ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2011-009

August 29, 2011

EDMONTON POLICE SERVICE

Case File Number F5042

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Summary: The Applicant made a request to the Edmonton Police Service (the "Public Body") under the *Freedom of Information and Protection of Privacy Act* (the "FOIP Act") for records relating to an "orchestrated political campaign to try to bring public pressure on justices of the peace in relation to judicial interim release (bail) hearings." The Public Body provided a severed copy of 335 records to the Applicant. The Applicant requested a review of the Public Body's decision.

The Adjudicator determined that copies of letters authored by an Alberta Provincial Court Justice and signed copies of an Information to Obtain a Search Warrant were excluded from the Act under section 4(1)(a) but the Public Body improperly applied that section to unsigned copies of the Information to Obtain a Search Warrant and related Warrant to Search forms.

The Adjudicator found that the Public Body properly applied sections 17 and 20(4) in most cases, but severed more information than necessary in some instances. The Public Body also correctly applied section 21(1)(b) to copies of printouts from the CPIC system.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 4, 6, 17, 20, 21, 24, 27, 71, 72, *Judicature Act*, R.S.A. 2000, c. J-2, *Police Act*, R.S.A. 2000, c. P-17, ss.

BC: *Police Act*, R.S.B.C. 1996, c. 367.

CAN: *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10, *Youth Criminal Justice Act*, S.C. 2002, c. 1, ss. 115, 118, 138.

ONT: *Police Services Act*, R.S.O 2000, c. P-15.

Authorities Cited: AB: Orders 96-015, 96-017, 97-002, 97-017, 99-028, 2001-037, F2004-015, F2006-007, F2007-007, F2007-013, F2007-021, F2008-012, F2008-017, F2008-027, F2008-028, F2009-038, F2010-007.

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, *R. v. Hoeving*, 2008 ABQB 479, *Solosky v. The Queen* (1979), [1980] 1 S.C.R. 821.

I. BACKGROUND

[para 1] On March 2, 2009, the Public Body received an access request under the Act from the Criminal Trial Lawyers' Association (the "Applicant") for records, including electronic records, relating to an "orchestrated political campaign to try to bring pressure on justices of the peace in relation to judicial interim release (bail) hearings." The Public Body responded to the request on July 13, 2009, providing 335 records, with information severed under sections 4(1)(a), 17, 20, 21, 24 and 27 of the Act.

[para 2] The Applicant requested a review of the Public Body's response. As mediation was unsuccessful, the matter proceeded to inquiry.

[para 3] In the course of the inquiry, the Public Body determined that section 20(4) applies to some records (previously withheld citing the federal *Youth Criminal Justice Act*). The Public Body also determined that it will no longer rely on sections 20(1) or 24 as reasons for severing information. The Public Body provided a newly redacted copy of the records to the Applicant at the time of its initial submission reflecting these changes.

[para 4] The Notice of Inquiry named five Affected Parties; one party responded but has since declined to participate further.

II. RECORDS AT ISSUE

[para 5] At issue in this inquiry are the redacted portions of the 335 records provided to the Applicant by the Public Body. The records are divided into four categories: Investigative Support Branch (92 pages), Court Services Section (171 pages), Legal Advisors' Section (42 pages), and the Office of the Chief (30 pages). The Investigative Support Branch and Legal Advisors' Section records consist mainly of copies of a Justice of the Peace Program Review 2007 document, which is a consultation document for an internal review of the Justice of the Peace Program directed by the Minister of Justice and Attorney General. Emails and draft responses from the Public Body are also included.

Records from the Court Services Section consist of emails, briefing notes, memos and notes of police officers primarily regarding bail hearings, bail conditions and investigations. The Office of the Chief records consist of communications between Chiefs of Police in Alberta and resolutions of the Alberta Association of Chiefs of Police concerning the Justice of the Peace review, as well as another copy of the consultation document.

III. ISSUES

[para 6] The Notice of Inquiry, dated December 3, 2010, lists the following issues (in a slightly different order):

1. **Are the records/information excluded from the application of the Act by section 4(1)(a)?**

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

3. **Did the Public Body properly apply section 21 of the Act (disclosure harmful to intergovernmental relations) to the records/information?**

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

5. **Did the Public Body properly apply section 27 (privileged information) to the records/information?**

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

IV. DISCUSSION OF ISSUES

1. Are the records/information excluded from the application of the Act by section 4(1)(a)?

[para 7] Section 4(1)(a) states:

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

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

[para 8] Records 100-103 and 243-245 are copies of letters authored by an Alberta Provincial Court Justice and clearly fall within section 4(1)(a). I have no jurisdiction to review the Public Body's decision to withhold these records.

[para 9] Records 119-120 and 122-123 are both copies of the same Information to Obtain a Search Warrant form; records 121 and 124 are both copies of the same Warrant to Search form. The Public Body withheld one copy of each (pages 122-124) under section 4(1)(a), stating that the Information to Obtain a Search Warrant form was signed by the Informant and sworn before a Justice of the Peace ("JP"), and the Warrant to Search form was signed by a JP. The other copy is unsigned and I assume it is simply a copy kept by the Public Body that was not filed. With respect to the unsigned copy, the Public Body severed some information under section 17 and disclosed the remainder of the records. In Order F2007-021, the Adjudicator drew a distinction between a version of a document that has been filed with the court, and copies of the same document that have not been filed:

> To reconcile my conclusion with Orders F2004-030 and F2007-007, I distinguish copies of the filed versions of records, which I believe fall under section 4(1)(a), from copies of the same records that are not copies of the filed versions, which do not fall under section 4(1)(a). Examples of the latter are drafts of documents (even if the content is the same as the document that was filed) and records that are not attached as exhibits to an affidavit that has been filed (even if it is the same record as the filed exhibit). What makes information fall under section 4(1)(a) is the fact that it is a copy of the *filed* record, rather than a copy of the *unfiled* record. When the previous Orders of this Office state that records "that a public body filed in court" and "duplicates [that] may also exist in the court file" remain within the scope of the Act, I accordingly restrict this to mean an unfiled copy or version of a record filed in court.

[Order F2007-021 at para. 26]

[para 10] I agree that the signed version of the documents would become part of a court file, and copies of the signed forms constitute information in a court file and are therefore excluded under section 4(1)(a) of the Act. In contrast, the unsigned copies of these forms are *not* information in a court file. Although the Public Body's argument indicates that there is one signed and one unsigned copy of both the Information to Obtain a Search Warrant form and the Warrant to Search form, in fact, both copies of the Warrant to Search form are unsigned. Therefore section 4(1)(a) would not apply to either copy of the Warrant to Search form (pages 121 and 124).

[para 11] A previous version of these redacted records withheld both copies of these records under section 4(1)(a). In the new version of records, the Public Body has, apparently in error, withheld the *unsigned* copy of the Information to Obtain a Warrant form (pages 122-123) under section 4(1)(a), and disclosed the *signed* version (pages 119-120), with some severing under section 17.

[para 12] The Public Body's submission indicates that this new version of redacted records has already been provided to the Applicant. All I can do now is point out that section 4(1)(a) applies to the signed version of the Information to Obtain a Warrant form, and I have no jurisdiction to review the severing of those records under section 17. The remaining unsigned documents cannot be withheld under section 4(1)(a). Section 17 has been applied to sever information from one copy of the Warrant to Search form (page 121), and I will consider below whether that provision was correctly applied. I will also consider whether section 17 applies to information in pages 122-124.

[para 13] The Public Body applied both section 4(1)(a) and section 17 to information severed from pages 304 and 305. I must determine first if section 4(1)(a) applies, since it determines whether I have jurisdiction over it.

[para 14] The Public Body states that the severed information consists of court docket numbers. Court dockets are information in a court file, since the information in court dockets is copied from information in a court file (see *Alberta (Attorney General)* v. *Krushell*, 2003 ABQB 252). As such, I find that the docket numbers severed from pages 304 and 305 are excluded from the Act under section 4(1)(a) and I have no jurisdiction over that information.

[para 15] The Applicant argues that if the information is contained in a court file, the Public Body should identify the file so that the Applicant can obtain the record by other means. He also argues that to withhold all information that could identify the file defeats the purpose of this particular exclusion.

[para 16] I take the Applicant's argument to be that the reason for the exclusion under section 4(1)(a) is that there is an alternate system for access to court records. This is supported by an Alberta Court of Queen's Bench decision, *Alberta (Attorney General) v. Krushell* (at para. 48). That Court also noted that another purpose for the exclusion is to protect the privacy of individuals who have been charged but not convicted of a criminal offence. In any case, once it has been determined that the information falls within the section 4(1)(a) exclusion, the FOIP Act no longer applies and I have no jurisdiction to review the public body's response or to order the public body to identify the record so that the Applicant may pursue access to the information through an alternate system. Section 4(1)(a) does not impose an obligation on the public body to mitigate the lack of access under the FOIP Act. That said, nothing in section 4 prevents the public body from disclosing information or records excluded from the FOIP Act through an alternate process (see Order 97-017, at para.10), but that is a matter for the Public Body to decide.

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

[para 17] The Applicant states that there is no evidence to suggest that law enforcement would be compromised by disclosing the information, and that in any case, the Public Body did not properly exercise its discretion in withholding the information.

[para 18] The Public Body is no longer relying on section 20(1) to withhold information in the records, but has applied section 20(4) to some information. That provision states:

20(4) The head of a public body must refuse to disclose information to an applicant if the information is in a law enforcement record and the disclosure would be an offence under an Act of Canada.

[para 19] While most of section 20 is discretionary, section 20(4) is a mandatory provision. This means that the public body must withhold any information to which section 20(4) applies; there is no exercise of discretion.

[para 20] Section 20(4) has two requirements:

a. the disclosure must be an offence under an Act of Canada; and
b. the information must be in a law enforcement record.

[Order 96-015 at para. 33]

[para 21] I will first consider whether the information is in a law enforcement record. Section 1 of the Act defines law enforcement as follows:

1 In this Act,

…

h) "law enforcement" means

i) policing, including criminal intelligence operations,

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

iii) proceedings that lead or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the proceedings or by another body to which the results of the proceedings are referred;

[para 22] The information severed from pages 127, 128, and 130-132 is recorded information about police investigations resulting in charges against a youth that could result in a penalty or sanction; therefore the second part of the test under section 20(4) is met.

[para 23] Section 115 of the federal *Youth Criminal Justice Act*, S.C. 2002, c. 1 (the "YCJA") permits the Public Body to retain records relating to an offence alleged to have been committed by a young person. Section 118 of that Act prohibits the disclosure of information retained under section 115 if the disclosure would identify the young person

as a person dealt with under that Act; it is an offence to contravene that provision (section 138).

[para 24] I accept that the following information is information in a law enforcement record, the disclosure of which would be an offence under an Act of Canada:

- the name, age and number of charges against the accused youth, wherever they appear
- the names of family members of the youth and their relationship to the youth, wherever they appear
- the date of an arrest and number of charges against the youth on page 127
- the identity of a co-accused (the co-accused is not a youth and so the YCJA does not apply to his or her name by itself), the dates of release, investigations etc., the number of charges against the youth and the second of three quotes from an official transcript on page 128
- all of the information severed on page 130 and 132

[para 25] I find that the Public Body properly applied section 20(4) to the above listed information.

[para 26] With that information severed, I fail to see how the remaining information identifies the youth such that disclosing the information would be an offence under the YCJA and the Public Body has not provided arguments other than its broad statement that the severed information identifies the youth as having been dealt with under the YCJA. Therefore I find that the remaining information cannot be withheld under section 20(4).

[para 27] The Public Body also noted that section 17 applies to this information, but did not provide further arguments on that point. Given the context of the records, any information that identifies the youth identifies him or her as a youth dealt with under the YCJA. Therefore, the information properly severed under section 20(4), as found above, encompasses all of the personal information about the youth. In other words, after severing the information about the youth as per above, there is no remaining personal information about the youth to which section 17 applies.

[para 28] The name of a JP appears on pages 127, 128, 130 and 131; this is information to which section 17 may apply and I will consider below whether the name of the JP must be severed from these pages under that provision.

3. Did the Public Body properly apply section 21 of the Act (disclosure harmful to intergovernmental relations) to the records/information?

[para 29] The Public Body applied section 21(1)(b) to pages 142, 152, 153, 240 and 241, as they are printouts from CPIC, which is a national law enforcement database.

[para 30] Section 21 states, in part:

21(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

(a) harm relations between the Government of Alberta or its agencies and any of the following or their agencies:

(i) *the Government of Canada or a province or territory of Canada,*

(ii) *a local government body,*

(iii) *an aboriginal organization that exercises government functions, including*

(A) the council of a band as defined in the Indian Act (Canada), and

(B) an organization established to negotiate or implement, on behalf of an aboriginal people, a treaty or land claim agreement with the Government of Canada,

(iv) *the government of a foreign state, or*

(v) *an international organization of states,*

or

(b) reveal information supplied, explicitly or implicitly, in confidence by a government, local government body or an organization listed in clause (a) or its agencies.

…

(3) The head of a public body may disclose information referred to in subsection (1)(b) only with the consent of the government, local government body or organization that supplies the information, or its agency.

(4) This section does not apply to information that has been in existence in a record for 15 years or more.

[para 31] There are four criteria under section 21(1)(b):

(a) the information must be supplied by a government, local government body or an organization listed in clause (a) or its agencies;

(b) the information must be supplied explicitly or implicitly in confidence;

(c) the disclosure of the information must reasonably be expected to reveal the information; and

(d) the information must have been in existence in a record for less than 15 years.

[Order 2001-037]

[para 32] In Order F2008-027, which also concerns an access request made to the Public Body, the Adjudicator determined that the rules of statutory interpretation indicate

that for section 21(1)(b) to apply, the information must be supplied *to* the Government of Alberta or an agency of it, to parallel the type of information protected by section 21(1)(a) (Order F2008-027, at para. 76). With respect to the Public Body, the Adjudicator noted that the authority to establish a municipal police force such as the Public Body, and the powers, functions and duties of the police force, lie in the provincial *Police Act*. For this reason, when the Public Body receives information as a function of its policing mandate, it is arguably receiving information on behalf of the Government of Alberta (Order F2008-017, at para. 91). I agree with this reasoning and find that when the Public Body retrieved information from CPIC, if the information was not originally supplied by the Public Body, the information was supplied to the Government of Alberta or an agency of it for the purposes of section 21(1)(b).

[para 33] I will consider each of the criteria in section 21(1)(b).

> *Information supplied by a government, local government body or an organization listed in clause (a) or its agencies*

[para 34] I agree that in operating CPIC, the RCMP is acting as an agency of the Government of Canada.

[para 35] Order F2009-038 considered information retrieved by the Public Body from the CPIC system. In that order, the Adjudicator determined that information supplied by the RCMP fulfilled the first criterion of section 21(1)(b); however, information originally supplied by the Public Body to the RCMP, then retrieved from the CPIC system, did not meet the criterion. This is presumably because in the latter case, the information cannot be said to have been *supplied by* the RCMP; the RCMP is merely maintaining the CPIC system on which the information resides. In other words, the Public Body cannot withhold its own information under section 21(1)(b) simply by storing the information on CPIC, instead of in their own files, and later retrieving the information from the database.

[para 36] In this case, the Public Body has not withheld information that it had originally provided to the CPIC system under this provision. Their submission states that the information withheld under this provision is information "contributed to CPIC by other law enforcement agencies in Canada."

[para 37] Looking at the printouts from the CPIC system, some of the information appears to originate from the Vancouver Police Department ("VPD"), the York Regional Police Service ("YRPS"), and the Barrie Police Service ("BPS"); for example, some records explicitly state that the record is owned by a particular agency. Although this information was retrieved from the CPIC system, which is maintained by the RCMP, I find that the information was *supplied by* the law enforcement agency from which it originated.

[para 38] I must therefore consider whether these law enforcement agencies are "a government, local government body or an organization listed in clause (a) or its agencies."

[para 39] "Local government body" is defined in the FOIP Act (section1(i)); the definition does not encompass any bodies outside Alberta. None of the VPD, YRPS or BPS is an aboriginal organization, a government of a foreign state, or an international organization of states under section 21(1)(a)(iii), (iv) and (v). For these police forces to meet the first criterion then, they must be a government of a province or territory, or an agent of one (section 21(1)(a)(i)).

[para 40] Similar to the *Royal Canadian Mounted Police Act* and the Alberta *Police Act*, the British Columbia *Police Act* (regarding the VPD) and the Ontario *Police Services Act* (regarding the YRPS and BPS) both establish the respective municipal police forces, and set out the powers, functions and duties of the police force. For the purpose of performing their duties and functions under the respective legislation, I find that the VPD, YRPS and BPS are agencies of the B.C. and Ontario provincial governments respectively, under section 21(1)(a)(i). I also find that the information provided to the CPIC system by these agencies was part of their policing functions. Therefore the first criterion under section 21(1)(b) is met.

Information supplied explicitly or implicitly in confidence

[para 41] In Order 2009-038, the Adjudicator quoted from the CPIC Reference Manual as cited by the Public Body in that case:

> The EPS states that the information at issue within records 65, 66, 69 and 72 was supplied in confidence. In support, the EPS refers to section 4.1 of the CPIC Reference Manual which states that "All information contributed to or retrieved from CPIC is supplied in confidence and must be protected against disclosure to unauthorized agencies or individuals". The EPS states that there is an explicit expectation of confidentiality with respect to the information obtained from the CPIC system and that failure to comply with the terms outlined in the CPIC manual could result in an individual user or a police agency having their access to the CPIC system revoked.

[para 42] The Adjudicator found that the confidentiality requirement was met in that case. Although I was not provided with a copy of or excerpts from the CPIC Reference Manual, authored by the RCMP, I accept the affidavit evidence that "the CPIC Reference Manual provides that information is contributed to the CPIC system in confidence by the originating agency, and it is to be used in confidence by other law enforcement agencies." The affiant also states that all agencies accessing the CPIC system must follow the policies in the Manual, and are subject to periodic audits to ensure this is done.

[para 43] For these reasons, I accept that the information contributed to the CPIC system by the law enforcement agencies is contributed in confidence. While other law enforcement agencies are given access to the information that is contributed to the database, there is no intention that the general public, or lawyers, will be given access to it. Thus the second criterion for section 21(1)(b) is fulfilled.

Disclosure of the information reasonably expected to reveal the information

[para 44] The records are a clear printout of the information provided by the various police forces; this criterion is fulfilled.

Information in existence in a record for less than 15 years

[para 45] The various items of information in the CPIC printout have associated dates; none of those dates fall outside the 15 year time frame.

Consent

[para 46] The Applicant argued that even if section 21(1)(b) applies to the CPIC printouts, this provision is discretionary, and the Public Body failed to properly apply its discretion in withholding the information.

[para 47] However, section 21(3) provides that the head of a public body may disclose information referred to in subsection 1(b) *only* with the consent of the organization that supplied the information. In this case, there is no evidence that any of the police forces provided consent to the disclosure. I therefore find that this information was properly withheld.

[para 48] I find that section 21(1)(b) applies to the information in the CPIC printouts on pages 142, 152, 153, 240 and 241 and was properly withheld, with one exception: the last entry on page 153 is information originally provided to the CPIC system by the Public Body. I noted above that the Public Body had not applied section 21(1)(b) to the information it had originally provided to the CPIC system, but rather withheld that information under section 17. I will accordingly consider below whether section 17 applies to the last entry on page 153.

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

[para 49] The Public Body is no longer relying on section 24 to withhold information in the records, so I will not consider its application.

5. Did the Public Body properly apply section 27 (privileged information) to the records/information?

[para 50] The Public Body applied section 27(1)(a), 27(1)(b)(iii) and 27(1)(c)(iii) to page 222. The relevant provisions of section 27(1) are as follows:

27(1) The head of a public body may refuse to disclose to an applicant

(a) Information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,

(b) information prepared by or for

…

(iii) an agent or lawyer of a public body,

in relation to a matter involving the provision of legal services, or

(c) information in correspondence between

…

(iii) an agent or lawyer of a public body,

and any other person in relation to a matter involving the provision of advice or other services by the Minister of Justice and Attorney General or by the agent or lawyer.

[para 51] In order for solicitor-client privilege to apply, three criteria must be met, as per *Solosky v. The Queen* (1979), [1980] 1 S.C.R. 821 (at p. 837). The record must be:

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

[See also Order F2007-013, at para. 72]

[para 52] The previous Commissioner adopted a definition of 'legal advice' set out by the Ontario Information and Privacy Commissioner (see Order 96-017, at para. 23). Legal advice includes "a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications."

[para 53] According to the Public Body's submission, page 222 is an email sent from an in-house lawyer in the Public Body's Legal Advisors' Section, to the Staff Sergeant in charge of the Court Services Section. I agree that the content of the email is legal advice regarding a matter falling within the Staff Sergeant's job duties, and this advice was provided to the Staff Sergeant as a client. There is nothing in the email or the Public Body's evidence to indicate that the Staff Sergeant was seeking legal advice; in fact, the email appears to have been unsolicited. This does not necessarily mean that the content of the email is not legal advice, since the Staff Sergeant is responsible for addressing concerns of the Public Body with JPs. In other words, given the Staff Sergeant's job duties, it might be that any new developments with respect to JPs initiate legal advice on the matter from the Legal Advisors' Section, as a matter of routine process.

[para 54] Although it is not explicit, I accept that the content of the email indicates the lawyer's recommended course of action and constitutes legal advice for the purpose of section 27(1)(a).

[para 55] Section 27(1)(a) is a discretionary provision; however, the Adjudicator in Order F2010-007 considered a Supreme Court of Canada decision with respect to the Ontario Information and Privacy Commissioner's review of the application of a solicitor-client privilege exception:

In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, the Supreme Court of Canada commented on the authority of the Ontario Information and Privacy Commissioner to review the way in which the head of a public body exercises discretion to withhold information in response to an access request.

> We view the records falling under the s. 19 solicitor-client exemption differently. Under the established rules on solicitor-client privilege, and based on the facts and interests at stake before us, it is difficult to see how these records could have been disclosed. Indeed, Major J., speaking for this Court in *McClure*, stressed the categorical nature of the privilege:
>
> > ... solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance. As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis. [Emphasis in original]
>
> Accordingly, we would uphold the Commissioner's decision on the s. 19 claim.

In relation to the application of discretion to withhold information subject to solicitor-client privilege, the Court considered that the public policy in keeping this privilege "as close to absolute as possible" is sufficient to demonstrate that discretion has been exercised appropriately. In other words, if information is withheld under section 27(1)(a) because it is subject to solicitor-client privilege, then that is reason enough to establish that discretion was exercised appropriately. With solicitor-client privilege, the purpose for applying discretion to withhold the information is inherent in the privilege itself.

[para 56] Following this reasoning, I find that the Public Body properly withheld the information in page 222. I do not need to consider the application of section 27(1)(b)(iii) to page 222.

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

[para 57] Many records were severed citing multiple exceptions, including section 17. I have found that pages 130 and 132 were properly severed under section 20(4); pages 142, 152, 153, 240 and 241 were properly severed under section 21(1)(b) (with the exception of the last entry of page 153); and pages 119, 120, and the severed parts of 304 and 305, are excluded from the scope of the Act under section 4(1)(a). As such, I will not consider the application of section 17 to those records.

[para 58] I found above that the exclusion under section 4(1)(a) does not apply to the unsigned Information to Obtain a Warrant form or the two copies of the unsigned Warrant to Search form (pages 121-124). As section 17 is a mandatory section, I will consider whether it applies to these pages.

[para 59] Section 17 states in part:

17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

(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,

…

(g) the personal information consists of the third party's name when

(i) it appears with other personal information about the third party, or

(ii) the disclosure of the name itself would reveal personal information about the third party,

or

(h) the personal information indicates the third party's racial or ethnic origin or religious or political beliefs or associations.

(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,

(b) the disclosure is likely to promote public health and safety or the protection of the environment,

(c) the personal information is relevant to a fair determination of the applicant's rights,

(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,

(e) the third party will be exposed unfairly to financial or other harm,

(f) the personal information has been supplied in confidence,

(g) the personal information is likely to be inaccurate or unreliable,

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and

(i) the personal information was originally provided by the applicant.

[para 60] The Applicant has argued that where the record is part of a public prosecution, there is little or no privacy interest, and that the Public Body did not take section 17(5) into account when severing the records. He states that the information at issue is needed to dispel misrepresentations made by the police and politicians criticizing the bail process, as well as to make a submission to Parliament about the federal Bill C-25, and to bring a *Charter* case.

[para 61] The Public Body correctly pointed out that once the Public Body has established that the records contain personal information of a third party, under section 71(2) the Applicant bears the burden of proving the disclosure of personal information would not be an unreasonable invasion of a third party's privacy.

[para 62] The first question then, is whether the information at issue is personal information.

[para 63] Section 1(n) defines personal information under the Act:

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

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

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

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

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

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

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

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

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

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

[para 64] Pages 77-79, 83 are pages from an EPS report.

[para 65] Pages 93-95, 97-99, 106, 127-128, 130, 134, 135, 136, 137, 138-139, 140-141, 202-206, 219-221, 235-239, 246, 248, and 303 consist of letters, briefing notes, emails, and memos; the severed information consists of names of accused (and possibly victims and witnesses), along with information about crimes and charges. Names and criminal history are personal information.

[para 66] Names of JPs are severed in pages 98, 104, 105-106, 111-113, 116, 118, 126, 129, 135, 137, 140, 144, 236, 237, 246, 247, 248, 257, 261, and 263 which consist of emails, memos and briefing notes. In some instances, opinions about JPs are expressed by Public Body employees. The name of a JP also appears on pages 127, 128 and 131, to which section 20(4) was applied. As I found that the name of the JP was improperly withheld under that section, I will consider whether it must be withheld under section 17.

[para 67] The names of the JPs appear in the context of the performance of their employment duties. Previous orders from this office have found 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 68] In this case however, other information in these records adds a personal dimension; for example, opinions are given about the JPs and their conduct, and the context of some of the information indicates alleged wrongdoing or perhaps bias. In some instances, comments about certain JPs appear to merely describe an action taken by the JP in his or her official capacity. Arguably this information would not have a sufficient personal dimension; however, in the context of the records as a whole, the comments that appear to lack a personal dimension can be linked to comments that contain a personal dimension, such that all the comments contain a personal dimension.

[para 69] On pages 106-107 and 125-126, the title and URL of a website authored by a JP are severed. The URL itself reveals the name of the author, and the website title could identify the author as well. This information appears in the context of a discussion about the JP and the website. Although clearly related to the JP's work, the website does not appear to be a product of the JP's employment duties, and so the severed information is personal information to which section 17 may apply. Even if the information were employment related and lacked a sufficient personal dimension by itself, this information can be linked to comments that contain a personal dimension, such that this information contains a personal dimension.

[para 70] For these reasons, there is a sufficient personal dimension to this information for section 17 to possibly apply to the names of the JPs. Page 118 consists of an email authored by a Public Body employee. The body of the email discusses the conduct of a JP

who is named only in the subject line, which was severed. Although the JP is not named in the body of the email, the comments made could identify the JP even without a name, and so the entire email is personal information.

[para 71] Although the Public Body has disclosed the names of its employees throughout the records, some personal (i.e. not work-related) information about one of the employees was severed from page 115. I agree that this is personal information.

[para 72] Pages 143-148, 150, 156-161, 170, 171, 176-182, 183-90, 192-201, 209-210, 217-219, 225-234, 242, 249 and 253-263 are various law enforcement forms, such as Arrest Booking Reports, and various investigation reports. These pages contain names, home addresses and contact information, birthdates, physical descriptions, criminal charges, medical histories, witness statements, and information about racial or ethnic origin of accused, victims, witnesses, and JPs. This is personal information.

[para 73] Pages 213-216 are handwritten notes of police officers, containing names, home addresses, contact information and physical descriptions of accused, victims and witnesses, which is personal information.

[para 74] Pages 153-155, 207-208 and 223-224 are CPIC printouts containing information originally provided by the Public Body, so 21(1)(b) does not apply. The printouts contain the names of accused, as well as charges, physical descriptions and identifying numbers, which are all personal information. They also contain ORI numbers, which are terminal numbers through which the CPIC system is accessed. According to an affidavit from the Public Body, law enforcement agencies are prohibited from disclosing other agency's ORI numbers. Here, the ORI numbers of other agencies are already properly severed under section 21(1)(b); the only ORI numbers that remain are the Public Body's.

[para 75] The Public Body's submission states only that the disclosure of ORI numbers of the Public Body must be assessed on a case by case basis regarding whether the disclosure would result in harm. The Public Body has not offered any assessment or evidence of harm in this case. They have also not offered any evidence that these numbers are personal information, and on the face of the records, it is not clear how they identify an individual. It might be that in another context, they would reveal personal information of a particular officer. At any rate, in the context of these records, the evidence that has been provided to me does not lead to the conclusion that these numbers are personal information that can be withheld under section 17.

[para 76] On pages 150 and 212, a line that indicates a general result of a CPIC check is severed. As all other identifying personal information has been removed from the pages, it is unclear how this general result can identify a particular individual. As such, this information is not personal information and cannot be withheld under section 17.

[para 77] I discussed above the unsigned Information to Obtain a Search Warrant form and two unsigned Warrant to Search forms (pages 121-124). Page 121 has been severed

under section 17. As section 4(1)(a) does not apply to pages 122-124, I must consider whether section 17 applies to those pages. These pages contain the name of an accused and the victim of the related crime, as well as the location of the crime (a home address). This is all personal information.

[para 78] In some pages, the forms are withheld almost in their entirety except for the page header. In most of those cases, the entire form contains personal information. Where the personal information does not take up the whole form, the Public Body has mostly severed only as necessary.

[para 79] However, on pages 249-252, large blocks of forms were severed; the severed information contains both personal information and information that is not personal. Similar forms to these occur on pages 147-150, and have only the personal information severed instead of large blocks of the form, and the remainder of the form has been disclosed. No argument has been provided as to why this same process cannot be applied to pages 249-252.

[para 80] Section 6 of the FOIP Act establishes an applicant's right to access information. It states, in part:

6(1) An applicant has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.

(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record.
…

[para 81] The personal information on pages 249-252 to which section 17 applies is: all identifying numbers, the occurrence location, name (including nickname), sex, date of birth, marital status, physical description, employment information, arrest date and time, place of arrest, medical assessment, the victim’s name, address and phone numbers, the emergency contact name, relationship and phone number. The remaining information cannot be withheld under section 17, as it is not personal information.

Would the disclosure be an unreasonable invasion of privacy?

[para 82] The Public Body argues, and I agree, that none of the provisions in section 17(2) apply.

[para 83] The Public Body argues that several presumptions against disclosure apply: 17(4)(a), 17(4)(b), and 17(4)(g). I would also add section 17(4)(h) to that list.

[para 84] A few of the pages contain medical, psychiatric or psychological conditions of accused persons; section 17(4)(a) presumes the disclosure of this personal information to be an unreasonable invasion of privacy.

[para 85] Section 17(4)(b) creates a presumption against disclosure of information contained in an identifiable part of a law enforcement record. Law enforcement is defined in section 1(h) of the Act, to include:

> *(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 86] This presumption applies to the personal information in the law enforcement forms. Many of the emails, briefing notes and memos are concerning active investigations and also fall into the category of law enforcement records. Where the information relates to a complaint about a JP that is being made under the *Judicature Act*, it falls within the definition of law enforcement records. Complaints made about a JP under that Act may lead to a penalty or sanction (see Order 2007-007, at para. 39) (e.g. pages 104-112 consist of a letter from the Public Body to the Assistant Chief Justice requesting a review of the conduct of a JP). However, the letters, emails, briefing notes and memos that discuss trends in bail hearings or even that criticize the conduct of a JP in a general manner, are not law enforcement records.

[para 87] Both section 17(4)(g)(i) and (ii) apply to the personal information in the records described above. Many of the records contain names of individuals, together with other personal information about them. With respect to the law enforcement records, even where names appear alone, the context of the record reveals further personal information about the individual.

[para 88] Similarly, not all of the personal information of the JPs appears in the context of a complaint; however, the fact that the JPs are mentioned in the context of these records indicates that they are the subject of complaints (whether formal or informal complaints of Public Body employees).

[para 89] Some of the physical descriptions of accused indicate the individual's racial or ethnic origin; section 17(4)(h) applies to that information.

[para 90] The factors leading to a presumption that disclosing the personal information is an unreasonable invasion of personal privacy must be considered in conjunction with the factors for and against disclosure listed in section 17(5), and any other relevant factors.

Section 17(5)(a)

[para 91] The Applicant has argued that the Public Body did not take section 17(5)(a) into account when severing the records. He stated that "the information was needed in order to make submissions to Parliament about Bill C-25 and to bring a *Charter* attack and to dispel misrepresentations made by the police and politicians criticizing the bail process."

[para 92] For public scrutiny to be a relevant circumstance, the Applicant must provide evidence that the activities of the Public Body have been called into question, and that the disclosure of the personal information must be necessary to subject the activities of the Public Body to public scrutiny (Order F2004-015, at para. 88).

[para 93] The following factors should be considered, although all three factors need not be met in order for section 17(5)(a) to be applicable:

a) whether more than one person has suggested that public scrutiny is necessary;
b) whether the applicant's concerns are about the actions of more than one person within the public body; and
c) whether the public body has previously disclosed a substantial amount of information or has investigated the matter in issue.

[Order 97-002 at paras. 94 and 95, and Order F2004-015 at para. 88]

[para 94] Additionally, 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 95] In this case, the Applicant is acting on behalf of the Criminal Trial Lawyers' Association, which indicates that this matter is of concern to more than one individual. The Applicant is also concerned with an "orchestrated campaign," involving the Public Body as a whole (although not necessarily every individual within the Public Body).

[para 96] In response to the access request, the Public Body disclosed a large portion of the records, including: the communications concerning the response to a consultation by the Minister of Justice and Attorney General on the review of JPs, communications concerning bail hearings and opinions regarding the conduct of various JPs with respect to bail hearings, and law enforcement records. The Applicant did not provide arguments

as to how the personal information that was withheld about individuals, such as the names of individuals involved with alleged criminal activities or the victims of crime, would provide further insight or scrutiny.

[para 97] One of the items the Applicant requested in its access request was information relating to the "process leading to replacing incumbent JPs, who have now been replaced or are being replaced." I note that the Public Body does not have authority to remove or replace a JP. Possibly the names of the allegedly targeted JPs might reveal the efficacy (or success) of any "orchestrated campaign to try to bring pressure on justices of the peace in relation to judicial interim release (bail) hearings" by the Public Body. If so, there may be a public interest in disclosing the personal information of the JPs, in order to determine whether these JPs were removed or replaced.

[para 98] However, the Applicant has failed to provide any evidence that JPs have been replaced or that any replacement could be linked to alleged leniency with respect to the bail process or to the Public Body's complaints about certain JPs. It appears to be mere speculation on the Applicant's part that the activity of the Public Body has had an effect on the replacement of JPs.

[para 99] Alternatively, it might be that the activity regarding which the Applicant is calling for scrutiny is not the efficacy of the Public Body's alleged attempt to have certain JPs replaced, but rather the manner in which the Public Body addressed its concerns about the bail processes and the conduct of JPs, and whether the Public Body was acting appropriately. In this case, I do not find that it is necessary to disclose the names of the JPs that may have been "targeted" by the Public Body in order to achieve scrutiny of the Public Body.

[para 100] With respect to "dispel[ing] misrepresentations made by the police and politicians criticizing the bail process," the Applicant did not elaborate as to the usefulness of the withheld personal information for this purpose. It might be that the personal information of the JPs and of the individuals brought before the JPs could show that the JPs have not, in fact, been unduly lenient with respect to the bail process. However, this is not obvious from the records alone and the Applicant has not provided any further evidence to support such an argument.

[para 101] As for the Applicant's need for the information in order to make a submission to Parliament about the federal Bill C-25 and to bring a *Charter* case, no arguments were made as to why personal information in the records would help with such endeavors. I assume that Bill C-25 refers to *An Act to Amend the Criminal Code (Limiting Credit for Time Spent in Pre-Sentencing Custody)*, which was introduced as Bill C-25 in March 2009 and received royal assent in October 2009. With respect to the *Charter* case, the Applicant might intend to make an argument that tougher sentencing laws and higher standards for interim release (bail) infringe the right to liberty under the *Charter*. However, the Applicant must provide a more direct argument as to why "the information was needed in order to make submissions to Parliament about Bill C-25 and

to bring a *Charter* attack" to support the disclosure of the personal information in the records.

Section 17(5)(c)

[para 102] Section 17(5)(c) requires a consideration of whether the personal information at issue is relevant to a fair determination of the Applicant's rights. As mentioned, the Applicant argued that the information at issues is needed to dispel misrepresentations made by the police and politicians criticizing the bail process, to make a submission on a federal bill, and to bring a *Charter* case.

[para 103] Four conditions must be met in order for section 17(5)(c) to apply:

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 and Order F2008-012 at para. 55]

[para 104] As to the first two conditions, since the Applicant represents accused in criminal matters, the Applicant might contemplate making an argument in a criminal proceeding in which it is argued that tougher sentencing or standards for interim release infringe the right to liberty. This assumes that the Applicant, as an association of lawyers representing clients in criminal proceedings, can be clothed in the rights of these clients for the purposes of section 17(5)(c). Even if that is the case, the Applicant has failed to provide any arguments as to why the personal information would be significant to the determination of the right or why it would be required to prepare for the proceeding.

Sections 17(5)(e) and (h)

[para 105] The Public Body argues that section 17(5)(e) (disclosure that may expose a third party to unfair financial or other harm) applies and I have added section 17(5)(h) (unfairly damage the reputation of any person). I believe that the information in these records could lead to reputational harm contemplated by section 17(5)(h); it is unclear what other harm contemplated by section 17(5)(e) may result and the Public Body did not offer arguments on this point.

[para 106] Previous orders have found that the disclosure of unfounded allegations might unfairly damage an individual's reputation. This presumption against disclosure applies to the individuals named in investigation files, since much of this information is

piecemeal and out of context. These are not full investigation files that follow an allegation to its conclusion; in other words, the allegations have not been tested.

[para 107] Where the information refers to past convictions, it arguably does not *unfairly* harm the individual's reputation, and this relevant circumstance does not exist.

[para 108] The complaints and allegations about conduct of various JPs are likewise unsubstantiated; this weighs against the disclosure of their personal information.

Section 17(5)(g)

[para 109] The Public Body also argues that section 17(5)(g) applies to the information at issue. The Public Body has not provided any evidence to suggest that the information is *likely* to be inaccurate or unreliable. I find that this is not a relevant factor.

Other factors under section 17

[para 110] The Applicant has argued that "where the matter has resulted in a public prosecution, the privacy interest has disappeared." With respect to the records at issue, I can only assume that the Applicant is referring to the disclosure of the investigation records, as neither the records nor any of the submissions indicate any other proceedings or prosecutions. In support if his claim, the Applicant cited *R. v. Hoeving*, 2008 ABQB 479. That case dealt with the police disciplinary hearing records and their disclosure in a subsequent court proceeding; the Court indicated that where the Chief of Police has determined that a disciplinary hearing is to be conducted in public under the *Police Act*, the privacy interests of the officer with respect to the disclosure of the related disciplinary records in the court proceeding cease to exist (at para. 32).

[para 111] I am not convinced that the balance between an individual's privacy and the disclosure of information that takes place in the context of a court proceeding is the same balance that takes place under the FOIP Act. The Alberta Court of Queen's Bench in *Calgary Police Service v. Alberta (Information and Privacy Commissioner)* 2010 ABQB 82, remarked on the distinction between disclosure under the FOIP Act and disclosure during criminal proceedings:

> There is a difference, however, between disclosure under the *FOIP Act* and disclosure in the criminal law context. Questions of relevance and admissibility must still be answered in the latter (at para. 84).

[para 112] I find that the *Hoeving* decision does not apply in this case. The records at issue in *Hoeving* related to a disciplinary file, whereas in this case, the records are investigation records where individuals are named along with allegations of criminal activity, or criminal charges. While many of these charges undoubtedly led to criminal prosecutions, which are held in public, it is conceivable that some did not. It is not clear

what information in the records at issue would have been made public as part of a criminal prosecution, nor did the Applicant make a specific argument.

Conclusion under section 17

[para 113] Several factors under section 17 weigh against the disclosure of personal information in the records at issue. Only section 17(5)(a) weighs in favour of disclosure. However, while it is possible to speculate about how this factor might operate in favour of disclosure of either the names of JPs or the names and related information of persons involved in bail applications, and while I have done so to some degree, I cannot rely on this speculation to determine this issue. The Applicant's points in this regard are inadequate to persuade me. Further, the Public Body has not had any opportunity to address these speculative possibilities since they were not raised in the Applicant's submissions.

[para 114] With respect to the names and bail-related information of individuals involved in bail matters, the Applicant has failed to provide sufficient evidence that this information would be sufficiently valuable for subjecting the activities of the Public Body to scrutiny and that this factor overcomes the presumptions against disclosure, especially section 17(4)(b) (information in law enforcement records) and section 17(5)(h) (disclosure unfairly damaging to reputations).

[para 115] With respect to the personal information of JPs that may have been targeted by the Public Body, the Applicant has again failed to provide an argument as to why the names of the JPs would be necessary or valuable for subjecting the activities of the Public Body to public scrutiny. In contrast, the risk of harm to the reputations of the JPs is real and significant enough to outweigh the minimal value that the personal information might bring to public scrutiny of the Public Body's activities.

V. ORDER

[para 116] I make this Order under section 72 of the Act.

[para 117] I find that pages 100-103, 119, 120, 243-245, and the information excluded under section 4(1)(a) in pages 304 and 305 are excluded from the scope of the Act and outside my jurisdiction.

[para 118] I find that pages 122, 123 and 124 were improperly withheld under section 4(1)(a). I order the Public Body to disclose the information subject to severing under section 17. Pages 122 and 123 must be severed in the same manner as pages 119 and 120; page 124 must be severed in the same manner as page 121.

[para 119] I find that some of the information in pages 127, 128, and 131 was improperly withheld under section 20(4). I order the Public Body to disclose information on page 127, 128 and 131, once the information is severed per paragraphs 24 and 26.

[para 120] I find that information in pages 142, 152, 153, 240 and 241 was properly withheld under section 21(1)(b).

[para 121] I find that section 27(1)(a) applied to information severed in page 222.

[para 122] I find that the Public Body improperly applied section 17 in some instances. I order the Public Body to disclose the following information:

- The results of a CPIC check on pages 150 and 212
- The Public Body's ORI numbers on pages 154, 208, 223 and 224
- The forms on pages 249-252, once the personal information has been severed as per paragraph 81

[para 123] I find that section 17 was properly applied to the information in the remaining instances.

[para 124] I further order the Public Body to notify me and the Applicant in writing, within 50 days of being given a copy of this Order, that it has complied with the Order.

Amanda Swanek
Adjudicator