ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2010-031

April 20, 2011

EDMONTON POLICE SERVICE

Case File Number F5284

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Summary: Pursuant to the *Freedom of Information and Protection of Privacy Act* (the "Act") the Applicants requested from the Edmonton Police Service ("EPS") all records relating to IA 2008-0171, a file relating to an internal investigation of police conduct. The EPS responded to the Applicant's request by providing the Applicants with a copy of the internal investigation file, with some records severed pursuant to sections 17 of the Act. Some records were also withheld under sections 4(1)(a) and 4(1)(l).

The Adjudicator found that the records withheld by the EPS pursuant to section 4(1)(a) of the Act were information on a court file and therefore she had no jurisdiction to review the EPS' decision to withhold the records. However, the EPS did not properly apply section 4(1)(l) to the records, and the Adjudicator ordered the EPS to disclose the information, subject to section 17.

The Adjudicator also found that the EPS properly applied section 17 of the Act to much of the third party personal information, including the personal information of the EPS members involved in the incident. However, some of the information severed under section 17 was not personal information, or was not personal information to which section 17 applied.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(h), 1(n), 4, 4(1), 4(1)(a), 4(1)(l), 4(1)(l)(ii), 6(2), 17, 17(1), 17(2)(b), 17(4), 17(4)(b), 17(4)(d), 17(4)(g), 17(4)(g)(i), 17(4)(g)(ii), 17(5), 17(5)(a), 17(5)(c),

17(5)(f), 17(5)(g), 17(5)(h), 17(5)(i), 20(1), 21(1)(b), 72 , *Police Act*, R.S.A. 2000, c. P-17, ss. 45(2)(a), 46.1, *Police Service Regulation*, A.R. 356/90, s. 16(1). **CAN:** *Criminal Code*, R.S.C. 1985, c. C-46. **ON:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31.

Authorities Cited: AB: Orders 96-008, 97-002, 99-027, 99-028, 2000-022, 2000-032, 2002-024, F2004-015, F2004-030, F2006-007, F2007-003, F2007-007, F2008-009, F2008-012, F2008-020, F2008-028, F2009-044.

Cases Cited: *Alberta (Attorney General) v. Krushell*, 2003 ABQB 252, *Calgary Police Service v. Alberta (Information and Privacy Commissioner)*, 2010 ABQB 82 Appeal as of right to the C.A. [May 5, 2010] 1001-0111 AC.

I. BACKGROUND

[para 1] The Applicants and another third party had made complaints about the conducts of EPS officers, which were investigated by EPS. Many of the complaints related to interactions between EPS members and the third party complainant, resulting from incidents between the third party complainant, who owns and manages a retail store, and the manager of a neighbouring retail store.

[para 2] By letter dated December 9, 2009, the Applicants made a request under the FOIP Act to the EPS for "all records relating to IA 2008-0171."

[para 3] On February 9, 2010 the EPS responded to the Applicants' request. It disclosed 345 pages of responsive records, withholding 110 pages and a DVD in their entirety under sections 17(1), 17(4) and 21(1)(b) of the Act. Information from the remaining 345 pages was severed under sections 17(1), 17(4) and 20(1) of the Act.

[para 4] On February 19, 2010, the Applicant requested the Commissioner conduct a review of the EPS' response. The Commissioner authorized mediation to resolve the issues between the parties. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

[para 5] The parties both provided initial and rebuttal submissions. With its initial submission, EPS provided the Applicants with a new CD of the responsive records, which released additional information. In this amended response, EPS withheld 38 pages under section 4(1)(a) of the Act and severed information from 4 pages under section 4(1)(l)(ii). EPS cited sections 17(1) and 17(4) to withhold information from several of the remaining records, as well as the video. Information from 3 pages was severed as not responsive.

II. RECORDS AT ISSUE

[para 6] The records at issue are the severed or withheld portions of the 455 pages of the EPS IA 2008-0171 file, as well as a video of a witness interview.

III. ISSUES

[para 7] The original Notice of Inquiry, dated August 26, 2010, states the following as issues:

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

B. Does section 21 of the Act (disclosure harmful to intergovernmental relations) apply to the records/information?

[para 8] However, since EPS has amended its response to the Applicants' request at the time of its initial submission, I have amended the issues to the following:

Issue A: Are the records/information excluded from the application of the Act by section 4(1)?

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

IV. DISCUSSION OF ISSUES

Issue A: Are the records/information excluded from the application of the FOIP Act by section 4(1)?

[para 9] Section 4(1) excludes certain records/information from the scope of the Act. If the record or information at issue properly falls within this section, I do not have jurisdiction over it.

[para 10] Section 4(1) states in part:

4(1) *This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:*

(a) *information in a court file, a record of a judge of the Court of Appeal of Alberta, the Court of Queen's Bench of Alberta or The Provincial Court of Alberta, a record of a master of the Court of Queen's Bench of Alberta, a record of a sitting justice of the peace or a presiding justice of the peace under the Justice of the Peace Act, a judicial administration record or a record relating to support services provided to the judges of any of the courts referred to in this clause;*

…

(l) *a record made from information*

…

(ii) *in the office of the Registrar of Motor Vehicle Services,*

[para 11] EPS withheld pages 268-305 in their entirety under section 4(1)(a). It states that these pages are screen prints from JOIN, the Justice Online Information Network. According to EPS, JOIN is a database operated by the Minister of Justice and Attorney General that provides automated support for criminal case tracking, traffic ticket processing, financial court administration, inquiries, witness management, police scheduling etc.

[para 12] Section 4(1)(a) applies to information taken or copied from a court file (Order F2004-030 at para. 20 and F2007-007 at para. 25); it also applies to information copied from a court file to create a new document, such as a court docket (*Alberta (Attorney General) v. Krushell*, 2003 ABQB 252). However, these orders state that records emanating from the Public Body itself or from some other source other than the court file are within the scope of the Act, even though duplicates of the records may also exist in the court file.

[para 13] In its submission, EPS referred to pages 268-305 as consisting of "criminal docket information from court files which are loaded on the JOIN database." I assume what EPS means is that the information is copied from the criminal docket into the database, essentially creating a copy of the docket in digital form, and not that the information in the JOIN database is merely the same information that appears in court dockets. Given that court dockets include general information such as names and addresses, many records will contain the same information; this is obviously not sufficient for section 4(1)(a) to apply.

[para 14] I agree that a record created by copying a court docket into the JOIN database, essentially creating a digital copy that can be printed out, falls within the scope of section 4(1)(a) of the Act. Therefore, I have no jurisdiction to review EPS' decision to withhold the records.

[para 15] EPS argues that some of the information severed from pages 70, 72, 107 and 402 is information from the Alberta Motor Vehicle Registry. I accept EPS' affidavit evidence that the information was obtained through a query of the Registry; however, I disagree that this fits the exclusion for *records made from information* in the Registry.

[para 16] Pages 70 and 72 are pages of a memorandum from one of the officers subject to the investigation, to the officer conducting the internal investigation. The severed information in both pages is part of the officer's narrative accounting of the incidents at issue in the investigation. The memo refers to information that had been obtained by querying the Motor Vehicles database at the time of the incident. Page 107 appears to be a copy of pages from one of the subject officer's notebooks. Similarly, page 402 appears to be a page from the investigating officer's notes. In the case of pages 70, 72 and 107, the information severed under section 4(1)(l) appears to be information written down after querying the Registry. In the case of page 402, the information appears to have been given to the investigating officer by someone else who had queried the Registry.

[para 17] Unlike section 4(1)(a), which excludes all information in a court file, even when it is copied from that file and compiled in a new format, section 4(1)(l) applies to records created from certain information. In Order 2000-022, the Commissioner interpreted "record made from information in a Land Titles Office" to mean a record made from information in a Land Titles Office that relates to the search, registration or filing functions of a Land Titles Office, including the daily record, register and record of names; a certificate of title; or a copy of any instrument or caveat requested (Order 2000-022, para. 41).

[para 18] An analogous type of record from the office of the Registrar of Motor Vehicle Services might be a drivers' abstract, or a vehicle registration. While the definition of "record" in the Act includes any "information that is written, photographed, recorded or stored in any manner," a licence plate number or home address, written down after querying the registry is not a record *made from* the registry. A record *made from* the registry implies that the information from the registry comprises the entirety, or majority, of the content of the new record (although the format or organization of the information in the new record may be different from that in the registry). I do not believe that the intent of this exclusion was to exclude any information, in any context, as long as a listed registry was the source of that information. If that were the case, it would have been clearer for the exclusion in section 4(1)(l) to mirror the language in section 4(1)(a) and specifically exclude *any information*, rather than a record *made from* information.

[para 19] I will consider below whether the information in these pages is personal information and whether it must be withheld under section 17.

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

[para 20] 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.*

(2) *A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if*

> *...*
>
> **(e)** *the information is about the third party's classification, salary range, discretionary benefits or employment responsibilities as an officer, employee or member of a public body or as a member of the staff of a member of the Executive Council,*
>
> *...*

(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,*

...

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

...

(f) *the personal information consists of personal recommendations or evaluations, character references or personnel evaluations,*

(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.*

Was the information personal information?

[para 21] Section 1(n) defines personal information under the Act:

1 *In this Act,*

(n) *"personal information" means recorded information about an identifiable individual, including*

(i) *the individual's name, home or business address or home or business telephone number,*

(ii) *the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,*

(iii) *the individual's age, sex, marital status or family status,*

(iv) *an identifying number, symbol or other particular assigned to the individual,*

(v) *the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,*

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

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

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

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

[para 22] Much of the information that EPS severed under section 17 includes personal information listed in section 1(n) of the Act: names, home addresses, age, employment history of the officers involved in the complaint; employee and payroll numbers of other officers; names, addresses and telephone numbers of witnesses, employees of the two retail stores, and other third parties; and police records relating to minor residents of a group home.

[para 23] Other information severed by EPS constitutes "information about an identifiable individual." A video of a witness interview was also withheld; the images of the interviewer and interviewee are obviously the personal information of each party; as well, personal information about third parties is revealed during the course of the interview. The records also contain photos of the officers involved in the complaint.

[para 24] The records to which EPS applied section 4(1)(l)(ii) contain some personal information, such as home addresses and licence plate numbers. Some of the severed information is not personal information. Most of the personal information appears to be about one of the Applicants, although the name is somewhat different from the name on the access request. If that is the case, then the information severed under section 4(1)(l)(ii) in record 70 and 107 must be disclosed to the Applicants. If this is a third party, then for the reasons given below, the information is properly withheld under section 17. The information on pages 72 and 402 is either not personal information, or is the personal

information of one of the Applicants. The names other than the names of one of the Applicants on pages 70 and 402 are personal information of third parties.

[para 25] There are a few instances where EPS has severed out blocks of information when removing a name or identifying number would de-identify the remaining information. In those cases, the remaining non-personal information cannot be withheld.

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

[para 26] Section 17 is a mandatory exception: if the information falls within the scope of the exception, it must be withheld.

[para 27] Under section 17, the public body must first prove that section 17 applies to the personal information withheld from the records. It is then up to the applicant to prove that the disclosure would not be an unreasonable invasion of a third party's personal privacy (Orders 99-028 at para. 12, 2000-032 at para. 25, F2002-024 at para. 17).

[para 28] Personal information about an applicant cannot generally be withheld under section 17. In one instance, EPS severed the name of one of the Applicants, apparently as an oversight. With respect to the personal information in the records to which EPS applied section 4(1)(l)(ii), most of the personal information appears to be about the other Applicant, although the name is somewhat different from the name on the access request. If that is the case, then the information severed under section 4(1)(l)(ii) in record 70, 107 must be disclosed to the Applicants. If this is a third party, then I find the analysis below for personal information of third parties would apply to this information as well.

[para 29] The Applicants indicate that the requested records relate to complaints they made to EPS, and therefore the names of the complainants in the records should not be severed. However, the Applicants are only two of the three complainants. Therefore, section 17 does not apply to the personal information of the two complainants who are also the Applicants, but the third complainant is a third party for the purposes of the access request. The Applicants did not provide any evidence that the third complainant has consented to the release of his or her personal information such that disclosure would not be an unreasonable invasion of personal privacy under section 17(2)(a). Additionally, although it would appear that the three complainants were cooperating for the purpose of the complaints, I have no evidence before me as to the current relationship between these three parties.

[para 30] This applies also to the Applicants' argument that the complainants' names should not have been severed from the letters that had originally been sent to EPS by the Applicants' counsel; the severed names are names of third parties for the purposes of the access request.

[para 31] Many of the records refer to individuals in their work-related capacity. EPS officers other than officers involved in the complaint are named in the records. The names of employees of the organizations involved in incidents with the complainants are

also given, as well as the names of other individuals acting in their professional capacity (e.g. an agent working for one of the organizations or an individual).

[para 32] There have been several orders concerning the application of section 17 to personal information about individuals acting in their professional capacities or performing work duties. Order F2008-028 provides a helpful overview:

> …[M]any previous orders of this Office have made it clear that, as a general rule, disclosure of the names, job titles and signatures of individuals acting in what I shall variably call a "representative", "work-related" or "non-personal" capacity is not an unreasonable invasion of their personal privacy. I note the following principles in particular (with my emphases in italics):
>
> - Disclosure of the names, job titles and/or signatures of individuals is not an unreasonable invasion of personal privacy where they were acting in *formal* or *representative* capacities (Order 2000-005 at para. 116; Order F2003-004 at paras. 264 and 265; Order F2005-016 at paras. 109 and 110; Order F2006-008 at para. 42; Order F2008-009 at para. 89).
> - Disclosure of the names, job titles and/or signatures of individuals acting in their *professional* capacities is not an unreasonable invasion of personal privacy (Order 2001-013 at para. 88; Order F2003-002 at para. 62; Order F2003-004 at paras. 264 and 265).
> - The fact that individuals were acting in their *official* capacities, or signed or received documents in their capacities as public officials, weighs in favour of a finding that the disclosure of information would not be an unreasonable invasion of personal privacy (Order F2006-008 at para. 46; Order F2007-013 at para. 53; Order F2007-025 at para. 59; Order F2007-029 at paras. 25 to 27).
> - Where third parties were acting in their *employment* capacities, or their personal information exists as a consequence of their activities as *staff performing their duties* or as a *function of their employment*, this is a relevant circumstance weighing in favour of disclosure (Order F2003-005 at para. 96; Order F2004-015 at para. 96; Order F2007-021 at para. 98; Order F2008-016 at para. 93).

[Order F2008-028, para. 53]

[para 33] The Adjudicator then noted that the above principles had been applied to information of employees of public bodies as well as other organizations, agents, sole proprietors, etc. He concluded that section 17 does not apply to personal information that reveals only that the individual was acting in a formal, representative, professional, official, public or employment capacity (Order F2008-028, para. 54).

[para 34] With respect to the records in this case, page 29 is a letter from EPS to an officer not involved in the complaint; the first line of that letter reports on actions taken by a lawyer acting in his professional capacity on behalf of a client. Section 17 applies to

the name of the client in the first line of the letter, but not to the remainder of that sentence.

[para 35] Similarly, the name severed from the third listed item under "Attachments" on page 202 is the name of an individual acting in his professional capacity.

[para 36] The email exchanges that comprise records 313-315 sever some sentences that do not contain personal information, or sever what would be personal information but from which an individual's name can be severed, thus de-identifying the information so as to make it non-personal. The other name withheld in these pages is of an individual in a purely professional context; there is no personal dimension and therefore the presumption does not apply. However, the emails also contain references to holiday plans and family events, which obviously have a personal dimension, and section 17 applies.

[para 37] In many instances, the employees of the organizations involved in the incidents with the complainants are identified only as working for, or having worked for, one of the organizations.

[para 38] Following the reasoning in Order 2008-028, I find that the disclosure of names of the individuals acting in their work capacity is not an unreasonable invasion of their privacy.

[para 39] In some of the records, there is additional information about the individuals that adds a personal dimension such that section 17 applies. I will consider that information below, in the discussion of sections 17(4) and 17(5).

[para 40] EPS argues that sections 17(4)(b), 17(4)(d), 17(4)(g)(i) and 17(4)(g)(ii) apply to the personal information, creating a presumption that disclosing the information would be an unreasonable invasion of personal privacy.

[para 41] 17(4)(b) creates a presumption against disclosure for information contained in an identifiable part of a law enforcement record. Law enforcement is defined in section 1(h) of the Act, to include:

1 *In this Act,*

(h) *"law enforcement" means*

…

(ii) *a police, security or administrative investigation, including the complaint giving rise to the investigation, that leads or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the investigation or by another body to which the results of the investigation are referred,*

…

[para 42] EPS states that the records in this case relate to a complaint that led to a service investigation for alleged breaches of the *Police Act*, *Police Service Regulation*, and *Criminal Code*. Citing Order F2008-020, EPS argues the responsive records are law enforcement records under 17(4)(b).

[para 43] I agree that the responsive records in this case, including the video, relate to a police and/or administrative investigation which could lead to a penalty or sanction under section 17 of the *Police Service Regulation*. Therefore there is a presumption against the disclosure of all the personal information in the records.

[para 44] Following Order F2008-009, I find that section 17(4)(d) applies to the personal information of the police officers involved in the complaint. That Order states:

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

[Order F2008-009 at para. 35]

[para 45] I find also that section 17(4)(g)(i) and (ii) apply to some of the names of the third parties in the responsive records, as the names appear with other information about the individuals, such as addresses, telephone numbers, employment history, and age. It also clearly applies to the records relating to the minor resident of the group home. In some of the records, a name itself reveals personal information about the third party, such as the fact that the individual was involved in a police complaint.

[para 46] I noted above that the names of various employees of the organizations involved in the incidents relating to the complainants appear in the records. In some instances, additional information about the individual is also given that must be considered under section 17.

[para 47] For example, it is clear from the transcript of the witness interview that the witness is an employee of one of the organizations. EPS withheld the name of the witness/employee and other third parties, including the names of other employees. The names of individuals who are merely identified in the interview as having worked for, or with, one of the organizations reveal only the position or former position held by these

individuals. In the instances where a phone number or province of residence is provided, the presumption applies.

[para 48] However, the personal information about the witness/employee goes beyond the performance of work related duties. For example, the interview reveals the witness/employee's opinion on matters unrelated to her employment or the incidents about which she was being interviewed, as well as information about her employment that is of an administrative or HR character, rather than being about her work duties. For this reason, I find that the presumption in section 17(4)(g) applies to the name of the witness/employee. Although the name of the witness/employee appears in other records in a merely work-related context, disclosing the name in those records could reveal the identity in the transcript records. Therefore the presumption against disclosure applies to the witness/employee's name wherever it occurs.

[para 49] Pages 87-89 consist of handwritten statements written and signed by the employees of an organization involved in the incidents relating to one of the complainants. Because these statements were written as a result of their employment, it is arguable that these employees are merely acting in the course of their employment duties. However, although the records indicate that the employees wrote the statements at the request of their manager, I am not convinced that making statements regarding alleged wrongdoing of others is in the normal course of work duties of retail store employees. Even if the statements can properly be characterized as work-related responsibilities, the statements also allude to activities outside work hours. I also believe that the nature of the handwriting and choice of language could reveal personal information about the employees. Therefore, the presumption against disclosure applies to these statements.

[para 50] In the transcript of the interview (pages 140-193), EPS has severed names of two officers not involved in the complaint, which were provided by the witness. The names appear in circumstances where the officers were acting in the course of their duties. One officer is identified by first and last name, and another is identified by his first name and the first initial of his last name. At first glance, since the witness is merely identifying officers acting in the course of their duties, the section 17 does not appear to apply. However, the witness provides further personal information about the officer whose last name she could not remember. Although the officer is not clearly identified, he could likely be identified by someone, perhaps a co-worker, and therefore the information is about an identifiable individual. I find that the presumption against disclosure applies to the first name and last initial of one of the identified officers; the additional information about the officer has already been disclosed to the Applicants in the initial response. Section 17 does not apply to the full name of the other officer.

[para 51] The Applicants state that the identity of police officers in audio, video recordings and photographs in relation to the execution of their public duty is not the type of personal information that should be withheld. I intend to address the issue of the video below. The Applicants do not provide further argument addressing why a photograph of a police officer in relation to the execution of his or her duty is not the type of personal

information that should be withheld. They might be arguing that since the photographs were taken in the performance of work duties, they do not have a personal dimension and section 17 should not apply.

[para 52] I would disagree that a photograph does not have a personal dimension. Photographs reveal more than the performance of employment duties or responsibilities, and do have a personal aspect.

[para 53] Information about an individual's performance of work duties may be personal information in a context where it is suggested or alleged that the individual has acted improperly or wrongfully (Order F2008-020, para. 28). I find that the fact of the complaint and the resulting internal investigation add sufficient personal dimension to the personal information about the officers involved in the complaint, that the presumption applies.

[para 54] Similarly, in one of the emails between managers of one of the organizations, an employee is discussed in a critical manner that suggests an informal reprimand. I find that this creates sufficient personal dimension such that the presumption against disclosing the employee's name applies.

[para 55] The factors leading to a presumption that disclosing the personal information is not an unreasonable invasion of personal privacy must be weighed against the factors against disclosure listed in section 17(5), and any other relevant factors.

[para 56] The Applicants and EPS argued that sections 17(5)(a) and (g) apply, respectively. I will also consider other sections that are relevant to this case.

> *Section 17(5)(a) – disclosure is desirable for the purpose of subjecting the activities of EPS to public scrutiny*

[para 57] The Applicants argued that EPS failed to consider the application of section 17(5)(a) to the records. Their submission speaks about the information being necessary to enable the Applicants to express opinions on how the investigation of their complaints was handled and the basis for their dismissal. However, they have not provided arguments to support the claim that the disclosure of the severed information is necessary to achieve this specific aim, or more generally subject the activities of EPS to public scrutiny.

[para 58] Several orders from this office have emphasized the requirement for a public component in order to meet the public scrutiny test:

> In *Pylypiuk (supra)* Gallant J. stated that the reference to public scrutiny of government or public body activities under what is now section 17(5)(a) requires some public component, such as public accountability, public interest and public fairness.

> In my opinion, the reference to public scrutiny of government or public body activities in s. 17(5)(a) speaks to the requirement of public accountability, public interest, and public fairness.

[Order F2006-007, at para. 27]

[para 59] Arguing against the application of section 17(5)(a), EPS cites *Calgary Police Service v. Alberta (Information and Privacy Commissioner)* ("*CPS*"), in which the Alberta Court of Queen's Bench considered the application of section 17(5)(a) of the Act to the disclosure of decisions of disciplinary hearings of police officers. Specifically at issue was the disclosure of personal information of the police officers involved in the disciplinary decisions. In that case, the Court found that public accountability, public interest and public fairness are generally met by the balance of public and private interests contained within the *Police Act* and the *Police Service Regulation*:

> In so far as such complaints have not fallen within Section 45(2)(a) or Section 46.1 [police actions that may constitute an offence under a federal or provincial act] 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.

[*CPS* at para. 101]

[para 60] Both the LERB and police commissions conduct inquiries and hearings as part of their oversight roles, and both have civilian memberships; this is the public component the Court indicates above. With respect to disciplinary hearings conducted by the chief of police under the *Police Act*, the public component is found in section 16(1) of the Police Service Regulation, which states that the police chief must determine whether a disciplinary hearing will be conducted in public or in private, depending on which he determines is in the public interest.

[para 61] In the current case, the records requested by the Applicants are records created during the investigative stage of a complaint. An internal investigation may lead to a disciplinary hearing, but in this case the investigation was closed due to a lack of evidence supporting the complaints. There is no "public" aspect to these internal investigations similar to the public component of the hearings discussed in *CPS*.

[para 62] In Order 2009-044, which also considered a request for internal investigation files, the Adjudicator found that the *CPS* decision may be of limited applicability in

matters involving a request for internal investigation files of EPS that did not lead to a hearing or decisions by the LERB or Police Commission (Order 2009-044, para. 38).

[para 63] For all the reasons above, I also question the extent to which the Courts decision in *CPS* with respect to the disclosure of disciplinary decisions decision applies here. In fact, the Court in *CPS* also appears to distinguish disciplinary hearing decisions from the first internal investigation stage when it stated "[t]here are no disciplinary decisions during the investigative stage of a complaint which would be within the purview of this application" (*CPS* at para. 102).

[para 64] Nevertheless, that decision offers some more general discussion on the balancing of interests when considering the public scrutiny factor.

[para 65] The Court was criticizing an approach under which personal information would be disclosed in a "blanket" manner based on the type of record at issue, or the type of person whose privacy interests were at stake (e.g. police officers).

[para 66] In *CPS*, Court states:

> To fall within the range of reasonableness the decision must give weight to the clear intent of the legislature. Section 17(1) requires that a public body (the CPS) refuse to disclose personal information if the disclosure would be an unreasonable invasion of a third party's (the police officer's) personal privacy. Section 17(4) presumes an unreasonable invasion if the personal information, as acknowledged here, relates to employment history or discloses the third party's name along with other personal information.
>
> The required considerations under Section 17(5) must be applied to each decision or document which is the subject of the application.

[*CPS* at paras. 90-91]

[para 67] Given this, it does not make sense to apply the Court's decision with respect to the disclosure of police officers' personal information in disciplinary decisions in a "one size fits all" manner to all records relating to police disciplinary matters.

[para 68] In determining whether the disclosure of personal information would be an unreasonable invasion of privacy, a public body must consider all the applicable factors in section 17(5), including whether the disclosure is desirable for the purpose of public scrutiny of the public body, and I must likewise consider the applicable factors when reviewing the decision.

[para 69] For section 17(5)(a) to apply, there must be evidence that the activities of the public body have been called into question, which necessitates the disclosure of personal information to subject the activities of the public body to public scrutiny (Order 97-002 at para. 94 and Order F2004-015 at para. 88). Although the Applicants spoke only of the desire to know how the investigation of their complaints was handled, I would agree that there is a general need for public scrutiny with respect to EPS' complaints process.

[para 70] However, in this case, I fail to see how the personal information withheld about the officers involved in the complaint (e.g. names and regimental numbers) would provide further insight regarding the conduct of the investigation; the same argument applies to the personal information of other third parties in the records. The information disclosed by EPS in this case includes the complaints, the officers' notes relating to the incidents leading to the complaints, statements from witnesses, actions taken by the investigating officers, and the conclusion of the investigation. I find that EPS disclosed the information necessary to subject EPS to public scrutiny and that section 17(5)(a) is not a factor weighing in favour of disclosure of the remaining information.

Section 17(5)(c) – personal information is relevant to a fair determination of the applicant's rights

[para 71] In order for section 17(5)(c) to apply, all four of the following criteria must be fulfilled: (a) the right in question is a legal right which is 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 which is either existing or contemplated, not one which 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 99-028 at para. 32; Order F2008-012 at para. 55).

[para 72] I find that this test is not met in this case. In their submission, the Applicants spoke only of wanting to know how their complaints were handled; I am not sure what legal right the Applicants would be pursuing. The records related to an investigation that has been completed and there was no indication that the Applicants plan to pursue the matter further.

Section 17(5)(f) – personal information supplied in confidence

[para 73] Since the records pertain to an internal EPS investigation, I considered whether some of the personal information was supplied in confidence. There is no evidence on the face of the records that any third party requested or expected confidentiality; EPS stated only that this is a relevant factor but did not explain why. I find that this section is not a factor in this case.

Section 17(5)(g) – personal information is likely to be inaccurate or unreliable

[para 74] EPS submitted that information collected in any investigation may be inaccurate or unreliable. It may be true that the context of an investigation raises the possibility that information may be inaccurate or unreliable, but it does not follow that the information is *likely* to be inaccurate or unreliable. I find that section 17(5)(g) is not a factor in this case.

Section 17(5)(h) – disclosure may unfairly damage the reputation of an individual referred to in the record

[para 75] EPS argued that witnesses and complainants might suffer unfair damage to reputation where information is revealed about their interactions with police, the individual's conduct and state of mind, and their possibly having violated the law. They point out that this factor is relevant in this case because the individuals have not had an opportunity to explain their conduct.

[para 76] I agree that this is a factor with respect to the personal information of the third party complainant, as well as the minor residents of the group home.

[para 77] EPS argued that this factor also applies to the personal information of the officers involved in the complaint. The records indicate that the internal investigation was completed, and it was found that there was no evidence to support the complaints against the officers. The records also include statements made by the officers involved in the complaint, on their own behalves. That said, there was no formal investigation or hearing into the complaints that absolved the officers (or did not, as the case may be). I find that this factor is not relevant to the personal information of the officers involved in the complaint.

Section 17(5)(i) – personal information was originally provided by the applicant

[para 78] The Applicants argue that it is unreasonable to sever the names of officers where those officers were referred to in the applicants' complaint statements.
Four officers are being investigated in this file. The name of one of the officers appeared in the complaint submitted on behalf of the third party complainant and one other officer was named in a complaint letter submitted on behalf of all three complainants, including the Applicants. The name of at least one of the officers is known to the Applicants.

[para 79] A number of orders have held that an applicant's prior knowledge of a third party's personal information is not a relevant consideration for disclosing that information (see Order 99-027 at para. 175); there is a difference between an applicant knowing the information, and having access to the information (Order 96-008). One illustration of that difference is that there is nothing to prevent an applicant from further disseminating the information obtained via an access request.

[para 80] In other orders, an applicant's prior knowledge has been a factor relevant to disclosure; however, in those orders the third party's personal information has been public knowledge. For example, in Order F2007-003, the Adjudicator stated:

> In the present case, in contrast, the key facts of the incident described by the Applicant are known not only to the Applicant, but were clearly public knowledge and received broad public attention, albeit a long time ago.

(Order 2007-003, at para. 15).

[para 81] In this case, the officers' names *may be* known by the Applicants, but this information is not public knowledge. I find that whether the Applicants have prior knowledge of the names of the officers who are the subject of the investigation is not a relevant factor.

[para 82] The same reasoning would apply to an argument that the name of the third complainant was provided by the Applicants to EPS when they filed joint complaints.

Conclusion under section 17

[para 83] I find that the factors listed at sections 17(4)(b) and 17(4)(d) of the Act weigh in favour of not disclosing this personal information. As there is no need for further public scrutiny of the EPS given the information already disclosed, I find that all the personal information of the EPS officers is properly withheld under section 17.

[para 84] For the most part, EPS has disclosed the names and other information of officers who were not named as part of the complaint. Some information, such as payroll numbers, and the name of one officer was not disclosed. There is no relevant factor that weighs in favour of disclosing this information.

[para 85] None of the factors in section 17(5) weigh in favour of disclosing the personal information of the third complainant, who is not one of the Applicants.

[para 86] I found that the names of several other third parties cannot be withheld under section 17 as they are named only with respect to their current or former employment duties. However, there is no factor that weighs in favour of disclosing the remaining personal information of those employees. There are no factors weighing in favour of disclosing the personal information of other third parties, whose information, including licence plate numbers, addresses and phone numbers, criminal histories, etc., does not appear merely in the context of work duties.

[para 87] The Applicants argue that audio and video records – in this case, the video of the witness interview, which includes an audio component – can be pixilated and the voices altered to disguise the identity of the persons in the video. EPS argues, and I agree, that even with pixilation, the witness may be identifiable. Given the context, the Applicants are likely to know that the witness is one of a few possible people. Actual identity might be ascertained by features like height, gestures or speaking cadence. Additionally, the witness is often referring to third parties in the course of the interview; these references would have to be severed from the audio portion of the video. I find that the third party personal information cannot reasonably be severed from the video, as per section 6(2). Most of the information contained in the video was provided in the form of a transcript, with the third party information severed.

V. ORDER

[para 88] I make this Order under section 72 of the Act.

[para 89] I confirm the decision of the EPS to refuse access to the information severed from the records at issue pursuant to sections 4(1)(a) and 17 of the Act.

[para 90] I find that EPS improperly applied section 4(1)(l)(ii) to information in the records. Some of the information is properly severed under section 17 of the Act, but the remaining information was either not personal information or was the personal information of one of the Applicants. I order EPS to disclose the following information:

- the information severed under section 4 on page 70, if it is personal information of one of the Applicants per paragraph 33 above, except the name in quotation marks, which is personal information of a third party and must be severed under section 17;
- the information severed under section 4 on page 72;
- the information severed under section 4 on page 107, if it is personal information of one of the Applicants per paragraph 33 above;
- the information severed under section 4 on page 402, except the last two words, which are personal information of a third party and must be severed under section 17.

[para 91] I find that EPS improperly applied section 17 in some instances. I order EPS to disclose the following information:

- the first sentence of the letter on page 29, except the name of the client;
- the last severed item on page 40;
- the two names in the "To" line of the email on pages 78 and 203;
- the three severed names in the third bullet on page 126, except the phone number;
- the first severed name on page 144;
- the name of the officer on pages 153-155 whose full name is provided;
- the name of the individual referred to by the witness at the top of page 155, in the three instances it appears there;
- the name of the individual referred to by the witness on page 191, in the two instances it appears there;
- the name severed from the third listed item under "Attachments" on page 202;
- the names in the email on page 209, except the author;
- on page 313, the severed sentence in the third email from the top, the second severed sentence in the fifth email, and the first severed sentence in last email;
- on page 314, the first severed sentence in the second email from the top;
- on page 315, the severed paragraph in the main body of the email;
- the four names in the main body of the letter on page 323, but not the phone number;
- the sentence severed in the last paragraph on page 429, except the identifying number in that sentence;

[para 92] I further order the Public Body to notify both me and the Applicants in writing, within 50 days of being given a copy of this Order, that it has complied with the Order.

Amanda Swanek
Adjudicator