ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2013-13

April 15, 2013

EDMONTON POLICE SERVICE

Case File Number F5536

Office URL: www.oipc.ab.ca

Summary: The Criminal Trial Lawyers Association, (the Applicant), made a request under the *Freedom of Information and Protection of Privacy Act*, (the FOIP Act), to the Edmonton Police Service, (the Public Body), for access to information about an investigation into events involving a police officer that took place on Whyte Avenue in front of police and civilian witnesses and led to criminal charges against the police officer and a disciplinary hearing. The criminal trial and the disciplinary hearing and their outcomes were reported in the media.

The Public Body provided portions of the disciplinary decision, but withheld information from 1236 records on the basis of section 17 of the FOIP Act (disclosure harmful to personal privacy).

The Public Body also withheld information under section 20 (disclosure harmful to law enforcement), 24 (advice from officials) and 27 (privileged information). The Public Body also decided that exemptions under section 4 applied to some records.

The Adjudicator agreed that some of the records were exempt from the FOIP Act under section 4. She found that the Public Body had failed to demonstrate that disclosure of the information it had withheld under section 20 met the requirements of this provision.

The Adjudicator ordered the Public Body to make a new decision regarding the application of section 17. She made this decision on the basis that it was not possible to review the Public Body's decision, as it was unclear whose information had been withheld in the records, or why, or how considerations had been weighed. She also found that the Public Body had failed to consider the public nature of the information regarding the disciplinary hearing, and had included considerations that had not been demonstrated to be relevant in weighing the factors for and against disclosure under section 17(5). She ordered the Public Body to take into consideration the public availability of information about the disciplinary hearing in its new decision.

The Adjudicator found that section 24(1)(a) applied to one record, and that section 24(1)(b) applied to two records; however, the Public Body, in relation to two of the records, had not considered that the information they contain may already be accessible by the public. She ordered it to reconsider its decision to withhold those two records.

The Public Body did not provide all the records to which it had applied the solicitor-client privilege for the inquiry. In accordance with the solicitor-client privilege adjudication protocol developed by this office, the Adjudicator issued a notice to produce for those records where she was uncertain as to whether the privilege could be said to apply or not. The Public Body refused to provide the records and brought an originating notice of motion to challenge the notice to produce.

The Adjudicator decided that she would not make a decision in relation to the records that had not been provided for her review, but would await the outcome of the judicial review application before disposing of the issues relating to those records. She also decided to reserve her decision on the issue of the application of settlement negotiation privilege to two records until the parties addressed current case law regarding this privilege and questions she had as to how this privilege would apply in an inquiry under the FOIP Act.

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, 30, 69, 71, 72; *Police Act* R.S.A. 2000, c. P-17, ss. 42, 43; Police Service Regulation, Alberta Regulation 356/90, s. 16; **CA:** *Criminal Code*, R.S.C. 1985, c. C-46; **BC:** *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, s. 22

Authorities Cited: AB: Orders 96-006, 97-007, 99-022, F2003-005, F2004-026, F2005-030; F2007-021, F2007-025; F2008-008, F2008-015, F2008-021, F2008-028, F2009-010, F2009-026, F2009-027, F2010-007, F2010-025; F2011-014, F2012-06, F2012-10; F2012-024; F2013-01; OIPC External Adjudication Order #4 **BC:** Order F12-10

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

Commissioner), 2010 ABQB 82; *R. v. Hoeving*, 2008 ABQB 479; *Halifax Herald v. Nova Scotia (Attorney General)* (1992), 115 N.S.R. (2d) 65 (T.D.); *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23; *Canada v. Solosky* [1980] 1 S.C.R. 821; [1986] N.S.J. No. 370; *Balabel v. Air India* [1988] Ch. 317, [1988] 2 All E.R. 246 (C.A.); *Leahy v. Canada (Citizenship and Immigration)*, 2012 FCA 227; *Scott & Associates Engineering Ltd. v. Ghost Pine Windfarm, LP*, [2011] A.J.; *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, [2003] B.C.J. 1093; *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, 2005 ONCA 6045; *I. Waxman & Sons Ltd. V. Texaco Canada Ltd.*, [1968] 1 O.R. 642 (H.C.J.) affirmed [1968] 2 O.R. 253 (C.A.); *Mahe v. Boulianne*, 2010 ABCA 74; *Blank v. Canada (Minister of Justice)*, 2006 SCC 39;

I. BACKGROUND

[para 1] On June 16, 2010, the Criminal Trial Lawyers Association, (the Applicant), made a request under the *Freedom of Information and Protection of Privacy Act*, (the FOIP Act), to the Edmonton Police Service, (the Public Body), for access to information about an investigation conducted in relation to a member of the Public Body (the Third Party). The request states:

> This is a FOIPP Act application for copies of all record relating to the incident on Whyte Avenue … which led to [the affected party] being charged criminally and under the *Police Act* and the investigation thereof. That will include all internal memos and emails and meeting minutes about the matter…
>
> As can be seen from the enclosed CBC article … and the numerous comments found at [a website address] there is a high degree of public interest in relation to how [the affected party] was handled initially and how his *Police Act* prosecution was handled. Allegations have been made that he received special treatment because of his status and there is substance to them.

[para 2] The Public Body responded to the Applicant's access request on August 23, 2010. The Public Body granted access to 35 records from a disciplinary decision held under the *Police Act*, with exhibits, but redacted information from these records under sections 17(1) and (4). The Public Body withheld information from 1236 records under sections 17. The Public Body also withheld information under sections 24(1) and 27 of the FOIP Act.

[para 3] The Applicant requested review by the Commissioner of the Public Body's response to its access request. The Commissioner authorized mediation to resolve the dispute. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

[para 4] The Applicant, the Third Party, and the Public Body each provided initial submissions for the inquiry. On January 5, 2012, the Public Body raised, for the first time, the application of sections 4 and 20 to information in the records, and stated that it intended to rely on these provisions to withhold some of the information at the inquiry.

[para 5] The Applicant did not object to the late raising of these provisions, but provided rebuttal submissions in relation to the Public Body's arguments regarding their application. I have therefore decided to add these issues to the inquiry.

[para 6] The Public Body elected not to provide some of the records to which it had applied solicitor-client privilege for the inquiry. Under the solicitor-client privilege adjudication protocol, a public body may provide evidence to establish that the privilege applies rather than the records themselves.

[para 7] After reviewing the affidavit evidence the Public Body provided in its initial submissions, I was uncertain as to whether some of the records were subject to solicitor-client privilege. I requested that the Public Body provide the records for my review. The Public Body declined to do so, but provided additional affidavit evidence sworn by one of its solicitors. Alberta Justice and Attorney General also provided submissions at that time.

[para 8] After I had reviewed the records available to me and the additional affidavit evidence submitted by the Public Body, I was uncertain whether records 1307 – 1308, 1312 – 1313, 1315, 1339 and 1340 were subject to solicitor-client privilege or not. I therefore issued a notice to the Public Body requiring production of these records so that I would have the benefit of the records in determining whether the Public Body had met the burden of proof.

[para 9] By originating notice of motion, the Public Body challenged my authority to demand production of the records. As a result, records 1307 – 1308, 1312 – 1313, 1315, 1339, and 1340 are unavailable for the inquiry.

"Non-responsive records"

[para 10] When I reviewed the records, I noticed that in some cases, the Public Body had indicated that the records were being withheld as "non-responsive", in addition to exceptions under the FOIP Act, such as section 17. I was unable to locate correspondence from the Public Body to the Applicant, in which it communicated a decision that records were being withheld for this reason, or attempted to clarify the access request. None of the parties addressed responsiveness in their submissions.

[para 11] The records being withheld as non-responsive do not appear to be so, as they relate in some way to the incident and appear to be contemplated by the Applicant's access request. However, once the Public Body has made new decisions and if it decides to disclose additional information, it will not be precluded from addressing the issue of responsiveness, so long as it first clarifies with the Applicant whether the records in question are responsive to the access request or not.

II. RECORDS AT ISSUE

[para 12] The records at issue are the two volumes of records the Public Body has identified as being at issue.

III. ISSUES

Issue A: Does section 4(1)(a) (information in a court file) operate so as to exclude records 931, 932, 955, 956, 957, 958, 959, and 960 from the application of the FOIP Act?

Issue B: Does section 4(1)(l) (record made from information in the office of the Registrar of Motor Vehicle Services) operate so as to exclude records 237, 238, 291, 346, 399, 400, 401, 916 and 917 from the application of the FOIP Act?

Issue C: Does section 17(1) (disclosure harmful to the privacy of a third party) apply to the information in the records?

Issue D: Did the Public Body properly withhold information from records 164, 130, 495, 597, 780, 889, 893, 899, 910, 911, 912, 966, 987, and 1062 under section 20 (information harmful to law enforcement)?

Issue E: Did the Public Body properly withhold information under section 24(1) (advice from officials)?

Issue F: Did the Public Body properly withhold information under section 27 (privileged information)?

IV. DISCUSSION OF ISSUES

Issue A: Does section 4(1)(a) (information in a court file) operate so as to exclude records 931, 932, 955, 956, 957, 958, 959, and 960 from the application of the FOIP Act?

[para 13] The Public Body withheld records 931, 932, 955, 956, 957 and 958 under section 4(1)(a). Section 4(1)(a) states:

> *4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:*
>
> *(a) information in a court file, a record of a judge of the Court of Appeal of Alberta, the Court of Queen's Bench of Alberta or The Provincial Court of Alberta, a record of a master of the Court of Queen's Bench of Alberta, a record of a sitting justice of the peace or a presiding justice of the peace under the Justice of the Peace Act, a judicial administration record or a record relating to*

> *support services provided to the judges of any of the courts referred to in this clause;*

[para 14] The records to which the Public Body applied section 4(1)(a) are a "promise to appear" (record 931), and "an information" signed by a justice of the peace (records 932, 959, 960).

[para 15] The Public Body argues that these records are "records in a court file."

> Where records are copies of documents that emanate from a court file, s. 4(1)(a) applies. What makes information fall under s. 4(1)(a) is the fact that it is a copy of information in a filed record.

[para 16] The Public Body argues that the information in the records emanates from a court file for the following reasons:

> A Promise to Appear is a document created pursuant to Part XVI of the Criminal Code. This Part details the procedural scheme regarding the laying of criminal charges, and the arrest, detention and release of persons charged with criminal offences. The provisions permit the release of individuals, thus avoiding the need to hold persons in custody pending appearance before a judicial officer. A peace officer who arrests an accused may release the individual on promise to appear. This document compels the person to appear in court on the specific date to answer to the charge set out in the promise to appear.
>
> There are two steps to bring charges before the court. First the promise to appear or other means of securing attendance is issued. The promise to appear indicates that an Information must be laid before a justice of the peace as soon as practicable and in any event before the date listed in the promise to appear. Second, the Information is laid before a justice of the peace who reviews and decides whether to confirm or cancel the promise to appear.

[para 17] Section 4(1)(a) encompasses several different types of records that are exempt from the operation of the FOIP Act. These include: a record filed with the Court, and therefore "in a court file", records of the judges of the Court of Queen's Bench, the Court of Appeal or the Provincial Court of Alberta, records of a justice of the peace, judicial administration records, or records relating to support services provided to the judges. Information need not be filed with the Court to meet the requirements of section 4(1)(a) if it falls under one of the other categories of information listed in this provision.

[para 18] It is not clear from the Public Body's arguments or the evidence before me that the records it argues are exempt under section 4(1)(a) constitute information that was filed with the Court, as discussed in previous orders of this office. However, I find that the records are "records of a justice of the peace" within the terms of this provision, given that they are records of a decision made by a justice of the peace under Part XVI of the *Criminal Code* to confirm the Information and promise to appear. I make this finding on the basis that the records consist of an Information and promise to appear and because the Information is signed by a justice of the peace.

[para 19] I find that records 931, 932, 959, and 960 are exempt from the application of the FOIP Act due to the operation of section 4(1)(a).

Issue B: Does section 4(1)(l) (record made from information in the office of the Registrar of Motor Vehicle Services) operate so as to exclude records 237, 238, 291, 346, 399, 400, 401, 916 and 917 from the application of the FOIP Act?

[para 20] The Public Body withheld records 238, 291, 346, 399, 400, 401, 916 and 917 under section 4(1)(l)(ii). Section 4(1)(l)(ii) 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:*
>
> *(l) a record made from information*
>
> *(ii) in the office of the Registrar of Motor Vehicle Services…*

[para 21] The Public Body argues the following:

> These pages of the Responsive records contain information from the Alberta Motor Vehicle Registry, as indicated on the face of the record. This information relates to information obtained and maintained by the Registrar in relation to the statutory functions under the [Traffic Safety Act]. The information was obtained by the EPS by queries of the information in the office of the Registrar.

[para 22] The records withheld by the Public Body under section 4(1)(l)(ii) are records made from personal driving and motor vehicle information obtained from the MOVES database maintained by the Registrar of Motor Vehicle Services. I find that they are records made from information in the office of the Registrar of Motor Vehicle Services.

[para 23] Table 1 of the Public Body's index of records indicates that it applied section 4(1)(l)(ii) to record 237. However, Table 2 of its index does not list record 237 as subject to section 4(1)(l)(ii) and the Public Body's arguments do not refer to record 237. As a result, I infer that it did not intend to apply section 4(1)(l)(ii) to this record. In any event, this record is not made from personal driving and motor vehicle information, or information that would otherwise be located in the office of the Registrar of Motor Vehicle Services. Therefore, record 237 is not excluded from the FOIP Act.

Issue C: Does section 17(1) (disclosure harmful to the privacy of a third party) apply to the information in the records?

Is all the information withheld by the Public Body under section 17(1) the personal information of third parties?

[para 24] Section 1(n) defines personal information under the Act:

> *1 In this Act,*

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

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

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

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

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

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

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

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

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

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

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

[para 25] Section 1(r) of the Act provides the following definition of "third party:"

1 In this Act,

(r) "third party" means a person, a group of persons or an organization other than an applicant or a public body;

[para 26] I will therefore consider first whether the records at issue contain the personal information of a third party, as defined by section 1(r), and if so, decide whether it would be an unreasonable invasion of the third party's or third parties' personal privacy to disclose it.

[para 27] In Order F2009-026, I said:

> If information is about employees of a public body acting in a representative capacity the information is not personal information, as the employee is acting as an agent of a public body. As noted above, the definition of "third party" under the Act excludes a public body. In Order 99-032, the former Commissioner noted:
>
> > The Act applies to public bodies. However public bodies are comprised of members, employees or officers, who act on behalf of public bodies. A public body can act only through those persons.
>
> In other words, the actions of employees acting as employees are the actions of a public body. Consequently, information about an employee acting on behalf of a public body is not information to which Section 17 applies, as it is not the personal information of a third party. If, however, there is information of a personal character about an employee of a public body, then the provisions of Section 17 may apply to the information. I must therefore consider whether the information about employees in the records at issue is about them acting on behalf of the public body, or is information conveying something personal about the employees.

[para 28] In *Mount Royal University v. Carter***,** 2011 ABQB 28, the Court denied Mount Royal University's application for judicial review, finding the above analysis reasonable. I will therefore consider whether the information in the records at issue is about the Third Party as a representative of the Public Body, or conveys something about the Third Party as an identifiable individual.

[para 29] The Public Body has withheld information under section 17(1) about the Third Party and witnesses to the Third Party's actions, as well as information about its representatives conducting the business of the Public Body.

[para 30] In relation to information about the Third Party contained in the records and of witnesses to the third party's actions giving rise to the disciplinary hearing, the Public Body argues:

> For section 17 to apply, it must be demonstrated that the information withheld is "personal information", and that the disclosure of the personal information would be an unreasonable invasion of a third party's personal privacy.
>
> …
>
> Information severed from the Responsive Records includes personal information of the Affected Party, witnesses and other third parties specifically listed in section 1(n) of the FOIP Act, such as names, addresses, educational history, race, gender, dates of birth, telephone numbers, credit card information, and medical information. The Responsive Records include information regarding charges contemplated and/or laid against third parties, and other criminal history information. The Responsive Records contain individuals' opinions regarding the actions of third parties, including opinions regarding whether a complaint about the person's conduct should be lodged, the process undertaken to investigate such a complaint, and the outcome of such a complaint, as contemplated by s. 1(n)(viii).
>
> Information severed also includes information about identifiable individuals not specifically listed in the FOIP Act such as physical description, relationship status, and level of intoxication. Information was also severed which is not listed in section 1(n), but which has previously been held to be personal information , such as badge numbers, an individual's image in a photograph, e-mail addresses, a description of an individual, and signatures. The Responsive Records

> contain photographs that identify third parties and these photographs have been withheld. Other photographs that do not contain images of persons have not been withheld and have been provided to the Applicant.
>
> The Applicant has requested records regarding the named Affected Party. The Responsive Records consist of documents prepared in response to a complaint regarding the professional conduct of the Affected Party. All the Responsive Records that reference him by name or that reference IA2006-0014 or the resulting disciplinary proceedings are in the nature of his personal information. Therefore the Responsive Records withheld in this matter consist of the Affected Party's personal information.

[para 31] From my review of the records at issue, I am satisfied that the disciplinary decision and the remaining records partly contain the personal information of the Third Party and other third parties.

[para 32] However, I am not satisfied that *all* information withheld by the Public Body under section 17 is personal information within the terms of the FOIP Act. Information that is not personal information cannot be withheld under section 17.

[para 33] In relation to the information it withheld from the records detailing its representatives performing employment duties on behalf of the Public Body, the Public Body states:

> The Responsive Records were created in order to investigate and communicate regarding disciplinary complaints made against a police member. These records largely concern activities of third parties in the course of their employment as police officers. Therefore, s. 17(4)(d) applies to these types of records.

[para 34] Section 17(4)(d), (reproduced below), creates a presumption that it would be an unreasonable invasion of personal privacy to disclose the employment or educational history of a third party individual.

[para 35] In Order F2003-005, the Commissioner determined that employment history is a complete or partial chronology of a person's working life such as might appear in a résumé or personnel file. In Order F2008-015 the Commissioner expanded on this view and said:

> In Order 2000-029, the term "employment history" was defined as a broad, general phrase that covers information pertaining to an individual's work record.
>
> In Order F2004-015, I held that the notes made during an investigation into activities of staff involved in an incident did not constitute "employment history" of those persons. However, I held that the results or conclusions of that investigation may be part of a personnel file and of a person's "employment history".
>
> In this inquiry, the Third Party's personal information does not refer to the results or conclusions of an investigation. The records contain the Third Party's name, the dates on which the Third Party used the credit card for personal purposes, the amount of each of those purchases and information regarding vendor names, locations and other transaction identifiers. However the records do not go further and disclose the results or conclusions of an investigation. Pursuant to the reasoning in Order F2004-015, I find that the presumption in section 17(4)(d) does not apply to the Third Party's personal information that remains at issue within the records.

[para 36] Information that reveals an investigator's conclusions about a third party in relation to an employment investigation regarding the third party will be information of the third party under section 17(4)(d). However, any information about the investigator appearing in the investigation records will not be the investigator's personal information, as the investigator is carrying out a function of a public body as its representative. Any information that is about an investigator, acting in his or her capacity as a representative of a public body, is not personal information within the terms of the FOIP Act. Rather, such information is about the public body in question acting through its representatives, and is therefore not the information of a "third party", as that term is defined by section 1(r).

[para 37] Although the Public Body withheld the names of the employees who investigated the circumstances giving rise to the disciplinary hearing, and argues that section 17 authorizes it to do so, the exchangeable affidavit of the disclosure analyst provides the names of each of these employees and provides details of their roles in the investigation at paragraphs 26 – 29. It is unclear to me why the Public Body elected to provide this information to the Applicant through its submissions when it withheld the same information from the records under section 17(1).

[para 38] In any event, I find that the names and identifying information of police officers or representatives who conducted the investigation documented in the records is not the personal information of those police officers. Rather, that information is information about the Public Body, given that in conducting the investigations the officers performed a function of the Public Body as its representatives. (This point is also discussed in Order F2011-014, in which the name and signature of a commissioner for oaths, acting in her capacity as a commissioner for oaths, was found not to be personal information to which section 17 could apply.) However, where these police officers discuss the Third Party or third party witnesses, these discussions constitute information that is the personal information of the Third Party or the third party witnesses respectively. In addition, in records documenting conversations between investigators and the third party or third party witnesses, the fact that the conversation took place and what was said may be considered to be the personal information of the third party or third party witness.

[para 39] The records also contain accounts of police officers who witnessed events while off-duty. Where information in the records is about off-duty police officers, I find that this is personal information, as these police officers witnessed events as part of their personal lives and not in a representative capacity. Where an off-duty police officer witness refers to the Third Party, that information is also the personal information of the Third Party, in addition to being the personal information of the off-duty police officer.

[para 40] For these reasons, I find that the personal information of the Third Party and other third parties is present in the records. However, I find that information about investigators or police officers acting in a representative capacity is not the personal

information of the investigators or police officers for the purposes of section 17, but is information about the Public Body.

[para 41] As I find that there is third party personal information in the records, I will now consider whether section 17(1) requires the Public Body to withhold it. I will return to the Public Body's severing of the information of officers acting in a representative capacity, which I find is not personal information, at the conclusion of my analysis in relation to section 17.

Does section 17(1) apply to the personal information in the records?

[para 42] Section 17 states in part:

> *17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.*
>
> *(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if*
>
> *...*
>
> *(c) an Act of Alberta or Canada authorizes or requires the disclosure...*
>
> *...*
>
> *(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if...*
>
> *...*
>
> *(b) the personal information is an identifiable part of a law enforcement record, except to the extent that the disclosure is necessary to dispose of the law enforcement matter or to continue an investigation,*
>
> *...*
>
> *(d) the personal information relates to employment or educational history,*
>
> *...*
>
> *(g) the personal information consists of the third party's name when*
> *(i) it appears with other personal information about the third party, or*
> *(ii) the disclosure of the name itself would reveal personal information about the third party...*
>
> *(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal*

privacy, the head of a public body must consider all the relevant circumstances, including whether

> *(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny*
> *(b) the disclosure is likely to promote public health and safety or the protection of the environment,*
> *(c) the personal information is relevant to a fair determination of the applicant's rights,*
> *(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,*
> *(e) the third party will be exposed unfairly to financial or other harm,*
> *(f) the personal information has been supplied in confidence,*
> *(g) the personal information is likely to be inaccurate or unreliable,*
> *(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and*
> *(i) the personal information was originally provided by the applicant.*

[para 43] Section 17 does not say that a public body is *never* allowed to disclose third party personal information. It is only when the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy that a public body must refuse to disclose the information to an applicant under section 17(1). Section 17(2) establishes that disclosing certain kinds of personal information is not an unreasonable invasion of personal privacy.

[para 44] When the specific types of personal information set out in section 17(4) are involved, disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. To determine whether disclosure of personal information would be an unreasonable invasion of the personal privacy of a third party, a public body must consider and weigh all relevant circumstances under section 17(5), (unless section 17(3), which is restricted in its application) applies. Section 17(5) is not an exhaustive list and any other relevant circumstances must be considered.

[para 45] In *University of Alberta v. Pylypiuk*, 2002 ABQB 22, the Court commented on the interpretation of what is now section 17. The Court said:

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

Section 17(1) requires a public body to withhold information only once all relevant interests in disclosing and withholding information have been weighed under section 17(5) and, having engaged in this process, the head concludes that it would be an unreasonable invasion of the personal privacy of a third party to disclose his or her personal information.

[para 46] I will first consider whether a provision of section 17(2) applies. As discussed above, if section 17(2) applies, it is not an unreasonable invasion of the third party's personal privacy to disclose the third party's personal information.

Section 17(2)(c)

[para 47] The Applicant argues that section 16(1) of the Police Service Regulation has now been amended and renders the Public Body's arguments moot. Section 16(1) currently states, in part:

> *16(1) Where a hearing or a portion of a hearing is to be conducted under Part 5 of the [Police] Act,*
>
> *(a) in the case of a complaint referred to in section 45 of the Act, the chief of police shall direct that the hearing or a portion of it be conducted in public or private whichever he determines to be in the public interest, and*
>
> *(b) in the case of a complaint referred to in section 46 of the Act, the person who is to preside over the hearing shall direct that the hearing or a portion of it be conducted in public or private whichever he determines to be in the public interest.*
>
> *(2) When a hearing is held in private, the hearing may be attended only by those persons involved in the proceedings.*
>
> *…*
>
> *(5) Where a hearing or a portion of a hearing is held in public, the written decision or the portion of it arising from the public hearing shall be made publicly available.*

[para 48] Possibly the Applicant argues that because disciplinary decisions resulting from public hearings must now be made publicly available, through the operation of this Regulation, that this decision should also be made public. If that is so, then it appears that the Applicant may be arguing that section 17(2)(c) applies to the disciplinary decision. I will therefore consider whether section 17(2)(c), does, in fact, apply.

[para 49] At the time the disciplinary hearing in question took place, section 16(5) of the Police Service Regulation was not in force. However, if it had been in force, those portions of the disciplinary decision that were read out at a public hearing but severed by the Public Body, would arguably be subject to section 17(2)(c) of the FOIP Act, given that the written decision arising from a public hearing must be made publicly available. However, as section 16(5) of the Police Service Regulation does not apply to records other than decisions arising from a public hearing, the remainder of the records sought by the Applicant would not be subject to section 17(2)(c), even if section 16(5) had been in force at the time of the hearing. In any event, section 16(5) was not in force at the time of the disciplinary hearing, and there is nothing to suggest that this regulation has a retroactive effect, such that the Public Body would be required to make publicly available a decision from an open hearing at this time, even though the law at the time of the hearing did not require it to do so.

[para 50] I am not aware of any legislation that authorizes or requires disclosure of the personal information in the records in issue within the terms of section 17(2)(c), and no other applicable legislative provisions have been brought to my attention by the parties. I therefore find that section 17(2)(c) does not apply.

Section 17(4)(b)

[para 51] Section 17(4)(b) (reproduced above) creates a presumption that it would be an unreasonable invasion of a third party's personal privacy to disclose the personal information of the third party if it forms an identifiable part of a law enforcement record, and disclosing the information would not serve to dispose of, or continue, a law enforcement matter.

[para 52] The personal information of the third party, the complainant, and other third party witnesses in the records relates to both a criminal and a disciplinary investigation and was, in all cases, gathered or documented for that reason. I find that the personal information of the third party, the complainant and other third party witnesses forms an identifiable part of a law enforcement record within the terms of section 17(4)(b). Moreover, there is no evidence that disclosing their personal information would serve to dispose of, or continue, a law enforcement matter. The law enforcement matters in this case have concluded.

[para 53] I find that the presumption created by section 17(4)(b) applies to the personal information of the Third Party, the complainant in the criminal matter, and to other third party witnesses.

Section 17(4)(d)

[para 54] As discussed above, section 17(4)(d) creates a presumption that it would be an unreasonable invasion of a third party's privacy to disclose personal information relating to employment or educational history. Moreover, as set out above, information

that reveals conclusions about a third party in relation to an employment investigation regarding the third party will be information of the third party under section 17(4)(d).

[para 55] I find that the disciplinary decision in the records contains, and may also be considered to constitute part of, the third party's employment history, as does information regarding the investigation. As a result, I find that information in the disciplinary decision and relating to the investigation is also subject to the presumption set out in section 17(4)(d), in addition to being subject to section 17(4)(b).

Section 17(4)(g)

[para 56] Section 17(4)(g), (reproduced above), creates a presumption that it is an unreasonable invasion of a third party's personal privacy to disclose the third party's name if it appears with other information about the third party.

[para 57] I find that the presumption set out in section 17(4)(g) applies to the names of the third party and the third party witnesses appearing in the records, and to facts and details about them appearing in the records. I therefore find that there is a presumption that it would be unreasonable invasion of their personal privacy to disclose this information.

Section 17(5)

[para 58] As I have found that presumptions under section 17(4) apply to the personal information in the records, I will now consider the application of section 17(5). Section 17(5), cited above, imposes a mandatory duty on the head of a public body to consider all relevant circumstances when determining whether it would be an unreasonable invasion of a third party's personal privacy to disclose the personal information of a third party to a requestor.

[para 59] The Third Party argues that I am bound by the decision in *Calgary Police Service v. Alberta (Information and Privacy Commissioner*), 2010 ABQB 82 (CPS). He states:

> … when the OIPC reviews this matter, it should follow the direction of the Court from the Calgary Police Services case. Disclosure of personal information is warranted only where there have been criminal charges, and even then, only the name, rank, nature of charge and sanction imposed. Disclosure of any other information or disclosure in any other circumstances (allegations / charges withdrawn or internal discipline) is an unreasonable invasion of [the Affected Party's] personal privacy.

[para 60] The Public Body also cited *CPS* both in its submissions and in its response to the Applicant. When it responded to the Applicant, the Public Body provided a copy of a disciplinary decision regarding the Third Party, with some information redacted from it under section 17, as well as exhibits. The Public Body cited paragraph 101 of the CPS decision, quoted below, as its authority for doing so. It also withheld records pertaining to the investigation of the incident involving the third party that were not part of the

evidence reviewed at the disciplinary hearing, and withheld the Third Party's personally identifying information from them, as well as that of witnesses and the police officers who investigated the matter giving rise to the disciplinary hearing.

[para 61] The Third Party argues that the Court in *CPS* has directed that only his name, rank, the nature of the charges and the sanction imposed may be disclosed, but no other personal information.

The Calgary Police Service decision

[para 62] I will now consider whether *CPS* is on point and is binding in relation to the issues before me. After the parties made their arguments, Order F2013-01 was issued by an adjudicator of this office. Although Order F2013-01 was issued subsequent to the parties' submissions in this inquiry, I did not consider it necessary to solicit any comments on the Adjudicator's decision from the Public Body or Applicant. Both the earlier Order and this one are responding to the same legal points regarding the *CPS* decision.

[para 63] In *CPS*, the Calgary Police Service applied to the Court of Queen's Bench for judicial review of order F2008-008. The Court granted the application and overturned the Adjudicator's order, finding that, except where the decisions involve or result from federal or provincial offences, disclosure of the decisions would be an unreasonable invasion of police officers' personal privacy, and that this presumption is not overridden by section 17(5)(a) of the Act. The Court's reasoning was that the desirability of public scrutiny of the disciplinary process was already fully addressed by representation from the public on the Law Enforcement Review Board and the Calgary Police Commission.

[para 64] The Court decided that in cases where there is an alleged provincial or federal offence that the Chief of Police has referred to the Minister of Justice and Attorney General, and a charge has resulted, disclosure of any subsequent disciplinary decision relating to the officer so charged ought to be ordered, but this is limited to the officer's name, rank, and the nature of the charge. The Court found that although there may be some harm to the officer's reputation, it is no more than any other person who has been charged with an offence. The Court went on to state (at para 101):

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

[para 65] Despite the absence of any Law Enforcement Review Board involvement for matters that are referred to the Minister and result in charges, the Court found the desirability of public scrutiny in cases involving federal or provincial offences is satisfied by the transparency of our judicial system. The Court also found, at paragraph 101, that:

> For similar reasons, disciplinary decisions that result from such charges such as dismissal, suspension from duty or loss of rank must be disclosed, again limited to the nature of the charge,

> name, rank and the sanction imposed. That is so in order that the public can make its own judgment as to the appropriateness of the employment sanctions.

[para 66] In the Court's view, for cases before it in which disciplinary hearings arose from charges involving federal or provincial offences, the name, rank, nature of the charge and sanction imposed is all of the information that needs to be disclosed.

[para 67] The Applicant, the Public Body, and the Third Party made submissions regarding the applicability of *CPS* to this inquiry. The Public Body and the Third Party argue that I am bound by this decision and that it authorizes withholding the personal information the Public Body has withheld from the records. The Third Party further argues that only his name and rank, and the nature of the charge and sanction may be disclosed. The Applicant primarily relies on the amendment to the Police Service Regulation, discussed above, and argues that this amendment renders debate as to the application of *CPS* moot. I addressed this argument above.

[para 68] As the Adjudicator notes in Order F2013-01, McMahon J. emphasized in his decision what he found to be the "heart" of the decision of the Adjudicator in Order F2008-008 – the applicability of section 17(5)(a) of the Act. The Court stated, (at paragraphs 29-31):

> In respect of Section 17(5)(a) - the desirability of public scrutiny relied upon by the Herald, the Commissioner concluded that paragraph 74:
>
> > Given all of the foregoing, I find that the Applicant has established that the disclosure of the personal information of third parties in the records at issue is desirable for the purpose of subjecting the activities of the Public Body to public scrutiny, under section 17(5)(a) of the Act. This accordingly weighs in favour of disclosing the personal information on the basis that it would not be an unreasonable invasion of personal privacy.
>
> Later, at para. 84, the Commissioner also said:
>
> > I find that the Applicant has established that the desirability of public scrutiny outweighs the factors that suggest that the personal information of the cited officers should not be disclosed in this inquiry (although I make some exceptions below). Where there has been alleged criminal misconduct and/or a formal hearing (even if the latter did not involve alleged criminal misconduct), disclosure of matters involving both founded and unfounded allegations are warranted in order to scrutinize the conduct of individual officers, the Public Body's processes and the soundness of its decisions. In other words, I find that the decisions should be disclosed because it is desirable to subject both the conduct of individual officers and the disciplinary process itself to public scrutiny.
>
> This then is the heart of the Commissioner's decision and represents both the rationale offered by the Herald and the grounds for the judicial review argued by the CPS.

[para 69] In the *CPS* decision, with regard to media coverage, the Court also said, (at paragraph 95):

> With respect, the Commissioner seems to have wrongly concluded that absent public scrutiny via the media, there is necessarily inadequate public scrutiny.

[para 70] Later in the decision, the Court commented on the potential for the public to learn of the complaint as an additional opportunity for public scrutiny, as follows (at paragraph 102):

> It should be noted that any citizen complainant can disclose his or her complaint publicly at any time. Public scrutiny would no doubt result, depending upon the seriousness of the complaint and the credibility of the complainant. In this respect, the media plays an important public oversight role regarding police services. There are no disciplinary decisions during the investigative stage of a complaint which would be within the purview of this application. Nevertheless, when a complainant goes public - and some may for good reason not wish to - there is a level of public scrutiny during the investigation in addition to the safe-guards provided in the *Police Act* and the PSR.

[para 71] It can be seen from these comments that the applicability of section 17(5)(a) of the FOIP Act (the desirability of public scrutiny) – which constituted the "grounds for the judicial review" – was the deciding factor in the case in the Court's view.

[para 72] In so far as the applicability of section 17(5)(a) of the Act is concerned, I believe that *CPS* is on point to a certain extent, as some of the records before me are portions of a disciplinary decision. However, the case before me is distinguishable on the basis that the disciplinary decision was read out at a public hearing, facts and findings referred to in the decision were reported and discussed extensively in the media, and the Public Body disclosed the majority of the contents of the decision in response to the Applicant's access request. Moreover, the Third Party, through his counsel, made statements in the media regarding some of the information that the Public Body has withheld from the Applicant. As the salient details of the circumstances giving rise to the charges, the charges themselves, and the sentence, have already been disclosed and reported in the media, the value of subjecting the information to public scrutiny recognized by section 17(5)(a) cannot be said to apply. However, in my view, there are other factors weighing in favor of disclosure which do not appear to have been present in the *CPS* decision, or considered by the Public Body, and I will discuss these below.

Damage to Reputation

[para 73] In the case before me, the information contained in the disciplinary decision that was withheld by the Public Body was considered by the presiding officer to be mitigating – in other words, it was information supporting a lighter, rather than a more severe, form of punishment.

[para 74] In *CPS*, the Court was primarily concerned about the possibility that unfair damage to reputation could potentially result from disclosing information regarding disciplinary charges and hearings that were not for federal or provincial offences. However, in the case before me, from my review of the disciplinary decision, I find that the information about the Third Party that was withheld by the Public Body from the decision on the basis that it would potentially damage his reputation, is either information about the Third Party that was discussed in the media through his counsel, or is information that tends to present the Third Party in a favorable light. Neither kind of

information can be said reasonably to give rise to the possibility of unfair damage to the Third Party's reputation if it is disclosed and therefore, section 17(5)(h), cited above, has no application to it.

[para 75] The Public Body has considered as a factor weighing against disclosure that disclosure would result in unfair damage to the Third Party's reputation. However, it has not been demonstrated that section 17(5)(h) has any application to the information the Public Body withheld from the decision, or to information about the Third Party that is similar to that appearing in the decision (including information that was made public), but appears in the records of the investigation. In relation to information appearing in records that are from newspapers or public websites or contain mitigating information, I find that section 17(5)(h) cannot apply.

Public disclosure of disciplinary decisions

[para 76] Notably, there is no indication in the *CPS* decision that the disciplinary decisions were read in public and reported in the media, or discussed in the media by the police officers whose conduct was the subject of the disciplinary hearing.

[para 77] It may be presumed from *CPS* that the disciplinary decisions at issue were not reported or debated in the media, or that the information they contain was not made public, as the access request in that case appears to have been made to afford the media the opportunity to do so.

[para 78] That none of the cases in the *CPS* were discussed in the media distinguishes the circumstances before me from those considered by the Court in *CPS*. The degree to which privacy is infringed by disclosure of information is different when that information has been disclosed by the Public Body and the Third Party in a forum to which the public has access and in which the full details of the information have already been openly discussed. I agree with the Adjudicator in Order F2013-01 that it makes little sense to regard as invasive the disclosure of information that has already been disclosed to the public by the Public Body. This is especially so when the information has been discussed in the media by the Third Party, whose information it is, as happened in the case before me.

[para 79] A recent decision of the Office of the Information and Privacy Commissioner for British Columbia also reflects this point. In Order F12-10, the adjudicator found (at paragraph 44) that a prior disclosure by a public body of information sought through an access request is a factor that overrides the presumption that disclosure of the information would be an unreasonable invasion of a third party's personal privacy. When discussing relevant circumstances for consideration under section 22(2) of British Columbia's *Freedom of Information and Protection of Privacy Act* (the equivalent of section 17(5) of Alberta's FOIP Act), the Adjudicator stated:

> Another relevant circumstance is that the College has already publicly disclosed some of the information at issue. This is a relevant circumstances *(sic)* weighing in favour of disclosure with respect to information of the kind already disclosed. This information

> includes disciplinary information about the physician and the fact that he kissed and hugged the patient. I have already mentioned this circumstance in reference to the application of s. 22(2)(a) of FIPPA above [public scrutiny]. It is also relevant on its own for the following reason. I have already found that the name of the physician is subject to s. 22(4)(c) of FIPPA and that s. 22(1) cannot apply to it. If I had concluded differently on that issue, the fact that the College disclosed the physician's name in the public notification would argue in favour of disclosing it in the Agreement as well.

[para 80] As discussed in the foregoing, prior public disclosure of the content of the disciplinary decisions, by reading them out in public, is a factor, separate from section 17(5)(a) (public scrutiny), that weighs in favour of disclosing the information. This is so because it is less invasive of privacy to disclose material that is already in the public realm.

[para 81] In Order F2013-01, the Adjudicator noted that another Justice of the Court of Queen's Bench has expressed the principle that when police disciplinary hearings are held in public, there is no expectation of privacy. In *R. v. Hoeving*, 2008 ABQB 479, the Court said (at paras 25 to 30):

> Professor Paciocco states his view as to what the law concerning disclosure of statutory disciplinary records should be:
>
> > In the end, this question, too, is a nuanced one. As a matter of principle, the regime that should be applied to records collected or generated as part of statutory disciplinary initiatives should depend ultimately on the nature that investigation takes. Under police disciplinary legislation, different procedures can be used, depending on the seriousness of the allegation. At times, internal disciplinary proceedings are conducted while at other times public hearings are held. Where legislation provides for internal disciplinary proceedings it is difficult to deny that they generate what are, in a real sense, "employment records" since the hearings are solely for the purpose of employment-based discipline. Where public hearings are going to be held, however, there is a statutorily recognized public interest in access to information. Even where information is not presented during public hearings, thereby clearly losing any pretense to a private character, if it has been gathered for a public disciplinary hearing it should carry no reasonable expectation of privacy for the same reason that criminal investigation occurrence reports do not; the officer has no right to control what information is ultimately revealed and therefore can have no expectation that it will remain private. ... If information is generated under circumstances where its publication is expected, there can be no reasonable expectation of privacy.
>
> …
>
> The complaints process in Alberta, therefore, provides considerable protection against unwarranted damage to a police officer's reputation by not requiring that the process be conducted in public until at least the hearing stage.
>
> In my view, as Professor Paciocco suggests, the statutory process provides a reasonable and practical test for determining, in an application of the type now before me, <u>whether a police officer has a privacy interest in the relevant disciplinary materials. The answer should depend on whether the disciplinary proceeding in question was conducted in private or in public,</u> assuming, of course, that the provisions of the legislation governing whether or not the process is conducted in public or in private have been respected.[My emphasis] ...

[para 82] Although the foregoing applies to disclosure for the purpose of a criminal defense, the principle of whether a police officer's privacy interest is maintained when a public disciplinary hearing is held carry over to the circumstances of an access request and, in particular, the circumstances of this inquiry, in which the written decisions sought were read, out loud, verbatim at the conclusion of a public hearing and then reported in the media and discussed in the media by the Third Party.

[para 83] The Public Body drew my attention to *Halifax Herald v. Nova Scotia (Attorney General)* (1992), 115 N.S.R. (2d) 65 (T.D.) in its submissions. In that case, the Nova Scotia Court Supreme Court determined that a requestor should be denied access to records that had been exhibits at a criminal trial, on the basis that the exhibits contained personal information about a senator who had been under investigation. The Court determined that even though the exhibits had been publicly available in a sense, at the trial, this fact did not mean that privacy rights in the records were extinguished for all time. Central to this case was the fact that the records in question had been obtained through a search warrant, and would not have been in the custody of the government absent the search warrant. This case is distinguishable, on the basis that personal information regarding the disciplinary decision in the case before me was disseminated extensively in the media and continues to be available on media websites. This was not the case in *Halifax Herald*. Moreover, it does not appear that there is any information in the records before me that was obtained through a search warrant, or could have been obtained only in that manner.

[para 84] To summarize, I find that the fact that the disciplinary hearing and decision were reported and discussed in the media, including by the Third Party, and that the discussion included details of the actions and the investigation giving rise to the charges, distinguish this case from *CPS*. Moreover, I find that section 17(5)(h) has no application to the information severed from the decision in this case, and therefore *CPS* is also distinguishable for that reason.

*The Public Body's decision regarding section 17(*5*)*

[para 85] As noted above, the Public Body disclosed the greater part of the disciplinary decision but withheld portions of the decision that address mitigating factors. The Public Body has also withheld the majority of records documenting the investigation it conducted under section 17.

[para 86] The Public Body's disclosure analyst set out the factors she considered relevant to her decision to withhold information under section 17(1) in the following terms:

> In confirming the decision to refuse access to portions of the Responsive Records, I have also considered the purposes of FOIPPA, and in particular:
>
> a) the objectives and purposes of FOIPPA, including the Applicant's right of access;

b) that the Applicant does not appear to have a pressing need of any third party personal information
c) that there is no public interest in the disclosure of the Responsive Records and that public scrutiny is not desirable;
d) that disclosure is not relevant to a fair determination of the Applicant's rights
e) that third parties may be exposed unfairly to harm;
f) that personal information may have been supplied in confidence and that release of the information would impact the EPS's ability in the future to have frank discussions with third parties (within and outside the EPS) that had been promised confidentiality;
g) that personal information may be inaccurate or unreliable and may not have been challenged by the individuals to whom the information relates;
h) that disclosure may unfairly damage the reputation of any person referred to;
i) that the requested information was not information originally provided by the Applicant;
j) that if personal information in complaint and investigation files is produced, the integrity and confidentiality of the complaint and discipline process will be undermined;
k) that the release of the information may result in future investigative and discipline processes being less candid and comprehensive;
l) that information in the Responsive Records has the potential to render third parties identifiable with whom these third parties are acquainted;
m) that personal information in the Responsive Records would be difficult or impossible to sever or that severance of some information would render the remaining information meaningless; and
n) that the decision to release some information to the Applicant regarding the outcome of the disciplinary process would satisfy any additional need for public scrutiny.

[para 87] It is unclear to me from the affidavit to what extent the factors were applied, at what point in the process, and why they were considered relevant. It is also unclear to me why the Public Body has elected to withhold so much information from the records that would not reveal any more personal information about the Third Party than has already been disclosed at the public hearing and in the media.

[para 88] While I agree that the Applicant has not established a pressing need for the information, or established that it would be necessary for a fair determination of its rights, or that there is any further need for public scrutiny, or that the Applicant did not provide the information in issue to the Public Body, it is not clear from the affidavit what weight the Public Body gave to these considerations. If the purpose in listing them is to establish that these possibilities were considered as possibly relevant and then rejected, then that is appropriate. However, if these factors were considered in the disclosure analyst's decision as weighing against disclosure, then that would mean that essentially irrelevant considerations were considered as factors weighing against disclosure. In saying this, I do not mean that the Public Body's has lost its case on the basis of these particular statements in the affidavit. It was open to me to try to clarify with the Public Bodywhat it meant by listing these particular factors. As explained further, below, I have decided in any case that the Public Body must make a new decision under section 17 because it has improperly applied section 17 to the information of individuals acting in a representative capacity, because other factors it states it considered are clearly irrelevant to its decision, and because it has failed to consider relevant factors in its decision. I make the comments above to ensure that the Public Body does not consider the fact that no factors enumerated under section 17(5) apply is, in itself, a factor weighing against disclosure.

[para 89] Further, with regard to the list of factors, above, the disclosure analyst states that personal information in the records *may* have been supplied in confidence and that, as a result of this possibility, disclosing the information would interfere with the Public Body's ability to have frank discussions with third parties who were promised confidentiality. While I do not disagree that confidentiality would be a factor weighing against disclosure within the terms of section 17(5)(f), *if* there were information supplied in the records because of assurances of confidence, I am unable to identify any such information in the records, and none has been pointed out to me. I therefore find that this factor, as it has been stated to me, is an irrelevant consideration.

[para 90] I disagree that the fact that disclosing personal information would render parties identifiable is a relevant consideration under section 17(5). Information is not personal information under the FOIP Act unless it is about an identifiable individual. The question to be answered under section 17(5) is whether disclosing information about an identifiable individual would be an unreasonable invasion of the individual's personal privacy. That information would serve to identify an individual does not answer this question, but merely establishes that the information in question may be personal information. Alternatively, it may be the case that even though the Public Body listed this factor as relevant to the decision to confirm refusal of access, and listed it at the end of the factors it considered, the Public Body meant that it first considered whether there was personal information in the records before confirming its decision. However, as I noted above, information that is not personal information within the terms of section 17 has also been withheld under section 17.

[para 91] In addition, consideration of the difficulty in severing information does not serve to answer the question raised by section 17(5) either. If a Public Body decides, after weighing the factors under section 17(5), that it would be an unreasonable invasion of a third party's personal privacy to disclose personal information, then the Public Body must sever the personal information from the records. If it decides that it would not be an unreasonable invasion of the third party's personal privacy to disclose the personal information, then it cannot sever the information under section 17(1). The difficulty in severing information would be irrelevant to the decision to be made under section 17(5).

[para 92] Alternatively, it may be that the Public Body listed the difficulty in severing the information because it determined that it would be an unreasonable invasion of a third party's personal privacy to disclose personal information, and then turned its mind to severing the information. However, it decided that any information remaining after severing the information would be meaningless. The Public Body has not indicated to me the information it considers to be personal information, and the information it considers would be meaningless, once the personal information is removed. In addition, and as I noted above, the Public Body has also severed the personal information of its employees acting in the course of their employment. As it is unclear in the records whose personal information has been severed, and the reasons for it, I am unable to accept the Public Body's position if it severed personal information from the records that the remainder would be meaningless.

[para 93] As discussed above, I find that the possibility that the Third Party would suffer unfair damage to reputation as a result of disclosing the remaining information in the disciplinary decision has not been shown to apply, and that the same holds true for any facts referred to in that decision that also appear in the context of the records documenting the investigation.

[para 94] Moreover, it is unclear to me from my review of the records and the Public Body's evidence and submissions, how third parties (or which third parties) would be exposed unfairly to harm if the personal information in the records is disclosed, or how this consideration factored into the Public Body's decisions under section 17(5).

[para 95] I asked the Public Body why it disclosed some of the Third Party's information contained in the disciplinary hearing records, but not from other records. The Public Body stated:

> …given the different content, context, and nature of the withheld records, they do not contain substantially similar information to those records released to the Applicant.

Elsewhere in its response it states that the "withheld records are in the nature of investigation records and not those relating to the public hearing." The Public Body notes that the withheld records differ in "purpose, content and extent" from the public hearing materials.

[para 96] I agree with the Public Body that where information in the records is *not* about the Third Party, that information, or similar information, has not necessarily been revealed at the disciplinary hearing. However, where the information in the records of the investigation can be construed as being *about* the Third Party, and therefore qualifies as his personal information, with the exception of information about his private life, (by which I mean information that refers to his domestic situation, his friends, and his off-duty life that is not the subject of the charges), many of the facts revealed in the investigation records are essentially the same as those appearing in the disciplinary decision. Section 17 may be applied only to personal information. If the personal information in the records is essentially the same information that is already public, then the public nature of the information must be considered, regardless of the purpose in creating a record.

[para 97] I accept that there are situations in which the presence of personal information in a particular kind of record may allow one to learn additional personal information about an identifiable individual by virtue of the nature of the record. In this case the records were prepared for an investigation, and therefore one can learn from the presence of facts about the Third Party in these records that he was the subject of an investigation. However, it is clear from the disciplinary decision and from media reports that an investigation was conducted. Therefore, the fact that the Third Party's personal information appears in the context of records documenting a criminal and disciplinary investigation and the procedures followed in the course of the investigations, does not convey anything about the Third Party that is not publicly known.

[para 98] I also accept that there is more detailed information in the investigation records than appears in the records of the disciplinary hearing. However, in my view, this does not alter my finding that much of the personal information revealed in the disciplinary decision, and that appearing in the investigation records, is essentially the same. To illustrate, a portion of the disciplinary decision that was provided to the Applicant refers to the Third Party's use of "foul and inappropriate language," while the investigative records document the accounts of witnesses as to what was said. From reading either the investigation or the disciplinary decision, one can come to the conclusion that the Third Party used foul and inappropriate language. In other words, the information one can learn about the Third Party from either the disciplinary decision or this portion of the records of the investigation is essentially the same.

[para 99] I also find that this is not a case where the information documenting the investigation can be said to be untested or that the Third Party has not had the opportunity to respond to it. The records establish that the Third Party was made aware of the charges and the reasons for them. Where information about the charges and the actions giving rise to them appears in the records documenting the investigation, this personal information can be tested by comparing the information documented in the investigation to the findings of the presiding officer in the disciplinary decision.

[para 100] I do not make these findings in relation to all the personal information of the Third Party appearing in the investigation records, but only that information that is also referred to in the disciplinary decision.

[para 101] In the case of the records that simply document steps or decisions made by employees responsible for the investigation, these records reveal that the Third Party was the subject of a criminal investigation and disciplinary proceeding. However that the Third Party was the subject of a criminal investigation and a disciplinary proceeding is already publicly known because of the public nature of the disciplinary hearing.

[para 102] I understand from its arguments and evidence that the Public Body did not consider the fact that the Third Party's personal information was disclosed at the public hearing and discussed in the media, as a factor relevant to its decision under section 17(5). The Public Body has withheld entire articles that indicate they were obtained from the CBC News website, (records 1244 – 73), and in some cases severed personally identifying information from them, under section 17. Given the public source of these records, it is difficult to understand why the Public Body considered that it would be an unreasonable invasion of personal privacy to disclose the information they contain, even if the contents of the articles can be said to be the personal information of the Third Party.

[para 103] I also note that the Public Body has withheld information about investigators and police officers acting in the course of their employment duties under section 17. I am unable to discern from its severing or from its arguments which information was withheld on the basis that it is about the Third Party, and which information was withheld on the basis that it was about representatives of the Public

Body carrying out responsibilities on behalf of the Public Body or about other third parties.

Conclusion

[para 104] In Order F2012-24, the Director of Adjudication ordered the Public Body to reconsider its decision to withhold information under section 17, on the basis that it was not practical or possible to conduct a review of the Public Body's decision. She said:

> I note first, however, that although my views about the relevant factors and how they apply differ on some points from those of the Public Body, it is not my intention in this case to substitute my decision as to whether disclosure would be an unreasonable invasion of privacy for that of the Public Body.
>
> This is so despite the fact that in past orders in which adjudicators have found that a public body has failed to take into account what the adjudicator has regarded as a relevant factor in favour of disclosure, the adjudicator has refused to confirm the public body's decision and has ordered the records to be disclosed. (See, for example, Order F2010-031.)
>
> In this case I have decided that rather than performing the weighing exercise myself taking into account these additional factors and points as to how they are to be applied, I will ask the Public Body to do so, and to make a new decision as to which portions of the personal information should be disclosed and which withheld. I have chosen this approach for the following reasons.
>
> By the terms of the Act, my task is to review the decisions of public bodies rather than to make decisions in the first instance, Though the Act gives me the ability to substitute my own decision for that of a public body, section 17(5) also places a positive duty on public bodies to make the decision initially, taking into account all relevant factors, including information from the Applicant and from third parties. My review is to be done with the benefit of the reasoning of the public body as to why particular items of information were withheld, and as well on the basis that the public body has gathered relevant factual information before making its decision. In this case I do not find it either practical or possible to conduct a "review" of the Public Body's decision at this time.
>
> The primary reason for this is that all the factors that the Public Body says in its submission that it applied in this case by reference to section 17(5) were factors that weighed against disclosure, whereas I believe that there are two significant factors, which I will discuss below, that apply in favour of disclosure of the information that has not yet been disclosed.

[para 105] In my view, this approach has merit in this inquiry as well. In relation to many of the records, I am unable to determine whose personal information has been withheld, and for what reason. This is primarily because of the Public Body's decision to withhold information about its employees performing their duties and because it is not indicated in the records whose information has been withheld or why. In addition, it appears that the Public Body has not gathered factual information to support its consideration of factors under section 17(5), but has given weight to factors that have not been established as applying, such as the possibilities that personal information was supplied in confidence or that reputations would be damaged by disclosure. As a consequence, I am not in a position to review the Public Body's decision. Moreover, the Public Body has not considered factors weighing in favor of disclosure, and as a result, has not provided section 30 notice to parties who may consent to the disclosure of their

records (such as the complainant in the criminal action), or who may provide relevant information regarding the decision the Public Body must make.

[para 106] Under section 72 of the FOIP Act I may require the head of a public body to perform a duty under the Act to be performed. As I am not satisfied that the Public Body has met its duty to consider all relevant circumstances under section 17(5), I must require the Public Body to make a new decision under section 17(1) in view of the following:

- that a relevant consideration under section 17(5) is that portions of the decision that have been withheld have already been placed in the public realm in the sense that the written decision was read aloud in public and discussed in the media by the Third Party's counsel; disclosure of the same information is not as invasive of privacy as disclosure of information that has not already been publicly disclosed in this manner, regardless of whether it appears in the decision or elsewhere in the records

- that it consider only factors that have been established as applying

- that only personal information of identifiable individuals may be withheld under section 17

- if, once the Public Body has made its new decision, it finds it necessary to consider severing information, it may only withhold information on the basis that "meaninglessness" will result, if it makes that determination after consideration of each specific piece of information that is left after severing.

Issue D: Did the Public Body properly withhold information from records 130, 164, 495, 597, 780, 889, 893, 899, 910, 911, 912, 966, 987, and 1062 under section 20 (information harmful to law enforcement)?

[para 107] The Public Body withheld the cell phone numbers of members and references to communications codes from the records under sections 20(1) (k) and (m). These provisions state:

> *20(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*
>
> *(k) facilitate the commission of an unlawful act or hamper the control of crime,*
>
> *...*
>
> *(m) harm the security of any property or system, including a building, a vehicle, a computer system or a communications system, ...*

[para 108] The disclosure analyst states the following regarding her decision to withhold cell phone numbers and communication codes from the records under these provisions:

> I believe that disclosure of the Codes could harm the EPS communications system, and could harm officer safety, because if it is released, it permits outsiders to the system to facilitate the commission of an unlawful act or hamper the EPS's ability to control crime. I believe that the harm created by disclosure of this type of information would be more than a mere inconvenience, as damage to the efficacy of the communications system would require a new system to be formulated as well as compromise the safety of police officers. If information about the Public Body's communications system and safety procedures fell into the public domain, the information could eventually come to be known by individuals willing to use it to the detriment of police officers when interacting with them in dangerous situations. It could also be used by such individuals to evade police members or in a manner that would hamper the EPS's efforts to prevent crime.
>
> I believe that release of police member cell phone information could similarly harm the operation of the EPS communications system and could bring harm to individual EPS members. Release of the information could enable outsiders to the communications system to infiltrate the system or to interfere with the duties of police members. Many police members, particularly those members acting in undercover roles, rely on the confidentiality of his information for their personal safety. Therefore I believe the release of this information would be more than a mere inconvenience because it would impact the operation of the communications system of the EPS, would potentially impact the personal safety of police members, and could be used to hamper the EPS' efforts to prevent crime.

[para 109] The Public Body withheld communications codes from record 164, which is an "event chronology", and cell phone numbers from records 130, 495, 597, 780, 889, 893, 899, 910, 911, 912, 966, 987, and 1062.

[para 110] The Applicant argues that the communications codes are widely known and that these are provided in disclosure packages to the defense in criminal trials. The Applicant notes that the Edmonton Police Service has never asked the Crown to place specific restrictions on the extent to which event chronologies may be used by the defense. The Applicant argues that the disclosure analyst is not an expert and that the opinion she presents in her affidavit should be rejected.

[para 111] The Public Body argues that the disclosure analyst's affidavit is consistent with the expectation that a public body provide evidence of harm to support its arguments that section 20 of the FOIP Act applies. However, the Public Body does not challenge the Applicant's statements that event chronologies containing communications codes are provided in disclosure packages to the defense in a criminal matter without restriction.

[para 112] With regard to the communications code contained in record 164, the disclosure analyst states that it is her belief that disclosure of this information will "permit outsiders to facilitate the commission of an unlawful act or hamper EPS's ability to control crime". She explains this view by stating that if the codes became known to individuals they could use it to the detriment of police officers in dangerous situations or enable such individuals to evade the police. However, the disclosure analyst does not explain, either in her exchangeable affidavit or *in camera* affidavit, how disclosure of the

numerical code appearing on record 164 could be expected to lead to the harm she anticipates. Moreover, as the Public Body does not dispute the Applicant's statement that the communications codes are disclosed to defense lawyers in other circumstances, it is unclear why the disclosure analyst anticipates harm would result by providing the same kind of information to the Applicant in response to an access request when harm does not result by providing it to the Applicant's members in a disclosure package.

[para 113] Having reviewed record 164, I find that it is highly unlikely that disclosing the communications code it contains would facilitate the commission of an offence or impede the ability of the Public Body to control crime in any way. I also find that the code does not impart any information about safety procedures and that disclosing the numerical code would not be reasonably likely to interfere with safety of police officers. I also find that it has not been established that disclosure would reasonably be expected to interfere with the Public Body's system of communications such that it would need to be replaced or modified.

[para 114] The disclosure analyst states that undercover operations may be compromised if cell phone numbers are disclosed, or alternatively, that disclosing the phone numbers could enable outsiders to infiltrate the system or interfere with the duties of police officers.

[para 115] It is unclear to me how the disclosure of cell phone numbers would compromise undercover operations. Possibly, the disclosure analyst envisions that if one of the police officers in question were undercover and he received a phone call from the Applicant's members while undercover, that the police officer's identity as a police officer, or as someone other than he or she was pretending to be, might be disclosed. I have not been presented with evidence that the police officers in question take part in undercover operations, or that they would bring these particular cell phones with them undercover. However, assuming that they do, it is not clear to me that telephone calls from members of the Public Body, a family member or friend, a telephone solicitor, or simply a wrong number would not be equally problematic for the police officer in this hypothetical situation. The Public Body collected the cell phone numbers in some cases as part of its investigation, although primarily the cell phone number severed is that of the staff sergeant conducting the investigation. There is no indication in the records that the police officers who provided their cell phone numbers warned the officers conducting the investigation that their cell phone numbers should not be used to contact them, or were being used in undercover investigations.

[para 116] Not only has the Public Body not stated that the officers whose cell phone numbers have been redacted take part in undercover operations, but the evidence of the records establishes that it is highly unlikely that they do. Most of the records refer to the cell phone number of one officer who is referred to by the Public Body as having been a staff sergeant in the Professional Standards Branch, which is a branch responsible for investigating police discipline matters (Records 130, 780, 889, 893, 899, 910, 911, 912, 987, 1062). The cell phone number is included in the email as a phone number for email recipients to contact him at. Even if it were at all likely that this officer takes part in

undercover operations, it seems unlikely that he would provide a cell phone number for a cell phone he intended to use on an undercover assignment on his letterhead and invite other police officers to contact him at that number at any time.

[para 117] It has also not been explained how obtaining a cell phone number would enable an individual to "infiltrate the system" or to "harm the security of any property or system" within the terms of section 20(1)(m). If the Public Body's theory is that releasing cell phone numbers would enable individuals to hack the cell phones, then it has not stated this or explained how this outcome is reasonably likely to occur from disclosure of the cell phone numbers. Moreover, it would seem unlikely that the officer whose cell phone number appears on records 130, 780, 889, 893, 899, 910, 911, 912, 987, and 1062 would share his cell phone number without imposing restrictions on using or sharing it if disclosing the cell phone number would enable someone to infiltrate the Public Body's system. If by "infiltration" the Public Body means that officers will receive unwanted telephone calls, then it has not been established that this does not already happen, or that receiving such calls would amount to harm to the security of the Public Body's system. Finally, it is unclear whether the cell phone numbers are the officers' personal cell phone numbers, or are provided by the Public Body, such that they could even be said to be part of "a system". However, given that the officers likely carry and use their cell phone outside work, and for purposes other than work purposes, I am prepared to accept that the cell phone numbers have a personal dimension and that section 17 may apply to the cell phone numbers.

[para 118] For these reasons, I find that it has not been established that section 20(1)(k) or (m) applies to the information to which the Public Body applied these provisions, and that the Public Body cannot withhold this information under this provision. I will therefore order the Public Body to disclose the radio code appearing on record 164 to the Applicant. However, as the Public Body withheld the remaining information to which it applied section 20 under section 17, I will not order that information disclosed. However, that information is subject to my direction to reapply section 17 to the information taking into account the considerations I set out above.

Issue E: Did the Public Body properly withhold information under section 24(1) (advice from officials)?

[para 119] The Public Body withheld information from records 134, 149 – 150, 793, 795 – 797, and 1341 under section 24(1)(a). It withheld information from records 1225 – 1227, 1229 – 1232, 1234 – 1240, 1284 – 1285 under section 24(1)(b). Section 24 states, in part:

> *24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*
>
> *(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,*

> *(b) consultations or deliberations involving*
> *(i) officers or employees of a public body,*
> *(ii) a member of the Executive Council, or*
> *(iii) the staff of a member of the Executive Council,*
> …
>
> *(2) This section does not apply to information that*
> …
> *(b) is a statement of the reasons for a decision that is made in the exercise of a discretionary power or an adjudicative function,*
> …
>
> *(f) is an instruction or guideline issued to the officers or employees of a public body, or*

[para 120] I will now review the information to which the Public Body applied section 24(1)(a) on a record by record basis.

Does section 24(1)(a) apply to the information withheld by the Public Body under this provision?

[para 121] In Order 96-006, the former Commissioner established a test to determine whether information is advice, recommendations, analyses or policy options within the scope of section 24(1)(a). He said:

> Accordingly, in determining whether section 23(1)(a) [now section 24(1)(a)] will be applicable to information, the advice, proposals, recommendations, analyses or policy options ("advice") must meet the following criteria.
>
> The [advice, proposals, recommendations, analyses and policy options] should:
> 1. be sought or expected, or be part of the responsibility of a person by virtue of that person's position,
> 2. be directed toward taking an action,
> 3. be made to someone who can take or implement the action.

The three part test adopted by the former Commissioner Clark in Order 96-006 is intended to assist in determining when advice, proposals, recommendations, analyses or policy options are *developed by or for a public body* within the terms of section 24(1)(a).

[para 122] The third branch of the test, as it was stated by the former Commissioner, appears open to the interpretation that advice, proposals, recommendations, analyses, and policy options" must *be made to someone* who can take or implement the action", in other words, that information will not fall under section 24(1)(a), unless the advice, proposals, recommendations, analyses, and policy options in question are actually provided or "made" to the decision maker. However, in my view, such an interpretation would be overly restrictive.

[para 123] The intent of section 24(1)(a) is to ensure that internal advice and like information may be *developed* for the use of a decision maker without interference. This purpose would not be achieved if information otherwise falling under section 24(1)(a) were automatically producible prior to the decision maker actually receiving it, or in cases where a public body elected to follow another course and the advice did not ultimately reach the decision maker. So long as the information described in section 24(1)(a) is developed by a public body or for the benefit or use of a public body or a member of the Executive Counsel, by someone whose responsibility it is to do so, then the information falls under section 24(1)(a) regardless of whether the individual or individuals ultimately responsible for making a decision receives it. The third arm of the test should therefore be restated as "created for the benefit of someone who can take or implement the action" to better accord with the language and purpose of section 24(1)(a), and I will review the information to which the Public Body has applied section 24(1)(a) with that in mind.

Record 134

[para 124] Record 134 is, in part, a memorandum written by a police superintendent. The memorandum is addressed to the acting Chief of Police and indicates that its subject is a complaint against the Third Party. In records 149 – 150, this memorandum is characterized as "a complaint". In records 149 – 150, the author of the email is referred to as a complainant, as are citizens who were involved in the incident that was the subject of the disciplinary hearing

[para 125] Record 134 has six attachments, each of which is a complaint regarding the conduct of a police officer within the terms of section 42.1(4) of the *Police Act.* The purpose of the memorandum, as indicated by its subject line, is to initiate a complaint and refer it to the Chief of Police under section 43 of the *Police Act*.

[para 126] The Public Body describes record 134 as a memorandum from a superintendent to the acting chief of police "providing analysis and a recommendation with respect to the investigation". However, the context provided by the attachments and by records 149 and 150, and the complaint provisions in the *Police Act*, supports a finding that record 134 was intended either as a complaint, or to refer complaints to the Chief of Police. The purpose of the memorandum was to initiate the complaint process under the *Police Act*. The memorandum refers to a course of action; however, I find that the course of action is the remedy the superintendent is seeking in making the complaint.

[para 127] I find that the reference to taking action in the memorandum was probably not intended as a recommendation, but is consistent with seeking a remedy under the *Police Act*. From my review of the records, I conclude that record 134 was both interpreted and handled as a complaint, and gave rise to the investigation documented in the records, and which ultimately led to the disciplinary hearing.

[para 128] I acknowledge that record 134 contains information that appears consistent with advice. Had this record not been described as a complaint in records 149

– 150, I would possibly have found that the information in this record was consistent with advice. However, I find the description in records 149 – 150 to this information as a complaint giving rise to the investigation documented in the records to be persuasive. A complaint and advice may appear similar, given that both are intended to influence or guide a course of action. However, a complaint under a statute is made for the purpose of obtaining a remedy -- in this case, the commencement of an investigation under the *Police Act* -- while advice is not developed to obtain a remedy, but to assist a decision maker to decide on a course of action.

[para 129] In any event, had I found record 134 to contain advice, I would have ordered the Public Body to reconsider its decision to withhold it. I would have made this order on the basis that it is public knowledge that the Public Body made a decision to conduct an investigation, and its reasons for doing so are apparent in the nature of the charges and in the contents of the disciplinary decision that were read out in public, and that the Public Body must take this factor under consideration when making a decision to withhold information.

[para 130] For these reasons, I find that section 24(1)(a) does not apply to record 134.

Records 149 – 150

[para 131] Records 149 – 150 consist of a memorandum from a detective of the Public Body's internal affairs division to the staff sergeant of that division. The Public Body applied both sections 17 and 24(1)(a) to the information in these records.

[para 132] I find that the memorandum contains analysis of events and a recommendation based on the analysis, and falls within the scope of section 24(1)(a).

[para 133] I find that records 149 – 150 contain information subject to section 24(1)(a).

Record 793

[para 134] Record 793 is an email from a sergeant of the internal affairs division written to other employees of the Public Body. The disclosure analyst describes this information as containing analysis and "confirming advice previously provided".

[para 135] I find that this email is better characterized as providing information, or a status update. There is no indication that the author of the email created the email to assist one of the employees she emailed to make a decision, or that there was a decision that the other employees were to make. Any references to a decision in the email are to a decision that she herself had already made. There is no indication that she was seeking the advice of anyone else regarding this decision or deliberating it within the terms of section 24(1)(b). The email does not propose or otherwise put forward a course of action and the information it contains is not consistent with information that is subject to section 24(1)(a) or any other provision of section 24(1).

795 – 797

[para 136] Records 795 – 797 are a series of emails between employees of the internal affairs division. The Public Body characterizes the information in the records as "analysis" and "advice".

[para 137] Having reviewed records 795 – 797, I am unable to identify any information that may be described as analysis or advice. As discussed above, "analysis" refers to weighing or evaluating courses of action, while advice refers to putting forward a course of action to a decision maker as possible or preferable. The purpose of these emails is to provide background information to other employees and to communicate directions to employees. While the author of the second email "requests" that others perform tasks, it is clear that there is an expectation that those asked to perform tasks will do so, as part of their duties.

[para 138] The author of the second email on record 797 refers to the first email as a summary of steps taken, and I agree with that description. The author of the second email also requests that the author of the first email take a specific action. Again, it is clear that the expectation would be that the author of the first email will comply with the request.

[para 139] In Order F2012-06 I found that directions to staff and background information cannot be withheld under section 24(1). I said:

> Some of the documents that consist of emails between individuals relate to media releases. With the exception of record 670, I am unable to conclude that any of these emails constitute advice, etc. or consultations or deliberations. Rather, these emails appear to have been created for the purpose of providing background information and, in the cases of 692 and 693, and 2189 and 2190, instructions or directions to employees of the Public Body... Neither quality brings these emails within the terms of sections 24(1)(a) or (b). However, that information is an instruction or direction to employees brings information into the scope of section 24(2)(f), with the result that it cannot be withheld under section 24.

[para 140] I find that records 795 – 797 contain an account of a meeting and directions to staff members and a summary of steps taken. There is no indication that the information in these records was intended to propose a course of action, to influence a decision, or to deliberate one. Rather, the records contain directions to employees and background facts. I find that the information in these records is inconsistent with information meeting the requirements of section 24(1)(a) or (b), or any other provisions of section 24(1).

Record 1341

[para 141] The Public Body withheld a portion of a sentence under section 24(1)(a) from record 1341. Record 1341 is an email reporting a decision of the Edmonton Police Commission. The Public Body states that the fragment it severed provides analysis and a recommendation made regarding the status of an investigation.

[para 142] The email fragment does not provide analysis and does not include or refer to a recommendation. Instead, it states what was decided at a meeting. The portion of the email severed under section 24(1)(a) documents procedural steps that were taken, and contains no information such as that described in section 24(1)(a).

[para 143] I find that section 24(1)(a) does not apply to the information the Public Body severed from record 1341 under this provision.

Does section 24(1)(b) apply to the information withheld by the Public Body under this provision?

[para 144] Section 24(1)(b) allows a public body to withhold consultations or deliberations involving specific decision makers.

[para 145] In Order 96-006, former Commissioner Clark considered the meaning of "consultations and deliberations" within the terms of section 24(1)(b). He said:

> When I look at section 23 [now section 24]as a whole, I am convinced that the purpose of the section is to allow persons having the responsibility to make decisions to freely discuss the issues before them in order to arrive at well-reasoned decisions. The intent is, I believe to allow such persons to address an issue without fear of being wrong, "looking bad" or appearing foolish if their frank deliberations were to be made public. Again, this is consistent with Ontario and British Columbia. I therefore believe a "consultation" occurs when the views of one or more officers or employees is sought as to the appropriateness of particular proposals or suggested actions. A "deliberation" is a discussion or consideration, by the persons described in the section, of the reasons for and against an action. Here again, I think that the views must either be sought or be part of the responsibility of the person from whom they are sought and the views must be sought for the purpose of doing something, such as taking an action, making a decision or a choice.

[para 146] I agree with the interpretation Commissioner Clark assigned to the terms "consultation" and "deliberation" generally. However, as I stated in Order F2012-10, section 24(1)(b) differs from the section 24(1)(a) in that section 24(1)(a) is intended to protect communications developed for a public body by an *advisor*, while section 24(1)(b) protects communications involving *decision makers*. That this is so is supported by the use of the word deliberation: only a person charged with making a decision can be said to *deliberate* that decision. Moreover, "consultation" typically refers to the act of *seeking* advice regarding an action one is considering taking, but not to *giving* advice in relation to it. Information that is the subject of section 24(1)(a) may be voluntarily or spontaneously provided to a decision maker for the decision maker's use because it is the responsibility of an employee to provide information of this kind; however, such information cannot be described as a "consultation" or a "deliberation". Put simply, section 24(1)(a) is concerned with the situation where advice is given, while section 24(1)(b) is concerned with the situation where advice is sought or considered.

[para 147] A consultation within the terms of section 24(1)(b) takes place when one of the persons enumerated in that provision solicits information of the kind subject to section 24(1)(a) regarding that decision or action. A deliberation for the purposes of section 24(1)(b) takes place when a decision maker (or decision makers) weighs the

reasons for or against a particular decision or action. Section 24(1)(b) protects the decision maker's request for advice or views to assist him or her in making the decision, and any information that would otherwise reveal the considerations involved in making the decision. Moreover, like section 24(1)(a), section 24(1)(b) does not apply so as to protect the final decision, but rather, the process by which a decision maker makes a decision.

[para 148] In my view, the test the former Commissioner developed to assist in determining whether advice, proposals, recommendations, analyses and policy options have been developed by or on behalf of a public body for the purposes of section 24(1)(a), is not useful in determining whether information is subject to section 24(1)(b). I say this because it does not make grammatical sense to suggest that a consultation or deliberation would be *made to*, or, as I have restated it, *created for the benefit of*, someone who can take an action, given that only the person charged with making a decision can consult or deliberate regarding it.

[para 149] It is conceivable that a decision maker might choose to consult with a colleague or an expert, or someone else the decision maker considers it useful to consult, but who has no formal duty to provide advice to the decision maker. Section 24(1)(b) is designed to enable a decision maker to seek out the information the decision maker believes is necessary to make a decision without interference or second guessing. This purpose would be undermined if a decision maker were restricted to seeking advice from only those whose official responsibility it is to advise the decision maker.

[para 150] I will now review the information to which the Public Body applied 24(1)(b), on a record by record basis.

Records 1225 – 1227

[para 151] Records 1226 to record 1227 consist of an email from a journalist to the Public Body containing questions he has for the Public Body. Record 1225 contains emails of employees of the Public Body referring to the email from the journalist.

[para 152] The disclosure analyst describes records 1225 – 1227 as "correspondence among various individuals in Media Relations and PSB, providing background and consultation regarding a media relations matter regarding the investigation".

[para 153] As discussed above, a consultation takes place when an individual responsible for making a decision seeks advice. A deliberation takes place when an individual responsible for making a decision considers and weighs various courses of action.

[para 154] The email appearing on records 1226 – 27 is clearly not a consultation or deliberation within the terms of section 24(1)(b), given that it is written by a journalist external to the Public Body who is seeking information to write a story. The journalist is not an individual enumerated in section 24(1)(b). The stated intent of the journalist in

writing the email was to obtain the Public Body's answers to questions for a story he intended to broadcast regarding the criminal matter and the disciplinary hearing.

[para 155] It may be the case that the Public Body has withheld the journalist's email appearing on records 1226 - 1227on the basis that it may reveal the subject matter of the information appearing in the first and second emails (which I will discuss below). However, I find that there is nothing in the journalist's email that would serve to reveal the information appearing in the first and second email. Moreover, I note that in Order F2004-026, at paragraphs 89 – 90, former Commissioner Work determined that section 24(1)(a) and (b) do not apply to information that reveals only the subject of advice, proposals, recommendations, analyses, policy options, consultations or deliberations or that such information was created, but rather to information that reveals something substantive about the advice, proposals, recommendations, analyses, policy options, consultations, or deliberations. In this case, the journalist's email does not enable one to learn the contents of the first and second emails on record 1225.

[para 156] The third email appearing on record 1225 indicates that the sender is forwarding the journalist's email to another employee. The contents of the email indicate that it was written for the purpose of forwarding the journalist's email, and it does not propose a suggested course of action for the recipient of the email to follow. There is no information in the forwarding email that can be construed as intended to influence or assist in making a decision regarding a response to the journalist's email.

[para 157] The second email appearing on record 1225 is a draft response to the email appearing on records 1226 – 1227. The first email on record 1225 contains a comment regarding the draft response.

[para 158] The second email may be characterized as the decision of an employee to respond to the reporter's email in a particular way, and to consult with others to assist her to make the decision, in which case the first email would be advice within the terms of section 24(1)(a) and the second email could be construed as a deliberation or consultation.

[para 159] With regard to the first and third sentence appearing after the draft response in the second email on record 1225, I find that they are inconsistent with consultations or deliberations, but convey information about the timing of events and steps that had been taken. The second sentence is potentially a request for advice, or a consultation, although it could also be construed as a request for approval.

[para 160] To summarize, I find that the first email on record 1225 is consistent with information that is subject to section 24(1)(a), and the second email contains some information consistent with section 24(1)(b). Regardless of how the first and second emails are characterized, it is unclear why the Public Body elected to withhold them under section 24(1). The first email and the written signature at the top of record 1225 indicate that the draft response was approved. Therefore it appears that the response contained in the second email was provided to a member of the media. If that is so, then

the Public Body's reasons for exercising its discretion to withhold the first two emails on record 1225 are obscure. I will return to the issue of how it exercised its discretion in relation to these records, when I address the Public Body's exercise of discretion in relation to section 24 generally.

[para 161] I find that the information on records 1226 - 1227 (the letter from the reporter), and the third email on record 1225 and are not subject to section 24(1). I also find that the first and third sentence following the draft response on record 1225 are not subject to a provision of section 24(1).

Records 1229 – 1232

[para 162] Record 1229 contains an email from the same journalist whose email appears on records 1226 – 1227. This email is forwarded to another employee of the Public Body for response as the journalist's new email contains an additional question. Records 1231, 1232, and 1233 contain the same email that comprised records 1226 – 1227. (Record 1233 is a continuation of records 1231 and 1232. It consists of a reporter's contact information. It was withheld under section 17, rather than section 24.) The records do not contain a response developed by the Public Body, or consultations or deliberations regarding such a response. Rather, the records simply document that the question was referred to another branch of the Public Body. I find that there is no information in these records consistent with information that is subject to section 24(1)(b).

[para 163] I find that section 24(1)(b) does not apply to records 1229 – 1232.

Records 1234 – 1240

[para 164] Records 1234 – 1236 contain emails between an employee of the Public Body and another employee of the Public Body and external counsel. The disclosure analyst describes these emails in the following terms:

> Records 1234 – 1240 of the Responsive Records consists of further email correspondence among various individuals in Media Relations, PSB and external legal counsel, providing further background and consultation regarding a media relations matter regarding the investigation.

[para 165] It would have been helpful if the affidavit provided by the Public Body in support of its application of section 24(1) to all the information in these records, contained facts explaining who was responsible for making a decision, what the decision was, and how the information in the records contributed or related to it. Describing records as "providing background and consultation" provides no assistance in determining whether there is an adequate factual foundation for deciding whether the information that has been withheld meets the requirements of section 24(1). Moreover, the fact that records contain background information does not bring the information they contain within the scope of any of the provisions of section 24(1).

[para 166] Key parts of the test for determining whether information is subject to section 24(1)(a) is whether "advice is sought or expected, by virtue of a person's position" and is "developed for someone who can take the action". These parts of the test are intended to encompass the requirement in section 24(1)(a) that the information in question be "developed by or on behalf of a public body". To meet the requirements of section 24(1)(b), information must reveal that an individual listed under section 24(1)(b), who is responsible for making a decision is seeking advice, or is reviewing options, regarding the decision. Evidence as to who is making a decision and his or her responsibilities is therefore crucial when the information in the record does not speak to these criteria.

[para 167] However, the Public Body has not provided evidence in relation to these factors, but essentially left the records to speak for themselves. Having reviewed these records, I can state that the email appearing on records 1234 - 1235 presents facts, and that the fourth sentence from the bottom on record 1234 is possibly consistent with analysis within the terms of section 24(1)(a), as it appears that this sentence may have been intended to persuade. However, this sentence also provides background, and I have not been told that the individual who wrote this email had a decision to make, or that the recipient of his email did. From my review of the record, I agree with the Public Body that the email appearing on record 1234 – 1235 is intended to provide background facts and does provide background facts. I therefore find that this email is not subject to section 24(1)(b), or to a provision of section 24(1).

[para 168] Record 1236 contains four emails. The first three emails appearing on the page do not contain information falling within sections 24(1)(a) or (b). Rather, these emails are intended to keep employees informed of steps that are being taken, or will be taken. The last email on the page contains a question. It is unclear what the purpose of the question is, as the question is unanswered by the recipients of the emails. If the question was asked for the purpose of consulting about a decision the author of the email had to make, I am unable to say, on the evidence before me, what the decision could have been.

[para 169] Records 1237 – 1240 contain the same email from the journalist that appears in records 1226 and 1227 and 1231 – 1233. It follows that I find this correspondence is not a consultation or deliberation for the same reasons that I found it was not a consultation or deliberation when it appeared in records 1226 and 1227 and 1231 – 1233.

[para 170] Record 1239 contains an email from an employee of the Public Body forwarding the journalist's email to another employee for response. There is no information in this email that is consistent with information subject to either section 24(1)(a) or (b).

[para 171] For these reasons, I find that records 1234 – 1240 do not contain information subject to section 24(1)(b).

Records 1284 – 1285

[para 172] Records 1284 – 1285 are an email chain. The Public Body withheld information from these records under both sections 17 and 24(1)(b).

> Pages 1284 – 1285 of the Responsive Records [consist] of still further email correspondence among various individuals in PSB and the FOIPP Unit, providing further background, reasoning, and consultation regarding a media relations matter regarding the investigation.

[para 173] I find that the information in these records is subject to section 24(1)(b).

[para 174] Record 1284 contains a request for advice from an individual who is clearly responsible for making a particular decision. It is also clear from the top email appearing on record 1285 that the decision maker used the emails appearing on record 1285 and the advice they contain to assist him in arriving at the decision. I find that the email on record 1284 can reasonably be construed as a consultation, while the emails appearing on record 1285 would reveal information deliberated by the decision maker. For those reasons, I find that section 24(1)(b) applies to these records.

Exercise of discretion

[para 175] I have found that records 149 – 150 contain information subject to section 24(1)(a) and that a portion of the second email on record 1225 and the emails appearing on records 1284, and 1285 contain information subject to section 24(1)(b). I must now consider whether the Public Body exercised its discretion appropriately when it elected to withhold information under these provisions.

[para 176] In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, the Supreme Court of Canada explained the process for applying discretionary exceptions in freedom of information legislation and the considerations that are involved. The Court illustrated how discretion is to be exercised by discussing the discretionary exception in relation to law enforcement:

> In making the decision, the first step the head must take is to determine whether disclosure could reasonably be expected to interfere with a law enforcement matter. If the determination is that it may, the second step is to decide whether, having regard to the significance of that risk and other relevant interests, disclosure should be made or refused. These determinations necessarily involve consideration of the public interest in open government, public debate and the proper functioning of government institutions. A finding at the first stage that disclosure may interfere with law enforcement is implicitly a finding that the public interest in law enforcement may trump public and private interests in disclosure. At the second stage, the head must weigh the public and private interests in disclosure and non-disclosure, and exercise his or her discretion accordingly.

[para 177] While the foregoing case was decided in relation to the law enforcement provisions in Ontario's legislation, it is clear from paragraphs 45 and 46 of this decision that its application extends beyond law enforcement provisions to the application of discretionary provisions in general and to the discretionary provisions in freedom of information legislation in particular. The provisions of section 24(1) of Alberta's FOIP Act are discretionary.

[para 178] Applying the principles in *Ontario (Public Safety and Security)*, a finding that section 24(1)(a) or (b) applies means that the public interest in ensuring that public bodies obtain candid advice *may* trump public or private interests in disclosing the information in question. After determining that section 24(1)(a) or (b) applies, the head of a public body must then consider and weigh the public and private interests in disclosure and non-disclosure in making the decision to withhold or disclose the information.

[para 179] Section 72(2)(b) of Alberta's FOIP Act establishes that the Commissioner may require the head to reconsider a decision to refuse access in situations when the head is authorized to refuse access. A head is authorized to withhold information if a discretionary exception applies to information. Section 72(2)(b) provision states:

> *72(2) If the inquiry relates to a decision to give or to refuse to give access to all or part of a record, the Commissioner may, by order, do the following:*
>
> > *(b) either confirm the decision of the head or require the head to reconsider it, if the Commissioner determines that the head is authorized to refuse access…*

[para 180] The disclosure analyst states that the following considerations were included in the decision to withhold information under sections 24(1)(a) and (b):

> a) The impact the disclosure would reasonably be expected to have on the EPS's ability to carry out similar decision-making processes in the future
> b) That the release of the information could make consultations and deliberations between EPS members less candid, open and comprehensive in the future if members understood that such information would be made publicly available;
> c) That the members of the EPS had a reasonable expectation that their deliberations, consultations, advice, analyses and recommendations would be kept confidential;
> d) The objectives and purposes of the Act, including the Applicant's right of access; and
> e) Whether the decision to release some information to the Applicant regarding the outcome of the disciplinary action would satisfy the need for public scrutiny.

[para 181] The factors the Public Body states it considered when it made its decision to withhold information from records 149 – 150 and 1284 – 1285 are in keeping with factors that should be considered when making the decision to exercise discretion under section 24(1)(a) and (b). However, the third factor to which the Public Body refers, that regarding confidentiality, is not so much an interest that is to be weighed in exercising discretion, but a factor that must be present in order to support withholding information under section 24(1). If the information to which a provision of section 24 is being applied is not intended to be confidential, or has not been kept confidential, then the public interest recognized by section 24(1) would not necessarily be served by withholding the information.

[para 182] With regard to records 1284 – 1285, I am satisfied that the Public Body exercised its discretion to withhold information from them appropriately.

[para 183] However, in relation to records 149 – 150, and the two emails on record 1225, the Public Body has not considered a factor weighing in favor of disclosure that may be relevant in this case: that the information is already publicly known or can be readily presumed.

[para 184] Records 149 – 150 contain information that is very similar in nature to information contained in the disciplinary decision that was read out at the hearing. Moreover, that the recommendation appearing in records 149 – 150 was made could be deduced by anyone with knowledge that a criminal trial and disciplinary hearing took place. While it may not be publicly known that the detective who authored records 149 – 150 made recommendations, the majority of the information included in these recordsto support the recommendations, is publicly known.

[para 185] I have already noted that the reasons for the Public Body's exercise of discretion to withhold the portion of the second email from record 1225 are unclear. The portion of the second email appearing on record 1225 is a statement apparently approved for release to the media. Assuming this statement was released to the media, the purpose of section 24(1) may not be served by withholding the statement, or the approval of it appearing in the first email, as the statement appears to reflect the public position of the Public Body.

[para 186] I must therefore require the Public Body to reconsider its decision to withhold the information from records 149 – 150 and the first and second emails appearing on record 1225, by considering whether some of the information they contain may already be known to the public and to consider whether the purpose of sections 24(1)(a) or (b), is served by withholding it if that is so. Although I have found that the provisions of section 24(1) do not apply to some of the records to which the Public Body applied this provision, I will not order disclosure of these records as the Public Body has withheld the information they contain under section 17. However, as with all records and information withheld under section 17, these records are subject to my order that the Public Body make a new decision regarding the application of section 17.

Issue F: Did the Public Body properly withhold information under section 27 (privileged information)?

[para 187] The Public Body applied section 27 in order to withhold some of the records. The records to which it applied provisions of section 27 were also withheld under section 17.

[para 188] Section 27(1)(a) states:

> *27(1) The head of a public body may refuse to disclose to an applicant*
>
> > *(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege…*

[para 189] Section 71(1) of the FOIP Act states:

> *71(1) If the inquiry relates to a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part of the record.*

Under the FOIP Act, a public body bears the burden of proving that an applicant has no right of access to records to which it has applied a discretionary exception to disclosure. Section 27(1)(a) is an example of a discretionary exception to disclosure. The Public Body therefore bears the burden of proving, on the balance of probabilities, that this exception applies to the information it has withheld from the records.

[para 190] The test for determining whether solicitor-client privilege applies to records is that set out in *Canada v. Solosky* [1980] 1 S.C.R. 821. A record is subject to solicitor-client privilege if it is a communication between solicitor and client, which entails the seeking or giving of legal advice; and which is intended to be confidential by the parties.

[para 191] The Public Body applied section 27(1)(a) to records 743 – 752, 753 – 755, 967, 968, 974, 977 – 986, 1052, 1078, 1228, 1295 – 1301, 1307 – 1308, 1312, 1313, 1314, 1315, 1339, 1340, 1344 – 1349, 1356 – 1359 on the basis that they are subject to solicitor-client privilege. Records 743 – 752, 753 – 755, 967, 968, 974, 977 – 986, 1052 and 1078 were withheld on the basis of Crown work-product privilege, in addition to solicitor-client privilege. I will not address the application of work-product privilege, as these records were not provided for my review. Records 1303 – 1304 were withheld on the basis of settlement negotiation privilege, or "without prejudice" privilege.

[para 192] The Public Body provided records 1228, 1295- 1301, 1303 – 1304, 1314, 1344 – 1345, 1346 – 1349, and 1356 – 1359 for my review, in addition to submissions and affidavit evidence regarding these records. However, the Public Body declined to provide the remaining records it withheld on the basis of privilege for my review, and has instead requested judicial review of the notice to produce I issued for some of them.

[para 193] I have decided not to make a decision regarding any of the records that have not been provided for my review in this case. While it would be possible, under the FOIP Act, to make a decision disposing of the issue of the application of section 27(1)(a) by applying the burden of proof set out in section 71, such a decision would, in most cases, result in a finding that the Public Body has not provided sufficiently detailed or convincing evidence to establish, on the balance of probabilities, that the information to which it has applied solicitor-client privilege, is subject to this privilege.

[para 194] I note that in *Leahy v. Canada (Citizenship and Immigration)*, 2012 FCA 227, the Federal Court of Appeal recently reaffirmed the need for public bodies to provide evidence to support their decisions to sever information, including information a public body believes to be subject to solicitor-client privilege.

[para 195] The affidavit evidence of the Public Body's solicitor refers to record 1078, as "part of the continuum of legal advice" and indicates that it passed between a prosecutor and the Public Body. She also describes this record as "referencing and supporting" the giving and seeking of legal advice. However, assuming that all these descriptors are accurate, this does not necessarily mean that the record is subject to solicitor-client privilege.

[para 196] From the language used in the affidavit to describe record 1078, I gather that the Public Body's solicitor is of the view that this record is privileged within the terms of *Balabel v. Air India* [1988] Ch. 317, [1988] 2 All E.R. 246 (C.A.). I say this because paragraph 18 of the solicitor's affidavit appears to paraphrase portions of that decision, which are quoted in *Scott & Associates Engineering Ltd. v. Ghost Pine Windfarm, LP*, [2011] A.J. No. 574, (below). In *Scott*, Mahoney J. said of *Balabel*:

> Solicitor-client privilege applies to a continuum of communications made in connection with the provision of legal advice. In *Blood Tribe v. Canada (Attorney General), 2010 ABCA 112*, 487 A.R. 71, the Court allowed a claim of privilege over correspondence between counsel and a client even though that correspondence did not contain advice or a request for advice. At para. 26, the Court cited with approval from *Balabel v. Air India*, [1988] Ch. 317, [1988] 2 All E.R. 246 (C.A.), including the following:
>
> > There will be a continuum of communication and meetings between the solicitor and client. The negotiations for a lease such as occurred in the present case are only one example. Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. [My emphasis]
>
> Solicitor-client privilege may apply to a whole document, or a portion of the document. See for example *Snehotta v. Zenker*, 2010 ABQB 556.
>
> However, communications with a lawyer not made for the purpose of obtaining legal advice are not privileged: see *Keefer Laundry Ltd. v. Pellerin Milnor Corp.*, 2006 BCSC 1180. *In R. v. Campbell*, [1999] 1 S.C.R. 565, Binnie, J. stated for the Court that solicitor-client privilege did not attach to communications where the lawyer provided business, not legal, advice. Further, "[w]hether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered": at para. 50.

[para 197] From the foregoing, I conclude that in Canada, or certainly, Alberta, solicitor-client privilege attaches depending on the nature of the relationship between the parties, the subject matter of the advice and the circumstances in which the advice was sought or given. In other words, if the factors set out in *Solosky* are met in relation to a record, and the record additionally meets the description set out in *Balabel*, (although it need not) it will be subject to solicitor-client privilege. However, if records meet the requirements of *Balabel*, but not *Solosky*, they are not subject to solicitor-client privilege.

[para 198] In the case before me, I have not been given facts necessary to establish that the *Solosky* test is met. For example, I have not been given sufficient information about the circumstances in which the records were created to determine that a Crown prosecutor and the Public Body formed a solicitor-client relationship, such that

communications between the two would be subject to solicitor-client privilege. Moreover, I have not been provided with unambiguous statements as to the subject matter of the information that would lead me to conclude that what the Public Body argues is legal advice, is legal advice. Finally, it is difficult to determine which portions of the affidavits have been offered as argument and which portions have been offered as evidence.

[para 199] If I were to find, by application of section 71, that the Public Body has not met the burden of proof in establishing that the records are privileged, this finding would not necessarily mean that the records are not privileged, even though the result of such a finding would be that I would order the disclosure of the records. Given the vital social importance of this privilege I consider it preferable in this case, to decide the matter of the application of solicitor-client privilege on the basis of the best possible evidence, which in this case, would be the records at issue. I will therefore await the decision of the Court on this matter, prior to exercising my jurisdiction to decide whether section 27(1)(a) applies to the records the Public Body has not provided for the inquiry.

Solicitor-Client Privilege

Record 1228

[para 200] The Public Body provided record 1228 for my review. This record contains two emails.

[para 201] The solicitor for the Public Body states in her affidavit:

> Page 1228 of the Responsive Records consists of an email dated June 7, 2010, sent from external legal counsel to [a staff sergeant] and to [a supervisor in media relations] and to [an inspector in the professional standards branch] in response to a request for confidential legal advice regarding a matter arising from external legal counsel's provision of legal services to the EPS. This email from external legal counsel consisted of providing the EPS with a legal opinion about a legal issue including advice regarding a recommended course of action based on legal considerations. These records consist of a communication between a solicitor (external legal counsel) and a client (the EPS), they reference the giving and seeking of legal advice, and they are intended to be confidential by the parties.

[para 202] I am unable to identify a portion of the emails in which a request for confidential legal advice is made. The email that is time-stamped 8:29 AM is not addressed to the lawyer, but copied to him. This email, written by a staff sergeant, contains a request for clarification of facts, and is addressed to an employee in Media Relations. The lawyer responded and clarified facts.

[para 203] Having reviewed the response from the lawyer, I am unable to identify a course of action that is being advised or suggested by the lawyer. If there is legal advice contained in the first email appearing on record 1228, I am unable to say what it is. As it stands, I find that the lawyer's response is consistent with providing facts within his knowledge, but I am unable to draw an inference that it was intended as anything more than that, as I do not know what the Public Body construes as legal advice in this email or

why it construes the information in this way. Moreover, the staff sergeant's email is consistent with asking for a clarification of facts from the supervisor in Media Relations, and I am unable to draw an inference that the act of copying the lawyer was intended as a request for legal advice.

[para 204] I find that it has not been established that disclosure of this record would reveal communications between a client and a lawyer in the lawyer's capacity as a lawyer, or that the communications documented on this record entail the giving or seeking of legal advice.

Records 1295 – 1301

[para 205] Records 1295 – 1296 consist of the cover page to a series of invoices for work performed on various files, prepared by a law firm. Records 1297 – 1300 are an invoice for services provided on one file and include a breakdown of those services. Record 1301 is a receipt. The Public Body withheld these records under sections 17 and 27(1)(a).

[para 206] Previous orders of this office (Orders F2007-025, F2010-007) have adopted the test set out by the British Columbia Court of Appeal in *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, [2003] B.C.J. 1093, and adopted by the Ontario Court of Appeal in *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, 2005 ONCA 6045: Is there a reasonable possibility that the assiduous inquirer, aware of background information available to the public, could use the information requested concerning the amount of fees paid to deduce or otherwise acquire communications protected by the privilege? If so, then the information is protected by solicitor-client privilege.

[para 207] The affidavit of the Public Body's solicitor states:

> My review of pages 1295 – 1300 of the Responsive Records indicates that they contain detailed references to the matters undertaken by external legal counsel and reference specifically the legal analysis conducted by external legal counsel on the EPS' behalf. There is a reasonable possibility that the assiduous inquirer, aware of background information available to the public, could use the information contained in these records to deduce or otherwise acquire communications protected by the privilege. These records consist of a communication between a solicitor (external legal counsel) and a client (the EPS), they reference the giving and seeking of legal advice, and they are intended to be kept confidential by the parties.

[para 208] The affidavit does not point to the information that she believes would assist an assiduous inquirer to deduce or otherwise acquire privileged communications. Moreover, the affiant does not state the facts that led her to form the opinion that the records reference the giving or seeking of legal advice or that they were intended to be kept confidential.

[para 209] I find that the description of the records provided by the affiant is not accurate in relation to records 1295 – 1296. Records 1295 – 1296 refer to files and file numbers, but do not contain, or refer to, any information that may be construed as legal

advice. At most, one can learn from these two records that a particular lawyer represented the Public Body as a presenting officer at a disciplinary hearing. In the case before me, any privilege attaching to that information was effectively waived when the presenting officer attended the disciplinary hearing on behalf of the Public Body. Alternatively, given that the presenting officer at no time concealed the fact that he was representing the Public Body, it may be that this was not a matter that he intended to be confidential.

[para 210] I find that records 1295 – 1296 are not subject to solicitor-client privilege and do not reveal information of this kind for the purposes of section 27(1)(a).

[para 211] With regard to records 1297 – 1300, the Public Body takes the position that this record is a lawyer's bill of account and that revealing its contents would enable the Applicant to learn privileged communications.

[para 212] Having reviewed records 1297 – 1300, I am not satisfied that their contents refer to privileged communications or that there is any likelihood that disclosing them would have the effect of revealing such communications. These records document a list of services performed by the Public Body's counsel, but does not refer to advice, or the subject matter of advice. However, even accepting that referring to a service refers to the giving or seeking of legal advice, I note that the information in the records establishes that the services in question were performed on behalf of the Public Body to the knowledge of the other parties. The records document that meetings and communications took place between the lawyer and other parties to the proceeding. Moreover, information about the services performed, such as representation at the hearing and attempts to settle the matter, was disclosed at a public hearing, and is known to anyone who attended. In addition, the information about attempts to settle the matter has already been disclosed to the Applicant, when portions of the decision documenting the attempts were provided to it.

[para 213] I am unable to find that disclosure of records 1298 – 1300 would reveal information subject to solicitor-client privilege. In this case, the steps taken on the file were known to the other parties, the presiding officer, and in some cases, to members of the public who attended the hearing. That this is so, is demonstrated by records 1298 – 1300, in addition to the records documenting the disciplinary proceedings. I therefore find that these records do not contain communications intended to be kept confidential by the parties.

[para 214] It does not appear that the solicitor's affidavit was intended to encompass record 1301; in any event, I find that record 1301 would not meet the description of records 1298 – 1300 provided in the affidavit. Record 1301 is a courier receipt. The Public Body does not address this record in its submissions. At most, record 1301 reveals that documents were sent from one law firm to another. There is nothing about the receipt that would have the effect of revealing privileged communications.

[para 215] For these reasons, I find that records 1295 – 1301 do not contain information subject to section 27(1)(a).

Records 1307, 1308, 1312 – 1313

[para 216] As the Public Body has not provided these records for my review, and as I am unable to determine whether these records are subject to solicitor-client privilege based on the submissions that I have been provided, I will decide this issue once the Public Body's judicial review application has concluded.

Record 1314

[para 217] Record 1314 consists of two emails, both dated March 3, 2010. The bottom email was sent at 8:46 AM, and the reply to it was sent at 8:51 AM. The first email forwards a question to a lawyer, and the lawyer's response, the top email, provided an answer. The question inquires as to whether an action has been taken, the response states that it has.

[para 218] The solicitor describes record 1314 in the following way:

> Record 1314 consists of email correspondence dated March 3, 2010, from [an employee] to external counsel requesting a further response to her February 23, 2010 correspondence, regarding information required for the provision of legal advice and the response email to this correspondence from external legal counsel on the same date. The information contained in pages 1339, 1315, and 1314 records facts in relation to which the confidential legal advice was sought and given, and provides factual background for the advice.

[para 219] Record 1314 does not refer to legal advice or contain information suggesting that information was required for the provision of legal advice. Rather, it contains a question, the answer to which will determine whether another step will be taken. While the solicitor states that the information in this record contains facts in relation to which confidential legal advice was sought or given, this characterization alone would not necessarily transform the emails into privileged communications. Having reviewed the emails, I am satisfied that the factual information does not relate to confidential legal advice. Contrary to the solicitor's description, the emails themselves indicate that legal advice was not required, as the parties had already determined the steps they would take once the factual question contained in the records was answered.

[para 220] For these reasons, I find that record 1314 is not subject to solicitor-client privilege and therefore cannot be withheld under section 27(1)(a).

Records 1315, 1339, 1340

[para 221] As the Public Body has not provided these records for my review, and as I am unable to determine whether these records are subject to solicitor-client privilege based on the submissions it has provided, I will decide this issue once the Public Body's judicial review application has concluded.

Records 1344 – 1345

[para 222] Records 1344 and 1345 consist of a confidential memorandum from an inspector to the manager of the legal services section.

[para 223] The solicitor states the following in relation to this memorandum:

> Page 1344 of the Responsive Records consists of a detailed memorandum from [an acting inspector] to [a lawyer and then the Manager of Legal Services at the EPS] regarding pages 1345 to 1349 of the Responsive Records, including a summary of external counsel's legal analysis of the status of the legal file, and external legal counsel's analysis of the matters conducted to that point.

[para 224] Despite the characterization of the records appearing in the affidavit as containing "legal analysis", I am satisfied from my review of these records that they do not contain or reveal legal analysis obtained from legal counsel. Rather, the memorandum documents the history of the file, the actions taken on the file, and the billings received to date. The purpose of the memorandum was to ensure that counsel was paid for the services provided.

[para 225] I find that the fact that counsel took various actions was not intended to be kept confidential between the parties to the proceeding for which the actions were taken. Rather, the steps taken, given their nature, would have been made known to the other side and to the presiding officer once counsel took them. Consequently, I find that the requisite element of confidence is missing in relation to any information referring to the activities of counsel on behalf of the Public Body in the records.

[para 226] I also find that records 1344 and 1345 are not in themselves a privileged communication, given that the purpose of the acting inspector in contacting the manager of legal services was to request that she authorize payment of a bill and to provide her with enough details of the actions taken on the file to satisfy her that authorizing payment was appropriate. Authorizing payment is an activity that would fall within her role as a manager, rather than as counsel.

Records 1346 – 1349

[para 227] Records 1346 – 1347 consist of a lawyer's bill of account. Records 1348 – 1349 consist of a cover page that accompanied the bill of account. According to the solicitor, disclosure of these records would reveal the substance of legal advice and reflect confidential conversations and instructions between solicitor and client.

[para 228] Having reviewed these records, I am satisfied that they do not reveal the substance of legal advice or reflect confidential conversations and instructions between solicitor and client. Rather, the records reveal that actions were taken, but not actions that were intended to be kept confidential from other parties to the matter. Moreover, I note that the final line item on record 1346 refers to the preparation of an email, but the email itself, which appears on record 1354, has not been withheld as privileged by the Public Body.

[para 229] Records 1348 – 1349 contain a list of names and file numbers. The records contain nothing that can reasonably be construed as legal analysis. There is nothing confidential about the name of the third party and the file number assigned to his case, given that this information was disclosed at the hearing and provided to the Applicant in response to his access request. If the Public Body's reason for withholding these records was that they would reveal that external counsel acted for it in the disciplinary matter, that information was also made public at the disciplinary hearing.

[para 230] I find that records 1346 – 1349 do not contain information that would enable even the most assiduous inquirer to obtain privileged information. I therefore find that they are not subject to section 27(1)(a).

Records 1356 – 59

[para 231] Records 1356 – 1359 consist of a letter written by an inspector of the Public Body to external counsel. The letter confirms that counsel has been retained to represent the Public Body in a matter. The letter appears to be a standard form document containing the rates the Public Body pays for lawyers at various experience levels and setting out the Public Body's allowable fees. The solicitor describes the record in the following way:

> Pages 1356 to 1359 are part of the continuum of legal advice sought by the EPS and provided by external legal counsel. Information in these pages was passed between EPS and external legal counsel in order to keep both solicitor and client informed so that confidential advice may be sought and given. Revealing the information contained in pages 1356 to 1359 would reveal the nature of the legal advice sought by the EPS and would reveal particular information sought by or provided to external legal counsel in relation to the provision of legal advice. These records consist of a communication between a solicitor, (external legal counsel) and a client (the EPS) they reference and support the giving and seeking of legal advice, and they are intended to be kept confidential by the parties.

[para 232] I agree that records 1356 – 1359 are a communication between a client and a lawyer. I also accept that the communication was made for the purpose of seeking legal advice, given that this letter is sent for the purpose of retaining counsel. However, I find that it has not been established that the communications contained in these records were intended to be kept confidential. That the lawyer in question was retained by the Public Body was made clear to the other side and to the public when the lawyer represented the Public Body at the disciplinary hearing and negotiated on its behalf. That the lawyer was provided with materials regarding the case was made plain to the other side when he contacted the other side to negotiate an agreed statement of facts. From the context provided by the letter, I find that the rate schedule it contains reflects the Public Body's standard policy with regard to retaining lawyers. No information is provided as to how the rate schedule would apply in this particular case.

[para 233] I find that the communications contained in records 1356 – 1359 were not intended to be kept confidential by the parties and were not kept confidential. I therefore find that these records are not subject to solicitor-client privilege.

"Settlement negotiation" or "without prejudice" privilege

Records 1303 - 1304

[para 234] The Public Body withheld records 1303 – 1304 on the basis of settlement negotiation privilege. According to the open submissions of the manager of the Public Body, records 1303 – 1304 were withheld on the following basis:

> Pages 1303 to 1304 of the Responsive Records indicates [*sic*] that it consists of correspondence dated March 30, 2010 , from external legal counsel to then-counsel for the EPS member investigated in relation to EPS file IA2006-014. This correspondence is marked with the notation "Without Prejudice". Page 1301 is the delivery slip indicating where and how this correspondence was delivered.
>
> My review of this correspondence at pages 1303 to 1304 indicates that it relates to legal matters at issue in the disciplinary proceedings which is in the nature of a litigious dispute. My review of this correspondence also leads me to believe that the parties were attempting to come to a resolution about legal matters at issue in the proceedings. Because of the context of the proceedings and the use of the term "Without Prejudice" on the correspondence, I believe that the parties were attempting to settle a dispute in a manner that would remain confidential if a resolution of the dispute was not reached. My review of the Responsive Records indicates that there were legal matters still in dispute at the time of the correspondence and that the correspondence requested that further information be provided in order that a resolution be reached.

[para 235] Records 1303 – 1304 consist of a letter from the Public Body's counsel to the Third Party's counsel. The letter indicates that it is sent "without prejudice" and proposes terms of settlement. While a response from the Third Party does not appear among the records, the presiding officer's decision indicates that the Third Party did accept the proposed terms of settlement. The evidence of the parties establishes that the matter has concluded and there are no further related proceedings in contemplation.

[para 236] I note that in *Mahe v. Boulianne*, 2010 ABCA 74, the Alberta Court of Appeal held that "without prejudice" privilege is presumed to expire once the merits of the dispute, and any related disputes, have been decided. The Court said:

> Not all privileges are of perpetual duration. For example, the litigation privilege ends when the litigation (and any collateral litigation) is over: *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319. The primary purpose of the "without prejudice" settlement privilege is to encourage efforts to resolve the dispute, by giving assurances that any concessions of fact or liability in the negotiations and the offer will not be shown to the trier of fact. Once the litigation (and any related litigation) is concluded, the reason for the privilege is ordinarily spent. As the Court held in *Blank* at para. 34 with respect to litigation privilege: "Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose – and therefore its justification". So absent any specific agreement between the parties (or other special circumstances) the "without prejudice" privilege is presumed to expire once the merits of the dispute have been decided. [My emphasis]

[para 237] The Court of Appeal may be taken to say that the privilege ends with the conclusion of the dispute (and any related proceedings), and the evidence of the parties

establishes that the disciplinary hearing and any related proceedings have concluded, the purpose of applying settlement negotiation privilege, or without prejudice privilege, would not be served by withholding the records. Moreover, it refers to the privilege as applying in relation to the litigation or collateral litigation for which the settlement communications were made. It is therefore unclear how this privilege would apply in an inquiry under the FOIP Act, which does not appear to be collateral litigation. However, the parties have not addressed *Mahe v. Boulianne* in their submissions.

[para 238] I also note that the Public Body has not explained how it exercised discretion to withhold records 1303 – 1304 under section 27(1)(a), (b), and (c) of the FOIP Act. While a public body need not explain why it has exercised discretion to withhold information once it has been established that information is subject to solicitor-client privilege, given the near absolute nature of this privilege, the same is not true of settlement negotiation privilege. This is particularly so when the proceedings for which the communication was made have long since concluded and it has not been established that the purpose of the privilege would be served by withholding the information.

[para 239] In *Leahy*, (supra), the Federal Court of Appeal determined that it would be inappropriate to decide the issues on the paucity of evidence before it as to how exceptions applied and how discretion had been exercised. I have decided that this is an appropriate approach to take in relation to records 1303 – 1304, as my decision would benefit from argument from the parties as to whether records 1303 – 1304 are privileged. In addition, the decision would benefit from argument as to whether this privilege has any application in an inquiry under the FOIP Act, as this inquiry is a proceeding unrelated to the disciplinary matter regarding which the offer of settlement was made. I have therefore decided to reserve my decision on this question until I have had the opportunity to canvas the parties with regard to the application of settlement negotiation privilege generally to an inquiry under the FOIP Act, and the application of *Mahe v. Boulianne*, 2010 ABCA 74 specifically. I would also then have the benefit as to the reasons the Public Body elected to withhold records 1303 – 1304.

Section 27(1)(b)

[para 240] The Public Body applied section 27(1)(b) to withhold information from records 743 – 752, 974 – 983, 1052, 1228, and 1303 – 1304. As records 1228 and 1303 – 1304 have been provided to me, I will determine whether the Public Body has properly withheld information on the basis of section 27(1)(b).

[para 241] Section 27(1)(b) states:

> *27(1) The head of a public body may refuse to disclose to an Applicant*
>
> *(b) information prepared by or for*
> *(i) the Minister of Justice and Attorney General,*
> *(ii) an agent or lawyer of the Minister of Justice and Attorney General, or*

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

in relation to a matter involving the provision of legal services…

[para 242] In Order F2008-021, I interpreted section 27(1)(b) in the following way:

> In the context of "information in relation to a matter involving the provision of legal services", I read "matter involving the provision of the legal services" such that the "matter" is constituted by, or consists of, the provision of legal services. The other potential interpretation of this part of the provision – that the phrase is met for any matter to which legal services have been provided at some time – is implausible. It would have the provision take into account a factor (that the matter happens to have involved the provision of legal services) that may be coincidental and have no relevance to the information that is being prepared and which requires the protection of the provision. I interpret the phrase "information prepared in relation to" as referring to information compiled or created for the purpose of providing the services, in contrast to merely touching or commenting upon the provision of the services. The use of the term "prepared" – which the *Canadian Oxford Dictionary* defines as "to make ready for use" - carries the suggestion that the information is necessary for the outcome that legal services be provided.
>
> It follows, then, that the person contemplated by the provision who is preparing the information, is doing so for the purpose of providing legal services, and therefore must be either the person providing the legal service or a person who is preparing the information on behalf of, or, at a minimum, for the use of, the provider of legal services.

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.

[para 243] In Order F2008-028, the Adjudicator held that the term "prepared" in section 27(1)(b) is not intended to refer to information that is not substantive, such as dates, letterhead, and names and business contact information. He said at paragraphs 156 – 158 of that order:

> I find that the substantive information on pages 305-311 was prepared for a lawyer of a public body in relation to a matter involving the provision of legal services, and therefore falls within section 27(1)(b)(iii). However, this is not because the information was sent to a solicitor, as the fact that information was destined to go to someone does not necessarily mean that it was prepared by or for that person. Under other sections of the Act, it has been concluded that, for a record or information to be created "by or for" a person, the record or information must be created "by or on behalf of" that person [Order 97-007 at para. 15, discussing what is now section 4(1)(q) of the Act; Order 2000-003 at para. 66, discussing what is now section 4(1)(j); Order 2008-008 at para. 41, discussing section 24(1)(a)]. Here, I find that the substantive content of pages 305-311 was prepared "for" the lawyer who received the information because the covering letter indicates that the sender of the information was specifically asked to provide input.
>
> However, to fall under section 27(1)(b), there must be "information prepared" as those words are commonly understood (Order 99-027 at para. 110). I therefore do not extend the application of section 27(1)(b) to the dates, letterhead, and names and business contact information of the sender and recipient of the information on pages 305-311. These are not items of information that were "prepared". In keeping with principles articulated in respect of sections 22 and 24 of

> the Act, section 27(1)(b) does not extend to non-substantive information, such as dates and identifying information about senders and recipients, unless this reveals the substantive content elsewhere. However, in the context of section 27(1)(b) - which applies more broadly to information that was prepared rather that the substance of deliberations or advice under sections 22 and 24 - I find that the heading on page 309 reveals the information that was prepared in the rest of the document.
>
> Pages 351-352, 353 (lower two thirds), 355 (upper half) and 373 consist of e-mail exchanges. I find that the content of these e-mails may not be withheld under section 27(1)(b). With the exception of the last five lines of page 352 and the top half of page 351, I do not consider the information to be "prepared". In my view, the word "prepared" implies that there must be a greater degree of substantive content, rather than simply a communication of an administrative nature (e.g., distributing documents, arranging meetings) or a communication referring to or briefly discussing information that has been prepared elsewhere. There is presumably substantive content in the attachments to some of the e-mails, but that content is not actually revealed in the e-mails. I also find that the last five lines of page 352 and the top half of page 351 do not fall under section 27(1)(b) because, although the information is substantive, it is not in relation to legal services. The content expressly refers to "policy" objectives.

[para 244] Applying the reasoning in Orders 99-022, F2008-021, and F2008-028, information "prepared for an agent or lawyer of a public body" is substantive information prepared on behalf of an agent or lawyer so that the agent or lawyer may provide legal services. Information sent to an agent or lawyer of the public body in circumstances where the sender is seeking to obtain legal services, is not captured by section 27(1)(b), as the information is not prepared on behalf of the agent or lawyer. It also follows that section 27(1)(b) does not cover the situation where a person, even a person who is one of the persons listed in subclauses i – iii, creates information that is connected in some way with the provision of legal services but is not created for that purpose. For example, section 27(1)(b) does not apply to information that merely refers to or describes legal services without revealing their substance.

Record 1228

[para 245] As discussed above, record 1228 consists of two emails. The first email is written by a lawyer in response to an email written by an employee of the Public Body. The email written by the employee is not addressed to the lawyer but to another employee. The lawyer was copied on this email.

[para 246] I find that the email written by the employee is not subject to section 27(1)(b), as section 27(1)(b) applies to information prepared by, or at the direction of, a lawyer for a public body. The email written by the employee cannot be characterized in this fashion.

[para 247] I also find that the email prepared by the lawyer cannot be construed as having been prepared for the purpose of providing legal services, as contemplated by section 27(1)(b). The lawyer was not asked a question or asked to provide legal services. His response was not sought by the individual. In addition, if the email was provided to the recipient as a legal service, it has not been established for this inquiry what that legal

service was. Rather, the response appears to have been intended to supply facts within the author's knowledge.

[para 248] I find that section 27(1)(b) does not apply to record 1228.

Records 1303 - 1304

[para 249] Records 1303 – 1304, discussed above, consist of a letter sent from counsel for the Public Body to counsel for the third party. The purpose of the letter was to negotiate a settlement of matters.

[para 250] As the Public Body's counsel was retained as a presenting officer at the disciplinary hearing, writing the third party's counsel with a view to effecting a settlement may be considered a legal service he provided to the Public Body. I therefore find that records 1303 – 1304 fall within the terms of section 27(1)(b).

Exercise of Discretion

[para 251] As discussed above, when making a decision to withhold or disclose information subject to a discretionary exception, consideration must be given to the purpose of the exception. However, in the case of section 27(1)(b), and, as will be seen below, section 27(1)(c), the purpose of the provision is unclear.

[para 252] Although section 27(1)(b) may apply in some instances to records that are subject to privilege, it does not follow that section 27(1)(b) applies to all records that are subject to solicitor-client privilege or is intended to do so. Determining whether section 27(1)(b) applies does not involve consideration of whether information is subject to privilege, but involves inquiring whether a person listed in subclauses 27(1)(b)(i – iii) prepared the record, and whether the record was prepared for the purpose of providing legal services. Section 27(1)(b) is clearly not intended to protect privileged information, as that is the purpose of section 27(1)(a). Moreover, it does not appear intended to protect information such as advice that is not subject to a privilege, as that is the purpose of section 24. In addition, it appears that section 27(1)(b) is not intended to serve the purpose of protecting information that may be harmful to negotiations, or competition, that is not privileged, as that is the purpose of section 25. Despite the references to the Minister of Justice and Attorney General in these provisions, sections 27(1)(b) and (c) do not appear intended to protect activities uniquely associated with that office, given that these provisions also apply to all public bodies generally.

[para 253] In any event, it is unclear what purpose is served by withholding non-privileged communications between a solicitor and a public body that merely relate to the provision of legal services, and that would not otherwise fall under an exception to disclosure in the FOIP Act, particularly as there is no requirement that the information be provided or accepted in confidence or that disclosure of the information could result in harm.

[para 254] The Public Body provided the following explanation of its decision to withhold information under section 27(1)(b) in its submissions:

> The Crown prosecutor is an agent or lawyer for the Minister of Justice or Attorney General, and the statements were made and gathered to provide legal advice. The information was undoubtedly prepared by or for the minister of Justice and Attorney General in relation to a matter involving the provision of legal services.
>
> Further, the external legal counsel to the EPS was providing legal services when sending the without prejudice correspondence, and when communicating legal advice by email.
>
> Therefore the EPS submits that the portions of the Responsive Records referencing the Crown opinion, direct communication with the Crown, and the without prejudice communications and other communication providing legal advice by the external legal counsel also fall within the exception to disclosure found in section 27(1)(b), and the EPS properly applied its discretion to refuse to disclose these portions of the Responsive Records to the Applicant.

[para 255] The Public Body has provided an explanation as to why it believes that the records it withheld under section 27(1)(b) fall within the terms of this provision. However, it has provided no explanation of its decision to *withhold* information under this provision. As described by the Supreme Court of Canada in *Ontario (Public Safety and Security),* (*supra*) applying a discretionary exception is a two-step process: first, it must be found that the exception applies; second, a decision must be made to withhold the information under the discretionary exception. When making the decision to disclose or withhold information, "the head must go on to ask whether, having regard to all relevant interests, including the public interest in disclosure, disclosure should be made". As discussed in *Blank v. Canada (Minister of Justice),* 2006 SCC 39 at paragraph 52, the discretionary wording of exceptions is intended to encourage the head of a public body to disclose information, unless he or she forms the opinion that it is in the public interest to withhold the information.

[para 256] The Public Body has not explained what interest in withholding information is served by section 27(1)(b), or why it concluded that this interest outweighed the right of access, or any other interests in disclosing the information withheld under this provision.

[para 257] In Order F2010-007, I said:

> If, as I have found, section 27(1)(b) applies to non-privileged, substantive information prepared by or on behalf of a lawyer of a public body", so that the agent or lawyer may provide legal services, the circumstances in which the interests protected by section 27(1)(b) would outweigh the right of access and its attendant principles of accountability and transparency, are equally difficult to imagine. That is to say, it is unclear what interest there is in protecting information prepared by or on behalf of a lawyer that is not already protected by the other discretionary sections in the FOIP Act. At the very least, to establish that discretion was applied appropriately to withhold information under section 27(1)(b), it would be necessary for the head of a public body to detail the reasons for the exercise of the discretion, and explain how the interests protected by section 27(1)(b) outweigh the right of access in the particular circumstances.

[para 258] As the Public Body has not attributed a purpose to section 27(1)(b) that is served by withholding the records, or explained how this purpose outweighs any competing interests, I am unable to conclude, on the facts before me, that the Public Body properly exercised its discretion when it withheld information under section 27(1)(b). However, as I have already decided that I must ask the Public Body further questions regarding the application of section 27(1)(a) to record 1303 – 1304, and its exercise of discretion in relation to section 27(1)(a), I conclude that I must ask it questions regarding its exercise of discretion in relation to section 27(1)(b). This is because a Public Body must comply with an order to re-exercise discretion within fifty days; however, if a public body cannot disclose the information because it is still arguing the application of another exception to the same records, then it cannot exercise discretion.

Section 27(1)(c)

[para 259] The Public Body applied section 27(1)(c) to withhold information from records 743 – 752, 974 – 983, 1052, 1228, and 1303 – 1304. As I have been provided with records 1228 and 1303 – 1304, I will consider whether these records are subject to section 27(1)(c).

[para 260] Section 27(1)(c) states:

> *27(1) The head of a public body may refuse to disclose to an Applicant*
>
> *(c) information in correspondence between*
>
> *(i) the Minister of Justice and Attorney General,*
>
> *(ii) an agent or lawyer of the Minister of Justice and Attorney General, or*
>
> *(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 261] The Public Body argues:

> Section 27(1)(c) permits a public body to refuse disclosure of information in correspondence between the Minister of Justice and Attorney General, an agent or lawyer of the minister of justice and Attorney General, or 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 of lawyer.
>
> For section 27(1)(c) to apply, specific criteria must be met. First, the information must be in correspondence. Second, in the case of paragraph (iii) specifically, that correspondence must be between an agent or lawyer of a public body and any other person. Third, the information or correspondence must be "in relation to a matter involving the provision of advice or other services by [either] the Minister of Justice and Attorney General or by the agent or lawyer.

[para 262] I agree with the Public Body's description of the requirements of section 27(1)(c).

[para 263] It appears that section 27(1)(c) anticipates that an agent of the Attorney General or counsel for a public body could be either the sender or the recipient of the correspondence referred to in this provision. It also appears that the "person" referred to in this provision need not be the recipient of the legal services referred to in this provision. As long as the correspondence in question relates, in some way, to a matter that involves the provision of legal services by the agent or lawyer, it appear that section 27(1)(c) gives the head of a public body the discretion to withhold the correspondence. The purpose the legislature intended this provision to serve is not apparent from the language or context of the provision or the scheme of the FOIP Act.

[para 264] McMahon J., stated in OIPC External Adjudication Order #4:

> As can be seen from the foregoing, the exemptions and exceptions are very wide and have the potential to sweep in a number of government documents. In addition, the head of a public body has discretion in many cases to release documents or not. Despite the noble sentiments often expressed in support of this kind of legislation, the reality is that a government's desire for secrecy too often trumps the nominal objective of "freedom of information". ... [O]ne need only look to s. 27(1) to see the crafted impediments. Subsection 27(1)(b) permits the public body to refuse disclosure of information prepared by or for an agent or a lawyer of the public body that merely relates to a matter involving the provision of legal services. The information need not involve the provision of actual legal services. Even more sweeping is subsection 27(1)(c). It permits non-disclosure of information in any correspondence between a lawyer of a public body ... (which would extend to the non-legal staff ...) on the one hand, and anyone else. The information need merely relate to a matter involving the provision of any kind of advice or any kind of service by the agent or lawyer.
>
> It would be difficult to draft a more general or exclusionary clause.

[para 265] I accept that records 1228, and 1303 – 1304 can be construed as meeting the requirements of section 27(1)(c), given that they appear in correspondence between a lawyer for the Public Body and another person. Moreover, this correspondence could be said to relate, generally, to the provision of legal services, given that attempting to settle a matter on behalf of a client is a legal service.

Exercise of Discretion

[para 266] Section 27(1)(c) authorizes the head of a public body to withhold information in correspondence between a lawyer and another person that is not privileged, not confidential, and the disclosure of which would not result in harm to the Public Body or anyone else. If this provision has the purpose to which McMahon J. assigned it, then it would be difficult for a Public Body to exercise discretion in favor of withholding information under section 27(1)(c). In my view, the legislature's purpose in enacting this provision is unclear. However, the parties have not provided argument as to what they believe this provision is intended to

[para 267] The Public Body has not provided an explanation of its decision to exercise discretion in favor of withholding information under section 27(1)(c). It has not commented on what it believes to be the purpose of section 27(1)(c), or explained why withholding information under this provision serves this purpose, or outweighs the right

of access in relation to the records it withheld under this provision. I have decided that the inquiry will benefit from obtaining the parties' arguments on the interpretation of section 27(1)(c) and the public interest they believe this provision supports. Moreover, any decision I make will benefit from obtaining the Public Body's reasons for exercising discretion to withhold information from records 1228, 1303, and 1304 under section 27(1)(c) as it did.

Conclusion

[para 268] For the reasons above, I find that the Public Body has not established that records 1228, 1295 – 1301, 1314, 1344 – 1345, 1346 – 1349, or 1356 – 1359 are privileged and I find that these records cannot be withheld under section 27(1)(a). I make no findings in relation to the records the Public Body did not provide for my review but will make a decision regarding those records once the Public Body's judicial review application has been concluded. I will not order disclosure of the records to which the Public Body applied section 27(1)(a), and which I have found are not subject to this provision, as this information has also been severed under section 17 and I have ordered the Public Body to make a new decision under section 17.

[para 269] I have found that section 27(1)(b) can be said to apply to records 1303 – 1304, and that 27(1)(c) may be said to apply to records 1228, and 1303 – 1304; however, I have found that the Public Body has not explained how it exercised discretion to withhold information under these provisions.

[para 270] I have also decided that I must seek further submissions from the parties regarding the application of settlement negotiation privilege, or "without prejudice privilege" to the records. At that time, I will ask the Public Body to explain its decision to withhold information from records 1228, and 1303 – 4 under the applicable provisions of section 27. I anticipate, for the purposes of section 69(6) of the FOIP Act that it will take a further three months from today to ask questions of the parties, to obtain their responses, and to issue a decision on the issues relating to settlement negotiation privilege and the application of discretion under section 27.

V. ORDER

[para 271] I make this Order under section 72 of the Act.

[para 272] I order the Public Body to disclose the radio code from record 164.

[para 273] I require the Public Body to reconsider its decision under section 17(1) in view of the following:

- that a relevant consideration under section 17(5) is that portions of the decision that have been withheld have already been placed in the public realm in the sense that the written decision was read aloud in public and discussed in the media by the Third Party's counsel; disclosure of the same information is not as invasive of

privacy as disclosure of information that has not already been publicly disclosed in this manner, regardless of whether it appears in the decision or elsewhere in the records

- that it consider only factors that have been established as applying

- that only personal information of identifiable individuals may be withheld under section 17

- if, once the Public Body has made its new decision, it finds it necessary to consider severing information, it may only withhold information on the basis that "meaninglessness" will result, if it makes that determination after consideration of each specific piece of information that is left after severing.

[para 274] I order the Public Body to reconsider its decision to withhold records 149 – 150 under section 24(1)(a) and the two emails appearing on record 1225 under section 24(1)(b). The new decision must take into account the purpose of the provision, whether withholding information under this provision serves this purpose, given the possibility that this information may not disclose anything that is not publicly known, and whether this purpose outweighs any competing interests in disclosing the information, such as the right of access. The new decision would be reviewable by this office if the Applicant is dissatisfied with the new decision.

[para 275] I confirm the Public Body's decision to withhold records 1284 – 1285 under section 24(1)(b).

[para 276] I confirm that records 238, 291, 346, 399, 400, 401, 916, 917, 931, 932, 959, and 960 are exempt from the operation of the Act by the application of section 4.

[para 277] If, after the head of the Public Body has made the new decisions, he determines that there is information in the records that is not subject to section 17(1), and he is not exercising his discretion to withhold this information under sections 24(1)(a) or (b), or a provision of 27, the head of the Public Body must disclose that information to the Applicant.

[para 278] I further order the Public Body to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

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Teresa Cunningham
Adjudicator