ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2013-03

January 31, 2013

LEDUC COUNTY

Case File Number F5433

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Summary: Under the *Freedom of Information and Protection of Privacy Act* (the "Act"), the Applicant asked Leduc County (the "Public Body") for copies of any complaints made by others about her, and various other information. The Public Body withheld some of the requested information under sections 17(1), 19(2) and 27(1)(c)(iii) of the Act, and the Applicant requested a review. She also requested a review into whether the Public Body had conducted an adequate search for the requested information, as required by section 10(1) of the Act.

The Adjudicator found that the Public Body did not meet its duty to assist the Applicant under section 10(1), as it had not conducted an adequate search for certain records. He accordingly ordered the Public Body to do so.

The Adjudicator found that section 17(1) applied to some of the information that the Public Body withheld, as its disclosure would be an unreasonable invasion of the personal privacy of third parties. He therefore confirmed the decision of the Public Body to refuse the Applicant access to the information. He found that section 17(1) of the Act did not apply to other information, and required the Public Body to give the Applicant access to it.

The Adjudicator found that the Public Body properly applied section 19(2) to some of the information that it withheld under that section, as its disclosure could reasonably identify a participant in a formal employee evaluation process involving the Applicant. He

accordingly confirmed the decision of the Public Body to refuse the Applicant access to the information.

The Adjudicator found that the Public Body did not properly apply section 19(2) to other information. He therefore required the Public Body to give the Applicant access to it, with the exception of information the disclosure of which the Adjudicator found would be an unreasonable invasion of the personal privacy of third parties.

The Adjudicator found that that the Public Body did not properly apply section 27(1)(c)(iii) to some of the information that it withheld under that section, as it was not information in correspondence between a lawyer of the Public Body and any other person in relation to a matter involving the provision of advice or other services by the lawyer. He therefore required the Public Body to give the Applicant access to the information.

The Adjudicator found that other information that the Public Body withheld under section 27(1)(c)(iii) fell within the scope of the section, but that the Public Body had not shown that it properly exercised its discretion to withhold it. He therefore ordered the Public Body to reconsider its decisions to refuse access to the information.

Statute Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(n), 1(n)(viii), 10(1), 17(1), 17(2), 17(2)(b), 17(2)(c), 17(2)(e), 17(2)(j), 17(4), 17(4)(d), 17(4)(f), 17(4)(g), 17(5), 17(5)(a), 17(5)(c), 17(5)(f), 17(5)(i), 19(2), 19(3), 27(1)(a), 27(1)(c), 27(1)(c)(iii), 27(2), 32(1), 35(a), 67(1)(a)(ii), 71(1), 71(2), 72, 72(2)(a), 72(2)(b), 72(2)(c), 72(3)(a) and 72(4).

Orders Cited: AB: Orders 97-002, 97-011, 98-007, 98-008, 98-016, 99-027, 99-028, 2000-019, 2001-016, F2002-019, F2003-001, F2003-005, F2003-014, F2004-015, F2004-026, F2004-028, F2005-016, F2005-019, F2006-006, F2006-025, F2006-030, F2007-004, F2007-029, F2008-012, F2008-020, F2008-028, F2008-031, F2009-001, F2009-018 and P2007-002.

Case Cited: *University of Alberta v. Pylypiuk*, 2002 ABQB 22.

Other Source Cited: *Oxford Dictionaries* (online), retrieved January 10, 2013 from http://oxforddictionaries.com/.

I. BACKGROUND

[para 1] The Applicant was employed by Leduc County (the "Public Body") from December 2005 to August 2008, at which time she was terminated. In a form dated March 25, 2010, she made a request to the Public Body under the *Freedom of Information and Protection of Privacy Act* (the "Act") for copies of any complaints made by others about her, which directly or indirectly resulted in a written warning from her supervisor being placed on her personnel file in April 2008. She specified various individuals and organizations that she suspected of making complaints about her, asking for all such complaints regardless of when they were made and even if they did not give

rise to the disciplinary action taken against her. The Applicant also asked for copies of all documents containing the facts that gave rise to the disciplinary action; all documents submitted to the Public Body's lawyer in relation to a particular individual's complaint about her and the lawyer's response letter; all memoranda and letters submitted to her two supervisors (the County Manager and Deputy County Manager) over a particular period, regarding her health and stress in the workplace, and their responses; her original performance evaluation submitted in March 2008; her own complaints filed against certain individuals regarding incidents of perceived harassment, bullying, violent behavior, physical assaults and health concerns in the workplace; and the contents of one of her supervisor's file in relation to her.

[para 2] By letter dated April 20, 2010, the Public Body granted access to 118 pages of information, but refused to disclose other pages on the basis that the information on them was excepted from disclosure under section 17 (disclosure harmful to personal privacy), section 19(2) (confidential evaluations) or section 27(1)(c)(iii) (information in correspondence to or from an agent or lawyer).

[para 3] In correspondence dated June 17, 2010, the Applicant requested a review of the Public Body's decision to withhold the information that it withheld. She also alleged that the Public Body had not adequately searched for all records responsive to her access request. The Commissioner at the time authorized a portfolio officer to investigate and try to settle the matter, but this was not successful. The Applicant then requested an inquiry, in a form and accompanying correspondence dated September 27, 2010. The matter was set down for a written inquiry.

[para 4] On April 7, 2011, I held a pre-hearing conference with the Applicant and a representative of the Public Body in order to determine the scope of the issues in the inquiry, among other things.

[para 5] As contemplated by section 67(1)(a)(ii) of the Act, this Office notified several individuals of the Applicant's request for review, as I considered them to be affected by it. Two individuals chose to participate in the inquiry as affected parties. One is the Applicant's former supervisor, who is no longer employed by the Public Body but is the individual who placed the written warning on her personnel file. He consented to being identified to the Applicant for the purpose of this inquiry. The other affected party's identity was not disclosed to the Applicant, as she did not consent. She was one of the individuals who effectively complained about the Applicant to the Public Body and her identity is therefore part of the information at issue in this inquiry.

II. RECORDS AT ISSUE

[para 6] As set out in an Index of Records prepared by the Public Body and provided to the Applicant and me, the records at issue consist of 107 pages of various e-mail correspondence, letters, memoranda and handwritten notes.

[para 7] The Public Body also provided me with a copy of the records that it decided to release to the Applicant in response to her access request.

III. ISSUES

[para 8] The Notice of Inquiry, dated July 4, 2011, set out the following issues:

> Did the Public Body meet its duty to assist the Applicant, as provided by section 10(1) of the Act?
>
> Does section 17(1) of the Act (disclosure harmful to personal privacy) apply to the records/information?
>
> Did the Public Body properly apply section 19(2) of the Act (confidential evaluations) to the records/information?
>
> Did the Public Body properly apply section 27(1)(c)(iii) of the Act (information in correspondence to or from an agent or lawyer) to the records/information?

[para 9] Following the pre-hearing conference on April 7, 2011, I wrote to the parties on April 11, 2011, regarding the scope of the issues in the inquiry. Although the Applicant had raised an issue in relation to section 35(a) of the Act (accuracy and completeness of her personal information), I indicated that the inquiry would not initially address this issue. I considered it more efficient to first decide whether the Applicant was entitled to any additional information in response to her access request. If I were to order the Public Body to release more information to her, the Applicant would then be in a better position to comment on the accuracy and completeness of her personal information. This mode of proceeding would also avoid splitting the issue in relation to section 35(a) (i.e., addressing the accuracy and completeness of the information already released to the Applicant, and then later having to address the accuracy and completeness of any other information subsequently released to her).

[para 10] In the Applicant's request for review, her request for inquiry and the parties' submissions, reference is made to whether disclosure of the information requested by the Applicant is "in the public interest". While this is the language used in section 32(1) of the Act, I did not include an issue in relation to section 32 for the purposes of this inquiry. I considered the substance of the parties' submissions to be more appropriately addressed in the context of section 17(5)(a) (whether disclosure is desirable for the purpose of subjecting the activities of the Public Body to public scrutiny). Accordingly, I deal with the parties' submissions in relation to public interest in the part of this Order that addresses the application of section 17(1).

IV. DISCUSSION OF ISSUES

A. Did the Public Body meet its duty to assist the Applicant, as provided by section 10(1) of the Act?

[para 11] Section 10(1) of the Act reads as follows:

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

[para 12] The Notice of Inquiry stated that the issue under section 10(1) of the Act was restricted to whether the Public Body conducted an adequate search for responsive records. A public body's duty to assist an applicant under section 10(1) includes the obligation to conduct an adequate search (Order 2001-016 at para. 13; Order F2007-029 at para. 50). The Public Body has the burden of proving that it conducted an adequate search, as it is in the best position to provide evidence of the adequacy of its search and to explain the steps that it has taken to assist the applicant within the meaning of section 10(1) (Order F2005-019 at para. 7; Order F2007-029 at para. 46). An adequate search has two components in that every reasonable effort must be made to search for the actual records requested, and the applicant must be informed in a timely fashion about what has been done to search for them (Order 2001-016 at para. 13; Order F2009-001 at para. 14).

[para 13] In general, evidence as to the adequacy of a search should cover the following points: who conducted the search; the specific steps taken by the public body to identify and locate records responsive to the applicant's access request; the scope of the search conducted (e.g., physical sites, program areas, specific databases, off-site storage areas, etc.); the steps taken to identify and locate all possible repositories of records relevant to the access request (e.g., keyword searches, records retention and disposition schedules, etc.); and why the public body believes that no more responsive records exist than the ones that have been found or produced (Order F2007-029 at para. 66; Order F2009-001 at para. 15).

[para 14] At the pre-hearing conference, the Applicant noted the particular information set out in her access request that she believed the Public Body had not adequately accounted for. On receipt of the Public Body's Index of Records, however, she was able to narrow down the information in question. In her inquiry submissions, she says that the Public Body has failed to adequately search for seven records or categories of records: (1) her 2008 performance evaluation; (2) her "health memos-letters"; (3) particular complaints that she filed; (4) "Leduc FCSS Advisory" complaints; (5) complaints made by a particular individual; (6) complaints made by staff of the Community Education Centre; and (7) the contents of the "personal file" that one of her supervisors kept about her.

[para 15] The Public Body responds that the Applicant's 2008 performance evaluation was provided to her, and I do see a signed copy in the package of records disclosed to her, which includes handwritten comments of the Applicant's supervisor. The Applicant

clarifies, at one point, that in requesting her "original" evaluation, she is not seeking the one that was placed on her personnel file. One of the affected parties, being the Applicant's former supervisor himself, included a copy of an unsigned evaluation with his submission, which does not include his handwritten comments. I therefore thought that this was the original evaluation. However, in her rebuttal submission, the Applicant still says that this is not what she is seeking, as she believes that there exists yet a different version of her performance evaluation.

[para 16] The Public Body and the Applicant's former supervisor are in the best position to indicate whether there is a different version of the Applicant's performance evaluation, and to search for and locate that different version if it indeed exists. They have explained that they have provided copies of the only versions existing or that were ever in their possession, and I have no reason not to believe this, despite an allegation on the part of the Applicant to the effect that her performance evaluation has been altered. I find that the Public Body has conducted an adequate search for the Applicant's original performance evaluation.

[para 17] In referring to her "health memos-letters", the Applicant means the memoranda and letters submitted to her two supervisors over a particular period regarding her health and stress in the workplace, as set out in her access request. In her inquiry submissions, she lists eleven such documents with particular dates. A twelfth, dated March 20, 2008, is to an individual other than the two supervisors mentioned in her access request, so I find that it is not responsive to her access request. The Public Body says that all documents that it "determined" to be health memos have been provided to the Applicant. It says that it located four such memos, dated between May and July 2008, and considered other correspondence to be related to WCB claims. I see some doctor's notes in the package of records given to the Applicant in response to her access request, but these are not the same records that she lists as missing in her initial inquiry submissions. I also consider the eleven aforementioned records to be responsive to her access request, whether they deal with WCB claims or not. The WCB claim information would presumably be regarding the Applicant's health and stress in the workplace, as set out in her access request. I will accordingly order the Public Body to conduct an adequate search for the health-related memoranda and letters.

[para 18] At the same time, I see a memorandum dated December 28, 2007 under Tab 24 of the Applicant's own initial inquiry submissions, which would appear to be one of the "health memos-letters" that she alleges to be missing. I leave it to the Public Body and the Applicant to sort out whether it is indeed one of the records that she is seeking.

[para 19] With respect to the complaints that the Applicant filed herself, her access request specified four individuals to whom she had made them, and in her inquiry submissions, she identifies six particular records that she believes to exist and alleges to be missing. In its inquiry submissions, the Public Body does not provide any specific response.

[para 20] In referring to the "Leduc FCSS Advisory complaints", the Applicant means complaints made about her to the Family and Community Support Services Advisory Committee. In her access request, she mentioned a complaint made by a particular individual, but did not purport to restrict her request in that regard. (She also asked for a written summary of all verbal complaints, but the Public Body's duty to assist does not include the obligation to create a written record for her.) For its part, the Public Body simply says that all responsive records were located, without providing any detail. Similarly, the Public Body does not specifically respond to the Applicant's concerns about the allegedly missing complaints made by another particular individual, and by two employees of the Community Education Centre. I also do not see any of the foregoing records in the package of records disclosed to the Applicant or in the package of records at issue being withheld from her.

[para 21] As for the contents of the "personal file" (not to be confused with a "personnel file") that the Applicant's former supervisor, one of the affected parties, kept about her, the Public Body explains that all of the information has either been provided to the Applicant or is being withheld from her. Indeed, there are notes made by the Applicant's supervisor, and records to or from him, in both the package disclosed to the Applicant and in the package of records at issue being withheld. For his part, the affected party takes issue with the reference to a "personal file", effectively because the records that he kept were work-related, and he indicates that he searched for and located all responsive information in his possession. Still, the Applicant alleges that an adequate search has not been conducted for certain items that she apparently handed in to her former supervisor. She specifies a "Leadership Evaluation" showing her strengths, and a name placard that was subjected to graffiti, but I do not see these in the records before me. Neither the Public Body nor the affected party responds in respect of these two specified records that are allegedly missing.

[para 22] I note that, in a letter dated April 25, 2011 accompanying its initial inquiry submissions, the Public Body wrote that it has continued to search for records that may be subject to the Applicant's access request, including earlier that month, but that it has not located any further records. In its inquiry submissions, the Public Body further indicates that its search for the complaints that influenced the Applicant's disciplinary letter (i.e., the written warning of April 2008) involved a search for electronic and paper documents, a search of the Applicant's personnel and payroll files, a search of "Association" and "Liaison" files, a search of the County Manager's office, and a network search using unspecified keywords. While the foregoing provides a general explanation of what was done to search for the records responsive to the Applicant's access request, it fails to specifically address the search for the particular records that the Applicant believes to exist and alleges to be missing. In short, while there has been an adequate explanation regarding the search for the Applicant's original performance evaluation, there has not been an adequate explanation regarding the search for the other records that she identifies.

[para 23] I accordingly conclude that the Public Body did not meet its duty to assist the Applicant, as provided by section 10(1) of the Act, as it has failed to demonstrate that it

adequately searched for certain records as well as failed to inform the Applicant in a timely manner about what was done to search for them. As referenced above, the allegedly missing records in question are the "health memos-letters", the complaints filed by the Applicant, the "Leduc FCSS Advisory" complaints, the complaints made by a particular individual, the complaints made by staff of the Community Education Centre, and the Leadership Evaluation and name placard that the Applicant says she gave to her former supervisor. I will order the Public Body to conduct an adequate search for these records.

[para 24] For any additional responsive records that the Public Body locates, it should decide whether or not to give the Applicant access to them. For any of the aforementioned records that it does not locate, the Public Body should inform the Applicant about what was done to search for them, as set out by me in the final part of this Order.

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

[para 25] Section 17 of the Act reads, in part, as follows:

> *17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.*
>
> *(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if*
>
> *…*
>
> *(b) there are compelling circumstances affecting anyone's health or safety and written notice of the disclosure is given to the third party,*
>
> *(c) an Act of Alberta or Canada authorizes or requires the disclosure,*
> *…*
>
> *(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,*
> *…*
>
> *(j) subject to subsection (3), the disclosure is not contrary to the public interest and reveals only the following personal information about a third party:*
>
> *(i) enrolment in a school of an educational body or in a program offered by a post-secondary educational body,*

(ii) repealed 2003 c21 s5,

(iii) attendance at or participation in a public event or activity related to a public body, including a graduation ceremony, sporting event, cultural program or club, or field trip, or

(iv) receipt of an honour or award granted by or through a public body.

(3) The disclosure of personal information under subsection (2)(j) is an unreasonable invasion of personal privacy if the third party whom the information is about has requested that the information not be disclosed.

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

…

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

…

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

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

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

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

…

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

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

…

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

…

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

…

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

[para 26] In the context of section 17, the Public Body must establish that the information that it has withheld is the personal information of a third party, and may present argument and evidence to show how disclosure would be an unreasonable invasion of the third party's personal privacy. If a record does contain personal information about a third party, section 71(2) states that it is then up to the Applicant to prove that disclosure would not be an unreasonable invasion of the third party's personal privacy.

[para 27] The Public Body withheld pages 1 to 62 of the records at issue from the Applicant on the basis of section 17(1).

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

[para 28] Section 1(n) of the Act reads, in part, as follows::

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

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

…

(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 29] As set out in the Index of Records prepared by the Public Body, it relied on section 17(1) to withhold various notes of third parties, e-mail correspondence to or from them, "letters of concern" from them, and records of their exit interviews. I find that the foregoing consist of the personal information of third parties, such as their names, information about their employment history, opinions about them, and the fact that they effectively complained about the Applicant.

[para 30] As just suggested by the reference to complaints about the Applicant, the foregoing records also consist, in part, of views or opinions about her, which constitute her own personal information within the terms of section 1(n)(viii). However, I find that

the nature of the views and opinions would also serve to identify the individual who provided them, and the particular individual's identity is his or her personal information. A fact, observation, view or opinion about someone else can simultaneously reveal the identity of the individual who provided it (Order F2006-006 at para. 117). Where an applicant's personal information (such as views and opinions about him or her) is intertwined with the personal information of a third party (including contextual information that identifies that third party), it becomes necessary to decide whether some or none of the personal information can be disclosed (Order 2000-019 at para. 76; Order F2006-006 at para. 112). A public body must make this decision regarding disclosure by weighing the applicant's right of access to information against the third party's right to protection of privacy (Order 98-008 at para. 35; Order 99-027 at para. 134). I have borne this principle in mind when weighing the relevant circumstances later in this Order.

[para 31] On the other hand, section 17(1) cannot apply to information that is solely the Applicant's personal information. For example, pages 54 to 55 consist of e-mail correspondence between the Applicant's two former supervisors regarding the Applicant's own performance evaluation, and page 58 consists of notes of a meeting that one of her former supervisors recorded when he met with her. As these pages contain only the Applicant's personal information – and the information about her former supervisors merely reveals work-related activities without any personal dimension, as discussed later in this Order – I will order disclosure of pages 54, 55 and 58 to the Applicant.

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

[para 32] Under section 17(2) of the Act, a disclosure of personal information is expressly not an unreasonable invasion of a third party's personal privacy in certain situations. One of these situations, as set out in section 17(2)(b), is where there are compelling circumstances affecting anyone's health or safety and written notice of the disclosure is given to the third party. The Applicant submits that section 17(2)(b) is engaged because her personal health and safety is at risk and her mental and physical well-being continues to be compromised by some of the individuals who authored the records at issue, or provided the information found in them. She says that she has even been physically assaulted, although she does not know by whom, as she was unable to see him or her.

[para 33] I find that section 17(2)(b) is not triggered in this inquiry. First, the section requires notice to the third parties in question, which has not been given in this case. Apart from this, an applicant relying on section 17(2)(b) must do more than simply say that compelling circumstances affecting health or safety exist, in that it must also be likely that the release of the particular information will have a direct bearing on the compelling health or safety matter (Order 98-007 at para. 48).

[para 34] Here, the Applicant arguably provides sufficient evidence and supporting documentation to show that she has mental health concerns, that she has suffered from some form of depression and anxiety due to work-related stress, and that her relationship

with the Public Body and her former colleagues is deeply affecting her. It might therefore be said that there are circumstances affecting her health or safety. However, I fail to see how disclosure of the records at issue would have a direct bearing on the Applicant's health or safety. She clearly desires to know what her former colleagues said about her when she was working with them, but this is insufficient to demonstrate that the Applicant's health or safety would be jeopardized if she does not find out this information. I do not mean to diminish the Applicant's strong feelings about her former employment, and I acknowledge the importance of her psychological well-being, but the threshold for engaging section 17(2)(b) would not be met in this inquiry, even if the third parties had been given notice as required by the provision.

[para 35] The Applicant briefly mentions section 17(2)(c), under which the disclosure of third party personal information is not an unreasonable invasion of personal privacy if an Act of Alberta or Canada requires the disclosure. She lists several Acts, but few specific provisions. In any event, I do not find that any of the pieces of legislation contain a provision requiring the Public Body to disclose any of the records at issue to her.

[para 36] The Applicant cites section 17(2)(e), under which the disclosure of third party personal information is not an unreasonable invasion of personal privacy if it is about the third party's classification, salary range, discretionary benefits or employment responsibilities as an officer, employee or member of a public body. None of the records at issue are about the classification, salary range or discretionary benefits of third parties. Some of them tangentially indicate certain employment responsibilities of employees, such as e-mails setting out or discussing a particular work-related task. However, these references are insufficient, in my view, to trigger the application of section 17(2)(e). In any event, where the records at issue merely contain work-related information about an individual, and there is no personal dimension to the information, there is either no personal information or there is a relevant circumstance in favour of disclosure, as I discuss below. In the end, this causes me to order the disclosure of the information that the Applicant argues is subject to section 17(2)(e), in any event.

[para 37] The Applicant also cites section 17(2)(j), arguing that disclosure of her personal information is in the public interest and therefore would not be an unreasonable invasion of the personal privacy of third parties. While section 17(2)(j) incorporates the notion of public interest, the section applies to the educational and other information listed in the subparagraphs that follow, which is not the kind of information at issue in this inquiry. Section 17(2)(j) is therefore not engaged. As noted earlier in this Order, however, I will review the Applicant's submissions in relation to public interest when I discuss section 17(5)(a) below.

(a) Presumptions against disclosure

[para 38] Under section 17(4) of the Act, a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy in certain circumstances. The Public Body cites the presumption against disclosure under section

17(4)(f), on the basis that the information on pages 53 to 62 of the records at issue consists of personal recommendations or evaluations, character references or personnel evaluations. However, the Public Body misapplies section 17(4)(f). The foregoing pages consist of evaluations of the Applicant *by third parties*, not evaluations *of third parties*. Section 17(1) only ever protects the privacy of third parties, and cannot apply to the personal information of an applicant. I accordingly find that the presumption under section 17(4)(f) does not arise in this inquiry.

[para 39] Having said this, the information on pages 53 to 62 still consists of the personal information of third parties, namely their identities as individuals who provided facts, observations, views or opinions about the Applicant, as noted earlier in this Order. While not cited by the Public Body, there is therefore a presumption against disclosure of some of the information that the Public Body withheld on the foregoing as well as other pages, due to section 17(4)(g). The records consist of the names of third parties appearing with other personal information about them and/or disclosure of the names will reveal other personal information about the third parties, such as the fact that they made comments or complained about the Applicant.

[para 40] The Public Body also submits that there is a presumption against disclosure of the personal information of various third parties under section 17(4)(d), on the basis that the information relates to their employment history. In Order F2003-005 (at para. 73), the concept of "employment history" was explained as follows:

> In my view the term "employment history" describes a complete or partial chronology of a person's working life such as might appear in a resume or personnel file. Particular incidents that occur in a workplace may become the subject of entries in a personnel file, and such entries may properly be viewed as part of employment history. However, the mere fact there is a written reference to or account of a workplace event does not make such a document part of the employment history of those involved. Many workplace incidents of which there is some written record will not be important enough to merit an entry in a personnel file. Similarly it would not make sense to regard documents recording complaints or investigations into complaints as part of a person's employment history unless the complaints were substantiated and a record of some related disciplinary action were entered in a personnel file.

[para 41] I find that the presumption against disclosure under section 17(4)(d) applies to some of the third party personal information at issue. As noted by the Public Body, the records include letters of resignation, and information recorded for the purpose of exit interviews, which I find would be placed on the particular employee's personnel file. I find that the presumption against disclosure under section 17(4)(d) does not arise in relation to other records, such as general e-mail correspondence and informal handwritten notes. Again, however, the presumption against disclosure under section 17(4)(g) arises in respect of much of the foregoing information.

[para 42] Even where presumptions against disclosure arise under section 17(4) of the Act, all of the relevant circumstances under section 17(5) must be considered in

determining whether a disclosure of personal information would constitute an unreasonable invasion of a third party's personal privacy. I will now review the enumerated and unenumerated relevant circumstances possibly weighing in favour of or against disclosure of the information at issue, as raised by the parties or else independently noted by me.

(b) Relevant circumstances possibly weighing in favour of disclosure

[para 43] Where personal information of third parties exists as a consequence of their activities as staff performing their duties, or as a function of their employment, this is a relevant circumstance weighing in favour of disclosure under section 17(5) (Order F2003-005 at para. 96; Order F2004-015 at para. 96). Where a name (which constitutes personal information) appears only with the fact that an individual was discharging a work-related responsibility (which is not personal information), the presumption against disclosure under section 17(4)(g) (name appearing with or revealing other personal information) does not apply (Order F2004-026 at para. 117). Consistent with the foregoing statements, several orders of this Office have found that disclosure of information that would merely reveal that individuals acted in a work-related capacity is generally not an unreasonable invasion of their personal privacy (for a list, see Order F2008-028 at para. 53, or Order F2008-031 at para. 129).

[para 44] Given these principles, I find that section 17(1) does not apply to some of the information that the Public Body withheld, as set out later in this Order. For instance, when the Applicant's former supervisor or the Public Body's human resources coordinator sent or received correspondence, or dealt with the Applicant, they were generally acting in a work-related capacity, without any personal dimension. Conversely, when employees, associates or clients of the Applicant provided their views or opinions about the Applicant, as a result of difficulties they were having when dealing with her, I find that there is a sufficient personal dimension so as to give rise to the possibility that disclosure of their identities, in conjunction with their views and opinions, would be an unreasonable invasion of their personal privacy.

[para 45] When the third parties in question, whether unsolicited or during an interview, provided their views or opinions about the Applicant – who was their supervisor or associate – there is a personal dimension because they did so confidentially, and would presumably have concerns about their job or their relationship with the Applicant, or fear retaliation or some other negative consequence, if the Applicant came to know their comments. Where the disclosure of information is likely to have an adverse effect on an individual, the record of a work-related act potentially has a personal dimension, and may therefore constitute the individual's personal information (Order F2006-030 at paras. 12, 13 and 16; Order F2008-020 at para. 28). Conversely, when the Applicant's supervisors and the human resources coordinator provided their views or opinions about the Applicant and her work performance, they were doing so in a work-related capacity without any personal dimension, as part of their roles and responsibilities were to evaluate, or assist in the evaluation, of the Applicant. Having said this, my comments are not intended to set out a uniform rule. There may be times, depending on

the context and the content of the particular record, when a colleague or someone being supervised provides comments strictly in a work-related capacity, and when a supervisor's comments have a personal dimension.

[para 46] Under section 17(5)(a), a relevant circumstance weighing in favour of the disclosure of personal information is that the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny. The Applicant argues that if an employee chooses to provide an evaluation of her, or to complain about her, the employee is opening himself or herself up to being held accountable, as a professional, for that evaluation or complaint. She notes that professionals are subject to codes of conduct, yet may not always be truthful, fair or honest in their dealings with others. She also submits that the Public Body's administration, as well as City Council, failed to address her continuing concerns regarding her mental health, and that government policy must be formulated to address the problem of workplace bullying. She alleges wrongdoing on the part of various officials and employees of the Public Body. She further notes that the public interest favours accountability and good government, and argues that there is a lack of legal remedies to address situations such as hers. She refers to the importance of ethics and good leadership in the public sector, and adds that there must be accountability in matters pertaining to human resources, social work and the health professions. She says that citizens have a right to know how their municipal government is acting, as it strengthens their democratic rights and fosters public debate so as to facilitate transparency in decision-making.

[para 47] For public scrutiny to be a relevant circumstance, there must be evidence that the activities of the Public Body have been called into question, which makes the disclosure of personal information desirable in order to subject the activities of the Public Body to public scrutiny (Order 97-002 at para. 94; Order F2004-015 at para. 88). In determining whether public scrutiny is desirable, I may consider whether more than one person has suggested that public scrutiny is necessary; whether the Applicant's concerns are about the actions of more than one person within the Public Body; and whether the Public Body has not previously disclosed sufficient information or investigated the matter in question (Order 97-002 at paras. 94 and 95; Order F2004-015 at para. 88). However, it is not necessary to meet all three of the foregoing criteria in order to establish that there is a need for public scrutiny (*University of Alberta v. Pylypiuk*, 2002 ABQB 22 at para. 49). What is most important to bear in mind is that the desirability of public scrutiny of government or public body activities under section 17(5)(a) requires some public component, such as public accountability, public interest or public fairness (*University of Alberta v. Pylypiuk* at para. 48; Order F2005-016 at para. 104).

[para 48] I find that the relevant circumstance set out in section 17(5)(a) does not exist in this inquiry. While the Applicant submits that the activities of the Public Body have been called into question and that the records will shed light on issues pertaining to public health and safety, the matter involves competing versions of events, in that the Applicant says that it is her colleagues who harassed and bullied her, while the records indicate that her colleagues believed that she was the one being inappropriate and

difficult in her dealings with others. There is an insufficient public component in this case, as the concerns raised by the Applicant are essentially in relation to her own personal dispute with the Public Body and several of its employees. At one point in her submissions, she acknowledges that she wishes to understand the decisions that the Public Body and its employees made in relation to her, so that she can challenge them.

[para 49] Further, while the Applicant argues, in reference to the public interest, that the issue of workplace bullying must be addressed and that the issues that she faced have the potential to affect any person at any time, I fail to see how disclosure of the records at issue will serve the purpose of reducing workplace bullying. Her situation is but one alleged example of workplace bullying. Similarly, I find that disclosure of the records in relation to the single situation involving the Applicant will not shed significant light on the overall or general issue of protecting mental health in the workplace. While they may shed light on her own personal matter, they will not do so from a public perspective.

[para 50] The Applicant raises the relevant circumstance set out in section 17(5)(c), under which a factor weighing in favour of the disclosure of third party personal information is that it is relevant to a fair determination of an applicant's rights. In order for section 17(5)(c) to be a relevant consideration, all four of the following criteria must be met: (a) the right in question is a legal right drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds; (b) the right is related to a proceeding that is either existing or contemplated, not one that has already been completed; (c) the personal information to which the applicant is seeking access has some bearing on or is significant to the determination of the right in question; and (d) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing (Order 99-028 at para. 32; Order F2008-012 at para. 55).

[para 51] The Applicant makes lengthy submissions about how she was treated unfairly by the Public Body, how individual employees bullied her, how the Public Body failed to properly accommodate her mental health concerns in the workplace, how she was constructively dismissed, how the Public Body owed her a duty of care, and how the Public Body can be held liable for workplace injuries that she alleges to have occurred. In her rebuttal submission, she adds that employees deserve to know the nature of complaints made against them in order to respond in a human resources investigation. However, I find that the relevant circumstance set out in section 17(5)(c) is not present in this inquiry. The Applicant is no longer employed by the Public Body, the matter pertaining to her discipline is over, and she has pointed to no actual proceeding – such as a lawsuit – that is either existing or contemplated, and in which she might require, for the purpose of preparation, the third party personal information at issue in this inquiry.

[para 52] The Applicant cites section 17(5)(i), under which a relevant circumstance in favour of the disclosure of third party personal information is the fact that the information was originally provided by her. While the Applicant provided some of the information at issue, such as on pages 29 to 31 and 52 where she provides comments about the performance of two of her staff, I find that section 17(5)(i) is not engaged in this inquiry.

When the Applicant provided the third party personal information that appears on the foregoing pages, she did so in her capacity as the third parties' supervisor, in other words as a representative of the Public Body. It is not the objective of section 17(5)(i) to permit a former supervisor or colleague, after leaving a public body, to regain access to information that he or she provided in a work-related capacity while employed by that public body. I say the same in respect of the personal information of third parties that the Applicant received in her work-related capacity. I am referring, for example, to pages 2 and 35 of the records at issue, which were sent to the Applicant herself and in which employees tendered their resignation from the Public Body. The fact that the Applicant received those resignations because she was the supervisor of the employees at the time does not mean that she is now entitled to have copies by way of an access request after her own departure from the Public Body.

(c) Relevant circumstances possibly weighing against disclosure

[para 53] Under section 17(5)(f) of the Act**,** a relevant circumstance weighing against the disclosure of third party personal information is that the information was supplied in confidence. Some of the records are explicitly confidential, such as the exit interview documents. I find that other records, such as e-mail correspondence and letters in which third parties effectively complain about the Applicant, contain information that was implicitly supplied in confidence. The context in which third party personal information is given can make it reasonable to conclude that such information was supplied in confidence (Order F2003-014 at para. 18).

[para 54] The affected party whose identity was not disclosed to the Applicant says that she does not want any of her personal information disclosed to the Applicant. A third party's objection or refusal to consent to the disclosure of his or her personal information is a factor weighing against disclosure (Order 97-011 at para. 50; Order F2004-028 at para. 32).

(d) Conclusions regarding the application of section 17(1)

[para 55] To first summarize my findings in the preceding part of this Order, there are often presumptions against disclosure of the third party personal information at issue, namely those under section 17(4)(d) (information relating to employment history) and 17(4)(g) (name appearing with or revealing other personal information). There is often a relevant circumstance weighing against disclosure, primarily the one set out in section 17(5)(f) (personal information supplied in confidence). Conversely, the only relevant circumstance weighing in favour of disclosure of some of the third party personal information at issue exists in respect of records that merely reveal work-related information, rather than information having a personal dimension.

[para 56] I find that the information on pages 20 to 23 merely reveals that individuals acted in a work-related capacity, with the information having no personal dimension so as to give rise to the application of section 17(1). On those pages, the Applicant's two former supervisors and/or the human resources coordinator discuss how to deal with a

complaint made by a third party about the Applicant, without actually discussing the contents of the complaint. In any event, this is a particular complaint of which the Applicant is aware, as the outcome of the discussions reflected on pages 20 to 23 was to provide her with a copy and an opportunity to respond.

[para 57] Pages 39 to 44 also merely reveal information of a work-related nature, with the information having no personal dimension. The Applicant and/or her former staff are discussing a particular work policy.

[para 58] Pages 54 and 55 are an e-mail exchange between the Applicant's two former supervisors, in which they discuss her performance evaluation. Page 58 consists of notes of a meeting that one of her former supervisors recorded when he met with her. Again, the information in relation to the two supervisors is work-related, and has an insufficient personal dimension so as to give rise to the possibility that disclosure would be an unreasonable invasion of their personal privacy.

[para 59] As I find that section 17(1) of the Act does not apply, I will order disclosure of all of the forgoing pages to the Applicant. I now turn to the remaining information at issue under section 17.

[para 60] Pages 1, 3 to 19, 24 to 34, 36 to 37, 53, 56 to 57 and 59 to 62 consist of e-mail correspondence, letters, records of exit interviews, transcribed voice mail messages and notes after conversations, in which individuals provided, or partly provided, views and opinions about the Applicant, essentially as complaints about her. The fact that the third parties made the complaints and what they said or wrote has a personal dimension, and is therefore their personal information to which section 17(1) can apply. In other words, the relevant circumstance in favour of disclosure of information merely reflecting work-related activities does not exist. Conversely, the relevant circumstance regarding information supplied in confidence weighs heavily against disclosure. Finally, the content of the complaints themselves would serve to identify the third parties. In view of the presumptions and relevant circumstances weighing against disclosures, and the absence of relevant circumstances weighing in favour of disclosure, I conclude that disclosure of the foregoing pages would be an unreasonable invasion of the personal privacy of the third parties under section 17(1).

[para 61] Pages 2 and 35 are records in which employees tendered their resignation. Page 38 is an e-mail from an employee to the human resources coordinator. Pages 45 to 52 document personnel matters regarding particular employees. For context, these records do not contain complaints about the Applicant, and indeed very little other information about her. The aforementioned exit interviews also contain some information that is not about the Applicant, in that the employees provide their comments on a variety of other things. In respect of these various records, there are only presumptions against disclosure and relevant circumstances weighing against disclosure, meaning that section 17(1) applies.

[para 62] Given the foregoing, I conclude that section 17(1) of the Act applies to the remaining information at issue that the Public Body withheld under that section, as its disclosure would be an unreasonable invasion of the personal privacy of third parties. Because section 17(1) sets out a mandatory exception to disclosure, the Public Body was required to withhold the information falling within the scope of the provision. In other words, there is no need for me to review any exercise of discretion on the part of the Public Body, in contrast to my discussions below of the Public Body's decisions to withhold information in reliance on sections 19(2) and 27(1)(c)(iii).

C. Did the Public Body properly apply section 19(2) of the Act (confidential evaluations) to the records/information?

[para 63] Sections 19(2) and 19(3) of the Act read as follows:

> *19(2) The head of a public body may refuse to disclose to an applicant personal information that identifies or could reasonably identify a participant in a formal employee evaluation process concerning the applicant when the information is provided, explicitly or implicitly, in confidence.*
>
> *(3) For the purpose of subsection (2), "participant" includes a peer, subordinate or client of an applicant, but does not include the applicant's supervisor or superior.*

[para 64] Under section 71(1), the Public Body has the burden of proving that the Applicant has no right of access to the information that it withheld under section 19(2). The Public Body applied section 19(2) to the information on pages 63 to 73 of the records at issue.

1. Does the information at issue fall within the scope of section 19(2)?

[para 65] In order for information to fall within the scope of section 19(2) of the Act, the following three-part test must be met: (i) the information must be provided by a participant in a formal employee evaluation process concerning the particular applicant; (ii) the information must be provided, explicitly or implicitly, in confidence; and (iii) the information must be personal information that identifies or could reasonably identify the participant (Order F2006-025 at para. 13). To meet part (i) of the test, the information must be provided by a "participant" in a formal employee evaluation process. Under subsection 19(3), "participant" includes a peer, subordinate or client of an applicant, but does not include the applicant's supervisor or superior.

[para 66] Depending on the circumstances, it is possible that disclosure of all or part of an evaluation or opinion would also disclose the identity of the individual who provided it (Order P2007-002 at para. 69; Order F2006-025 at para. 22). Although the participant's views or opinions are the personal information of an applicant within the terms of section 1(n)(viii), it remains within the discretion of a public body to refuse to

disclose those views or opinions, provided that they are also information that identifies or could reasonably identify the participant (Order F2006-025 at para. 24).

[para 67] Pages 63 to 65 consist of what the Public Body calls a transcribed conversation, although it appears to be an individual's transcription based on a recollection after the fact. Submissions of the Public Body that I accepted *in camera*, as they reveal the identity of the individual who transcribed the conversation – being a peer, subordinate or client of the Applicant – satisfy me that this was part of a formal evaluation of the Applicant. The transcription was apparently requested by the Public Body as part of its evaluation of her. I also find that the information contained in the transcription was supplied in confidence by the individual who transcribed it, and that the content and context of the conversation would identify that individual. While the Applicant presumably was not aware of the fact that she was being evaluated at the time of the conversation in question, this does not detract from my finding that this was a formal employee evaluation process. An employee may not always be aware that he or she is being evaluated. Indeed, when information about an employee is requested from a peer, subordinate or client, the employee being evaluated will not necessarily be aware that this is happening, as disclosing the fact of the evaluation may identify the participant and therefore defeat the purpose of section 19(2).

[para 68] Pages 66 to the upper portion of page 68 consist of e-mail correspondence sent to and from various employees of the Public Body, which the Public Body describes as information relating to the performance and role of the human resources coordinator. As both the Applicant and human resources coordinator were senders or recipients of all of this correspondence, I find that it was not provided, explicitly or implicitly, in confidence. Section 19(2) therefore cannot apply.

[para 69] The lower portion of pages 68 to page 70 consist of a record of a telephone conversation when an employee called the Public Body to request time off. I find that the telephone call was not part of a formal employee evaluation process and that the information in relation to it therefore does not fall within the scope of section 19(2).

[para 70] The Public Body explains that pages 71 to 73 consist of confidential notes written by the human resources coordinator, who catalogued events in case the Applicant wanted to register a formal complaint. As the notes were recorded by the human resources coordinator for the purpose of responding to a possible complaint made by the Applicant, and not for the purpose of a formal employee evaluation of her, I find that section 19(2) cannot apply.

[para 71] I have found that the information on pages 66 to 73 does not fall within the scope of section 19(2). As for whether the information instead falls within the mandatory exception to disclosure set out in section 17(1) of the Act, page 66 to the upper portion of page 68 consist of an e-mail exchange between the Applicant, her former supervisors and the human resources coordinator, and although it sets out a disagreement on an approach to be taken, the exchange merely reveals activities carried out in a work-related capacity. Consistent with my findings in the part of this Order dealing with section 17(1), I find

that disclosure of the information would not be an unreasonable invasion of personal privacy and will order its disclosure to the Applicant. There is one exception in respect of the personal information of a particular employee being discussed, which appears in the large paragraph on page 67. This third party's personal information also appears in the record of the telephone call appearing on pages 68 to 70. As the information is in relation to the third party's request for time off, and was supplied in confidence, I find that disclosure would be an unreasonable invasion of her personal privacy.

[para 72] As for the notes of the human resources coordinator on pages 71 to 73, most of the entries consist of information relating to the personnel management of third parties or else their views and opinions about the Applicant. I find that this information has a personal dimension and was supplied in confidence, consistent with my conclusions earlier in this Order. I conclude that disclosure would be an unreasonable invasion of their personal privacy, and that the Public Body must therefore withhold the information under section 17(1).

[para 73] Conversely, a few entries again consist of information that merely record the views and activities of individuals acting in a work-related capacity, namely the Applicant's former supervisor and the human resources coordinator, and I find that section 17(1) does not apply. Finally, two of the entries consist of the Applicant's own personal information, which cannot be withheld under section 17(1). She is accordingly entitled to these entries.

2. Did the Public Body properly exercise its discretion not to disclose?

[para 74] I have found that the information on pages 63 to 65 falls within the scope of section 19(2) of the Act. The Public Body therefore had the discretion, but was not required, to withhold the information from the Applicant. In order to properly exercise discretion relative to a particular provision of the Act, a public body should consider the Act's general purposes, the purpose of the particular provision on which it is relying, the interests that the provision attempts to balance, and whether withholding the records would meet the purpose of the Act and the provision in the circumstances of the particular case (Order F2004-026 at para. 46).

[para 75] To explain its decision to apply section 19(2) to the information at issue under that section, the Public Body writes as follows:

> Leduc County made the decision to withhold documents in their entirety under Section 17 and Section 19(2) as it is believed that it would be an unreasonable invasion of these third parties['] personal privacy to identify these individuals. It is of Leduc County's opinion that individuals should have their privacy protected when revealing a personal employment matter with an employer. Leduc County believes that the third parties should be afforded their right to privacy.
>
> By releasing the document these third parties would be identified due to the direct working and reporting relationship the third parties had with the applicant. The records related to the parties were to demonstrate their individual, personal

> employment concerns regarding their ability to work in the environment and the conditions under the current supervision and believed their confidentiality would be protected. It is our opinion that due to the close working relationship the applicant had with the third parties, that any event, program or discussion would identify the third party.

[para 76] While the above excerpt combines the Public Body's submissions in relation to sections 17 and 19(2), section 19(2) indeed serves to protect the privacy of third parties in that it permits a public body to withhold information that might identify them as participating in a formal employee evaluation process. The Public Body's reference to the participants' need to be able to describe work-related matters fully and frankly, and their expectation of confidentiality when doing so, satisfy me that the Public Body properly exercised its discretion to withhold the information on pages 63 to 65 in reliance on section 19(2).

[para 77] At this juncture, I point out what I consider to be the similarity and difference between sections 17(1) and 19(2) of the Act. Both have, or can have, the purpose of protecting the identity of individuals who provide information in confidence. Section 19(2) itself refers to information provided in confidence, while section 17(5)(f) sets out the relevant circumstance regarding personal information supplied in confidence. The difference is that section 19(2) applies only to the identity of a third party who participates in a formal employee evaluation process, and in this respect, it may generally be said that the participant was acting in a work-related capacity. As explained earlier in this Order, this is a factor that militates against the ability of a public body to rely on section 17(1) so as to refuse access on the basis that disclosure of the identity of the participant would be an unreasonable invasion of his or her personal privacy. In such cases, section 19(2) nonetheless remains to give a public body the discretion to refuse to disclose information that would reveal the identity of the participant – that is, even in circumstances where section 17(1) would not authorize or require it to do so. Conversely, where certain third parties, as in this inquiry, make complaints about an applicant outside the context of a formal employee evaluation process, and in a manner having a personal dimension, it is section 17(1), not section 19(2), that might apply so as to require the public body to withhold their identities or information that would serve to identify them.

D. Did the Public Body properly apply section 27(1)(c)(iii) of the Act (information in correspondence to or from an agent or lawyer) to the records/information?

[para 78] Section 27(1)(c)(iii) of the Act reads as follows:

> *27(1) The head of a public body may refuse to disclose to an applicant*
>
> *...*
>
> *(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 79] Under section 71(1), the Public Body has the burden of proving that the Applicant has no right of access to the information that it withheld under section 27(1)(c)(iii). The Public Body applied section 27(1)(c)(iii) to pages 74 to 107 of the records at issue.

[para 80] The affected party, being the Applicant's former supervisor, briefly refers to solicitor-client privilege in his submissions. This is a basis for withholding information under section 27(1)(a), and it is a discretionary exception to disclosure where, as here, there may be privileged information of the public body itself. However, the Public Body in this inquiry referred only to section 27(1)(c)(iii) in its response to the Applicant, in its notations in the records at issue, and in its submissions in this inquiry. Moreover, in a letter dated January 27, 2011, I asked the Public Body whether it was claiming solicitor-client privilege over the information that it was withholding under section 27(1)(c), given that this Office's *Solicitor-Client Privilege Adjudication Protocol* might then be engaged. I indicated that, if the Public Body was not claiming solicitor-client privilege, the *Protocol* did not apply and the Public Body should submit a copy of the records to me. By letter dated February 7, 2011, the Public Body submitted the records to which it applied section 27(1)(c)(iii) with no indication that it also wished to apply section 27(1)(a), or that it otherwise intended to claim solicitor-client privilege over the records.

[para 81] In short, the Public Body did not apply section 27(1)(a) to the records at issue, and I will therefore not decide whether section 27(1)(a) or solicitor-client privilege applies to any of the information at issue.

1. Does the information at issue fall within the scope of section 27(1)(c)(iii)?

[para 82] For information to fall within the scope of section 27(1)(c)(iii) of the Act, it must meet the following two criteria: (1) it must be in correspondence between an agent or lawyer of a public body and any other person; and (2) the information in the correspondence must be in relation to a matter involving the provision of advice or other services by the agent or lawyer (Order 98-016 at para. 17; Order F2007-004 at para. 13).

[para 83] Pages 74 to 77, 79 to 96 and 107 of the records at issue consist of e-mails, letters and attachments sent from the Public Body's lawyer to employees of the Public Body. I find that all of the foregoing correspondence is in relation to a matter involving the provision of advice or other services by the Public Body's lawyer, as he had been engaged by the Public Body in order to resolve issues between the Applicant and the Public Body. The two criteria set out in section 27(1)(c)(iii) are therefore met in respect of the information on the aforementioned pages, subject to the following comments.

[para 84] Section 27(1)(c) applies only to information "in correspondence"; it does not apply to other information, such as the fact that a record is correspondence between persons specified in section 27(1)(c) (Order F2003-001 at para. 63). As a result, section 27(1)(c) does not extend to the dates of correspondence, or to the names of the senders and recipients of it (Order F2009-018 at para. 46). Section 27(1)(c) does, however, extend to the information in any "subject" lines, as this is part of the substantive "information in correspondence" (Order F2009-018 at para. 46).

[para 85] Given the foregoing, the Public Body improperly applied section 27(1)(c)(iii) to the dates of correspondence, and to the names of the senders and recipients of it, on pages 74 to 77, 79 to 96 and 107. I will accordingly order disclosure of this information to the Applicant.

[para 86] Page 105 is the first page of a draft letter from an employee of the Public Body to the Applicant. However, the complete final version of the letter, the first page of which is identical to the first page of the draft, appears in the package of records given to the Applicant in response to her access request. There is therefore no point discussing page 105 of the records at issue any further. The Applicant has already received a copy.

[para 87] Pages 97 to 104 and 106 of the records at issue consist of "notes to file" prepared by the Applicant's former supervisor following his discussions with the Public Body's lawyer, or following his meetings with the Applicant's other former supervisor during which topics discussed with, or to be discussed with, the Public Body's lawyer were reviewed. The Public Body submits that a note from an employee of a public body summarizing a conversation between the employee and the public body's lawyer can meet the two criteria set out in section 27(1)(c)(iii). I also see that page 78 is a note to file prepared by the lawyer himself, which consists of a transcription of a voice mail message that the Applicant had left for him.

[para 88] A dictionary defines "correspondence" as "communication by exchanging letters" [*Oxford Dictionaries* (online)]. In other words, correspondence necessarily means something in writing, although it can be by way of e-mail and not just letters. Here, the notes prepared by the Applicant's supervisor and the Public Body's lawyer record verbal exchanges involving the Public Body's lawyer or a voice mail message received by him, not written exchanges. I therefore find that section 27(1)(c)(iii) cannot apply and will order disclosure to the Applicant of all of pages 78, 97 to 104 and 106. I considered whether disclosure of any of the information on the foregoing pages would be an unreasonable invasion of the personal privacy of third parties under section 17(1) of the Act, and therefore subject to that mandatory exception to disclosure, but decided otherwise. The information consists of the Applicant's own personal information and information of other individuals merely acting in a work-related capacity.

[para 89] Finally, I note that it is possible that some of the information on pages 78, 97 to 104 and 106 is covered by solicitor-client privilege as it relates to the Public Body – though not a person other than the Public Body as contemplated by section 27(2) – and therefore might arguably have been withheld in reliance on the discretionary exception to

disclosure set out in section 27(1)(a). However, as explained earlier, the Public Body did not apply section 27(1)(a) to any of the information. That was its prerogative. I cannot find that a discretionary exception to disclosure applies to information if a public body did not apply it.

2. Did the Public Body properly exercise its discretion not to disclose?

[para 90] Because I have found that section 27(1)(c)(iii) of the Act does not apply to the dates and to the names of senders and recipients of various correspondence on pages 74 to 77, 79 to 96 and 107, and does not apply to the whole of pages 97 to 104 and 106, the Public Body did not have the discretion to withhold the foregoing information from the Applicant in reliance on section 27(1)(c)(iii). Here, I turn to whether it properly exercised its discretion to withhold the remaining information, which I have found to fall within the scope of section 27(1)(c)(iii). The Applicant submits that the Public Body did not properly exercise its discretion.

[para 91] Principles regarding a public body's exercise of its discretion relative to a particular provision of the Act were set out earlier in this Order. While the Public Body explained why it chose to withhold information from the Applicant in reliance on section 19(2) of the Act, it provided no explanation as to why it chose to withhold information in reliance on section 27(1)(c)(iii). The reason for withholding information, on the basis that it is in correspondence between a lawyer of a public body and any other person in relation to a matter involving the provision of advice or other services by the lawyer, is not self-evident. Disclosure of some such information may hinder the ability of a public body to resolve legal or other matters with the assistance of its lawyer, while disclosure of other information may be quite innocuous, even though it nonetheless falls within the scope of the provision. Further, the purpose of section 27(1)(c) is to protect the substance of advice and services by a lawyer of a public body (Order F2009-018 at para. 47).

[para 92] An earlier Order of this Office summarized as follows:

> Section 27(1)(c) [previously section 26(1)(c)] is a discretionary exception because it authorizes a public body to refuse access to information, but does not require a public body to do so. In Order 96-017, the Commissioner discussed the two-step decision-making process a public body must complete when claiming a discretionary exception. A public body must first provide evidence on how a particular exception applies; and second, on how the public body exercised its discretion. A public body must show that it took into consideration all the relevant factors when deciding to withhold information, including the purposes of the Act, one of which allows access to information.
>
> (Order F2002-019 at para. 90)

[para 93] Because the Public Body has provided no submissions to explain why it withheld information from the Applicant in reliance on section 27(1)(c)(iii), I will order it to reconsider its exercise of discretion by bearing in mind the principles set out above. It may decide to give the Applicant access to some or all of the information, even though it

falls within the scope of section 27(1)(c)(iii), and it may continue to withhold some or all of the information from the Applicant, provided that it gives an adequate explanation to her as to why it is withholding the information.

V. ORDER

[para 94] I make this Order under section 72 of the Act.

[para 95] I find that the Public Body did not meet its duty to assist the Applicant, as provided by section 10(1) of the Act, as it has failed to demonstrate that it adequately searched for certain records as well as informed the Applicant in a timely manner about what was done to search for them. Under section 72(3)(a), I order the Public Body to perform its duty to assist the Applicant by conducting an adequate search for the "health memos-letters" described on pages 16 and 17 of the Applicant's initial inquiry submissions, the complaints filed by her and described on pages 17 and 18 of her initial inquiry submissions, the "Leduc FCSS Advisory" complaints described on pages 18 and 19 of her initial inquiry submissions, the complaint made by the particular individual described on page 20 of the Applicant's initial inquiry submissions, the complaints made by the two employees of the Community Education Centre described on pages 20 and 21 of the Applicant's initial inquiry submissions, and the Leadership Evaluation and name placard that the Applicant says she gave to her former supervisor and describes on page 21 of her initial inquiry submissions.

[para 96] Under section 72(4) of the Act, I specify that, for the foregoing records that cannot be located, the Public Body must write an explanation to the Applicant, indicating the specific steps taken to identify and locate the records, the scope of the search conducted (e.g., physical sites, program areas, specific databases, off-site storage areas, etc.), the steps taken to identify and locate all possible repositories of the records (e.g., keyword searches, records retention and disposition schedules, etc.), and why the Public Body believes that the records do not or no longer exist.

[para 97] I find that section 17(1) of the Act applies to some of the information that the Public Body withheld under that section, as its disclosure would be an unreasonable invasion of the personal privacy of third parties. Under section 72(2)(b), I confirm the decision of the Public Body to refuse the Applicant access to the information on pages 1 to 19, 24 to 38, 45 to 53, 56 to 57 and 59 to 62 of the records at issue.

[para 98] I find that section 17(1) of the Act does not apply to other information that the Public Body withheld under that section. Under section 72(2)(a), I require the Public Body to give the Applicant access to pages 20 to 23, 39 to 44, 54 to 55 and 58 of the records at issue.

[para 99] I find that the Public Body properly applied section 19(2) of the Act to pages 63 to 65 of the records at issue, as its disclosure could reasonably identify a participant in a formal employee evaluation process concerning the Applicant when the

information was provided in confidence. Under section 72(2)(b), I confirm the decision of the Public Body to refuse the Applicant access to this information.

[para 100] I find that the Public Body did not properly apply section 19(2) of the Act to pages 66 to 73 of the records at issue, as the information was not provided in a formal employee evaluation process. Under section 72(2)(a), I require the Public Body to give the Applicant access to the information on the foregoing pages, with the exception of information the disclosure of which I find would be an unreasonable invasion of the personal privacy of third parties under section 17(1). The latter information, in respect of which I require the Public Body to refuse access under section 72(2)(c), consists of the large paragraph on page 67, the handwriting on the lower portion of page 68 to page 70, and the information on pages 71 to 73, but not the entries dated February 28, March 7 and March 8, 2007 on page 71 and the entry dated March 31, 2008 on page 72. I require the Public Body to give the Applicant access to those four entries.

[para 101] I find that the Public Body did not properly apply section 27(1)(c)(iii) to some of the information that it withheld under that section, as it is not information in correspondence between a lawyer of the Public Body and any other person in relation to a matter involving the provision of advice or other services by the lawyer. Under section 72(2)(a), I require the Public Body to give the Applicant access to the dates and to the names of senders and recipients of the correspondence found on pages 74 to 77, 79 to 96 and 107 of the records at issue. I also require it to give the Applicant access to all of pages 78, 97 to 104 and 106 of the records.

[para 102] I find that the remaining information that the Public Body withheld under section 27(1)(c)(iii) falls within the scope of the provision, as it is information in correspondence between a lawyer of the Public Body and any other person in relation to a matter involving the provision of advice or other services by the lawyer. However, I find that the Public Body has failed to show that it properly exercised its discretion to withhold this information in reliance on section 27(1)(c)(iii). Therefore, under section 72(2)(b), I require the head of the Public Body to reconsider the decisions to refuse access to the remaining information at issue, which appears on pages 74 to 77, 79 to 96 and 107 of the records. If the Public Body decides to continue to withhold any or all of the information, I specify, as a term of this Order under section 72(4), that the Public Body must give an adequate explanation to the Applicant as to why it is withholding the information.

[para 103] I further order the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that it has complied with the Order.

Wade Raaflaub
Adjudicator