ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2012-12

May 15, 2012

ALBERTA HUMAN SERVICES

Case File Number F5489

Office URL: www.oipc.ab.ca

Summary: An individual had made a complaint to Employment Standards, a branch of Alberta Employment and Immigration (the Public Body, now part of Alberta Human Services) after having been terminated from his private-sector employer (the Organization). The Public Body investigated the individual's complaint under the *Employment Standards Code* (the *Code*). After the investigation by the Public Body had been concluded, the individual made an access request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) to the Public Body for copies of all documents and correspondence pertaining to the following:

- his employment and/or termination of employment with the Organization;
- his complaint against the Organization;
- his appeal of the decision by the Public Body under the *Code*; and
- his complaint made to the Alberta Ombudsman against the Public Body regarding the Public Body's decision and appeal.

The Public Body released 38 pages of records, with severing under sections 4(1)(d), 17, and 20(1)(d). The Applicant requested a review of the Public Body's response.

The Adjudicator determined that the Public Body had properly applied section 4(1)(d) to a letter written by the Public Body to the Ombudsman, and as such, the Adjudicator did not have jurisdiction with respect to that record.

The Adjudicator found that the Public Body did not properly apply section 20(1)(d) to any of the information severed under that provision, as the relevant information had been provided to the Public Body by the Organization as part of the Public Body's investigation into the Organization's actions; the Organization was therefore not a confidential source of law enforcement information.

The Adjudicator agreed with the Public Body's application of section 17 to some of the withheld records that could identify individuals who had made complaints about the Applicant to the Organization, but found that other information severed under section 17 was not personal information about an identifiable individual and could not be withheld.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 4, 17, 20, 24, 27, 72, *Employment Standards Code*, R.S.A. 2000, c. E-9, ss. 1, 128, 129, 132, *Ombudsman Act*, R.S.A. 2000, c. O-8, s. 21, *Personal Information Protection Act*, S.A. 2003, c. P-6.5, s.24.

Authorities Cited: AB: Orders 96-008, 96-019, 97-002, 97-007, 97-008, 97-017, F2000-010, F2000-019, F2003-005, F2004-015, F2004-016, F2007-021, F2008-008, F2008-012, F2008-028, F2008-031, F2009-009, F2009-016, F2010-007, F2010-029, F2011-018, F2012-010.

Cases Cited: *British Columbia Development Corp. v. Friedman (Ombudsman)*, [1984] 2 S.C.R. 447.

I. BACKGROUND

[para 1] In June 2005, an individual made a complaint to Employment Standards, a branch of Alberta Employment and Immigration (the Public Body, now part of Alberta Human Services) after having been terminated from his private-sector employer (the Organization). The Public Body investigated the individual's complaint under the *Employment Standards Code* (the *Code*) and concluded, in February 2005, that the individual had been terminated by the Organization with just cause. The individual appealed this decision, but his appeal was denied and the file was closed in March 2006.

[para 2] In March 2010, the individual made an access request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) to the Public Body for copies of all documents and correspondence pertaining to the following:

- his employment and/or termination of employment with the Organization;
- his complaint against the Organization;
- his appeal of the decision by the Public Body under the *Code*; and
- his complaint made to the Alberta Ombudsmen against the Public Body regarding the Public Body's decision and appeal.

[para 3] The Public Body subsequently clarified the request with the Applicant, who clarified that he wanted only records that did not originate from him. The Public Body

released 38 pages of records, with severing under sections 4(1)(d), 17, and 20(1)(d) (although the Public Body notes that it erroneously cited section 20(1)(c) instead of 20(1)(d) in its response to the Applicant).

[para 4] The Applicant requested a review of the Public Body's response. As mediation was unsuccessful, the matter proceeded to inquiry.

II. RECORDS AT ISSUE

[para 5] The records at issue are 35 severed or withheld pages of records that refer to the Applicant's termination of employment from the Organization, his subsequent complaint to the Public Body and his complaint to the Ombudsman. In many instances, names have been blacked out on these records in a manner different from that which the Public Body has used to indicate the information it has severed from the records in response to the access request (pages 33-40, 42, and 43). The Public Body has confirmed that these names were blacked out by the Organization when it provided the records to the Public Body for the Public Body's Employment Standards investigation under the *Code*; the Public Body does not have a completely unsevered copy of the records.

III. ISSUES

[para 6] The issues stated in the Notice of Inquiry dated May 18, 2011, are as follows:

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. **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)(d)?

[para 7] Section 4(1)(d) 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:*
>
> *…*
>
> *(d) a record that is created by or for or is in the custody or under the control of an officer of the Legislature and relates to the exercise of that officer's functions under an Act of Alberta.*
>
> *…*

[para 8] An "officer of the Legislature" is defined in section 1(m) of the Act:

> *1(m) "officer of the Legislature" means the Auditor General, the Ombudsman, the Chief Electoral Officer, the Ethics Commissioner, the Information and Privacy Commissioner or the Child and Youth Advocate*

[para 9] The Public Body has applied section 4(1)(d) to page 20, stating that it is a communication created for the Ombudsman. The Public Body states that if section 4(1)(d) applies to a record, the Public Body does not have the authority to disclose the record. This is not quite correct; rather, if section 4(1) applies to a record, the record is not subject to an access request under the FOIP Act. The Public Body may still choose to disclose the record at its discretion, but this would not be a disclosure under Part 1 of the Act (see Order 97-017, at para. 10). Either way, the Public Body correctly points out that if section 4(1)(d) applies to the record, I do not have jurisdiction to order the Public Body to disclose the record to the Applicant.

[para 10] In order to fall under section 4(1)(d), the following must be met:

> (i) the item must constitute a record;
> (ii) the record must be created by or for, or be in the custody of or under the control of, an officer of the Legislature; and
> iii) the record must relate to that officer's functions under an Act of Alberta

[Order F2007-021, at para. 34]

[para 11] With respect to the last element of the test, the Public Body states that the letter on page 20 relates to the Ombudsman's authority to compel a public body to respond to his recommendations under section 21(3) of the *Ombudsman Act*.

[para 12] Section 21 of that Act applies when the Ombudsman, after conducting an investigation, makes one of the following determinations regarding the public body's decision or act in question that are listed below. In such a case, the Ombudsman may make a recommendation to the Minister or public body, and request that the public body notify the Ombudsman of steps taken to give effect to those recommendations. The relevant portion of the provision states as follows:

> *21(3) If, when this section applies, the Ombudsman is of the opinion*
>
> *(a) that the matter should be referred to the appropriate authority for further consideration,*
> *(b) that the omission should be rectified,*
> *(c) that the decision should be cancelled or varied,*
> *(d) that any practice on which the decision, recommendation, act or omission was based should be altered,*
> *(e) that any law on which the decision, recommendation, act or omission was based should be reconsidered,*
> *(f) that reasons should have been given for the decision,*

(g) that the matter should be reheard or reconsidered by the appropriate authority, or
(h) that any other steps should be taken,

the Ombudsman shall report that opinion and the Ombudsman's reasons for it to the appropriate Minister and to the department or agency concerned or to the administrative head of the professional organization concerned, and may make any recommendations the Ombudsman thinks fit, and in that case the ***Ombudsman may request the department, agency or administrative head of the professional organization to notify the Ombudsman within a specified time of the steps, if any, that it proposes to take to give effect to the Ombudsman's recommendations***.(My emphasis)

(4) If within a reasonable time after the report is made under subsection (3) to the administrative head of a professional organization no action is taken that seems to the Ombudsman to be adequate and appropriate, the Ombudsman may, after considering the comments, if any, made by or on behalf of the professional organization, send a copy of the report to the appropriate Minister.

(5) If, within a reasonable time after the report is made to the appropriate Minister and the department or agency under subsection (3) or to the administrative head of a professional organization under subsection (3) and to the appropriate Minister under subsection (4), no action is taken that seems to the Ombudsman to be adequate and appropriate, the Ombudsman, in the Ombudsman's discretion after considering the comments, if any, made by or on behalf of the department, agency or professional organization, may send a copy of the report and recommendations to the Lieutenant Governor in Council and may afterwards make any report to the Legislature on the matter that the Ombudsman thinks fit.

(6) The Ombudsman shall attach to every report sent or made under subsection (5) a copy of any comments made by or on behalf of the department, agency or professional organization concerned.

[para 13] As page 20 is a letter from the Public Body to the Ombudsman in response to recommendations made by the Ombudsman, page 20 is a record that relates to the Ombudsman's exercise of authority under section 21(3) of the *Ombudsman Act*.

[para 14] Past orders of this office have considered the application of section 4(1)(d) to records in the custody or control of public bodies. The facts in Order 97-008 are very similar to the facts of the current case: an applicant had made an access request to a public body for its response to a report and recommendations made to that public body by the Ombudsman. The applicant in that case had argued that section 4(1)(d) (then section 4(1)(c)) did not apply to file copies of records created by the public body that had remained in the possession of the public body.

[para 15] Former Commissioner Clark found that file copies of a record to which section 4(1)(d) applies are excluded from the scope of the Act by section 4(1)(d) even though these copies are in the possession of a public body:

> While being mindful of the purpose of the *Ombudsman Act*, I find that for both statutes to operate harmoniously, file copies of Ombudsman's records, such as the Record, must be excluded from the Act's application. To make file copies subject to the Act, would be contrary to the spirit and intent of the *Ombudsman Act*. Such disclosure would in effect, trivialize the provisions in the *Ombudsman Act* which give the Ombudsman wide powers over his process and information.
>
> I think section 21(1) is particularly significant because it gives the Ombudsman control over where, when, and to whom, his recommendations are made known. He will only make them known when he believes that the Public Body has not acted adequately. If the Public Body acts, the Ombudsman does not divulge. To allow this Application would be to deprive the Ombudsman of that power.
>
> In accordance with the statutory interpretation principle that both acts be interpreted harmoniously and consistently, I interpret "custody and control" to include file copies of an original record. Consequently, a record need not be held by the Ombudsman to be "in the custody and under the control" of the Ombudsman. This interpretation of section 4(1)(c) reflects the unique role of the Ombudsman.

[Order 97-008, at paras. 34-36.]

[para 16] At the time that Order 97-008 was issued, section 4(1)(c) (now section 4(1)(d)) did not refer to "records created *by or for*… the officer of the Legislature", only to records "*created by*…" the officer of the Legislature:

> *4(1)(c) a record that is created by or is in the custody or under the control of an officer of the Legislature and relates to the exercise of that officer's functions under an Act of Alberta;*

[para 17] The word "for" was added to the provision in the 1999 amendments to the Act such that the record may be one that is created "by or for" an officer of the Legislature (there is little in the way of extrinsic evidence to indicate the intent behind this amendment). I prefer an alternative analysis of the application of section 4(1)(d) to page 20 of the records at issue based on the amended language of the provision; i.e. whether the records was "created by or for" the Ombudsman.

[para 18] I recognize that former orders of this office have consistently interpreted "by or for" with respect to other provisions in the FOIP Act as meaning "by or on behalf of." More specifically, past orders have clarified that in those provisions, "for" does not refer to a record or information simply on the basis that it was sent to the relevant recipient.

[para 19] This principle was first stated in Order 97-007. In that Order, a public body had argued that a briefing note prepared for and sent to a Minister was excluded from the scope of the Act under section 4(1)(q) (then section 4(1)(l)). Former Commissioner Clark found that "for" means "on behalf of", and that "the Legislature intended "for" to be understood as analogous to the word "by", meaning that the documents must emanate from the office of the Minister" (at para. 15). He further stated that:

> Although the Public Body's and the Intervenors' submissions are specifically in regard to ministerial briefing notes and not other documents which may be sent to a Minister, I am unable to avoid the logical conclusion that if briefing notes are excluded because they were "intended for" the Minister, anything else intended for the Minister would also be excluded. Again, it seems to me that this would run counter to the purpose of the Act. Since a Minister is the head of a Public Body, it could be argued that much of what the Public Body does is done to enable the Minister to do his or her job. That being the case, much of what a department does would be excluded from the Act. I do not believe that the Legislature intended this.

[Order 97-007, at para. 20]

[para 20] In Order F2008-008, the adjudicator considered the phrase "by or for" with respect to the application of section 24(1)(a):

> In my view, for information to be developed by or on behalf of a public body under section 24(1)(a) of the Act, the person developing the information should be an official, officer or employee of the public body, be contracted to perform services, be specifically engaged in an advisory role (even if not paid), or otherwise have a sufficient connection to the public body. I do not believe that general feedback or input from stakeholders or members of the public normally meets the first requirement of the test under section 24(1)(a), as the stakeholders or members of the public do not provide the information by virtue of any advisory "position". This is even if the public body has sought or expected the information from them.
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> To put the point another way, the position of the party providing information under section 24(1)(a) – or the relationship between that party and the public body – should be such that the public body has specifically sought or expected, or it is the responsibility of the informing party to provide, more than merely thoughts, views, comments or opinions on a topic. General stakeholders and members of the public responding to a survey or poll are not engaged by the public body in a sufficient advisory role. They have simply been asked to provide their own comments, and have developed nothing on behalf of the public body.
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> I distinguish the foregoing, however, from situations where a public body might ask a specific stakeholder – who has a particular knowledge, expertise or interest in relation to a topic – to provide advice, proposals, recommendations, analyses or policy options for it, thereby engaging the stakeholder to develop information "on behalf of" the public body. In other words, I do not preclude the possibility of a stakeholder providing advice, etc. by virtue of its position, and therefore within the meaning of section 24(1)(a) of the Act. In such a case, the stakeholder (again, even if not paid) would be specifically engaged in an advisory role and therefore have a sufficiently close connection to the public body. This may be what occurred in the context of the inquiries that gave rise to some of the previous orders of this Office, which are discussed above.

[Order F2008-008, at para. 42-44]

[para 21] Following Orders 97-007 and 2008-008, another adjudicator found that a record was created "for" a lawyer of a public body within the meaning of section 27(1)(b)

because the record indicated that the sender of the information was specifically asked to provide input:

> For section 27(1)(b) to apply to information, the information in question must be prepared by the lawyer or someone acting under the direction of the lawyer for the purpose that a lawyer will use the information in order to provide legal services to a public body.

[Order F2010-007, at para. 37]

[para 22] These interpretations indicate that under section 4(1)(d), a record created "for" the relevant recipient does not include unsolicited information sent to the recipient. Nor does it apply to even a solicited record simply on the basis that it is "intended for" or provided to the recipient. However, a third party (e.g. a stakeholder) may develop advice etc. for (understood as "on behalf of") a public body if it has a sufficiently close connection to the public body to be engaged in an advisory role. Similarly, information prepared and under the direction of a public body, to be used by that public body, may be "prepared for" (i.e. "on behalf of") that public body.

[para 23] "On behalf of" suggests that the information in question is such that the recipient may embrace or utilize it as its own. I recognize that that would not be the case with the information here at issue. Thus it would be somewhat inapt to refer to it as having been created on the Ombudsman's *behalf*.

[para 24] At the same time, however, the letter from the Public Body responding to the Ombudsman's recommendations is not unsolicited information. Further, in my view, the response differs in character from information that, though solicited, merely provides the views or opinions of third parties. Rather, the Public Body's response is required by the Ombudsman pursuant to his power to require it under his legislation *so that he may reach a decision as to whether the response is "adequate and appropriate" in his view*, which, in turn, governs the further courses of action he will follow. It seems to me that in these particular circumstances, there is a sufficiently close connection between the purpose of the record and the work of the Ombudsman for the record to be said to have been created "for" the Ombudsman, in the sense that it is created at his request and to allow him to decide what further actions to take relative to the matter.

[para 25] A recent Order of this office considered whether an argument made by a public body before an independent decision maker – another public body – was advice "prepared for" the public body making the decision for the purposes of section 24(1)(a). The adjudicator in that order said:

> In my view, it is not accurate to say that a party making arguments to an independent third party decision maker to support its case is developing advice or other information subject to section 24(1)(a) on behalf of that decision maker. The arguments are not made on behalf of the decision maker (in this case, the WCB), but on behalf of the party making the arguments. In a sense, one may consider the arguments of a party to reflect the party's decision to make particular arguments. However, as discussed above, section 24(1)(a) and (b) do

> not apply to decisions, but to certain kinds of information revealing how a decision was arrived at.
>
> … While it may be the role or responsibility of the employee of the Public Body to provide arguments to the WCB, it is not the responsibility of such an employee to *advise* the WCB. It is clear from the content of the email that the author's purpose was to argue the Public Body's case. Arguments made to an independent decision maker are not subject to either section 24(1)(a) or (b).

[Order F2012-10, at paras. 100-101]

[para 26] The situation discussed in Order F2012-10 has some similarities to the situation at hand, but is not the same. Both involve communications from a public body to an independent decision maker regarding an investigation by that decision maker. However, the analysis in Order F2012-10 does not turn on whether arguments made to the decision maker are "for" that decision maker; rather, the point was that the arguments were not *advice* prepared for the decision maker. Even applying the broader interpretation of "for" to the situation in Order F2012-10, the public body's arguments to the decision maker – even if it could have been said to have been prepared *for* the decision maker – would not have been *advice* prepared for the decision maker.

[para 27] Section 4(1)(d) has a broader scope than section 24(1)(a). There is no requirement that the public body was advising the Ombudsman, only that the record was *created* for the Ombudsman. Previous orders have stated that records coming into existence *prior to* an investigation by an Officer of the Legislature are not excluded by section 4(1)(d) (see Order F2011-018, at para. 15), because those records would not have been created at the request of the Officer of the Legislature pursuant to his or her statutory authority to request or require them.

[para 28] In this case, the letter written by the Public Body to the Ombudsman was clearly created directly in response to the Ombudsman's recommendations to the Public Body and his request for the Public Body's response to those recommendations.

[para 29] I note also that the interpretation here under discussion of section 4(1)(d) captures the importance of the role of the Ombudsman, as discussed by the Supreme Court of Canada in *British Columbia Development Corp. v. Friedman (Ombudsman)*, [1984] 2 S.C.R. 447. The Court's comments related to BC's *Ombudsman Act*; however, the provisions discussed are substantially similar to those in Alberta's Act such that the comments are applicable:

> It is important to note that the Ombudsman has no power directly to force any governmental authority to remedy a wrong he uncovers. The Act does, however, create a variety of mechanisms whereby the Ombudsman may move the government to implement any decision he reaches after an investigation. He may recommend corrective action to an authority who must then notify him of what action will be taken, if any, and where no action is planned the reasons why (s. 23). If the Ombudsman remains unsatisfied, he may report the matter to the Lieutenant Governor in Council and to the Legislative Assembly (s. 24). And he may comment publicly on any case where he deems it appropriate (s. 30).

> It is these sections that ultimately give persuasive force to the Ombudsman's conclusions: they create the possibility of dialogue between governmental authorities and the Ombudsman; they facilitate legislative oversight of the workings of various government departments and other subordinate bodies; and they allow the Ombudsman to marshal public opinion behind appropriate causes.
>
> Read as a whole, the Ombudsman Act of British Columbia provides an efficient procedure through which complaints may be investigated, bureaucratic errors and abuses brought to light and corrective action initiated. It represents the paradigm of remedial legislation. It should therefore receive a broad, purposive interpretation consistent with the unique role the Ombudsman is intended to fulfill. There is an abundance of authority to this effect.

[para 30] The role of the Ombudsman's authority to investigate and require information and responses from government bodies supports an interpretation of "for" that distinguishes records created at the request of the Ombudsman related to the exercise of his or her statutory function, from records that may be merely intended for or sent to an officer of the legislature or another public body.

[para 31] For the foregoing reasons, I find that section 4(1)(d) applies to page 20, and I do not have jurisdiction under the FOIP Act with respect to this record.

[para 32] Before leaving this section I note that it does not necessarily follow from my determination that the word "for" applies to cover the record at issue in the present case, that any record requested by an officer of the Legislature or provided to that officer to enable the officer to fulfill their function will likewise be covered. Whether it is will depend on the particular circumstances, including nature of the power to require the record and the nature of the record.

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

[para 33] The Public Body applied section 20(1)(d) to some information in 11 pages of records. This provision states:

> *20(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*
>
> *...*
>
> *(d) reveal the identity of a confidential source of law enforcement information,*
>
> *...*

[para 34] In order for section 20(1)(d) to apply, the Public Body must establish that (i) law enforcement information is involved, (ii) there is a confidential source of law enforcement information, and (iii) the information in question could reasonably be expected to reveal the identity of that confidential source (Order 96-019).

[para 35] "Law enforcement" is defined in section 1(h) of the Act, as follows:

1(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 36] The Public Body argues that the Employment Standards section of the Public Body was conducting a law enforcement investigation when considering whether the Applicant had been terminated by the Organization with cause. As part of its Employment Standards investigation, the Public Body had ordered the Organization to produce records related to the Applicant's termination. Some of the records produced by the Organization, which now comprise part of the records at issue, included statements about the Applicant made by other employees (whom I will hereafter refer to as the complainants) of the Organization. These statements were taken in the course of an internal investigation by the Organization into complaints made about the Applicant while he was employed with the Organization.

[para 37] The Public Body argues that the complainants who provided statements to the Organization in the course of its investigation of the Applicant's conduct are confidential sources of law enforcement information. In the Applicant's view, this argument of the Public Body only makes sense if the Public Body had been investigating the harassment complaints for which the complainant's statements were made. He states that

> In this matter, there were in fact **two** investigations. The first investigation was conducted by the employer in determining whether harassment had occurred whereby the complainants were the sources of information. The second investigation was conducted by [the Public Body] to determine the validity of the employer's claim of termination with cause whereby I was the source of information. The public body has taken elements of each investigation and treated them as though there were regarding a single investigation.
>
> With regards to the first investigation, the employer is not a law enforcement agency nor does it have any law enforcement powers. Therefore the [Organization's employees] cannot be consider sources of *law enforcement* information in the first investigation, and section 20(1)(d) does not apply.
>
> With regards to the second investigation, since I was the complainant against the employer and I am not a third party, section 20(1)(d) does not apply in any way to the second investigation (i.e. the one conducted by [the Public Body]).

[para 38] I largely agree with the Applicant regarding the Public Body's application of section 20(1)(d). The complainant's statements were collected by the Organization in the course of its own investigation into the harassment allegations against the Applicant. The Public Body acknowledges this, and even states that the complainants' "could not have anticipated that their statements would have gone beyond the Employer."

[para 39] "Law enforcement" includes administrative investigations that could lead to a penalty or sanction. The penalty or sanction must result from the violation of a statute or regulation; a breach of policy or of terms of employment do not fulfill this requirement (Order 2000-019 at paras. 66-67; Order F2003-005 at para. 68; Order F2009-016 at para. 22). Therefore the Organization was not conducting a law enforcement investigation when it was investigating the Applicant's conduct, and the statements provided to the Organization by its employees were not provided in the course of a law enforcement investigation.

[para 40] In Order 96-019, former Commissioner Clark considered whether information that was not collected as part of a law enforcement investigation becomes law enforcement information when it is later brought into an investigation for the purposes of section 20(1)(d) (then section 19(1)(d)):

> Does the act of forwarding non-law enforcement information make that information "law enforcement information" merely because it has been brought into the investigation? In my view, the answer is no. If the original information is not law enforcement information, I fail to see how that information can suddenly become law enforcement information merely because it has been passed on during the course of the investigation.

[Order 96-019, at para. 24]

[para 41] Following this reasoning, since the complainants' statements were not law enforcement information when collected by the Organization, they did not become law enforcement information when subsequently collected by the Public Body. This is regardless of whether the Public Body's investigation under the *Code* was a law enforcement investigation.

[para 42] Both the Public Body and Applicant also make arguments regarding the complainants' expectation of confidentiality in providing their statements to the Organization. However, as I have found that the complainants' statements are not law enforcement information, I do not have to consider whether they were provided in confidence.

[para 43] Even were the Public Body conducting a law enforcement investigation as argued, the source of the information provided to the Public Body for that investigation was largely the Organization, as well as the Applicant; neither were providing information to the Public Body as a confidential source.

[para 44] The Public Body also argued that "even if some of the information [withheld under section 20(1)(d)] was not upheld as law enforcement information, it still meets the criterion for being withheld under the test for disclosure." The Public Body cites as support Order 96-019, which states:

> Under this part of the test, the public body may refuse to disclose information that could reasonably be expected to reveal the identity of the confidential source. Section 19(1) [now 20(1)] does not say that the information that could reveal the identity has to be law enforcement information; it just says *information*. Consequently, under section 19(1)(d) [now 20(1)(d)], the identity of the confidential source of law enforcement information can be contained in any other information, whether that information is in a document produced during the course of the investigation or afterward. The identity does not have to be contained in the law enforcement information itself. The only limitations are that disclosure of the information could reasonably be expected to reveal the identity, and there must be a confidential source of law enforcement information.
>
> To interpret section 19(1) as referring to disclosure of only law enforcement information would potentially allow for disclosure of the identity of a confidential source by including that identity in non-law enforcement information (that is, in information produced outside the law enforcement context). I do not think that is the intent of section 19(1)(d), especially given that the information in the post-investigation records has come into being by virtue of the information produced during the course of the investigation.

[Order 96-019, at paras. 32-33, emphasis in original]

[para 45] In my view, what the former Commissioner is saying in the quoted paragraphs is that once there is a confidential source of law enforcement information whose identity could be revealed by the disclosure of certain information, it does not matter if that certain information is itself law enforcement information or contained in a law enforcement record. The purpose of the provision is to protect the identity of an individual who provided *law enforcement information* in confidence; to allow the "identity-revealing" information to be disclosed because it is located in a non-law enforcement record would undermine this purpose. That said, there must still be a confidential source of *law enforcement information*, whose identity is at risk of being revealed for section 20(1)(d) to be triggered. In this case, the Public Body has failed to persuade me that there is any source, whether confidential or not, of *law enforcement information*.

[para 46] The Public Body also argues that the records at issue would likely not have been disclosed under other privacy legislation, specifically the *Personal Information Protection Act* (PIPA). The Public Body points out that the Applicant could have requested access to the records from the Organization under PIPA, although it seems that such a request would not have included records in the custody or control of the Public Body relating to his complaint about the Organization to the Public Body, his appeal of the Public Body's decision, or his complaint to the Ombudsman, which makes up three quarters of his access request to the Public Body. Under PIPA, the Organization would have, according to the Public Body, "limited [the Applicant's] right of access based on

the information being collected for investigative purposes." The Public Body cites sections 24(2) and (3), which are the discretionary and mandatory exceptions to access under that Act.

[para 47] The Public Body further states in its submission that "[i]n accordance with Driedger's principles of statutory interpretation, similar legislation is to act harmoniously. It is not reasonable that the Applicant could obtain under FOIP what he would not be able to access under PIPA."

[para 48] The fact that the same information may be accessible under FOIP when in the custody or control of a public body, but not accessible under PIPA when in the custody or control of an organization, does not mean that the two Acts are acting in conflict or are otherwise in discord. While these Acts both deal with access to information and the protection of personal information, their purposes and function are significantly different.

[para 49] PIPA addresses only an individual's access to his or her own personal information in the custody or control of an organization. That right of access is subject to the exceptions in the Act, and an overarching principle of reasonableness. In comparison, FOIP provides a right of access to *all* information in the custody or control of a public body, subject only to the exclusions and exceptions in the Act.

[para 50] Further, both section 6(1) and section 16 of the FOIP Act clearly contemplate the ability to request access to an organization's business information in the custody or control of a public body (if, for example, the organization was a contractor of the public body), yet PIPA does not allow an individual to request access to that same information directly from that organization. In other words, it is entirely reasonable that an individual may be able to request access to information under the FOIP Act that he or she could not request under PIPA.

[para 51] I find that section 20(1)(d) does not apply on the basis that there is no confidential source of law enforcement information in the records at issue. I will consider next whether any of the information to which the Public Body applied section 20(1)(d) should be withheld under section 17.

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

Is the withheld information "personal information" under the FOIP Act?

[para 52] 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 53] The Public Body states that the records at issue contain information about identifiable individuals as follows:

- names of third parties (pages 4 and 22);
- personal feelings of third parties (pages 6 and 14);
- personal information about third parties that is not related to employment duties (pages 4 and 6);
- signatures of third parties (pages 23, 32 and 44);
- investigative interview records between third parties and the employer (pages 34 and 43);
- handwritten records of third party complaints against the Applicant (submitted to the employer) (pages 33, 36, 37 and 40-42); and
- records that would reveal the gender of third party complainants (pages 6, 38, 39).

[para 54] The index of records indicates that information from the following pages was also severed under section 17, though this is not specifically referred to in the Public Body's submissions: 3, 7, 8, 10, 12, 13, 17, 18, 35, and 44. I will apply the Public Body's arguments to the severed information in these pages as well.

[para 55] Across the top of pages 24-44 is information typically found on faxed pages: the time and date the pages were faxed, number of pages, as well as the name and fax number of the organization from which the pages were faxed. In this case, the Organization's name appears across the top of these pages, along with what I assume is its fax number. The Public Body has severed the Organization's fax number from the top of pages 24-44, citing section 17. An organization's fax number is not personal information, and the Public Body has not specifically addressed how section 17 might apply to this information. I find that the Organization's fax number cannot be withheld under section 17.

[para 56] The Public Body also severed pronouns under section 17, citing Order F2009-009 in support of its argument that gender might be about an identifiable individual depending on the number of individuals involved (i.e. if the gender alone could sufficiently narrow the number of individuals the information could be about). In this case, it is apparent from the content of the records that the Organization received complaints from several employees about the Applicant, and that many individuals of the same gender worked for the Organization. There is no reason for me to expect, and the Public Body has not provided any evidence to indicate that revealing the gender of the individuals in the records at issue could identify those individuals. For this reason, the pronouns in the records are not personal information that can be withheld under section 17.

[para 57] The Applicant agrees with the Public Body that names are appropriately severed from the records at issue under section 17, stating in his initial submission, "I agree with the conclusion that the names (which are already blacked out) should be omitted because of [section 17(4)(g)] of the act, but it does not follow logically that any other information should be omitted." The Applicant's objection then is to the severing of information other than names of individuals under section 17. In all but one instance the names of the complainants are completely blacked out from the records by the Organization. I note that names were severed from pages 3, 4, 6-8, 10, 12-14, 17, 18, 22, 23, 32, 34, 35, 39, 43, and 44.

[para 58] The Public Body has severed the names and titles of employees of the Organization, other than the employees who had made complaints about the Applicant. 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, noting that

> 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)

[Order F2008-028, para. 53, emphasis in original]

[para 59] The adjudicator also noted that this principle had been applied to information about 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.

[para 60] Following the above principle, I find that the job titles severed by the Public Body are not personal information that can be withheld under section 17.

[para 61] The information in the records at issue about the complainants includes the content of their complaints and in one instance, a first name and last initial. Pages 33, 36, 37 and 40-42 are copies of the handwritten complaints. The nature of the handwriting and

choice of language could reveal personal information about the complainants; as well, although the complaints were made in the context of the complainant's employment, in my view the complainants were not merely acting in the course of their employment duties. I will therefore consider whether the disclosure of the handwritten complaints would be an unreasonable invasion of privacy under section 17.

[para 62] In other records (pages 18, 34, 38, 39 and 43), the complaints are paraphrased or quoted in a typed format. While the complaints may be the personal information of the complainants, with the names severed, I find that the remaining information does not identify a particular individual complainant. Information severed by the Public Body under section 17 includes pronouns that reveal gender (discussed above), as well as sentences indicating a complainant's discomfort with having his or her name revealed to the Applicant (page 6), phrases indicating an individual's relationship status (page 43), a paraphrase of a question posed by the Applicant to one of the complainants (page 43), and a phrase indicating the gender of an unnamed individual other than the complainant (page 38). On the face of the records, this information is sufficiently general and the Public Body has not provided any arguments to support the position that this information would reveal the identity of a particular individual.

[para 63] I note that the paraphrased complaints on pages 6, 18, 34 and 43 include details of specific incidents that, in another context, might be sufficient to identify the complainant. However, given the number of complainants, the similarity of the incidents complained about, and the amount of time that has elapsed since the incidents complained about, in my view these paraphrased complaints do not identify the respective complainant.

[para 64] The Public Body also severed sentences indicating the discomfort of an employee (other than a complainant) with giving his or her home number to the Public Body (page 14) and mention of an illness-related absence (page 4); as above, with the name severed, the sentence itself does not reveal personal information of an identifiable individual.

[para 65] I find that only the handwritten statements of the complainants contain personal information to which section 17 may apply. I will consider whether the disclosure of these statements would be an unreasonable invasion of the complainants' privacy.

Would the disclosure of the personal information be an unreasonable invasion of privacy?

[para 66] The Public Body argues that sections 17(4)(b) and (g) apply to the withheld information. Section 17 states in part:

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

...

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

(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,

...

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

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

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

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

...

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

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

...

[para 67] The Public Body and Applicant agree that section 17(2), which enumerates situations in which the disclosure of personal information is not an unreasonable invasion of a third party's privacy, does not apply to the records at issue.

[para 68] I found above that section 20(1)(d) did not apply to the employee statements because the employees were not providing law enforcement information. Section 17(4)(b) applies more broadly, and requires only that the personal information be an identifiable part of a law enforcement record. All of the records at issue are from the investigation performed by the Employment Standards branch of the Public Body. Both the Applicant and the Public Body provided arguments on whether the Employment Standards investigation is "law enforcement" for the purposes of section 20(1)(d) the FOIP Act; these arguments are also relevant here.

[para 69] According to the Public Body, the Applicant "requested an investigation by Employment Standards for the purpose of determining whether he had been wrongfully terminated and was consequently owed earnings under the *Code*." It pointed out that an employer's failure to pay earnings to an employee is a prohibition under the *Code* to which an offence is attached. The relevant provisions of the *Code* are as follows:

> *1(1)(j) "earnings" means wages, overtime pay, vacation pay, general holiday pay and termination pay;*
>
> …
> *128 No employer may*
>
> *(a) fail to pay earnings to an employee or to provide anything to which an employee is entitled under this Act;*
>
> *...*
>
> *129 A person who contravenes section 52, 53.4, 65, 124, 126, 127 or 128 or a regulation made under section 138(1)(e) is guilty of an offence.*
>
> *...*
>
> *132(1) An employer, employee, director, officer or other person who is guilty of an offence under this Act is liable,*
>
> *(a) in the case of a corporation, to a fine of not more than $100 000, and*
>
> *(b) in the case of an individual, to a fine of not more than $50 000.*
>
> *(2) In addition to any other penalty imposed under subsection (1), the judge who convicts the person may make an order requiring payment, within the time fixed by the judge, to the Director on behalf of each employee affected, of an amount not exceeding the sum that an officer, the Director or an umpire could have ordered or awarded.*

[para 70] The Applicant argues that the Public Body was not conducting a law enforcement investigation when it investigated his complaint against the Organization. He states that the Public Body "was not investigating the employer with regards to violating section 128 or any other section of the code. The public body investigated the employer's claim that they had *terminated with cause*. The code in fact gives the employer the right to make such a claim. The investigation was only to determine whether the claim was valid" (emphasis in original).

[para 71] It is apparent from the Applicant's access request that he made a complaint against the Organization regarding his termination, and the records sought are related to that complaint. The Public Body argues that it was investigating whether the Organization had just cause to terminate Applicant, "which would then waive the Applicant's right to termination pay. Failure to pay earnings is rationally linked to termination without cause, a section 128 violation and an offense under the *Code*."

[para 72] In Order F2010-029, the adjudicator found that an investigation under the *Code* is a law enforcement investigation for the purposes of section 17(4)(b) of the FOIP Act:

> … In this case, the records in which the information at issue appears were generated in the context of the Public Body's administrative investigations under the *Employment Standards Code* (see, e.g., sections 77 and 82 to 85), and they include the complaints giving rise to the investigations. The Affected Party may be subject to a penalty or sanction under the *Employment Standards Code* for failing to pay earnings or provide anything to which an employee is entitled (see sections 128 and 129).

[Order F2010-029, at para. 121]

[para 73] I disagree with the Applicant's characterization of the Public Body's investigation. Had the Public Body found that the Organization's claim of just cause for termination was *not* valid (to use the Applicant's language), then it seems to me that the logical conclusion would be that the termination was without cause and the Applicant was entitled to termination pay under section 128. As noted by the Public Body, failure to pay earnings is an offense with an associated penalty under the *Code*. Therefore I find that section 17(4)(b) is an applicable factor weighing against disclosure.

[para 74] The Public Body also applied section 17(4)(g) to the severed information. However, as the Applicant does not object to the severing of the names of individuals in the records, this section does not apply.

[para 75] The presumptions against disclosure in section 17(4) must be weighed against the factors listed in section 17(5) (and any other relevant factor).

[para 76] The Applicant argues that the reports that are withheld or severed are reports on events at which he was present. The Public Body responds that an applicant's prior knowledge does not create a right of access (citing Order 96-008). I note that with respect to the reports that recount meetings with the Applicant (pages 22, 35, 38 and 39) I have found that the severed information – other than the severed names – is not personal information to which section 17 applies.

[para 77] The Applicant also argues that section 17(5)(a) weighs in favour of disclosing the personal information in the records. He argues that he is scrutinizing the decisions of the Public Body related to his complaint about his termination and planning to make a complaint to the Ombudsman regarding the Public Body's actions (although this process appears to have been pursued by the Applicant already), and that he requires the disclosure of as much information in the records as possible.

[para 78] For section 17(5)(a) to apply, there must be evidence that the activities of a 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).

[para 79] The Applicant argues that "[t]hough public scrutiny often refers to scrutiny made by a large portion of the public, it is still valid if this scrutiny is made by even one member of the public." However, the Applicant's arguments refer only to the Public Body's decision concerning his own complaint, specifically that the decision maker showed bias in coming to a determination about the Applicant's complaint. Whether or not the records at issue indicate any bias such that there is a public component required by section 17(5)(a), in my view the disclosure of the personal information of the third parties in the records would not shed light on the Public Body's actions or decisions.

[para 80] With respect to section 17(5)(b), the Applicant argues that if his case before the Ombudsman is successful, the Ombudsman will make recommendations for changes to the Public Body's processes that would promote public safety and the preservation of individual rights. He adds that the disclosure of the personal information in the records would allow him to make a more effective argument before the Ombudsman, which would assist the Ombudsman to more effectively discharge his duties. I find this argument too speculative for section 17(5)(b) to weigh in favour of disclosure.

[para 81] Four criteria must be fulfilled 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 which the appellant is seeking access to 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 F2008-012 at para. 55, Order F2008-031 at para. 112).

[para 82] In Order F2008-012, the adjudicator found that a fair determination of the applicant's rights required that the applicant know the substance of the concerns and allegations on which a particular decision was based. In Order F2008-031, cited by the Applicant, the adjudicator similarly found that identities and comments made by third parties were relevant to a fair determination of the applicant's rights.

[para 83] The Applicant argues with respect to section 17(5)(c) that in the interests of preserving his rights, he needs to make his case before the Ombudsman, and that if his case were to proceed to judicial review, he would be given all evidence pertaining to the case. It seems to me that the Applicant has already made a complaint to the Ombudsman regarding the Public Body's investigation into the Organization's actions and that the Ombudsman has investigated and made recommendations to the Public Body. The Applicant has not specified what further complaint he anticipates making to the Ombudsman, except to state that "part of [his] complaint to the Ombudsman is that [the Public Body] was not administratively fair in its decision because it did not require the employer to follow its own policies with regards to its investigation or any other fair investigative practice." The Applicant has also stated that his ability to make arguments has been hindered by having to speak hypothetically.

[para 84] Even if the Applicant has a legal right, the Applicant has not provided me with sufficient detail to find that the severed personal information in the records is required for the Applicant's complaint to the Ombudsman. I note that the Applicant has a copy of the Organization's harassment policies, and I intend to order the Public Body to disclose information about the substance of the complaints made by the Applicant's coworkers. Therefore I find that section 17(5)(c) is not a factor weighing in favour of disclosure of the personal information in this case.

[para 85] The Public Body argues that section 17(5)(e) weighs against the disclosure of the personal information in the records. It states that

> even though the Applicant has received sufficient records to know the complaints made against him, he remains focused on receiving the withheld records of third parties who were harassed by the Applicant in a work environment. The Applicant's request for the complainant's statements may be a veiled attempt to make unsolicited contact with the complainants.

[para 86] The Public Body states that its concerns are similar to concerns of the public body in Order F2004-016 in which the adjudicator found that section 17(5)(e) was a relevant factor. However, the adjudicator in that case also noted that evidence from the applicant's own submissions indicated that the applicant intended to contact the third parties. In this case, the Applicant denies having this ulterior motive. The Public Body states that "[i]t is both relevant and noteworthy that the records at issue involve personal information of individuals who believed they were being harassed in the workplace by the Applicant." I note that the severed information does not include names or contact information for the complainants, with one exception (a first name and last initial was severed by the Public Body on page 22). Given that the Applicant is not seeking the disclosure of names of individuals in the records, I find the Public Body's concerns in this regard to be speculative and I do not consider section 17(5)(e) to be a relevant factor.

[para 87] The Public Body argues that section 17(5)(f) also weighs against the disclosure of the personal information in the records. The Public Body points to page 6 of the records at issue, which records a complainant's express wish that her identity not be told to the Applicant. The Applicant argues that the Organization's harassment policy indicates that the identity of a complainant will be made known to the employee being complained about. I have read the policy and disagree with this interpretation. Although the policy outlines a conciliation process in which both the complainant and the individual complained about would discuss the issue with a third party, this is a voluntary process. If this process is not chosen, there is no indication that the identity of the complainant would be disclosed to the individual complained about. I agree with the Public Body that, given the nature of the complaints, the complainants had a reasonable expectation of confidentiality when they made complaints about the Applicant to the Organization.

[para 88] I have found that section 17 applies only to the handwritten complaints on pages 33, 36, 37 and 40-42. I find that there are no factors in section 17(4) or (5) that weigh in favour of disclosing these complaints.

[para 89] The handwritten complaints contain the Applicant's own personal information. Generally an applicant's personal information cannot be withheld; however, as the Public Body notes, "in [Order 2000-010], it is found that where most of the personal information relates to other individuals besides the applicant, or where the information of the applicant and a third party is intertwined such that severing would be insufficient to protect the identity of a third party, then the third party information must be liberally severed (para. 35)."

[para 90] As an opinion about an individual is that individual's own personal information under section 1(n)(viii), the information in the handwritten complaints is the Applicant's personal information. I agree that it is not possible to sever the Applicant's own personal information from the personal information of third parties in the handwritten complaints. Although this means withholding information about the Applicant, most of the content of those complaints has been reproduced in other records that I will be ordering the Public Body to disclose to him.

V. ORDER

[para 91] I make this Order under section 72 of the Act.

[para 92] I find that section 4(1)(d) applies to page 20, which is therefore excluded from the scope of the Act and outside my jurisdiction.

[para 93] I find that the Public Body did not properly apply section 20(1)(d) to the severed information.

[para 94] I find that the Public Body did not properly apply section 17 to the severed information except the handwritten complaints on pages 33, 36, 37 and 40-42.

[para 95] I order the Public Body to disclose the withheld information, except pages 20, 33, 36, 37 and 40-42 per above to the Applicant.

[para 96] I further order the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that it has complied with the Order.

Amanda Swanek
Adjudicator