaching my conclusions below.

2. Would disclosure be an unreasonable invasion of personal privacy?

[para 40] Under section 17(2)(a) of the Act, disclosure of a third party's personal information is not an unreasonable invasion of personal privacy if the third party has, in the prescribed manner, consented to the disclosure. Under sections 7(3) and 7(4) of the *Freedom of Information and Protection of Privacy Regulation*, one of the prescribed manners for consenting to disclosure is as follows:

> *7(3) The consent or request of a third party under section 17(2)(a) of the Act must meet the requirements of subsection (4), (5) or (6).*
>
> *(4) For the purposes of this section, a consent in writing is valid if it is signed by the person who is giving the consent.*

[para 41] The Applicant is aware that the Public Body interviewed two of his children during its investigation. He submitted a Consent to Release Information, which is in writing and signed by his four children and their mother, who is the Applicant's former wife. In it, they "authorize the Edmonton Police Service (EPS) to release forthwith to [the Applicant] any/all information, personal and otherwise,

including but not limited to electronic/video/written form, concerning any/all communications/interviews of/with us conducted by/for the EPS about [the Applicant], during 2004 and at any/all other times".

[para 42] Under section 84(1)(e) of the Act, any right or power conferred on an individual by the Act may be exercised, if the individual is a minor, by a guardian of the minor in circumstances where, in the opinion of the head of the public body concerned, the exercise of the right or power by the guardian would not constitute an unreasonable invasion of the personal privacy of the minor. The Public Body submits that it is not clear from the document provided by the Applicant that the mother, acting as guardian for the minors, is exercising their power to consent. The Public Body takes no position on whether the consent provided by the mother on behalf of the children is valid, but says that, if the consent is valid, it does not object to releasing the severed portion of the records relating to the third parties who have provided consent.

[para 43] The Consent to Release Information is signed by each child in sequence, and then by their mother below. The mother is consenting, in her own right, to release of her personal information, although I do not see any of her personal information in the records at issue. If any of the children are no longer minors, they are also consenting in their own right. As for the minor children, I interpret the document to set out consents in their own right, to the extent that they are capable of providing consent given the circumstances and their present age, or alternatively a consent on their behalf by their mother as their guardian. While the Public Body is unsure whether the mother is purporting to consent on behalf of the children, I find that she is, given the wording and layout of the document. Moreover, because the records do not indicate that the mother gave a statement or was interviewed by the Public Body, I presume that she is consenting to the release of the personal information of her children who were interviewed.

[para 44] Whether the minors have the capacity to provide consents on their own, or their mother is consenting for them, the consents to release the personal information of the children are valid. I also take the Public Body's non-objection to release of the personal information of the minors, in the event that there is a valid consent by their mother, to mean that its head is of the opinion that exercise of the power by the mother would not constitute an unreasonable invasion of the personal privacy of the minors.

[para 45] As a result, I find that there is consent, in the prescribed manner, to release the personal information of the Applicant's children. The circumstance under section 17(2)(a) therefore exists, such that disclosure would not be an unreasonable invasion of their personal privacy. As noted by the Public Body, however, the children and their mother cannot consent to release of the personal information of other third parties (e.g., other individuals mentioned by the children during their interviews). The Public Body also notes that it applied section 20(1) in some instances where it applied section 17(1) to the personal information of the Applicant's children, so I must go on to review the Public Body's alternative application of section 20(1) later in this Order.

[para 46] If I am wrong, and one or more of the consents to release personal information are not valid for any reason, then I alternatively find that the document provided by the Applicant weighs in favour of disclosing the personal information of his children. Even if the document does not constitute proper consent within the terms of section 17(2)(a) and/or section 84(1)(e), it nonetheless sets out a willingness on the part of the children and their mother to have the personal information of the children released to the Applicant. The difference is that disclosure does not automatically fall outside the scope of section 17(1), and I must go on to balance the willingness of the parties to release the personal information against the presumptions and relevant circumstances weighing against disclosure. I will do this below, for the purpose of the alternative analysis.

[para 47] The Public Body submits that, in this inquiry, there is a presumption against disclosure of third party personal information under section 17(4)(b) of the Act, on the basis that the information is an identifiable part of a law enforcement record, and disclosure is not necessary to dispose of the law enforcement matter or to continue an investigation. I agree that the presumption against disclosure under section 17(4)(b) arises. The records withheld by the Public Body are in the context of "law enforcement", as defined in section 1(h) of the Act, which reads, in part, as follows:

> *(h) "law enforcement" means*
>
> *(i) policing, including criminal intelligence operations,*
>
> *(ii) a police, security or administrative investigation, including the complaint giving rise to the investigation, that leads or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the investigation or by another body to which the results of the investigation are referred, or*
> *…*

Here, an individual complained that the Applicant had sexually assaulted her, which was then the subject of a police investigation that could lead to a penalty or sanction imposed by a court under the *Criminal Code*. The definition set out in section 1(h)(ii) is therefore met. More generally, the records are also in the context of policing, within the terms of section 1(h)(i).

[para 48] I also agree with the Public Body that there is a presumption against disclosure of third party personal information in the records at issue under section 17(4)(g). The names of third parties appear with other personal information about them under section 17(4)(g)(i), and the disclosure of some names themselves would reveal personal information about third parties under 17(4)(g)(ii).

[para 49] I agree that, in the case of the accuser's personal information contained in the letter of April 13, 2004 from the doctor who examined her, there is a presumption against

disclosure under section 17(4)(a), as the personal information relates to medical history, diagnosis, condition, treatment or evaluation.

[para 50] Finally, I agree that a presumption against disclosure arises under section 17(4)(h) in a few instances, as the personal information indicates the third party's racial or ethnic origin.

[para 51] However, even where presumptions against disclosure arise under section 17(4) of the Act, all of the relevant circumstances under section 17(5) must be considered in determining whether a disclosure of personal information would constitute an unreasonable invasion of a third party's personal privacy.

[para 52] In arguing against disclosure, the Public Body submits that third parties will be exposed unfairly to psychological harm under section 17(5)(e), their personal information was supplied in confidence under section 17(5)(f), and disclosure may unfairly damage their reputations under section 17(5)(h). It notes that children are a vulnerable group in society, their best interests must be protected, and it therefore proceeds with the utmost caution when disclosing personal information in sexual assault matters where children are the complainants. The Public Body also submits that the third party personal information at issue is highly sensitive and delicate. I note that the nature and sensitivity of personal information can be a relevant circumstance under section 17(5) (see, e.g., Order 2000-029 at para. 104; Order F2008-020 at para. 103; and Order F2009-040 at para. 59). Further, the context in which third party personal information is given during an investigation, and the sensitivity of the events recorded, may make it reasonable to conclude that personal information was supplied in confidence under section 17(5)(f) (Order F2003-016 at para. 35).

[para 53] I find that the foregoing circumstances militate against disclosure of the third party personal information at issue, although to varying degrees. They weigh most heavily in relation to the personal information of the child who accused the Applicant of sexually assaulting her, another child who was interviewed, and the individual who completed the Witness Statement Form. They weigh much less heavily, or do not weigh at all, in relation to the personal information of the Applicant's two children who were interviewed. The Applicant points out that the investigating detective wrote, in his R-2 Narrative dated April 29, 2004, that "nothing of note was disclosed" during these two interviews. On my review of the content of the particular Child Interview and Monitor Sheets, I find that disclosure of the personal information of the Applicant's two children would not expose them to psychological harm under section 17(5)(e), or damage their reputations under section 17(5)(h). While there are presumptions against disclosure, and the children may have supplied information in confidence under section 17(5)(f) at the time of their interviews, their willingness and that of their mother to now allow the Applicant to have the information weighs sufficiently in favour of a conclusion that disclosure would not be an unreasonable invasion of the children's personal privacy.

[para 54] Again, however, the foregoing conclusion does not apply to the personal information of other third parties, such as teachers, friends and family members that the

children mentioned during their interviews. The personal information of these third parties – along with that of the Applicant's accuser, another child who was interviewed and the individual who completed the Witness Statement Form – remains at issue so I will review whether there are other relevant circumstances in favour of disclosure.

[para 55] The Applicant argues that disclosure of the personal information of third parties would not be an unreasonable invasion of their personal privacy because he and the third parties are well known to one another. This is not sufficient to be a relevant circumstance in favour of disclosure under section 17(5) (see, e.g., Order 2000-019 at para. 112). Just because the Applicant knows or believes that he knows the individuals who were interviewed or gave a statement does not mean that he is entitled to know what they said, or entitled to receive confirmation of their identities through disclosure of their names in the records.

[para 56] I considered whether the Applicant seeks disclosure of third party personal information for the purpose of subjecting the activities of the Public Body to public scrutiny under section 17(5)(a). He explains, for instance, that he made his access request "in order to get to the bottom of what actually happened during that original investigation". If he means to argue in favour of public scrutiny, he does not offer sufficient, if any, evidence to establish that it is desirable in this case. He alone appears to want to scrutinize his own personal matter.

[para 57] The Applicant makes submissions to the effect that the personal information is relevant to a fair determination of his rights under section 17(5)(c). In his request for inquiry, he writes that disclosure of the records would exonerate him of any wrongdoing. In his inquiry submissions, he argues that he is entitled to a copy of the letter of the doctor who examined his accuser and found no evidence of sexual assault, as the letter will contradict and refute the accusation.

[para 58] In order for section 17(5)(c) to be a relevant consideration, all four of the following criteria must be fulfilled: (a) the right in question is a legal right drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; (b) the right is related to a proceeding that is either existing or contemplated, not one that has already been completed; (c) the personal information to which the applicant is seeking access has some bearing on or is significant to the determination of the right in question; and (d) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing (Order 2001-027 at para. 40).

[para 59] I find that the circumstance under section 17(5)(c) does not exist in this inquiry. The Applicant was not charged with any offence, so there is no proceeding, existing or contemplated, in that respect. While the Applicant believes strongly that he is entitled to the information at issue in order to remove the cloud of suspicion hanging over him, this engages at most a non-legal right, which does not fall within the scope of section 17(5)(c). In arguing that he should be given access to the requested information because the Public Body and the Crown would have to make full disclosure if he were

charged, the Applicant effectively points out the very distinction that makes section 17(5)(c) inapplicable in this case. When an individual becomes the subject of a criminal proceeding, he or she has a right to make full answer and defence in the course of that proceeding, whereas this right is not engaged if an individual has not been charged.

[para 60] I note that the Applicant also wants access to the police file in order to establish that he should have obtained a police information clearance in December 2008, and that his personal information should have been corrected in this regard. However, because the Applicant did not request an inquiry into the matter involving his correction request, there is no proceeding in this respect either. I make no comment on whether the other criteria under section 17(5)(c) would be met, even if there were such a proceeding.

[para 61] Even though the relevant circumstance under section 17(5)(c) is not present in this case, I considered whether the Applicant's non-legal interest in exonerating himself, or removing the cloud of suspicion over him, amounts to a non-enumerated factor in favour of disclosure under section 17(5). I find that it does, but only with respect to some of the third party personal information at issue, as other information would not assist the Applicant whatsoever in exonerating himself (e.g., the fact that a child who was interviewed has a particular teacher or enjoys a particular hobby).

[para 62] As for the information that might assist the Applicant in exonerating himself, I find that the Applicant's non-legal interest in clearing his name is outweighed by the relevant circumstances militating against disclosure, being those relating to the sensitivity and confidentiality of the third party personal information remaining at issue, along with unfair exposure to harm and unfair damage to reputation if the information were disclosed. For instance, while there may be information pointing to the Applicant's innocence in the Child Interview Sheets and Monitor Sheets, or in the letter of the doctor who examined the Applicant's accuser, the nature of the information in those records (e.g., information on sexual topics and sensitive medical information) and the circumstances under which it was provided (i.e., in the context of a sexual assault investigation involving a child) lead to my conclusion that the Public Body properly withheld it under section 17.

[para 63] Moreover, the Applicant has already been given access to facts and information that he can use for the purpose of exonerating himself. For instance, he already knows that the examining doctor found no evidence of sexual assault. He does not need to know specific details, or why the doctor reached that conclusion, for the purpose of removing the cloud of suspicion over him. The Public Body has also already released portions of Monitor Sheets and the R-2 Narrative that set out information from the interview with the Applicant's accuser. The Applicant indicates that he is aware that his accuser changed her allegation and the person she was accusing, and that there is no independent witness to confirm what happened. He is already in a position to use this information for the purpose of clearing his name, if he wishes to do so.

[para 64] Because the Applicant's non-legal interest in exonerating himself is not relevant to disclosure of some of the third party personal information, and where it is

relevant, its relevance is outweighed by the presumptions and factors militating against disclosure, I conclude that section 17(1) of the Act applies. It would be an unreasonable invasion of personal privacy to disclose the remaining third party personal information that the Public Body withheld under section 17, being that of all third parties other than the Applicant's two children.

C. Did the Public Body properly apply section 20 of the Act (disclosure harmful to law enforcement) to the records/information?

[para 65] The Public Body relied on section 20(1)(a), 20(1)(c) and 20(1)(f) of the Act to withhold some of the information requested by the Applicant. However, as explained earlier in this Order, the Applicant is not interested in some of this information, and other information was properly withheld under section 17(1). I am here addressing only the information that is still at issue.

[para 66] Sections 20(1)(a), 20(1)(c) and 20(1)(f) read as follows:

> *20(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 a law enforcement matter,*
> *…*
>
> *(c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement,*
> *…*
>
> *(f) interfere with or harm an ongoing or unsolved law enforcement investigation, including a police investigation,*
> *…*

[para 67] Under section 71(1) of the Act, the Public Body has the burden of proving that the Applicant has no right of access to the information that it withheld under section 20.

[para 68] In order for information to fall under section 20(1)(a), 20(1)(c) or 20(1)(f), there must first be law enforcement. As I already found above in the context of section 17, the Public Body was engaged in law enforcement in relation to the specific matter involving the Applicant, within the meaning set out in section 1(h) of the Act. The Public Body also carries out law enforcement, in a general sense.

[para 69] Second, the Public Body must show that disclosure of the information at issue could reasonably be expected to cause one of the harms set out in section 20(1)(a), 20(1)(c) or 20(1)(f). In particular, the Public Body must satisfy the "harm test" that has been articulated in previous orders of this Office, in that there must be a clear cause and effect relationship between disclosure of the withheld information and the harm alleged;

the harm that would be caused by the disclosure must constitute damage or detriment and not simply hindrance or minimal interference; and the likelihood of the harm must be genuine and conceivable (Order 96-003 at p. 6 or para. 21; Order F2005-009 at para. 32).

[para 70] The harm test must be applied on a record-by-record basis (Order F2002-024 at para. 36). In order for the test to be met, explicit and sufficient evidence must be presented to show a reasonable expectation of harm; the evidence must demonstrate a probability of harm from disclosure and not just a well-intentioned but unjustifiably cautious approach to the avoidance of any risk whatsoever because of the sensitivity of the matters at issue (Order 96-003 at p. 6 or para. 20; Order F2002-024 at para. 35). The harm test – specifically in relation to law enforcement matters under section 20 of the Act – and the requirement for an evidentiary foundation for assertions of harm were upheld in *Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner)*, 2006 ABQB 515 (at paras. 6, 59 and 60).

[para 71] In its submissions, the Public Body does not offer any argument directly in relation to its application of section 20(1)(f) of the Act, which authorizes a refusal to disclose information if it could reasonably be expected to interfere with or harm a specific ongoing or unsolved law enforcement investigation. The Public Body instead focuses on its application of sections 20(1)(a) and 20(1)(c). Section 20(1)(a) refers to harm to a "law enforcement matter", which likewise means a specific law enforcement matter (Order 96-003 at p. 6 or para. 21; Order F2008-031 at para. 48). Conversely, because section 20(1)(c) refers to harm to the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement, the harm can be in relation to either the specific matter involving the Applicant, or law enforcement more generally.

[para 72] As for the specific matter involving the Applicant, he takes issue with the Public Body's position that his file has been "suspended" rather than "closed". He argues that he is not, or at least should no longer be, under investigation by the Public Body, as he was verbally informed in April 2004 that the file would be closed, and he obtained a security clearance in November 2005. If the investigation file is indeed only suspended, the Applicant submits that the Public Body should either charge him or clear him. He adds that his "guilt by accusation" has affected his career and visitation with his children.

[para 73] The investigating detective's R-2 Narrative dated April 29, 2004 concluded that "[n]o charges will be laid and the file will be suspended…" The file was therefore not actually "closed". The staff sergeant who dealt with the Applicant's concerns about not being cleared at the time of the police information check in December 2008 was unable to explain, in the briefing note that he prepared, why the existence of the police file had not been noted at the time of the November 2005 security clearance check.

[para 74] Whether the Public Body relies on section 20(1)(a), 20(1)(c) or 20(1)(f), I find that disclosure of the information at issue would not cause harm in relation to the particular case involving the Applicant. This is because I find that there is really no longer any law enforcement matter or investigation involving him. The Public Body

says that the Applicant may undergo another interview or polygraph examination, but it has been seven years since any action has been taken on the file. For the purpose of section 20(1)(c), it has been stated that an "ongoing or unsolved investigation" means one that is "currently taking place or in progress" (Order F2004-023 at para. 10). I find that, in actuality, the investigation of the Applicant is not taking place or in progress. For the same reason, I find that there is no outstanding "law enforcement matter" for the purpose of applying section 20(1)(a). Also for the same reason, section 20(1)(f) cannot apply, insofar as investigative techniques and procedures used in the specific investigation of the Applicant are concerned.

[para 75] If I am wrong, and there is still an investigation or law enforcement matter involving the Applicant, I nonetheless find that no harm could reasonably be expected to occur on disclosure of the information that remains at issue in this part of the Order.

[para 76] Most of the information that the Public Body withheld on the Child Interview Sheets is not at issue here, as it consists of guidelines for the interviewer and unasked questions in which the Applicant is not interested. Other information was properly withheld by the Public Body under section 17(1). The information that remains at issue on the Child Interview Sheets appears on pages 33-34 of the records, in the form of certain answers given by a child who was interviewed, and the related questions or headings (but not the answers that consist of the personal information of other third parties, as this was properly withheld under section 17).

[para 77] I find that the questions, headings and answers remaining at issue on pages 33-34 do not alternatively fall under section 20(1). Disclosure of this information cannot reasonably be expected to harm the law enforcement matter or investigation involving the Applicant, or the effectiveness of investigative techniques and procedures used in the course of it. The Public Body submits that, if the Applicant were to know exactly what questions the children were asked, it would pose a significant risk because the Applicant could then approach the children, question them about what transpired during their interviews, and influence their responses relating to the investigation. However, the Applicant can already approach the child in question, find out what he or she was asked and/or try to influence what he or she might say during a later interview. While it is possible that disclosure of certain information would assist the Applicant, to the extent that it indicates greater detail than what the child might remember or tell him, the questions, headings and answers that are at issue on pages 33-34 have no real bearing on the Applicant's case. The particular questions and headings were merely used to elicit some background information about the child at the outset of the interview, and the answers are innocuous.

[para 78] Because, in a different case involving a different suspect, the questions and headings would elicit the same type of innocuous information, and the substantive answers here are in the context of the Applicant's specific case, I also find that disclosure of the information remaining at issue on the Child Interview Sheet at pages 33-34 would not harm the effectiveness of the Public Body's investigative techniques and procedures used more generally in law enforcement matters.

[para 79] There is no information at issue on the Subject Interview Sheet, as the Applicant already obtained access to the questions actually asked and the answers that he gave. There is also no information at issue, in this part of the Order, on the Monitor Sheets, as the Public Body did not apply section 20 to those pages.

[para 80] The Public Body applied section 20 to part of the R-2 Narrative at page 7 of the records, and part of the Investigative Notes at pages 63 and 65. I find that the information in question does not fall under section 20(1)(a), 20(1)(c) or 20(1)(f). First, the information indicates steps taken in the course of the Public Body's investigation that would come as no surprise to the Applicant or anyone else, so disclosure would not harm the particular law enforcement matter or investigation involving the Applicant, or the effectiveness of the Public Body's investigative techniques or procedures generally. Second, the substantive information that would be revealed is information about past matters that cannot be altered so as to thwart the Public Body's law enforcement or investigation relating to the Applicant. The Public Body could again take the particular investigative steps and there would be nothing that the Applicant could do to affect the result.

[para 81] For two lines of information in the Investigator's Notes on page 63, and for one line on page 65, the Public Body cited section 21(1)(b) of the Act, which authorizes a public body to refuse to disclose information if the disclosure could reasonably be expected to reveal information supplied, explicitly or implicitly, in confidence by a government, local government or an organization listed in clause 21(1)(a) or its agencies.

[para 82] The Public Body only noted section 21(1)(b) in the package of records submitted to me. It did not cite the section in its initial response to the Applicant, list it in the index of records prepared for the inquiry, or make reference to it in its inquiry submissions. As it did not make any submissions regarding section 21(1)(b), it is possible that the Public Body is no longer relying on that section, assuming that it intended to do so at one point. Alternatively, if the Public Body intends to rely on section 21(1)(b), the complete absence of submissions on point means that it has not met the burden of proving that the Applicant has no right of access under that section. Having said this, I must also bear in mind that, before disclosing information contemplated in section 21(1)(b), section 21(3) requires a public body to obtain the consent of the organization or agency who supplied the information.

[para 83] Regardless of the foregoing, the three lines of information to which the Public Body appears to have applied section 21(1)(b), at least at one point, cannot fall under that provision. The lines indicate that information was sought but not obtained, and I therefore find that no information was supplied, let alone in confidence. The fact that there was no information from the source contacted is not itself an item of information supplied.

[para 84] Finally, it is possible that the Public Body meant to rely on section 20(1) to withhold the information beside which it noted section 21(1)(b). If that is the case, I find

that the information does not fall under section 20(1), for the same reasons set out above in relation to the other information on pages 7, 63 and 65.

[para 85] Most of the information that the Public Body withheld in the polygraph file is not at issue, as it consists of the polygraph examiner's notes used in designing or analyzing the polygraph examination. As stated earlier, the Applicant is interested only in the questions actually asked and answers actually given during his interview and examination. As a result, the only information that remains at issue is that found at pages 74-75 of the records, which I will call the polygraph form, and all of the information in the video recording of the Applicant's polygraph interview and examination.

[para 86] In applying the harm test as it relates to disclosure of the foregoing information, the Public Body submits that there is a clear cause and effect relationship between disclosure and harm, in that disclosure of information in the polygraph form and video recording would provide the Applicant with a complete template of what transpired during his interview and examination, which could then enable him to gain a tactical advantage if he were to undergo another polygraph examination, whether in the suspended investigation or a future one. The Public Body says that there is clear detriment associated, as polygraph examinations are a valuable investigative tool relied upon by investigators in conducting criminal investigations. As for whether the likelihood of harm is genuine and conceivable, the Public Body submits that it is possible that the Applicant may undergo another polygraph test, given that the first one was incomplete as a result of countermeasures employed by him. The Public Body says that he could then use information in the records to defeat a later test.

[para 87] The Applicant argues that there would be no harm to law enforcement if he obtains a copy of his polygraph interview and examination, given that many individuals who have been charged with an offence have already obtained copies of their polygraph test records.

[para 88] The Public Body submitted two affidavits of the detective who conducted the Applicant's polygraph examination. I accepted one of them *in camera*, as parts of it risk revealing the contents of the records at issue or other information that the Public Body may be entitled to withhold under section 20 of the Act, and the remaining parts are adequately repeated or summarized in the Public Body's submissions and the other affidavit of the polygraph examiner, which were exchanged with the Applicant.

[para 89] In the affidavit that was exchanged, the polygraph examiner explains that polygraph countermeasures are mental or physical manoeuvres undertaken for the purpose of altering the physiological responses to polygraph questions. He states that it is his opinion that the Applicant employed countermeasures in an attempt to defeat his polygraph test.

[para 90] In short, the Public Body submits that access to the polygraph form and video recording will enable the Applicant to use countermeasures if he undergoes a

polygraph test again in the future. However, I fail to see how disclosure would harm the law enforcement matter, the investigation, or the effectiveness of the investigative techniques or procedures, if the Applicant already used countermeasures during the previous test and therefore knows how they can be used, and given that he was present at his own polygraph interview and examination and already knows the questions that he was asked and the answers that he gave. While review of the polygraph form and video recording may provide the Applicant with details that he may have forgotten, I do not believe that knowledge of those details will assist the Applicant in using countermeasures in the course of a future polygraph examination. Having already undergone a polygraph examination (and, in fact, an additional one prior to the one appearing in the video recording), the Applicant is already aware of how they are designed, are carried out and function. I do not believe that he will be in any better position to defeat a future polygraph examination, as alleged by the Public Body, simply by reviewing or studying his previous interview and examination. I find that the harm test is not met.

[para 91] I conclude that disclosure of the information in the polygraph form and video recording will not bring about any of the harms set out in sections 20(1)(a), 20(1)(c) and 20(1)(f), insofar as the specific law enforcement matter and investigation involving the Applicant are concerned. I will now turn to the question of whether disclosure could reasonably be expected to harm the effectiveness of investigative techniques and procedures used in law enforcement, more generally speaking, under section 20(1)(c).

[para 92] The Applicant argues that section 20(1) cannot apply to the polygraph information, as the results of a polygraph test are inadmissible as evidence in court against an accused person because of their inherent unreliability. However, a polygraph examination is nonetheless an investigative technique or procedure, for instance to elicit a confession or narrow the number of suspects. It is therefore possible for section 20(1)(c) to apply.

[para 93] The Public Body notes that section 20(1)(c) gives it discretion to withhold information relating to investigative techniques and procedures in situations where general knowledge of the investigative technique or procedure would reduce their effectiveness (Order F2007-005 at para. 9). It submits that, while polygraph examinations may be techniques that the public knows to exist, and they have been depicted in a general way or through entertainment media, the information at issue is not basic information about well-known techniques but rather consists of significant detail. In his affidavit that was exchanged with the Applicant, the polygraph examiner says that the information about polygraphs that is already publicly available is mostly descriptive, narrative or editorial in nature, whereas the information here consists of a complete template showing how the particular polygraph examination, a Control Question Theory Test, is administered by a Forensic Polygraph Examiner certified by the Canadian Police College.

[para 94] With respect to the harm test under section 20(1)(c), the Public Body submits that the efficacy of the techniques and procedures employed while conducting polygraph examinations is directly undermined by public knowledge of how they operate. It argues that there is a clear cause and effect relationship between disclosure of the records at issue and the public increasing its knowledge. It says that harm would result, and that it would constitute damage or detriment, in that the public's knowledge of how a polygraph works would enable individuals to develop countermeasures capable of defeating the test, and the tests are frequently relied upon by the Public Body during its investigations. As for whether the likelihood of harm is genuine and conceivable, the Public Body submits that the contents of the polygraph records would be highly valued and sought after by individuals desiring to undermine or defeat criminal investigations. It says that the Applicant could easily and broadly disseminate the information in the video recording (e.g., on "Youtube"), and that this is particularly likely to facilitate the public's comprehension of how a polygraph examination works, given that the recording is audiovisual.

[para 95] In my view, it is highly unlikely that the Applicant will disseminate the information at issue, given that it relates to sensitive criminal allegations that the Applicant believes to reflect very badly on him. I therefore do not find the likelihood of the harm alleged by the Public Body to be genuine and conceivable under the third branch of the harm test. The polygraph information and video recording are not likely to fall into the public domain where others would be in a position to use the information in a manner that would harm the effectiveness of future polygraph examinations administered by the Public Body.

[para 96] The foregoing disposes of the matter. In the alternative, I will assume for the sake of discussion that the information at issue could conceivably fall into the public domain. However, even if that were to happen, I would find that there is no clear cause and effect relationship between disclosure of the contents of the polygraph form, interview and examination and the harm alleged by the Public Body, which is that members of the public, and future suspects, will learn how to use countermeasures in order to defeat a polygraph examination. I would find that, given what is actually revealed by the polygraph form and video recording, the Public Body is overstating the harm that would occur on disclosure. In other words, I also find that the first and second branches of the harm test are not met.

[para 97] The first part of the video recording consists of the polygraph examiner providing the Applicant with some general information about polygraph examinations and his participation. However, the Public Body does not explain how disclosure of this information would harm the effectiveness of a polygraph examination conducted on another individual. The Public Body would presumably provide the same information to a future subject, and I fail to see how the subject's advance knowledge would enable him or her to use countermeasures or otherwise thwart the interview or examination.

[para 98] Next in the video recording, the polygraph examiner obtains some of the Applicant's background personal information, some of which is for a particular purpose

indicated at paragraph 4 of the examiner's *in camera* affidavit. The polygraph form sets out the same information, although in a more limited way, in that it consists of notes prepared by the polygraph examiner at the time. Again, the Public Body does not explain how the public's knowledge of this kind of information, of the purpose for which it was obtained, would harm the effectiveness of the Public Body's polygraph interviews and examinations. The Public Body focuses its argument on the use of countermeasures during the polygraph examination itself.

[para 99] At various points in the video recording, the polygraph examiner and the Applicant discuss the particular matter involving the Applicant. Because this information is case-specific, and consists of the Applicant's own views and thoughts about the allegations against him, I find that disclosure would not harm the effectiveness of the Public Body's investigative techniques or procedures in law enforcement matters involving other individuals.

[para 100] Elsewhere in the video recording, the polygraph examiner explains to the Applicant how a polygraph test functions technologically and physiologically and, as would be expected, attaches the components to the Applicant and gives him instructions for carrying out the test. The two of them also discuss something set out at paragraph 5 of the examiner's *in camera* affidavit. Because this content reveals aspects of the polygraph examination itself, it is the most relevant to the Public Body's argument that another individual's knowledge of how a polygraph test works would enable that individual to develop countermeasures capable of defeating the test. However, I still find that disclosure could not reasonably be expected to harm the effectiveness of the Public Body's investigative techniques and procedures used in the course of conducting its polygraph examinations.

[para 101] The type or nature of the countermeasures that the Public Body believes were used by the Applicant, and the type or nature of possible countermeasures more generally, are never stated in the video recording. In his *in camera* affidavit, the polygraph examiner tells me what countermeasures he believes the Applicant used to undermine his polygraph test, but I do not see how most individuals watching the video recording would be able to ascertain what those were.

[para 102] A very clever and astute individual might possibly see the countermeasures allegedly used by the Applicant, and might possibly recognize the strategies used by the polygraph examiner in the course of the interview and examination. However, I believe that such an individual would already know about the nature of such countermeasures and strategies anyway, or would be able to learn about them from other sources. In short, the video recording does not consist of any clear or direct information about the countermeasures that might be used by a subject, or the strategies that might be used by a polygraph examiner. Therefore, even if the video recording were to fall into the public domain, it would not really add to the public's understanding of countermeasures, or how they can be used. I do not find a sufficient link between dissemination of the information at issue and a member of the public learning how to undermine the Public Body's

investigative techniques or procedures in conducting a polygraph interview and examination.

[para 103] On my consideration of the submissions and affidavits provided by the Public Body and my review of the records at issue, I conclude that the Public Body did not properly apply section 20 of the Act to the information in the polygraph form and in the video recording of the Applicant's polygraph interview and examination. As the information does not fall under section 20(1)(a), 20(1)(c) or 20(1)(f), the Public Body had no discretion to withhold it in reliance on any of those provisions.

[para 104] The information in the polygraph form and video recording consist primarily of the Applicant's personal information, or information that is nobody's personal information. However, there are instances where the personal information of third parties exists, so I considered whether disclosure would be an unreasonable invasion of their personal privacy under section 17(1).

[para 105] Some of the third party personal information in the polygraph form and video recording is information about the Applicant's acquaintances (e.g., his best friend) and his family members (e.g., his mother and father). Under section 17(5)(i) of the Act, a relevant circumstance weighing in favour of disclosing third party personal information is that the information was originally provided by an applicant. I find that this weighs sufficiently in favour of disclosure of the personal information of the foregoing individuals, such that disclosure would not be an unreasonable invasion of their personal privacy.

[para 106] Some of the third party personal information in the video recording was not provided by the Applicant, but was instead mentioned by the polygraph examiner. For instance, he speaks briefly about himself and his wife. However, this personal information given by the polygraph examiner is not of such a nature that I would find disclosure to be an unreasonable invasion of personal privacy (e.g., his wife read a particular book).

[para 107] Finally, there is personal information in the video recording about the Applicant's accuser and her family members, primarily being her sister and mother. Unlike the information about the third parties mentioned above, the information of these particular third parties is sensitive and delicate, in that it identifies the Applicant's accuser as a victim of an alleged sexual assault, reveals details of the alleged sexual assault, and identifies the accuser's sister and mother as having their respective roles in the course of the events in question. Even if the accuser's name is severed from the video recording, identification of her sister and mother, and any other family member of the accuser, would also serve to identify her as an alleged victim of sexual assault. Finally, although the Applicant is already aware of the identities of the foregoing individuals and he provided much of the personal information in question, I am mindful of the possibility, as suggested by the Public Body, that the video recording might fall into the hands of someone other than just the Applicant. Given the sensitivity of the contents of the video recording, I conclude that disclosure of the names of the Applicant's accuser, her sister,

her mother and any other family member of the accuser would be an unreasonable invasion of personal privacy under section 17(1) of the Act.

[para 108] Section 6(2) of the Act reads as follows:

> *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.*

Given the above, I intend to order the Public Body to consider whether the names of the Applicant's accuser, her sister, her mother and any other family member of the accuser can reasonably be severed from the video recording under section 6(2), and if it can, to give the Applicant access to the remainder of the video recording.

[para 109] If the Public Body determines that the foregoing names cannot reasonably be severed from the video recording and that the Applicant therefore has no right of access to the remainder of the video recording, the Applicant may then request a review of the Public Body's determination if he chooses to do so.

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

[para 110] The Public Body relied on section 24(1)(a) and 24(1)(b) of the Act to withhold information from the Applicant in Polygraph Examiner's Comments, which are found at pages 69-70 of the records.

[para 111] Sections 24(1)(a) and 24(1)(b) read as follows:

> *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 112] Under section 71(1) of the Act, the Public Body has the burden of proving that the Applicant has no right of access to the information that it withheld under section 24.

[para 113] In order to refuse access to information under section 24(1)(a), on the basis that it could reasonably be expected to reveal advice, proposals, recommendations, analyses or policy options, the information must meet the following criteria: (i) be sought or expected from or be part of the responsibility of a person, by virtue of that person's position, (ii) be directed toward taking an action, and (iii) be made to someone who can take or implement the action (Order 96-006 at p. 9 or para. 42; Order F2009-018 at para. 17).

[para 114] Section 24(1)(b) gives a public body the discretion to withhold information that could reasonably be expected to reveal consultations or deliberations involving its officers or employees. A "consultation" occurs when the views of other persons are sought as to the appropriateness of a particular proposal, and a "deliberation" is a discussion or consideration of the reasons for and/or against an action (Order 96-006 at p. 10 or para. 48; Order F2009-018 at para. 32). The test for information to fall under section 24(1)(b) is the same as that under section 24(1)(a) in that the consultations or deliberations must (i) be sought or expected from or be part of the responsibility of a person, by virtue of that person's position, (ii) be directed toward taking an action, and (iii) be made to someone who can take or implement the action (Order 99-013 at para. 48; Order F2009-018 at para. 18).

[para 115] Part (ii) of the test under both sections 24(1)(a) and 24(1)(b) is that the information must be directed toward taking an action. The information must relate to a suggested course of action, which will ultimately be accepted or rejected by the recipient (Order 96-006 at p. 8 or para. 39; Order F2007-013 at para. 108). Taking an action includes making a decision (Order 96-019 at para. 120; Order F2002-028 at para. 29).

[para 116] The Public Body submits that it was the responsibility of the polygraph examiner to provide the investigating detective with his observations and commentary about the polygraph examination, so that the investigating detective could determine how to proceed with the investigation of the Applicant, such as whether to pursue him as a suspect. The Public Body notes that information in a record can fall under section 24(1)(a) or 24(1)(b) even if it is only implicitly directed toward a person for the purpose of allowing him or her to take an action or make a decision (Order F2009-018 at para. 29). While the document in question does not explicitly indicate its intent, the Public Body submits that its clear purpose was to provide the investigating detective with the information that he required in order to decide how to proceed.

[para 117] The Public Body notes that a factual summary, without more, is not sufficient to trigger the application of section 24(1) (Order 97-007 at para. 37). However, it argues that the commentary of the polygraph examiner, while factual in tone, had the purpose set out above, and was not merely information for information's sake.

[para 118] Background facts may be withheld if they are sufficiently interwoven with advice, etc. (Order 99-001 at paras. 17 and 18; Order F2007-013 at para. 108) or

with consultations/deliberations (Order 96-006 at p. 10 or para. 50; Order F2004-026 at para. 78). However, I find that the facts and observations in the Polygraph Examiner's Comments are not sufficiently interwoven with any information falling under section 24(1)(a) or 24(1)(b). In fact, I fail to see any advice, proposals, recommendations, analyses, policy options, consultations or deliberations at all.

[para 119] While the investigating detective may have used the information in the Polygraph Examiner's Comments to make a decision, the polygraph examiner does not suggest any course of action. He does not say how the investigating detective should or should not proceed with the matter, or say whether the Applicant should or should not be pursued as a suspect. While the investigating detective may have seen for himself, in Polygraph Examiner's Comments, reasons for or against a particular course of action, it is not the polygraph examiner who was linking any information to such reasons or course of action. For information to fall under section 24(1)(a) or 24(1)(b), it is not sufficient for the recipient of the information to use it for the purpose of an action or decision; the individual providing the information must actually be suggesting a particular action or decision.

[para 120] Insofar as the polygraph examiner may have been implicitly suggesting a course of action, or reasons for or against one, the Public Body has not established that he was. Some of the views given by the examiner could be seen to point to the Applicant's innocence and some to his guilt, so I do not see how the polygraph examiner was implicitly suggesting how the investigating detective should proceed with the matter overall. As for whether the polygraph examiner was implicitly giving some information to suggest that the Applicant should be pursued as a suspect and other information to suggest that he should not be (i.e., reasons both for and against a course of action), the Public Body has not explained that particular facts – such as that the polygraph examination was incomplete/inconclusive, the Applicant was believed to engage in countermeasures or he said certain things – necessarily mean that the polygraph examiner was suggesting a reason for or against a particular course of action. It is not apparent to me that the particular polygraph examiner, or polygraph examiners generally, always mean to be saying that a suspect should or should not be pursued if certain things are noted during the polygraph interview and test. In short, the Public Body has not adequately explained what facts or observations set out by the polygraph examiner necessarily and therefore implicitly mean that the polygraph examiner was suggesting what the investigating detective should do.

[para 121] I conclude that the Public Body did not properly apply section 24 of the Act to the information that it withheld in the Polygraph Examiner's Comments. As the information does not fall under section 24(1)(a) or 24(1)(b), the Public Body had no discretion to withhold it from the Applicant in reliance on either of those provisions.

V. ORDER

[para 122] I make this Order under section 72 of the Act.

[para 123] I find that the Public Body did not meet its duty to assist the Applicant under section 10 of the Act, in that it failed to conduct an adequate search for the Child Interview Sheet noted to be at pages 41-45 in the index of records prepared by the Public Body. Under section 72(3)(a), I order the Public Body to comply with its duty to respond to the Applicant openly, accurately and completely. Under section 72(4), I specify that the Public Body conduct another search for the Child Interview Sheet in question. If it cannot be located, I specify that the Public Body explain to the Applicant what has been done to search for it, which explanation should indicate who conducted the search, the specific steps taken to identify and locate the record, the scope of the search conducted (e.g., physical sites, program areas, specific databases, off-site storage areas, etc.), the steps taken to identify and locate all possible repositories of the record (e.g., keyword searches, records retention and disposition schedules, etc.), and why the Public Body believes that an additional Child Interview Sheet does not exist, including a better explanation of why a record was once noted to be at pages 41-45.

[para 124] I find that section 17(1) of the Act does not apply to the personal information of the Applicant's two children who were interviewed during the Public Body's investigation, as they have consented to disclosure under section 17(2)(a), or disclosure would otherwise not be an unreasonable invasion of their personal privacy. I also find that the foregoing information does not fall under section 20(1), where the Public Body alternatively applied that section. Under section 72(2)(a), I order the Public Body to give the Applicant access to the following:

- the answers given, along with the related questions or headings, on pages 33-34 (Child Interview Sheets) where they consist of nobody's personal information or consist only of the personal information of the Applicant's two children (being the headings of the last four boxes on page 33, the answers in the 2nd last box on page 33, the heading and answer in the 7th last line of page 33, the heading in the 5th last line on page 33, and the headings of the 2nd and 3rd boxes on page 34);
- everything on page 37 (Child Interview Sheet), with the exception of the personal information of other third parties in the 1st, 2nd, 3rd, 5th and 7th lines of the handwritten notes in the lower left-hand corner; and
- everything on pages 38-40 and 46-48 (Monitor Sheets), with the exception of the personal information of third parties other than the Applicant's two children (being the names of these other third parties and any other information about them).

[para 125] I find that section 17(1) of the Act applies to the remaining personal information that the Public Body withheld under that section, as disclosure would be an unreasonable invasion of the personal privacy of third parties. Under section 72(2)(b), I confirm the Public Body's decision to refuse the Applicant access.

[para 126] I find that the Public Body did not properly apply section 20 of the Act to the information at issue under that section, as disclosure could not reasonably be expected to harm a law enforcement matter under section 20(1)(a), harm the

effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement under section 20(1)(c), or interfere with or harm an ongoing or unsolved law enforcement investigation under section 20(1)(f). I also find that section 17(1) does not apply to most of the information that the Public Body withheld under section 20. Under section 72(2)(a), I order the Public Body to give the Applicant access to the following:

- the last paragraph on page 7 (R-2 Narrative);
- the last two lines on page 63 (Investigator's Notes);
- the 1st to 6th, and 11th to 13th, lines of notes on page 65 (Investigator's Notes); and
- everything on pages 74-75 (polygraph form).

[para 127] While I find that the Public Body did not properly apply section 20 of the Act to the information in the video recording of the polygraph interview and examination, I find that section 17(1) applies to the names of the Applicant's accuser, her mother, her sister and any other family member of the accuser, as disclosure would be an unreasonable invasion of personal privacy. I therefore order the Public Body to consider whether these names can reasonably be severed from the video recording under section 6(2) of the Act, and if they can, to give the Applicant access to the remainder of the video recording.

[para 128] If the Public Body determines that the foregoing names of third parties cannot reasonably be severed from the video recording and that the Applicant therefore has no right of access to the remainder of the video recording, I order it to advise both me and the Applicant accordingly.

[para 129] I find that the Public Body did not properly apply section 24 of the Act to the information at issue under that section, as the information does not constitute advice, proposals, recommendations, analyses or policy options under section 24(1)(a), or consultations or deliberations under section 24(1)(b). Under section 72(2)(a), I order the Public Body to give the Applicant access to the following:

- everything on pages 69-70 (Polygraph Examiner's Comments).

[para 130] 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.

Wade Riordan Raaflaub
Adjudicator