ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2010-025

April 27, 2011

EDMONTON POLICE SERVICE

Case File Number F5355

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Summary: The Applicant made a request for access to a letter written by a police officer. The police officer wrote the letter to his supervisor to respond to a complaint the Applicant had made about statements the police officer had made in the media. The Edmonton Police Service (the Public Body) denied the Applicant access to the letter. The Public Body initially withheld the letter under section 20 (harm to law enforcement) of the *Freedom of Information and Protection of Privacy Ac*t, (the FOIP Act), but later decided to withhold it under section 17(1) (unreasonable invasion of personal privacy) instead.

The Applicant argued that there was a public interest in disclosing the personal information of the police officer found in the records at issue, because misleading or slanted statements made by police officers to the media has become a national problem. The police officer argued that he had supplied his personal information in confidence and had a reasonable expectation that his personal information would not be disclosed. The Public Body argued that because the records related to a matter that had not been decided or found to warrant sanction, there is a presumption that disclosure of the police officer's personal information would damage his reputation. The Public Body also argued that the personal information could be unreliable or inaccurate because it had not been tested at a hearing.

The Adjudicator determined that the Applicant had not established a public interest in disclosing the personal information in the records at issue, or that disclosing the personal

information was necessary to enable public scrutiny of, or engage public debate in, a matter of public interest. Although the Adjudicator found that it had not been established that disclosing the personal information in the records would damage the reputation of the police officer, and also found that it had not been established that the personal information was likely to be unreliable or inaccurate, she found that the personal information had been provided to the police officer's supervisor in confidence, and found that there were no factors outweighing the presumption that it would be an unreasonable invasion of the police officer's personal privacy under section 17(1) of the FOIP Act to disclose the personal information in the records.

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

Authorities Cited: AB: Order F2008-009, F2009-010, F2009-026

Cases Cited: *University of Alberta v. Pylypiuk*, 2002 ABQB 22; *Mount Royal University v. Carter*, 2011 ABQB 28; *Calgary Police Service v. Alberta (Information and Privacy Commissioner*), 2010 ABQB 82;

I. BACKGROUND

[para 1] On December 9, 2009, the Applicant, the Criminal Trial Lawyers' Association, requested access from the Edmonton Police Service (the Public Body) to records created by a police officer. The Applicant had made a complaint earlier regarding statements made by the police officer to the media and the records to which the Applicant requested access had been written by the police officer in response to this complaint.

[para 2] The Public Body responded to the Applicant's access request on March 30, 2010. The Public Body stated that four records from a Professional Standards Branch case file had been identified as responsive to the Applicant's access request. The Public Body explained that the Applicant would not be granted access to these records because they were being withheld in their entirety under sections 20(1)(a) and (f) (harm to law enforcement) of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act).

[para 3] On April 21, 2010, the Applicant requested that the Commissioner review the Public Body's response to its access request.

[para 4] On September 2, 2010, the Public Body wrote the Applicant and stated that its response of March 30, 2010 should also have included reference to sections 17(1), 17(4)(b), and 17(4)(g)(i) and (ii) of the FOIP Act, in addition to sections 20(1)(a) and (f).

[para 5] The police officer was identified as a person affected by the Applicant's request for review. The police officer was therefore invited to participate at the inquiry and to make submissions. The police officer did so.

[para 6] The parties exchanged initial and rebuttal submissions. In its initial submissions, the Public Body made arguments only in relation to the application of section 17 and confirmed that it was no longer relying on section 20(1) to withhold information from the records.

II. RECORDS AT ISSUE

[para 7] A four-page memorandum created by the police officer is at issue.

III. ISSUE

Issue A: Does section 17(1) of the FOIP Act (disclosure harmful to personal privacy) apply to the information in the records?

IV. DISCUSSION OF ISSUE

Issue A: Does section 17(1) of the FOIP Act (disclosure harmful to personal privacy) require the Public Body to withhold the information in the records?

[para 8] The Public Body withheld all the information in the records at issue under section 17.

[para 9] Section 1(1)(n) defines personal information under the Act:

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

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

[para 10] Section 17 states in part:

> *17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy…*
> *…*
> *(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if…*
>
> *…*
>
> *(b) the personal information is an identifiable part of a law enforcement record, except to the extent that the disclosure is necessary to dispose of the law enforcement matter or to continue an investigation…*
> *(d) the personal information relates to employment or educational history…*
> *(g) the personal information consists of the third party's name when*
> *(i) it appears with other personal information about the third party, or*
> *(ii) the disclosure of the name itself would reveal personal information about the third party…*
>
> *(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether*
>
> *(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny*
> *(b) the disclosure is likely to promote public health and safety or the protection of the environment,*
> *(c) the personal information is relevant to a fair determination of the applicant's rights,*
> *(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,*
> *(e) the third party will be exposed unfairly to financial or other harm,*
> *(f) the personal information has been supplied in confidence,*
> *(g) the personal information is likely to be inaccurate or unreliable,*
> *(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and*
> *(i) the personal information was originally provided by the applicant.*

[para 11] Section 17 does not say that a public body is *never* allowed to disclose third party personal information. It is only when the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy that a public body

must refuse to disclose the information to an applicant under section 17(1). Section 17(2) (not reproduced) establishes that disclosing certain kinds of personal information is not an unreasonable invasion of personal privacy.

[para 12] When the specific types of personal information set out in section 17(4) are involved, disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. To determine whether disclosure of personal information would be an unreasonable invasion of the personal privacy of a third party, a public body must consider and weigh all relevant circumstances under section 17(5), (unless section 17(3), which is restricted in its application) applies. It is important to note that section 17(5) is not an exhaustive list and that other relevant circumstances must be considered.

[para 13] In *University of Alberta v. Pylypiuk*, 2002 ABQB 22, the Court commented on the interpretation of what is now section 17. The Court said:

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

Section 17 requires a public body to withhold information when the information would be harmful to the personal privacy of a third party.

[para 14] Section 1(r) of the Act provides the following definition of "third party:"

> *1 In this Act,*
>
> *(r) "third party" means a person, a group of persons or an organization other than an applicant or a public body;*

[para 15] I will therefore consider first whether the records at issue contain the personal information of a third party, as defined by section 1(r), and if so, decide whether it would be an unreasonable invasion of the third party's personal privacy to disclose it.

[para 16] In Order F2009-026, I said:

> If information [contained in the record in issue] is about employees of a public body acting in a representative capacity the information is not personal information, as the employee is acting as an agent of a public body. In Order 99-032, the former Commissioner noted:
>
> > The Act applies to public bodies. However public bodies are comprised of members, employees or officers, who act on behalf of public bodies. A public body can act only through those persons.

> In other words, the actions of employees acting as employees are the actions of a public body. Consequently, information about an employee acting on behalf of a public body is not information to which Section 17 applies, as it is not the personal information of a third party. If, however, there is information of a personal character about an employee of a public body, then the provisions of Section 17 may apply to the information. I must therefore consider whether the information about employees [in] the records of issue is about them acting on behalf of the public body, or is information conveying something personal about the employees.

[para 17] In *Mount Royal University v. Carter*, 2011 ABQB 28, the Court found the above analysis to be reasonable. I will therefore consider whether the information in the records at issue is about the third party as a representative of the Public Body, or conveys something about the third party as an identifiable individual.

[para 18] The Public Body argues that the records at issue contain the personal information of the police officer. It notes that the information about the police officer is information falling under sections 1(n)(i), (vii), and (viii) of the FOIP Act. Moreover, it argues:

> The responsive records contain information about the [police officer's] employment status, and employment history, including his employment activities that led to complaints, as contemplated by s. 1(n)(vii).
>
> In addition, the responsive records are [the police officer's] personal response to a complaint about his employment. This response consists of documents prepared by [the police officer] outlining his perspective regarding his professional conduct. This includes [the police officer's] reasoning regarding steps taken, and information relating to [the police officer's] personal and work experience. Therefore the responsive records in their entirety consist of [the police officer's] personal information.

[para 19] I agree with the Public Body that the records at issue contain the personal information of the police officer. I make this finding on the basis that he wrote the letter on his own behalf, rather than on behalf of the Public Body, and because it contains his personal views and accounts of decisions he made and actions he took. The letter was written by him as an employee of the Public Body to the Public Body as employer. Any consequences arising from the complaint to which the letter responded would be personal to the police officer.

[para 20] I also find that the personal information of the police officer is information falling under sections 17(4)(g)(i), as it consists of his name in the context of other information about him as an identifiable individual. Moreover, even if the police officer's name were severed from the records, his name would remain associated with the information in the records, given that the Applicant requested records associated with the police officer.

[para 21] I therefore find that a presumption has arisen that disclosing the police officer's personal information from the records at issue would be an unreasonable invasion of his personal privacy. I will therefore consider whether that presumption is rebutted under section 17(5).

Section 17(5)(a)

[para 22] The Applicant did not refer to the specific provisions of section 17(5) it considers weigh in favor of disclosure. However, the Applicant argues that disclosing the personal information in the records at issue would have the effect of promoting principles of fairness and transparency in policing matters.

[para 23] The Applicant specifically argues that there is public controversy and concern surrounding statements made by the police officer to the media and notes:

> A reporter with Global TV in Edmonton told [a member of the CTLA] on January 20, 2011 that [the police officer] told the media when he made his comments about the recent shooting that he had to make the disclaimer about his opinions because of the complaints made by the CTLA. If would appear that he believes that he has license to say anything he wants so long as he makes that disclaimer. It would also appear that this is based on what EPS has told him and it is expected that that type of information will be contained within the PSB files that are at [question] in this Inquiry.
>
> It must be stressed that not only is this an issue in Edmonton, it is an issue nationally. There are serious problems in relation to statements made by police agencies to the media about the conduct of their members which have been proven to be false or misleading. Perhaps, the most notorious, is in relation to the case of Robert Dziekanski where the RCMP issued statements to the media about the circumstances surrounding the death of Robert Dziekanski at the Vancouver Airport were proven to be lies.

[para 24] The Applicant also states:

> It is in the interest of all Canadians that the public have confidence that, when police services make statements to the media… the statements are true. Further, it is in the interest of all Canadians that, when police officers make statements to the media, they do not go beyond their duty and express opinions about guilt or punishments or criticize actors in the justice system.
>
> Having said that, there have been serious problems with the Edmonton Police Service in relation to statements made to the media, examples of which follow…

[para 25] I understand the Applicant to argue that there is a national problem regarding communications between police officers and the media, and that it is in the public interest to subject the personal information in the records at issue to public scrutiny, in order to inform public debate regarding this issue. In effect, the Applicant argues that section 17(5)(a),(reproduced above),would apply to the information in the records at issue and weigh in favor of disclosure.

[para 26] In *Pylypiuk*, *supra*, the Court commented on the first part of the test for public scrutiny:

> In addition, having referred to no evidence or analysis regarding why the University's activities should be subject to public scrutiny, the Commissioner then moved on to his three part test. Pylypiuk did not meet the first part of that test. While it may not be necessary to meet all three parts of the test, the analysis should demonstrate some rationale as to why one person's

> decision that public scrutiny is necessary is sufficient to require disclosure, particularly where that person's rights are not affected by the disclosure under s. 16(5)(c).

The Court in *Pylypiuk* found that it was necessary to answer the question of why one person's decision that public scrutiny is called for is sufficient to require disclosure. As I noted in Order F2009-010, I do not interpret the Court as saying that it is automatically undesirable to subject personal information to public scrutiny if only one person has requested the information, or conversely, that it is automatically desirable to subject personal information to public scrutiny if more than one person requests the information. Rather, the Court means that when determining whether section 17(5)(a) applies to personal information, one must consider whether disclosing the personal information would serve a public interest, such as promoting fairness or accountability, as opposed to private interests only.

[para 27] In *Calgary Police Service v. Alberta (Information and Privacy Commissioner*), 2010 ABQB 82 the Court quashed Order F2008-009 and found that it was unreasonable for the Commissioner to conclude that that there was insufficient scrutiny of the Calgary Police Service complaint resolution processes, such that it attracted the application of section 17(5)(a):

> Thus the Commissioner appears to have reversed the presumption, i.e., that if the third party is a police officer, there is very limited personal privacy that will be unreasonably invaded ("because of their role in society" – para. 79).
>
> The Commissioner also justified disclosure of all disciplinary decisions on the basis that it was necessary to scrutinize the CPS resolution process (paragraph 73). 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".
>
> With respect, the Commissioner seems to have wrongly concluded that absent public scrutiny via the media, there is necessarily inadequate public scrutiny.
>
> Nor did the Commissioner have any evidence for an assumption that the legislated public protections against police misconduct were inadequate. The Commissioner said that public accountability, public interest or public fairness were most important in the reference to the desirability of public scrutiny. In my view, those needs are generally met by the careful balance of public and private interests contained within the *Police Act* and the PSR.

[para 28] The Court then applied criteria to the materials before it, to determine whether it would, or would not be, in the public interest to disclose the personal information of police officers from the records. The Court said:

> Discipline decisions arise because of the operation of the *Police Act* and the PSR. It is reasonable to categorize disciplinary decisions to a degree before dealing with the twelve specific decisions here. The *Police Act* and the PSR provide a framework for such categorization. It must be remembered that complaints may be initiated by the Chief of Police or any citizen.

a. Section 45(2)(a) and Section 46.1 concern complaints referred by the Chief to the Minister of Justice and Attorney General because they may constitute a federal or a provincial offence. There is neither a hearing nor a CPS decision at this stage.

If a decision to charge results from such a referral, or even without a referral, then disclosure of personal information limited to name and rank of the police officer so charged is justified along with the nature of the charge. There may be some reputational harm but no more so than to any member of the public in a sensitive position.

Once a charge has been laid, the transparency of the justice system prevails. Public confidence in the system requires no less. Thus our open courts permit public scrutiny of the entire proceedings, subject only to court ordered restrictions on publication or access. The desirability for public scrutiny has been satisfied. For that reason, the disciplinary decision disclosure can be limited to the name and rank of the officer involved, and the nature of the charge.

For similar reasons, disciplinary decisions that result from such charges such as dismissal, suspension from duty or loss of rank must be disclosed, again limited to the nature of the charge, name, rank and the sanction imposed. That is so in order that the public can make its own judgment as to the appropriateness of the employment sanctions.

b. Section 45(2)(b) and Section 46.1(4)(b) concern complaints which may constitute contravention of regulations governing discipline or the performance of duty. In so far as such complaints have not fallen within Section 45(2)(a) or Section 46.1 it is my view that there is no added public scrutiny that is desirable. I have described the public component of the LERB and the Calgary Police Commission both of which exercise oversight review in relation to the CPS. Many of these complaints would be primarily employment issues for which the legislature has provided a detailed process for resolution, while balancing the public interest in the well-managed police service with the private and public interest in protecting against unreasonable loss of privacy merely for wearing the uniform.

The result then is that for this category of disciplinary decisions, Section 17(5)(a) of the *Act* does not weigh sufficiently against the presumption in Section 17(4) and so the right to the police officer's privacy remains.

I conclude as well that for this category of disciplinary decisions, Section 17(5)(h) is engaged:

The disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

The disclosure of disciplinary decisions that do not involve or result from any federal or provincial offence would not warrant the resulting reputational damage, and serves no public interest and so would be unfair.

[para 29] The Court concluded:

1. File #04-051: Two counts of a breach of PSR were, after an open hearing, found not proven. Accordingly, this decision need not be disclosed.

2. File #04-105: One count of a breach of a PSR was admitted and an employment sanction imposed. Employment sanctions are typically loss of accumulated overtime hours and/or a reprimand. Accordingly, this decision need not be disclosed.

3. File #05-047: One count of a breach of PSR was admitted and an employment sanction imposed. This decision as well need not be disclosed.

> 4. File #03-042: A breach of PSR charges were withdrawn given the officer's retirement from the CPS. No further decision was taken and accordingly, the records are not within the purview of the request.
>
> 5. File #04-060: Two counts of a breach of PSR were admitted. One of those counts resulted from a conviction under the *Criminal Code* for the unsafe storage, handling or transportation of a firearm for which the officer received an absolute discharge. An employment sanction was imposed. Given that the decision followed upon a conviction for a *Criminal Code* offence, the decision is disclosable.
>
> 6. File #05-010: One count of a breach of PSR arising from a guilty plea to an offence under the T*raffic Safety Act* which occurred while the officer was offduty. An employment sanction was imposed. Given that the charge arose following a conviction for a provincial offence, the decision is disclosable.
>
> 7. File #05-072: One count of a breach of PSR arising from a *Criminal Code* conviction while the officer was off-duty for a which a conditional discharge was granted. An employment sanction was imposed. Given that the matter arose following a *Criminal Code* conviction, the decision is disclosable.
>
> 8. File #05-011: The officer admitted to ten breaches of the PSR. An employment sanction was imposed. There is no record indicating that these breaches relate to any federal or provincial offences and accordingly the decision is not disclosable.
>
> 9. File #05-028: Two counts of a breach of a PSR. Again, there is no reference to a federal or provincial offence and accordingly the decision is not disclosable.
>
> In respect of those disciplinary decisions that I have directed will be disclosed, they will be disclosed subject to the same deletions directed by the Commissioner as to personal information which would be an unreasonable invasion of personal privacy of third parties other than the police officer. The details are contained in the Commissioner's decision beginning at paragraph 105. As to the police officer, disclosure from the disciplinary decisions is restricted to the nature of the charge and the name and rank of the officer.

[para 30] The Court noted that the legislature, in enacting the complaint provisions of the *Police Act*, had struck a balance between the public interest in a well-managed police service with the private and public interests in protecting personal privacy. The Court considered this to be a relevant factor when determining whether scrutiny of the activities of a public body is in the public interest, for the purposes of section 17(5)(a).

[para 31] The Public Body argues that the principles and approach followed in *Calgary Police Service* are applicable in the case before me. I will therefore consider whether the principles and approach in that case apply in this case.

[para 32] The Court considered that the interest to be considered in relation to the application of section 17(5)(a) was the public interest in maintaining well-managed police forces. Additionally, the Court considered the privacy interests of police officers with respect to their reputations under section 17(5)(h) of the FOIP Act, to be relevant to deciding whether it would be an unreasonable invasion of personal privacy to disclose the personal information in the records before it, as it was possible that the information the Commissioner ordered disclosed could unfairly damage the reputations of the police officers who were the subject of the information. The Court held that for officers

convicted of a criminal offence, the interest in well-managed police forces would outweigh the officer's privacy interests in maintaining his or her reputation in relation to the name, rank, charge, and sanction relating to the matter. However, in the case of the officers whose personal information the Commissioner had ordered disclosed, and who had not been convicted of an offence, or sanctioned, the Court considered that the privacy interests in relation to their reputations under section 17(5)(h) outweighed any public interest in disclosure recognized by section 17(5)(a).

[para 33] The Applicant in this case is not arguing that public scrutiny is necessary in order to ensure that the Edmonton Police Service is managed well. Moreover, it is not making arguments regarding a public interest that has been, or could be, addressed under the *Police Act*. Instead, the Applicant argues that slanted, inaccurate, or less than candid statements made by police officers to the media is a national problem that potentially affects the fairness of trials and the constitutional right to a fair hearing of an accused, and could reduce public confidence in the justice system provincially and nation wide. The Applicant refers to a number of complaints made by its members, and to cases within the province and across Canada, which it argues establish that statements made by police officers to the media are a matter of national concern.

[para 34] The police officer argues that he supplied the personal information in the records at issue to the Public Body in confidence and therefore his privacy should be maintained for that reason. This is an argument that is addressed by consideration of section 17(5)(f). Moreover, the police officer argues that he has a right to privacy which would be negated if his personal information were disclosed. This privacy interest is recognized by the presumption established by section 17(4)(g). As the Court in *Calgary Police Service* did not specifically address these privacy interests in its analysis under section 17(5), it is logical to assume that they were not before, or not relevant to, the matter before the Court. However, in the circumstances before me, the issue of whether the police officer supplied the personal information in the records at issue to the Public Body in confidence is clearly relevant.

[para 35] Given that the public interests being argued as relevant to section 17(5) analysis in the case before me are not the same as those that were argued before McMahon J. in *Calgary Police Service*, I find that this case is not entirely on point. As the Court in that case rejected as unreasonable a "one size fits all approach" to section 17(5) analysis, it would be inappropriate to apply the reasoning of the Court in *Calgary Police Service* to a set of facts and section 17(5) considerations that are different than those that were before the Court in that case.

[para 36] I will therefore consider whether the Applicant has established that there is a public interest in disclosing the police officer's personal information and whether there are any other interests weighing against, or in favor of, disclosure of that information.

Is there a public interest in subjecting the activities of the Public Body to public scrutiny in this case?

[para 37] As noted above, the Applicant drew my attention to complaints its own members have made regarding comments attributed to police officers in the media. It also provided a copy of a complaint it made regarding statements made by the police officer and referred to documents created by the Public Body in responding to the Applicant's complaint. Finally, it provided decisions of the Law Enforcement Review Board (LERB) in which the LERB admonished police officers for releasing statements that the LERB did not find to be factual.

[para 38] The evidence of the Applicant falls short of establishing that there is a problem within the Public Body regarding statements made by members of the Public Body to the media or that this is part of a greater, nation-wide problem. While it is clear from the Applicant's evidence that some statements made by police officers to the media have attracted sanction in some situations, the Applicant's evidence fails to establish a) these are not isolated incidents, b), they have not already been addressed appropriately and c) they require public scrutiny. There does not appear to be any relationship between the statements for which police officers were admonished by the LERB, statements made by the police officer to the media, or statements made by the RCMP in the Dziekanski matter, to which the Applicant refers in its submissions.

[para 39] As I find that the Applicant has not established the existence of a problem requiring public scrutiny, it follows that I find that the Applicant has failed to establish that it would be in the public interest to disclose the records at issue.

Would disclosing the police officer's personal information be necessary for the purpose of subjecting the activities of the Public Body to public scrutiny?

[para 40] Had I found that there is a systemic problem regarding statements made by police officers to the media, I would not find that disclosing the police officer's personal information contained in the records at issue would serve to bring this problem to light or would be necessary for public debate regarding this problem.

[para 41] The records at issue do not contain any information that would serve the purpose of shedding light on the issue identified by the Applicant. In addition, there is no evidence before me establishing that the police officer has made misleading statements to the media or made statements that would in any way undermine the justice system or were made with that intent.

[para 42] In my view, the materials the Applicant submitted for the inquiry are adequate for the purpose of discussing the issue it identified as being in the public interest. Had I found that there was a public interest in subjecting the problem identified by the Applicant to public scrutiny, I would find that disclosing the information in the records at issue would not serve the purpose of, and is therefore unnecessary for, generating public debate regarding the activities of the Public Body or subjecting the activities of the Public Body to public scrutiny.

Does any public interest in disclosing the police officer's personal information outweigh the police officer's privacy interests under section 17(5)?

[para 43] The police officer argues that he has a right to privacy in relation to the records at issue. In addition, he argues that the records at issue were supplied in confidence.

[para 44] The police officer's interest in the privacy of his information is recognized by the presumption created by section 17(4)(g) that it would be an unreasonable invasion of his personal privacy to disclose the information contained in the records at issue.

[para 45] Having reviewed the records at issue, I am satisfied that the police officer created them for the exclusive review of the person to whom they are addressed. In addition, there would be no reason for him to expect that the recipient, or the Public Body, would disseminate this information or otherwise make it public. I therefore find that the police officer supplied the personal information contained in the records at issue in confidence. I therefore find that section 17(5)(f) applies, and weighs in favour of withholding the police officer's personal information.

[para 46] The Public Body argued that disclosing the personal information in the records would unfairly damage the police officer's reputation for the purposes of section 17(5)(h). It also argues that section 17(5)(g) (information that is likely to be inaccurate or unreliable) is relevant to the inquiry. The Public Body argues:

> In this matter, there has been no finding of misconduct pursuant to the *Police Act*, nor allegations of criminal behavior leading to criminal charges. Subsection 17(5)(g) provides that the head of the public body must consider whether the personal information is likely to be inaccurate or unreliable. In this instance, information that is collected in any investigation may be inaccurate or unreliable. Allegations pertaining to members of the EPS that do not lead to a formal hearing or criminal proceedings would not have been challenged through the hearing process. The release of unproven allegations or other investigative records could be highly prejudicial to the interests of the EPS members where the members are identified by name. This is especially the case where initial complaints are resolved prior to hearing or withdrawn. This factor does not weigh in favor of disclosure of the Responsive Records. [my emphasis]

[para 47] The Public Body appears to suggest that the personal information prepared by the police officer in the records at issue is likely to be inaccurate or unreliable by reason of the fact that it was prepared as part of an investigation. However, on my review of the information in the records at issue, I have no reason to discount the statements made by the police officer in the records at issue or to question their accuracy.

[para 48] It may be that the Public Body's arguments are not intended to discount the statements made by the police officer in the records at issue, but to point out that the statements were made in the context of an investigation that has either not concluded or not resulted in a penalty or sanction. I say this because the Public Body refers in its arguments to "unproven allegations" that may be "prejudicial," given that allegations have not been tested through the hearing process. The Public Body's theory appears to be

that if information is not tested by a third party who is the subject of the information at a hearing, it is presumptively inaccurate or unreliable for the purposes of section 17(5)(g).

[para 49] In my view, the Public Body's interpretation of section 17(5)(g) is contrary to the express language of the provision. Section 17(5)(g) applies in situations where information is *likely* to be inaccurate or unreliable, which suggests that there must be a factual basis for concluding that the personal information at issue is probably not true. However, the Public Body relies on a presumption, i.e., that all the information in records relating to its investigations may be unreliable or inaccurate, because it is untested. In my view, establishing that information has not been tested at a hearing and has not been proven to be accurate or reliable, is not the same thing as establishing that the information is *likely* to be inaccurate or unreliable. Finally, as the police officer created and assembled the personal information in the records at issue, it is unclear why the Public Body argues that he has not had the opportunity to test it.

[para 50] For these reasons, I find that the factor recognized by section 17(5)(g) has no application in this case.

[para 51] The Public Body also argues that disclosing the police officer's personal information from the records at issue would be likely to damage his reputation unfairly for the purposes of section 17(5)(h). The Public Body does not explain how the personal information in the records could be expected to lead to this result. Instead, it relies on the following statement by the Court in *Calgary Police Service*:

> I conclude as well that for this category of disciplinary decisions, Section 17(5)(h) is engaged:
>
> The disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.
>
> The disclosure of disciplinary decisions that do not involve or result from any federal or provincial offence would not warrant the resulting reputational damage, and serves no public interest and so would be unfair.

[para 52] The Public Body argues:

> Even leaving aside the findings in the *CPS Decision*, recent decisions of the OIPC, such as Order F2008-020, have recognized that the potential for damage to reputation must be weighed in light of the state that a complaint has reached. Where allegations have not proceeded to a formal disciplinary hearing, a greater privacy right attaches to the members' personal information.

[para 53] As noted above, the Public Body does not explain what it is about the information that would be likely to have the result of damaging the police officer's reputation. On my review of the records, I am unable to identify information that would be detrimental to the police officer's reputation if the personal information in the records were disclosed.

[para 54] In my view, the Court in *Calgary Police Service*, for the parties' ease of reference, chose to break down the information before it into categories. The fact that the

Court refers to "persons referred to in the record requested by the applicant" indicates that it is not here referring to general presumptions that disclosing all information in any records relating to investigations that do not proceed to disciplinary hearings, is, by that fact alone, damaging to the reputation of an individual, regardless of the content of the information disclosed and the specific circumstances. Certainly the nature of a record and the circumstances in which it is created are always relevant to this determination; however, a determination must be made, based on evidence, including the evidence of the information in the record itself and evidence regarding the individual's reputation, that disclosure would result in unfair damage to an individual's reputation, prior to finding that section 17(5)(h) applies.

[para 55] The Public Body has not provided evidence to establish the likelihood that the police officer's reputation would be damaged by disclosure of the records at issue. As the records on their face do not support a finding that the police officer's reputation would be damaged by their disclosure, I am unable to conclude that it would be.

[para 56] The Disclosure Analyst who made the decision to withhold the Police officer's personal information explains the factors she considered relevant to her determination under section 17(5). She states:

> I have also considered the purposes of FOIPPA, and in particular:
>
> a) the objectives and purposes of FOIPPA, including the Applicant's right of access;
> b) that the Applicant does not appear to have a pressing need of any third party personal information;
> c) that there is no public interest in the disclosure of the Responsive Records and that public scrutiny is not desirable;
> d) that disclosure is not relevant to a fair determination of the Applicant's rights;
> e) that third parties may be exposed unfairly to harm;
> f) that personal information may have been supplied in confidence and that release of the information may impact the EPS's ability in the future to have frank discussions with third parties that had been promised confidentiality;
> g) that personal information may be inaccurate or unreliable and may not have been challenged by any members under investigation;
> h) that disclosure may unfairly damage the reputation of any person referred to;
> i) that the requested information was not information originally provided by the Applicant;
> j) that if personal information in complaint and investigation files is produced, the integrity and confidentiality of the complaint and discipline process will be undermined;
> k) that the release of the information may result in future discipline processes being less candid and comprehensive;
> l) that the fact that the Applicant has been advised regarding the outcome of [the] investigation satisfied any need for release of the information; and
> m) that, as a complainant in the IA Investigation, the Applicant has had access to adequate information that supports its desire to express itself about this matter.

It is unclear from the affidavit why the Disclosure Analyst considered that disclosure of the information in the records at issue would result in unfair harm or damage to reputation. It is also unclear why she considered that the information in the records was

likely to be inaccurate or unreliable. However, I find that the other factors considered were relevant to the decision to withhold information under section 17(5).

[para 57] I find that the Applicant has not established that there is a public interest in disclosing the police officer's personal information. I also find that the police officer's personal information is subject to a presumption under section 17(4)(g), strengthened by the application of section 17(5)(f), that it would be an unreasonable invasion of his personal privacy to disclose it. As there are no factors weighing in favor of disclosing the police officer's personal information, and as an applicable factor under section 17(5) serves to strengthen this presumption, I find that the presumption is not rebutted.

[para 58] For these reasons, I find that section 17(1) of the FOIP Act requires the Public Body to withhold the Police officer's personal information from the records at issue.

V. ORDER

[para 59] I make this Order under section 72 of the Act.

[para 60] I confirm the decision of the Public Body to withhold the police officer's personal information under section 17(1).

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Teresa Cunningham
Adjudicator