ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2013-51

December 13, 2013

ALBERTA HUMAN RIGHTS AND CITIZENSHIP COMMISSION

Case File Number F5753

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Summary: The Applicant made an access request to the Alberta Human Rights and Citizenship Commission ("the Public Body" or "HRC") for records containing information about a human rights complaint she had made against the University of Calgary.

The Public Body provided responsive records, but severed information under sections 17 (disclosure harmful to personal privacy), 18 (disclosure harmful to individual or public safety), 20 (disclosure harmful to law enforcement), and 27 (privileged information) of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act).

The Adjudicator found that sections 18, 20, and 27 had not been shown to apply to the information that had been withheld. She ordered the Public Body to disclose any information that had been withheld solely on the basis of these provisions.

With respect to personal information that had been withheld under section 17 (as well as under sections 18, 20 and 27 in some cases) the Adjudicator found that the manner in which the Public Body had made its decisions in reliance on section 17 made it impossible for her to determine whether its decisions had been made correctly. She ordered it to make a new decisions that would involve giving notice to the individuals whose information was in the records so that they could provide their views, to make determinations as to whether the entirety of the information was personal information, and whether it would identify the individuals whose personal information it was, and to

consider only factors that have been established as relevant when making the new decisions.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 6, 16, 17, 18, 19, 20, 24, 25, 27, 30, 72; *Health Information Act* R.S.A. 2000, c. H-5, ss. 11; *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 1980 c.H-11.7 ss. 19.1, 28

Orders Cited: AB: Orders 96-004, 99-009, 99-022, H2002-001, F2003-005, F2004-032, F2008-028, F2008-030, F2008-031, F2009-026, F2010-007, F2010-025, H2010-003, F2011-014, F2012-24.

Court Cases Cited: *Blank v. (Minister of Justice)*, [2006] 2 S.C.R. 319; *Merck Frosst Canada Ltd. v. Canada (Health)* [2012] S.C.J. No. 3; *Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner)*, 2006 ABQB 515; *Mount Royal University v. Carter*, 2011 ABQB 28; Alberta Court of Queen's Bench oral decision, September 9, 2011 (Court File Number 1103 01171); *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2012 ABQB 595.

I. BACKGROUND

[para 1] On November 17, 2010, the Applicant made an access request to the Alberta Human Rights Commission (the Public Body). She requested all records pertaining to a sexual harassment complaint she had made against the University of Calgary.

[para 2] The Public Body responded to the Applicant's request for records on February 22, 2011. The Public Body stated:

> The AHRC has decided to provide you with partial access to the records you have requested. Some of the records contain information that must be withheld from disclosure under Sections 16 (Business Information), 17 (Personal Information) and 27 (Legal Privilege) of the FOIP Act. Other records contain information that may be withheld from disclosure under Sections 18 (Harmful to Individuals), 19 (Confidential Evaluations), 20 (Harmful to Law Enforcement), 24 (Advice to Officials), and 25 (Interests of a Public Body). Please find attached copies of the relevant sections of the Act.
>
> Due to the large volume of records related to your request, it will take a few days to complete all copying and preparation.

[para 3] The Applicant requested review by the Commissioner of the Public Body's response to her access request.

[para 4] The Commissioner authorized mediation. Following mediation, the Applicant requested an inquiry. In her submissions, the Applicant referred only to the Public Body's application of sections 17 and 18 as being in issue.

[para 5] The University of Calgary was identified as an affected party for the inquiry, given that the records withheld under section 27 had been withheld on the basis that any privilege attaching to them belonged to it.

[para 6] A notice of inquiry was issued by this office on May 10, 2012. The notice identified only the application of sections 17, 18, and 27 as being at issue for the inquiry.

[para 7] The parties exchanged submissions. Once I reviewed the parties' submissions, I noted that the application of sections 16, 19, 20, 24, and 25 had not been set out in the notice of inquiry and that the parties had not made arguments in relation to the Public Body's application of these provisions. However, the Public Body had also applied these provisions to many of the records it was also withholding under sections 17, 18, and 27, with the result that even if the Applicant were successful regarding the application of sections 17, 18, and 27, most of the information that is being withheld under these provisions could not be released. I therefore wrote the Applicant to obtain clarification of her intentions regarding the inquiry.

[para 8] The Applicant clarified that she had not intended to limit the issues for inquiry to the Public Body's application of sections 17, 18, and 27.

[para 9] I decided that the Public Body's application of sections 16, 19, 20, 24, and 25, would be added as issues to the inquiry. In finding that the Applicant was entitled to raise these issues, I noted that the Public Body's response had been unclear as to the provisions that had been applied to withhold information. I provided the parties additional time to prepare submissions regarding these issues.

[para 10] The Public Body reviewed the records and its severing decisions. It stated in its initial submissions that it was no longer relying on sections 16, 19, 24, and 25 to withhold information from the records. (There was some lack of clarity as to whether sections 24 and 25 were still being applied to some of the records, but as no submissions were made by the Public Body to support the application of these provisions, I cannot find that they applied.) With regard to section 20, it stated that it was now applying this provision to withhold information only from records 1-20, 1-21, 1-22, 1-23, 1-26, 1-28, 1-79 to 1-83, 1-85, 1-128, 1-143, 1-243, 1-270, 1-451, 1-489, 3-25, 3-27, and 3-34 to 3-37. The Public Body stated that it was prepared to release information that had been withheld under sections 16, 19, 20 (other than the information contained on the records cited above), 24, and 25.

II. RECORDS AT ISSUE

[para 11] The records at issue are those from which the Public Body has severed information under sections 17, 18, 20, and 27 of the FOIP Act.

III. ISSUES

[para 12] The issues in the Inquiry are as follows:

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

Did the Public Body properly apply section 18 of the Act (disclosure harmful to individual or public safety) to the information in the records?

Did the Public Body properly apply section 20(1) of the Act (disclosure harmful to law enforcement) to the information in the records?

Did the Public Body properly apply section 27 of the Act (privileged information) to the information in the records?

[para 13] Given my conclusions with respect to these issues, I will discuss them in a different order than that just stated. As I have decided that sections 18, 20, and 27 of the Act cannot be relied on to withhold any of the information, I will discuss the application of these sections first. I will then deal with the application of section 17.

IV. DISCUSSION OF ISSUES

Did the Public Body properly apply section 18 of the Act (disclosure harmful to individual or public safety) to the information in the records?

[para 14] Section 18 of the FOIP Act authorizes the head of a public body to withhold information in situations where disclosing the information may reasonably be expected to harm individual or public safety. This provision states:

> *18(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to*
>
> *(a) threaten anyone else's safety or mental or physical health, or*
>
> *(b) interfere with public safety.*
>
> *(2) The head of a public body may refuse to disclose to an applicant personal information about the applicant if, in the opinion of a physician, a regulated member of the College of Alberta Psychologists or a psychiatrist or any other appropriate expert depending on the circumstances of the case, the disclosure could reasonably be expected to result in immediate and grave harm to the applicant's health or safety.*

> *(3) The head of a public body may refuse to disclose to an applicant information in a record that reveals the identity of an individual who has provided information to the public body in confidence about a threat to an individual's safety or mental or physical health.*

[para 15] In Order H2002-001, former Commissioner Work considered what must be established in order for section 11(1)(a)(ii) of the *Health Information Act*, a provision which is similar in purpose to section 18 of the FOIP Act, to be applicable. He reviewed previous orders of this office addressing what is necessary to establish a reasonable expectation of harm under section 18 of the FOIP Act and adopted the following approach:

> In Order 2001-010, the Commissioner said there must be evidence of a direct and specific threat to a person, and a specific harm flowing from the disclosure of information or the record. In Order 96-004, the Commissioner said detailed evidence must be provided to show the threat and disclosure of the information are connected and there is a probability that the threat will occur if the information is disclosed.

[para 16] In Order 99-009, former Commissioner Clark explained the necessary elements of establishing that there is a reasonable expectation that disclosing information would threaten the health or safety of an individual under what is now section 18 of the FOIP Act. He said:

> In Order 96-004, I said that where "threats" are involved, the Public Body must look at the same type of criteria as the harm test referred to in Order 96-003, in that (i) there must be a causal connection between disclosure and the anticipated harm; (ii) the harm must constitute "damage" or "detriment", and not mere inconvenience; and (iii) there must be a reasonable expectation that the harm will occur.
>
> Consequently, for section 17(1)(a) [now section 18(1)(a)] to apply, the Public Body must show that there is a threat, that the threat and the disclosure of the information are connected, and that there is a reasonable expectation that the threat will occur if the information is disclosed.

[para 17] In Order F2004-032, the Adjudicator found that a Public Body cannot rely on speculation and argument that harm might take place, but must establish a reasonable expectation that harm would result from disclosure before it may apply section 18 of the FOIP Act.

[para 18] Section 11(1)(a) of the HIA, which former Commissioner Work considered in H2002-001, is similar in wording and purpose to section 18 of the FOIP Act and refers to information that may result in harm to individual mental or physical health and safety or public safety. It states:

> *11(1) A custodian may refuse to disclose health information to an applicant*
>
> *(a) if the disclosure could reasonably be expected*

> *(i) to result in immediate and grave harm to the applicant's mental or physical health or safety,*
> *(ii) to threaten the mental or physical health or safety of another individual, or*
> *(iii) to pose a threat to public safety*

[para 19] In *Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner),* 2006 ABQB 515 the Court agreed with the Commissioner that a public body must provide evidence to support its arguments that there would be a risk of harm if information is disclosed. The Court said:

> The Commissioner's decision did not prospectively require evidence of actual harm; the Commissioner required some evidence to support the contention that there was a risk of harm. At no point in his reasons does he suggest that evidence of actual harm is necessary.
>
> The evidentiary standard that the Commissioner applied was appropriate. The legislation requires that there be a "reasonable expectation of harm." Bare arguments or submissions cannot establish a "reasonable expectation of harm."

[para 20] These cases establish that section 18 of the FOIP Act applies to harm that would result from disclosure of information in the records at issue, but not to harm that would result from factors unrelated to disclosure of information in the records at issue. Further, a public body applying section 18 of the FOIP Act must provide evidence to support its position that harm may reasonably be expected to result from the disclosure of information (as must a custodian applying section 11(1)(a) of the HIA).

[para 21] Following the approach adopted by the former Commissioner in Order 96-004, and in subsequent cases considering either section 18 of the FOIP Act or section 11 of the HIA, the onus is on the Public Body to provide evidence regarding a threat or harm to the mental or physical health or safety of individuals, to establish that disclosure of the information and the threat are connected, and to prove that there is a reasonable expectation that the threat or harm will take place if the information is disclosed.

[para 22] The information the Public Body withheld under section 18 consists primarily of notes of interviews, notes of attempts to contact parties, and details of events taking place in the course of investigations into the Applicant's complaints.

[para 23] The Public Body stated the following in its submissions:

> Numerous references were made during the course of the investigation interviews to suggest interviewees reasonably felt threatened and were concerned for their own safety or the safety of others. As certain of this information was disclosed in response to the initial access request, the Public Body has not specified the pages of records on which this evidence appears. As the Applicant knows the names of individuals interviewed, disclosure of specific information such as page numbers would extinguish the need for the protection of third party information under section 17 as information would be attributable to identifiable individuals.

> Notwithstanding, the Public Body refers the Commission to those pages of records identified as notes form investigation interviews for this information.
>
> The Public Body submits that by their nature the comments surrounding these threats meet the test:
>
> - There is a causal connection – "if the information is disclosed it will result in harm",
> - The harm will be damaging,
> - It is not unreasonable to expect that, knowing the individuals involved and the situation in the workplace that harm will occur.
>
> The Public Body refers the Commissioner to those pages of records identified as notes from investigation interviews in the second package of records (the 3-records) as well for evidence pursuant to section 18.
>
> The Public Body submits that it properly applied section 18 and that the damage / harm in the matter at inquiry is not diluted by the application of this section in what may be a more obtuse manner than usual.

[para 24] From its arguments, I understand that the Public Body believes there is evidence in the records that supports its application of section 18.

[para 25] Having reviewed the records, I am unable to find evidence of threats being made by the Applicant, or any information that would be reasonably likely to result in the kind of harm contemplated by section 18. I also find that there is nothing in the records to support the statement that the records "suggest interviewees reasonably felt threatened and were concerned for their own safety or the safety of others".

[para 26] In making this finding, I note a reference on record 3-75 that one employee of the University of Calgary considered another employee of the University of Calgary to feel harassed by the Applicant's emails; however, this record does not refer to the employee feeling *threatened* or describe threats made by email. There is nothing in the records to support a finding that this individual was ever threatened or felt that way. From my review of the emails by the employee who is referred to as feeling harassed by the Applicant's emails, (records 3-68 – 3-70), I am unable to conclude that the recipient felt threatened, or even harassed, by the Applicant, given that she sought to meet with the Applicant on receipt of her email. For the purposes of section 18, there is nothing in record 3-75 to suggest that if the information it contains were disclosed, that harm to the recipient or anyone else would result. Finally, I note that record 3-168, which was provided to the Applicant, makes reference to the Applicant as having been told some of the information that was severed from record 3-75.

[para 27] As noted above, previous orders of this office require a public body to provide evidence regarding a threat or harm to the mental or physical health or safety of individuals, to establish that disclosure of the information and the threat are connected, and to prove that there is a reasonable expectation that the threat or harm will take place if the information is disclosed. The Public Body has not described the harm it

contemplates will result if the information in the records is disclosed, or explained how this harm would relate to the disclosure of the information to which it has applied section 18.

[para 28] I also note that there is reference in records 1-215 to 1-216 to an incident involving the Applicant's husband. The Public Body applied section 18 to this record, in addition to sections 17 and 20. The Public Body has not provided context for the notes, or a translation for the passages where the writing is illegible, or any explanation where the sentences in the notes do not have a subject or object. It is unclear who or what is the source of information in the notes, whether the notes record a first or second-hand account, and whether the information was verified by the individual who recorded it. (Although the Public Body states on page 9 of its submissions that the notes appearing in the first volume of the records were taken by an individual contracted by the University of Calgary to investigate the Applicant's complaint of harassment, record 1-81 of the notes indicates that the notes were not made by that individual, but by someone else, possibly the HRC's investigator. As well, in its additional submission of January 18, 2013, the Public Body refers to the Volume 1and 3 notes having been made by its own investigators.) Again, the Public Body has not said what harm it contemplates will result if the information in the records is disclosed, or explained how this harm would relate to the disclosure of the information to which it has applied section 18.

[para 29] The Applicant also refers to an incident in her submissions and states that it was not violent, although she agrees that others reported it in those terms. She confirms that she was banned from attending the University of Calgary campus following an incident taking place once her employment terminated, but that this ban was lifted at her request. The Public Body has not addressed the Applicant's arguments regarding the incident or contested her account of what happened in its submissions.

[para 30] There is also a report of an incident appearing on record 1-290. This record, which was provided to the Applicant in response to this access request, indicates that a security guard was told by an employee of the University of Calgary that the Applicant's husband had been verbally abusive toward him. This report does not provide any further details of what was alleged to have been said. A second document attested to by the employee (record 1-552, supported in some aspects by the account of another person in record 1-553) describes the incident more fully, setting out an angry and threatening comment in reference to the person who had allegedly been harassing the Applicant, made by the Applicant's husband at the time the Applicant was terminated from her employment.

[para 31] Assuming that there was a threatening aspect to the incident involving the Applicant's husband, it has not been established for the inquiry that the Applicant herself has ever threatened anyone or that disclosing the information in the records about this incident to the Applicant would result in anyone being threatened or exposed to harm. Moreover, any likelihood that the Applicant's husband would further threaten, verbally abuse or harass anyone should the information in the records be disclosed has not been

established for this inquiry, if this is indeed the Public Body's concern, and the reason it has withheld information under section 18.

[para 32] The information to which the Public Body applied section 18 primarily documents the association between the Applicant and the University of Calgary, the identities of those individuals who were interviewed as part of investigations and what they said, and telephone numbers of these employees. However, this information does not speak to any current relationship between the Applicant and the Public Body, or establish what is likely to happen should the Applicant or her husband obtain the information.

[para 33] The Public Body argues that "knowing the individuals involved and the situation in the workplace", it is reasonable to conclude that harm is likely to result from disclosure of the records. From this statement, I am possibly being asked to conclude that the personality of the Applicant is such, and her prior relationship with her coworkers is such, that once she receives the severed information, she may be expected to use it to harass or interfere with employees of the University of Calgary at their workplaces. However, the "evidence" to which the Public Body refers obliquely, supports a contrary conclusion. Instead, the records support a finding that the Applicant has always pursued any concerns she may have with the University of Calgary through legal and appropriate channels, such as through a human rights complaint, a complaint to the sexual harassment office at the University of Calgary, a formal request to the head of the University of Calgary's security department to remove restrictions, and by making access requests under the FOIP Act. There is no evidence before me that disclosing to the Applicant any of the information to which the Public Body has applied section 18 could reasonably be expected to be used to threaten anyone else's mental or physical health, or to interfere with public safety. Moreover, there is no evidence before me that anyone would feel threatened should the Applicant obtain the information at this time.

[para 34] Possibly, the Public Body is concerned that the Applicant, as a consequence of receiving the records, will send further emails specifically to the individual referred to in record 3-75, or to other individuals, and that such emails could be harassing or perceived to be harassing. I note that in Order H2010-003, the Adjudicator rejected the argument that the likelihood that an individual might send angry or harassing emails amounted to a threat to mental or physical health or safety. She said:

> It may be that the Custodian is concerned that the notes interpret the Applicant's mood or actions in a way that the Applicant may not agree with; however, in my view there is nothing to suggest that a threat to mental or physical health or safety would result if the Applicant were to be presented with notes containing interpretations of his mood and actions with which he does not agree. On the contrary, the affiant documents in his affidavit many situations in which the Custodian has confronted the Applicant over his behavior; however, he does not point to anyone having suffered harm to mental or physical health or safety as a result of these confrontations. While the affiant points to the Applicant writing angry emails and speaking angrily when confronted, in my view, this type of conduct, without evidence that this is likely to threaten the mental or physical health or safety of another individual, does not amount to a threat or risk to the physical or mental health or safety of another individual for the purposes of section 11(1)(a)(ii).

(This Order was upheld by the Alberta Court of Queen's Bench in an oral decision issued on September 9, 2011 (Court File Number 1103 01171)). If the Public Body's decision to withhold information from the records under section 18 is based on a concern that the Applicant may harass employees of the University of Calgary, or its own employees, using email, then that has not been established. Moreover, even if this had been established, then it would be necessary for the Public Body to establish that harassing emails would harm the mental or physical health of these employees, and this has also not been established.

[para 35] In the oral decision upholding Order H2010-003, cited above, the Court of Queen's Bench stated:

> It is vital to bear in mind the scope and mandate of these proceedings. Neither the Commissioner nor any adjudication process under applicable legislation is responsible to determine risks or threats in general. They are to deal here with whether release of material would reasonably be expected to create a threat. The dynamics between [the requestor] and some providers of Health Services clearly pre-date this information request. Those dynamics are relevant but not in the least determinative of what restrictions might be appropriate to impose on the general right to access information.

[para 36] The Public Body has referred obliquely to the records created by an investigator and essentially asked me to draw an inference from the information in these records that the requirements of section 18 are met. I am being asked to determine risks or threats generally that may exist in 2013, based on vague information about the relationship the Public Body attributes to the Applicant and the University of Calgary in the years 2001-2003. The Public Body has not explained how release of the information in the records, including information regarding the incidents referred to above, could reasonably be expected to contribute to a specific, foreseeable, harm.

[para 37] As was the case in Order H2010-003, the dynamics between the Applicant and her husband, and the University of Calgary, predate the access request. However, to the extent that the dynamics of those relationships at the time of the human rights complaint are revealed in the records, I am not persuaded that they were such that disclosing the information the Public Body has withheld could reasonably be expected to result in harm contemplated by section 18, the less so now that over nine years has passed since the investigations documented in the records were completed.

[para 38] As cited above, the Public Body argues that there is a "causal connection", presumably between a harm it projects, but has not explained, and disclosure of the information in the records. It also argues that the harm it projects will be damaging, and that it is not unreasonable to expect that, knowing the individuals involved and the situation in the workplace, that harm will occur. However, the Public Body does not elaborate on the nature of this harm, or explain why it believes this harm is damaging. From the records themselves, I am unable to determine that the situation between the Applicant and the University of Calgary was such that disclosing the information in the records to her at that time would have resulted in harm to anyone. Moreover, given the

time that has passed, I am unable to anticipate that harm would result to anyone if the information in the records was disclosed today.

[para 39] I find that the Public Body has not established that section 18 applies to the information it severed under this provision. Although I find that section 18 does not apply to the records, I will not order disclosure of the records, as the Public Body also applied section 17 to the records. The information will be subject to my decision to order the Public Body to make a new decision under section 17, below.

Did the Public Body properly apply section 20(1) of the Act (disclosure harmful to law enforcement) to the information in the records? (the provision was applied to records 1-20, 1-21, 1-22, 1-23, 1-26, 1-28, 1-79 to 1-83, 1-85, 1-128, 1-143, 1-243, 1-270, 1-451, 1-489, 3-25, 3-27, and 3-34 to 3-37)

[para 40] The Public Body refers to section 20(1)(a) and (d) in its submissions. 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*
>
> *(a) harm a law enforcement matter,*
>
> *...*
>
> *(d) reveal the identity of a confidential source of law enforcement information…*

[para 41] The information the Public Body withheld from the records is information gathered by an employee that it characterizes as an "investigator / conciliator". It explains its application of section 20 in the following way:

> Those records are notes of investigators / conciliators of the Human Rights Commission. The severed records contain information that may reveal the confidential source of a law enforcement investigation (section 20(1)(d)). In addition, the severed information contains notes of the conciliators / investigators regarding the nature of the evidence they are recording and reviewing. These notes constitute a law enforcement matter (section 20(1)(a)). Matters in question relate specifically to the Human Rights Commission legislative responsibility to investigate and resolve matters of alleged discriminatory actions under the *Alberta Human Rights Act.*

[para 42] Section 1(h) of the FOIP Act defines "law enforcement" for the purposes of the Act. This provision states:

> *1 In this Act,*
>
> *(h) "law enforcement" means*
>
> *(i) policing, including criminal intelligence operations,*

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

[para 43] I understand from its submissions that the Public Body is of the view that the investigation and conciliation documented in the records, about which some information is withheld under section 20, is a law enforcement investigation within the terms of section 1(h)(ii) of the FOIP Act.

[para 44] One difficulty that arises in evaluating the Public Body's claim that information in the records is subject to the law enforcement exceptions is that many of the records do not indicate who prepared them, or for what purpose. As well, the Public Body's submissions create confusion about this question. In its submissions relating to section 20 (additional submissions of January 18, 2013), the Public Body states that the notes it withheld are the notes of its investigators and conciliators. However, as discussed above, it refers on page 9 of its submission to the notes appearing in the first volume as the notes of an investigator hired by the University of Calgary.

[para 45] I have already decided that most of the notes appearing in the first volume of records are those of the Public Body's own investigator, and that only records 1-165, 1-166, and 1-167 were prepared by the University of Calgary's investigator. Of these, the Public Body withheld information from record 1-166 in reliance on section 20.

[para 46] I note that the investigation conducted by the University of Calgary's investigator was not an investigation conducted under human rights legislation. From the information available to me in the records, I infer that the University of Calgary's investigation was intended to determine whether there was merit to the Applicant's complaint. There is no evidence before me that this investigation was intended to enforce the law or could have led to a penalty or sanction in order to enforce a law. I also note that in Order F2003-005, which dealt with records created in this earlier investigation, the Adjudicator held that the investigation was not a law enforcement investigation. The Adjudicator said (at para 68):

> I do not accept that the records that relate to the Public Body's sexual harassment investigation are part of a law enforcement record. Order 2000-019 held that "law enforcement" should encompass the notion of a violation of "law". The sexual harassment investigation here at issue and resulting records were related to enforcement of the Public Body's sexual harassment policy. While this policy contains some references to provincial and federal human rights legislation, the Public Body's investigation was under the policy, not under the "law" which consists of human rights legislation.

[para 47] In Order F2008-030, I considered whether investigations that were not themselves intended to ensure compliance with a law could be considered law enforcement investigations if they uncovered information that could then be referred to another body responsible for enforcing a law. I said:

> I turn to whether section 1(h)(ii) of the Act (which defines "law enforcement") is met because an investigation by the director could, if he or she were to discover the elements of an offence in the course of conducting an investigation, lead to the imposition of a penalty or sanction. In this regard, I acknowledge that if the director were to discover facts which amounted to an offence, and were to refer the matter to the police, any investigation or proceeding that followed could lead to the imposition of penalties or sanctions. I also note that section 1(h)(ii) contemplates an investigation that could lead to a penalty or sanction imposed by another body to which the results of the investigation are referred. As well, I note that the director is empowered under the child welfare legislation to take whatever action he or she thinks is appropriate after concluding an investigation, which could conceivably be interpreted to include the power to refer the matter for a possible charge and prosecution, and that in any event, section 40(1)(q) of the Act permits public bodies to disclose personal information to assist in investigations from which a law enforcement proceeding is likely to result. Finally, I note that the child welfare legislation, both current and former, makes it an offence to willfully cause a child to be in need of protective services or intervention. Thus it is arguable that a director's investigation could meet the definition of "law enforcement" under section 1(h)(ii) of the Act by reference to all of these factors.
>
> However, there is another possible interpretation of section 1(h)(ii), which is that it is limited such that the purpose of the administrative investigation must be to enforce compliance with a law, and does not cover an investigation which has other primary purposes but which might incidentally uncover an offence, which can then be referred to police for further investigation or prosecution. Under this interpretation, since a director's investigations are for the purpose of taking steps to protect children, and the uncovering of offences is not among the director's expressed duties, a director's investigation is not "law enforcement" under the Act. Support for this interpretation may be found in the fact that many statutory powers of investigation could lead to the incidental discovery of an offence, from which it would follow that all such statutory investigative powers are "law enforcement" under the Act - arguably a result that is broader than was intended.

[para 48] In the foregoing order, I found that an interpretation of section 1(h)(ii) of the FOIP Act that would include statutory investigations that were not in and of themselves intended to enforce compliance with the law, would be overly broad. In the case before me, the investigation recorded in the first volume of records is not a statutory investigation. Rather, as noted above, it is an investigation as to whether there was any merit to the Applicant's complaint.

[para 49] I agree with the Adjudicator in Order F2003-005 that the University of Calgary's investigation was not a law enforcement investigation within the terms of section 1(h) of the FOIP Act.

[para 50] The conciliation and investigation documented in the records was conducted under the former *Human Rights, Citizenship and Multiculturalism Act*. As the Applicant made her complaint in 2001, the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 1980 c.H-11.7 was in force. From my review of section 19.1 of this Act, it appears that the conciliation process is intended to effect a settlement of a matter. However, if a matter does not result in settlement as a result of the conciliation process, it may proceed to an investigation, and then, ultimately, to a hearing before a human rights panel. A human rights panel would then have the power under section 28 to order a person it had found to have contravened the Act to cease doing so, to refrain from doing so in the future, to provide opportunities to the person discriminated against, to compensate the person discriminated against, to take other actions, and to award costs. The term "sanction" can refer to a penalty or reward intended to enforce compliance with a rule or with a law. The powers of a human rights panel under section 28 of the former *Human Rights, Citizenship and Multiculturalism Act* are consistent with a penalty or sanction within the terms of section 1(h) of the FOIP Act.

[para 51] A conciliation is the first step in proceedings that could lead to a penalty or sanction by a human rights panel. An investigation is the second stage in that process. I find that the conciliation and investigation conducted by the Public Body and documented in the records are administrative investigations within the terms of section 1(h)(ii).

Section 20(1)(a)

[para 52] As cited above, section 20(1)(a) authorizes the head of a public body to withhold information if disclosing the information would harm a law enforcement matter. In the case before me, the law enforcement matter appears to be the conciliation that took place in 2001 and the investigation that concluded in 2003. If there is another, ongoing, law enforcement matter that the Public Body is concerned would be exposed to potential harm if the records are disclosed, it has not described the matter in its submissions, and the records themselves do not point to one. On the contrary, the parties are in agreement that the matters documented in the records have concluded.

[para 53] The Public Body did not elaborate on the harm it projects would result to the investigations documented in the records if the information is disclosed. However, it may be the case that the Public Body is concerned that if the identities of individuals who provided statements, and the statements themselves, were provided to the Applicant, she might use this information to harass them or threaten them. I have already rejected this argument as lacking a factual foundation.

[para 54] It may be the case that the Public Body considers it possible that those who were interviewed as part of the investigations were promised that their statements would be held in confidence and that these promises would be breached by disclosing the information in the records. Given that the Public Body has also raised the issue of the application of section 20(1)(d) to the same information, it may be the case that the Public Body's concern is that those interviewed had, or have, expectations of confidentiality. It

may also be the case that it is concerned that the investigators themselves had expectations of confidentiality, as records such as 1-21, which is a post-it note apparently documenting a line of investigation an investigator was considering pursuing, and an investigator's notes appearing on records 1-22 to1-28, which are otherwise comprised of statements made by the Applicant, have also been withheld under section 20.

[para 55] The reference in section 20(1)(a) to a *matter* indicates that a public body must establish that its conduct of a specific matter will be harmed by disclosure of information. I draw support for this conclusion from Order F2008-031, in which the Adjudicator said of section 20(1)(a):

> In order to properly apply section 20(1)(a) of the Act, under which information may be withheld if disclosure could reasonably be expected to harm a law enforcement matter, a public body must satisfy the "harm test" that has been articulated in previous Orders of this Office. Specifically, there must be a clear cause and effect relationship between the disclosure and harm alleged; the harm that would be caused by the disclosure must constitute damage or detriment and not simply hindrance or minimal interference; and the likelihood of harm must be genuine and conceivable (Order 96-003 at p. 6 or para. 21; Order F2005-009 at para. 32).
>
> The harm test must be applied on a record-by-record basis (Order F2002-024 at para. 36). In order for the test to be met, explicit and sufficient evidence must be presented to show a reasonable expectation of probable harm; the evidence must demonstrate a probability of harm from disclosure and not just a well-intentioned but unjustifiably cautious approach to the avoidance of any risk whatsoever because of the sensitivity of the matters at issue (Order 96-003 at p. 6 or para. 20; Order F2002- 024 at para. 35). The harm test -- specifically in relation to law enforcement matters under section 20 of the Act -- and the requirement for an evidentiary foundation for assertions of harm were upheld in *Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner)*, 2006 ABQB 515 (at paras. 6, 59 and 60).
>
> The Public Body has not established that section 20(1)(a) applies to the records at issue. Its investigations of the Applicant are already complete, as are the proceedings before the Life Insurance Council. All that remained, from the time of the Applicant's access request onwards, were various appeals. I fail to see how disclosure of the records at issue would harm a law enforcement matter if the law enforcement -- being the investigations and imposition of sanctions -- is already finished.
>
> Further, when seeking to apply section 20(1)(a), the public body should identify a specific law enforcement matter that would be harmed and not simply claim harm to law enforcement in general (Order 96-003 at p. 6 or para. 21). While the Public Body submits that it is critical that documents relating to the conduct of ongoing law enforcement investigations not be disclosed, and argues that it and the MFDA must have the ability to protect the confidentiality and integrity of their investigative processes, the Public Body does not explain how disclosure of the records at issue would harm the specific law enforcement matter involving the Applicant. Similarly, the MFDA's submissions are in relation to its law enforcement generally, as it does not specifically assert that the law enforcement matter involving the Applicant would be harmed if records at issue were disclosed. I conclude that section 20(1)(a) does not apply in this inquiry.

In Order F2008-031, following previous orders of this office, the Adjudicator rejected the argument that section 20(1)(a) applies to harms to law enforcement generally. Rather, a public body seeking to argue that section 20(1)(a) applies must point to a specific matter that will be harmed by disclosure of the records.

[para 56] The Public Body has not made arguments to support its application of section 20(1)(a). The investigations referred to in the records have long since concluded, as was the case in Order F2008-031. The only arguments I am able to anticipate that it might have made, are those relating to harm to law enforcement in general, in the sense that if the information it appears to consider confidential is disclosed, that the Public Body's or the University of Calgary's ability to accept information in confidence in other proceedings may be undermined.

[para 57] Moreover, I am unable to find references to confidentiality or assurances of confidentiality in the records that document the sexual harassment conciliation and investigation conducted by the Public Body. The report of the human rights investigator who conducted the investigation lists all the names of her sources. (The report is contained in records 1-35 to 1-44.) In some instances the report also attributes statements or points of view to those interviewed, although not in every instance. This report was provided to the Applicant and to the University of Calgary. The report makes no reference to confidentiality. In my view, the report amounts to the best evidence of the intentions of the investigator regarding expectations of confidentiality. I find that the report does not support a finding that those who were interviewed were assured confidentiality or expected it. Rather, the evidence provided by the human rights investigator's report supports a finding that individuals were not assured that their identities would be held in confidence or that the information they provided to the Public Body's investigator would not be used or referred to in the report.

[para 58] With regard to the records prepared by the University of Calgary's investigator, as they were not prepared as part of a law enforcement investigation, even if I were to find that the University of Calgary's investigation would be harmed by the disclosure, I could not find that disclosure would harm a law enforcement matter. Moreover, the University of Calgary's investigation concluded before the human rights conciliation and investigation, and so I am unable to find that disclosure would have any effect on the investigation. Finally, I am unable to say that disclosure of record 1-166 would harm the Public Body's sexual harassment investigation, as this has also concluded.

[para 59] For the reasons above, I find that section 20(1)(a) has not been shown to apply to the information the Public Body withheld under this provision.

Section 20(1)(d)

[para 60] Section 20(1)(d) authorizes the head of a public body to withhold information if the information would serve to reveal the *identity* of a confidential source of law enforcement information. It does not permit a public body to withhold information

about individuals or statements attributed to them if they were not assured that their identities would be held in confidence and if the information in question would not serve to identify them.

[para 61] I note that the Public Body has applied section 20(1)(d) to withhold information from records that does not identify anyone. Moreover, as I noted above, the human rights investigator named all the persons she interviewed in the investigation report. I am unable to conclude from the fact that she did so that the identities of those who were interviewed were intended to be kept in confidence. Rather, her decision to do so supports the finding that the interviewees were not confidential sources of law enforcement information.

[para 62] As noted above, record 1-166 contains a list of individuals interviewed as part of the University of Calgary's investigation. I have found that this investigation is not a law enforcement investigation. I find that record 1-166 does not reveal the identity of confidential sources of law enforcement information.

[para 63] For the reasons above, I find that section 20(1)(d) does not apply to the information withheld by the Public Body under this provision. Although I have found that none of the records to which the Public Body applied section 20 are subject to this provision, I will not order disclosure of all records to which it has applied this provision, as the Public Body also applied section 17 to some of these records. However, the Public Body did not apply section 17 to information on records 1-20, 1-21, 1-22, 1-23, 1-26, 1-28, 1-79, 1-80, 1-81, 1-82, 1-83, 1-85, 1-143, 1-231, 1-232, 1-233, 1-243, 1-270, 1-451, 1-360, 1-489, 3-25, 3-26, 3-27, 3-34, 3-35, 3-36, 3-37, or 3-53. As I have already found that section 18 does not apply to any of these records, and find below that section 27 does not apply to them, I will order disclosure of these records in their entirety. The remaining information to which the Public Body applied section 20 will be considered under the 'section 17' heading below.

Did the Public Body properly apply section 27 of the Act (privileged information) to the information in the records?

[para 64] Section 27(1)(a) of the Act authorizes the head of a public body to withhold privileged information. Section 27(2) *requires* the head of a public body to withhold privileged information if the privilege belongs to another. Sections 27(1)(b) and (c) authorize the head of a public body to withhold certain kinds of information that have been prepared by or for a lawyer, or information appearing in correspondence in relation to a matter involving a lawyer. These provisions state:

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

(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.

(2) The head of a public body must refuse to disclose information described in subsection (1)(a) that relates to a person other than a public body.

[para 65] The University of Calgary argued that section 27 applies to two records, but does not provide an explanation as to why the provision applies. These records (1-166 and 3-50) are described in the Public Body's letter to this office of January 24, 2012 as communications between the University of Calgary and the Public Body "regarding administrative matters such as scheduling interviews".

[para 66] The index of records provided by the Public Body for the inquiry does not indicate the specific subsection of section 27 on which the Public Body has relied to withhold information. Rather it states that section 27 was applied on the basis of "legal privilege". I note that in its response to the Applicant the Public Body also indicated that it would apply section 27 to information that was the subject of "legal privilege".

[para 67] The Public Body does not appear to argue that any of the information in the records constitutes "legal advice". Rather, it says the information it withheld under section 27 is subject to litigation privilege and that this privilege belongs to the University of Calgary. The Public Body itself applies section 27 to information in the following: records 1-110 – 113, 1-147, 1-151, 1-190 – 1-212, 1-237 – 1-242, 1-360, 1-538 – 1-539, 1-540 – 1-541, 1-542 – 1-546, 1-547, 1-548 – 1-549, 1-550 – 1-551, 1-552, 1-55 – 1-554, 3-43 – 3-48) on the basis that this privilege belongs to the University of Calgary. It states:

> The test for "litigation privilege" was articulated in Alberta Order 96-015:
>
> *[99.] The "dominant purpose" test consists of three requirements, each of which must be met: see Manes and Silver, Solicitor-Client Privilege in Canadian Law, p. 93. Those requirements are:*
> *(i) the documents must have been produced with existing or contemplated litigation in mind,*
> *(ii) the documents must have been produced for the dominant purpose of existing or contemplated litigation, and*
> *(iii) if litigation is contemplated, the prospect of litigation must be reasonable.*

> In the matter at hand, litigation was reasonably contemplated and addressed in a number of the documents excepted from disclosure pursuant to section 27.
>
> The prospect of litigation was reasonable.
>
> Arguably, the investigation occurred in order to lay to rest the sexual harassment complaint that was before the Applicant's employer and the Human Rights Commission. The Public Body submits that as a corollary, the investigation would have equally been expected to provide basic information to be used in the likely event that litigation would flow from the complaint.
>
> There is no clear "dominant purpose'. The Public Body submits it is reasonable to consider these two "purposes" as parallel in weight.
>
> The records were properly withheld form disclosure as privileged information.

[para 68] In relation to the application of section 27(1)(b) and (c) the Public Body states:

> Contrary to what the Applicant states in her initial brief therefore, there are instances in which advice – "legal advice" may not be present but in which the records may be drawn under the protection of section 27 as they provide "other service" as contemplated by section 27(1)(c). There are a modest number of pages for which the Public Body has relied on the provisions of section 27(1) to withhold information. These records are identified on the "Exceptions to Disclosure" table.
>
> …
>
> The Public Body has again deliberately not identified the specific pages of records for which privilege was claimed. To do so would be to identify the individuals / interviewees making such comments or joining the dialogue and thus extinguish the need for the application of section 27 as well as 17.
>
> There are a modest number of records for which 27 was claimed as an exception to disclosure and the "section 27 information" is evident from the records on their face.
>
> In addition to the section 27(1)(a) & (b) considerations, there is one record [page 3-50] that was withheld pursuant to section 27(1)(c).

[para 69] From its submissions, I conclude that the Public Body has chosen to apply section 27(1)(b), in addition to section 27(1)(a) to withhold information from the records. However, it did not clearly communicate the fact that it was applying section 27(1)(b) and (c) in its response to the Applicant, and instead referred only to section 27 and the heading of section 27.

[para 70] The first reference to the application of section 27(1)(b) and (c) is made obliquely in the Public Body's submission that I excerpted above. On reviewing its submissions, I considered whether it was appropriate to even consider in this order whether these provisions apply, given the lack of notice to the Applicant that the Public

Body had applied sections 27(1)(b) and (c) to withhold information from the records. However, once I reviewed the records, I determined, for the reasons that follow, that section 27 does not, and cannot, apply to the information that the Public Body withheld under its provisions. I have therefore decided that the Applicant will not be prejudiced by the Public Body's failure to state clearly the provisions on which it was relying in its response to her.

[para 71] I also considered whether it would benefit the inquiry to ask the Public Body questions regarding its reasons for applying section 27 to withhold the records, and to ask which specific provisions of section 27 it considered as applicable, and to which pieces of information that had been withheld. Again, as I am satisfied that the provisions the Public Body has applied cannot apply, regardless of any reasons it may have for doing so, I elected not to ask it questions, even though it has declined in its submissions to explain how its arguments apply to the information it has withheld or to reference record numbers.

Litigation Privilege

[para 72] In *Blank v. (Minister of Justice)*, [2006] 2 S.C.R. 319 the Supreme Court of Canada clarified the nature, requirements, and extent of litigation privilege. The Court said:

> Litigation privilege, on the other hand, is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties.

Litigation privilege applies to communications between a lawyer and third parties, or a litigant and third parties, when the communications are made for the dominant purpose of preparing for litigation.

[para 73] In addition, litigation privilege will also apply to information that is not, strictly speaking a "communication", but to records created or gathered for the dominant purpose of conducting litigation, or assisting in that purpose. Such records are sometimes referred to as "work product".

[para 74] The Court in *Blank* held that litigation privilege ends when the litigation (or related litigation) for which communications were prepared or compiled has ended:

> The purpose of the litigation privilege, I repeat, is to create a "zone of privacy" in relation to pending or apprehended litigation. Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose — and therefore its justification. But to borrow a phrase, the litigation is not over until it is over: It cannot be said to have "terminated", in any meaningful sense of that term, where litigants or related parties remain locked in what is essentially the same legal combat.

> Except where such related litigation persists, there is no need and no reason to protect from discovery anything that would have been subject to compellable disclosure but for the pending or apprehended proceedings which provided its shield. Where the litigation has indeed ended, there is little room for concern lest opposing counsel or their clients argue their case "on wits borrowed from the adversary", to use the language of the U.S. Supreme Court in *Hickman*, at p. 516.

[para 75] To establish that records are subject to litigation privilege, if the records themselves do not indicate that they were created for or gathered for use in, litigation, or that they contain communications made for the dominant purpose of preparing for litigation, then it is necessary for a party relying on this privilege to establish that records were created for this purpose or were gathered for this purpose, through the evidence of someone with knowledge about the circumstances in which the records were created or gathered. A party must also establish that the litigation, or related litigation, for which the records or communications were created or gathered, continues to be within contemplation, or is in progress.

[para 76] The records to which the Public Body has applied section 27 are records created and compiled by an investigator of the Public Body. These records include notes of interviews, statutory declarations, and letters indicating the availability of witnesses. While I accept that a proceeding arising from a human rights complaint constitutes litigation for the purposes of the privilege, the fact that the records were created and gathered by the investigator for the investigation, and not by one of the litigating parties, precludes the application of litigation privilege. The investigator conducted the investigation on behalf of the Public Body. The Public Body was not a litigant in the proceedings, but was ultimately responsible for deciding the complaint. The notes were not made for the purpose of litigating the complaint, but of deciding it.

[para 77] The University of Calgary objects to the disclosure of information contained in record 3-50. This record was created by a legal assistant, and appears intended to confirm the times of interviews that were to take place with a human rights investigator. The information from the records that was withheld consists of names and direct-line telephone numbers. I am unable to find that the University of Calgary created this record for use in litigation. Rather, it provided this information to the Public Body in order to comply with its statutory obligation to cooperate with the investigation. Moreover, it is clear that no zone of privacy attached to this record, as it was sent to the Public Body.

[para 78] Even if I were to find that any of the information in the records was subject to litigation privilege, litigation privilege ends when litigation ends. In this case, the human rights complaint has concluded.

[para 79] As the Public Body notes in its arguments in relation to section 17(5)(c):

> There is no legal right of the Applicant at issue. The proceeding has been concluded and the third party personal information in the records to which the Applicant has been

> denied access is not significant in the determination of any real or perceived right of the Applicant.

The Applicant does not dispute that the litigation, and any related litigation, has concluded. She notes that the records were created over nine years ago and that all legal actions have ceased. Given the evidence of both parties that the proceedings have concluded, litigation privilege cannot attach to the records to which the Public Body has applied section 27(1)(a).

[para 80] For these reasons, I find that section 27(1)(a) does not apply to the records the Public Body withheld under section 27.

Section 27(1)(b)

[para 81] 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 82] In Order F2010-007, the Adjudicator stated the following in relation to section 27(1)(b):

> 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, who is, in this case, an Alberta Justice lawyer.

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 83] In Order F2008-028, the Adjudicator held that the term "prepared" in section 27(1)(b) precludes information falling within its scope 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 84] In Order F2008-028, the Adjudicator also considered what the term "agent" means in the context of section 27. He said:

> Even if the sender or recipient of correspondence is not a lawyer, section 27(1)(c) permits the withholding of information sent to or from an "agent". In my view, the reference to "agent" is not intended to include *everyone* employed by or otherwise acting on behalf of the Minister of Justice and Attorney General or another public body. If that were the case, section 27(1)(c) would shield a great many records of a public body from disclosure under the Act, given that a great many records consist of correspondence from employees in relation to the advice or other services that they provide. The Legislature may have cast a wide net in section 27(1)(c), but it could not have intended to cast such a wide net. If it had so intended, it would have used the word "employee" – as done elsewhere in the Act – rather than the word "agent".
>
> A basic rule of interpretation is that it is presumed that Parliament or a Legislature uses language carefully and consistently, and that within a statute, the same words are taken to have the same meaning and different words have different meanings [*Winko v. British Columbia (Forensic Psychiatric Institute)*, 1999 CanLII 694 (SCC), [1999] 2 S.C.R 625 at para. 133, citing Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) at pp. 163 to 65]. Given this rule of interpretation, the fact that the word "agent" is used in section 27(1)(c) – as well as 27(1)(b) – shows that the Legislature intended for the term "agent" to mean something different than the broader term "employee". ("Employee" is already defined in section 1(e) of the Act to include a person who performs a service for the public body under a contract or agency relationship, so use of the term "employee" would not have excluded outside legal and non-legal agents).
>
> As cited above, External Adjudication Order No. 4 stated that section 27(1)(c) would extend to correspondence sent to or received by non-legal staff of Alberta Justice. However, that Order did not say *all* non-legal staff of Alberta Justice (or other public bodies). There may be times where a non-legal staff member has acted as the agent of the Minister of Justice and Attorney General or another public body, such as for the purpose of acts done under particular legislation, or in the course of a specific matter or proceeding. However, the fact that the individual was an "agent" should be demonstrated in each case.
>
> In this inquiry, the Public Body has not explained the roles of the individuals who sent or received correspondence, in order for me to ascertain whether and why they are "agents" of the Minister of Justice and Attorney General or another public body. I therefore find that some of the information at issue does not fall under section 27(1)(c)... .

[para 85] Applying the reasoning in Orders 99-022, F2010-007, 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 a 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 by or 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. The term "agent" does not refer to *any* employee of a public body, but to an individual who is acting as an agent of a public body under particular legislation, or in the course of a specific matter or proceeding.

[para 86] I am unable to identify information falling within the terms of section 27(1)(b) among the records to which the Public Body has applied section 27(1)(b). There is no information in the records that could be said to have been prepared by or on behalf of an agent or lawyer of a public body in order that the agent or lawyer may provide legal services.

[para 87] In making the above finding I acknowledge that record 3-50 indicates that it was prepared by an employee of the University of Calgary whose title is "legal assistant". However, the record is addressed to the Public Body, and the purpose of the record is to indicate the availability of two employees of the University of Calgary for interviews with an investigator employed by the Public Body. There is nothing to suggest that this record was prepared to enable a lawyer for the University of Calgary to provide legal services; rather, the contents of this letter argue against such a conclusion.

[para 88] In addition, the records indicate that the legal assistant was not acting as the agent of the University of Calgary in relation to the human rights complaint that was being investigated by the Public Body, so the record cannot be characterized as having been prepared by an "agent of a public body" within the terms of section 27(1)(b).

Section 27(1)(c)

[para 89] As noted above, the Public Body also withheld information from record 3-50 under section 27(1)(c). The Public Body withheld the names of employees and their direct lines under this provision.

[para 90] 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 91] As noted above, record 3-50 was prepared by a legal assistant and sent to the Public Body in order to confirm the availability of employees for interviews. There is nothing to suggest that this letter was prepared at the direction of a lawyer or received by

one, such that this letter could be characterized as correspondence between a lawyer or agent of a public body and any other person. I have already found that the legal assistant who prepared the letter was not acting as an agent of the University of Calgary in the human rights matter.

[para 92] For the reasons above, I find that section 27(1)(c) does not apply to the information withheld by the Public Body under this provision.

[para 93] The Public Body also applied section 17 to the records to which it applied section 27 (with the exception of records 1-147 and 1-360). As I have found that section 27 does not apply to the information withheld from records 1-147 and 1-360, I will order the Public Body to disclose these records. The application of section 17 to the information in the remaining records will be addressed below.

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

[para 94] Section 17 requires a public body to withhold the personal information of a third party if disclosing the personal information would invade the third party's personal privacy.

Is there personal information in the records?

[para 95] Personal information is defined by section 1(n) of the FOIP Act as information about an identifiable individual. Section 1(n) states;

> *1 In this Act,*
>
> *...*
>
> *(n) "personal information" means recorded information about an identifiable individual, including*
>
> *(i) the individual's name, home or business address or home or business telephone number,*
>
> *(ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,*
>
> *(iii) the individual's age, sex, marital status or family status,*
>
> *(iv) an identifying number, symbol or other particular assigned to the individual,*
>
> *(v) the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,*
>
> *(vi) information about the individual's health and health care history, including information about a physical or mental disability,*
>
> *(vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,*
>
> *(viii) anyone else's opinions about the individual, and*
>
> *(ix) the individual's personal views or opinions, except if they are about someone else;*
>
> *…*

[para 96] The names and personal contact information of witnesses is the personal information of these witnesses, except where they express opinions about the Applicant. However, the fact that the witnesses held or expressed the opinion is their personal information. In other words, some information may be considered to be the personal information of more than one person at the same time, such as when the information is both about the Applicant and a witness. Insofar as the records contain facts or opinions about the Applicant, the opinion itself is her personal information by operation of section 1(ix), and the fact that a witness holds the opinion, is the personal information of the witness.

[para 97] Some of the information withheld consists of information solely about the Applicant. Section 17(1) requires a public body to withhold personal information if it would be an unreasonable invasion of *a third party's* personal privacy to disclose it. However, in the context of an access request, the persons making the request are not third parties. Section 1(r) of the FOIP 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;*

As section 1(r) provides that the information of an applicant is not the information of a third party within the terms of the FOIP Act, information about applicants cannot be withheld under section 17(1).

[para 98] From the severing conducted by the Public Body, it appears that it may have relied on section 17 to withhold information about its employees or those of University of Calgary employees acting in the course of their duties. For example, the Public Body withheld records such as the University of Calgary's representative's first name and the business phone and fax number at which she could be contacted, contained in records 3-1, 3-2, and 3-3.

[para 99] As well, the Public Body has severed information, partly in reliance on section 17, that may be properly characterized as 'work product'. For example, it has severed the questions asked by an investigator, in addition to the answers of those interviewed. It has also withheld what is possibly a line of inquiry which the investigator means to follow (the note severed from record 1-151). While some of the questions and notes may reveal the personal information of witnesses, it does not appear that it is always the case that they do, and it appears possible that the Public Body withheld information on the basis that it may reveal something about the investigator performing duties on its behalf, rather than personal information about third parties.

[para 100] The Public Body has also withheld notes of an interview by the Public Body's investigator of the University of Calgary's legal counsel, in part in reliance on section 17. Information about the legal counsel's participation in the events surrounding

the Applicant's complaint to the University is not her personal information unless it has a personal aspect, which was not shown.

[para 101] As well, it may be that some of the information of persons interviewed in the third volume relating to the Applicant's 'retaliation' complaint, which was withheld in reliance on section 17, may be information about events in which these persons participated in a representative rather than a personal capacity. Again, to be personal in such a context, information must be shown to have a personal dimension.

[para 102] In Order F2009-026, the Adjudicator 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.

In that case, the Adjudicator found that information solely about an employee acting as a representative of a public body was information about the public body, and not information about the employee as an identifiable individual. In *Mount Royal University v. Carter*, 2011 ABQB 28, Wilson J. denied judicial review of Order F2009-026.

[para 103] In Order F2011-014, the Adjudicator concluded that the name and signature of a Commissioner for Oaths acting in that capacity was not personal information, as it was not information about the Commissioner for Oaths acting in her personal capacity. She said:

> Personal information under the FOIP Act is information about an identifiable individual that is recorded in some form.
>
> However, individuals do not always act on their own behalf. Sometimes individuals may act on behalf of others, as an employee does when carrying out work duties for an employer. In other cases, an individual may hold a statutory office, and the actions of the individual may fulfill the functions of that statutory office. In such circumstances, information generated in performance of these roles may not necessarily be about the individual who performs them, but about the public body for whom the individual acts, or about the fulfillment of a statutory function.

I find that the names and other information about employees of the Public Body and the University of Calgary acting in the course of their duties, as representatives of their employers, cannot be withheld as personal information, unless the information is at the same time that of an individual acting in the individual's personal capacity.

[para 104] I turn to the notes made by the Public Body's investigator of interviews with witnesses, which comprise a large part of the information that was withheld from the Applicant. With regard to the records in Volume 1, many pages of these notes record information which would possibly be identifiable only by reference to the names that are noted on the first of a series of pages recording a particular witness's statements and answers. It is possible that some of the statements would identify their maker from their content or their context quite apart from their names, but for much of this information, this is by no means clear. However, it appears that in making its decision as to what information to provide, rather than severing names and providing otherwise unidentifiable information, the Public Body provided only the names as written in the top margin of the notes, and, further, also provided these names and the associated page numbers of the notes in the index of records. The consequence is that though it might have been possible to disclose some of the information to the Applicant because the person being interviewed was not identifiable, the Public Body's disclosure of the names means that information cannot be disclosed on this basis.

[para 105] However, this did not happen for some of the records that record witness interviews, for example, in Volume 3. For these notes, there remains a possibility that the people whose statements are being recorded in interviews are not identifiable, hence some of this information may not be "personal information" within the terms of the Act if the names are severed.

[para 106] I note further that it may not have been possible for the person who performed the severing in this case to determine whether or not the interview notes would identify the person being interviewed if the name were severed. Indeed the only way it may have been possible to try to determine this would have been to ask the maker of the statements, and/or the person who made the notes. Conversely, some of the items of information, such as individuals' telephone numbers and an email address, are clearly their personal information. (Though the names might be severable, the Applicant could presumably try to discover whose phone numbers or email addresses they are by calling the numbers.)

[para 107] Given this lack of clarity, I cannot determine whether much of the information that was withheld in part on the basis of section 17 was the personal information of an identifiable individual. I will deal below with how this problem can be addressed.

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

[para 108] 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

(a) the third party has, in the prescribed manner, consented to or requested the disclosure,[…]

…

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

(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,
(b) the personal information is an identifiable part of a law enforcement record, except to the extent that the disclosure is necessary to dispose of the law enforcement matter or to continue an investigation,

…

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

…

(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 109] Before discussing the subsections of section 17 that the Public Body says are applicable in this case, I note that large portions of the Applicant's submissions in this inquiry involve the presentation of material intended to demonstrate that the findings of the Adjudicator in relation to section 17 in the inquiry that resulted in Order F2003-005 were in error. The Applicant's material relates to the Adjudicator's findings with respect to the fairness of the University of Calgary's harassment investigation (relative to section 17(5)(a)), and the likelihood that witness statements were inaccurate (relative to section 17(5)(g)). I must reiterate that, as the Applicant was advised in correspondence, this inquiry cannot become a forum in which to revisit a matter dealt with earlier by this office. The Commissioner, and I as her delegate, have no power to reconsider earlier decisions of this office on the basis of new evidence. Therefore, I cannot consider the information presented by the Applicant for the purpose of making different findings regarding the matters mentioned above than were made by the Adjudicator in Order F2003-005.

[para 110] As well, the Applicant raises section 17(5)(a) relative to the *Public Body's* investigation of her harassment claim. However, most of the material she presents relates to her views that the *University of Calgary's* investigation was inadequate. The Applicant does disagree with the manner in which the Human Rights Commission's investigator interpreted factual situations, and objects that she was not given an opportunity to respond to witness statements or to cross-examine the witnesses. She also feels the Human Rights Investigator's report contains inaccuracies.

[para 111] However, these points do not, in my view, raise a concern that the investigator's process (of interviewing witnesses involved in the events relating to the allegations, and making determinations based on what she heard) was flawed, such that public scrutiny of that process is called for, or that the Applicant's disagreements with statements about, or interpretations of, facts, make section 17(5)(g) applicable. Even if additional evidence could show the investigator's conclusions were wrong, it doesn't follow that there was anything inadequate about the process she used to reach her conclusions on the basis of the relevant evidence that was before her. Similar observations apply to the Applicant's suggestion that closer scrutiny of the process is necessary to promote public health and safety under section 17(5)(b).

[para 112] I note as well that at earlier points in time, some of the information withheld under section 17 might possibly have had some bearing on the fair determination of the Applicant's rights under section 17(5)(c). However, because there is no longer any process or forum available to the Applicant to have her concerns addressed further (as the Applicant herself states in her submissions), these materials do not have any bearing relative to that provision in the present inquiry.

Section 17(2)(a) – consent

[para 113] Section 17(2)(a) provides that disclosure of information is not an unreasonable invasion of privacy when the person whose information it is consents to or requests its disclosure.

[para 114] Section 17(2)(a) does not expressly state who is to initiate the provision of consent if consent would be forthcoming. An access requestor will often not be in a position to know whose personal information is in the records or what the nature of the personal information is. Occasionally a requestor may know some of this information and may be able to obtain the consent themselves. However, circumstances undoubtedly arise in which third parties would consent if asked, but the applicant is not in a position to ask. There is no reason in principle that the rule in favour of disclosure under section 17(2)(a) should apply only in the former kinds of circumstances but not the latter; if a third party would willingly consent to disclosure, disclosure would not be an unreasonable invasion of their privacy, regardless of the way in which their position on this question can be elicited. Therefore, if section 17(2)(a) is to ground a public body's decision to release records in the latter type of circumstance, the question of whether third parties consent to disclosure will have to be asked by the public body.

[para 115] This matter is closely tied with the duty of public bodies under section 30 of the Act, to give notice to third parties if it is considering disclosing their personal information. If there appears from the face of the records or other information in the possession of the public body the distinct possibility that an individual would consent to disclosure of their personal information if consulted, and the public body fails to determine whether this is so, it is failing to properly make the determination under section 30 of whether to "consider giving access", with its associated duty to notify third parties and obtain their views. A recent Supreme Court of Canada decision supports this conclusion. In *Merck Frosst Canada Ltd. v. Canada (Health)* [2012] S.C.J. No. 3, the Court made the following comments about a public body's duty to give notice under the parallel provision of the federal *Access to Information Act*:

> (i) With respect to third party information, the institutional head has equally important duties to disclose and not to disclose and must take both duties equally seriously
>
> (ii) The institutional head:
>
> …
>
> - should *refuse to disclose* third party information *without notice* where the information is clearly exempt, that is, where there is no reason to believe that the information is subject to disclosure.
>
> (iii) The institutional head must give notice if he or she:
>
> - is in doubt about whether the information is exempt, in other words if the case does not fall under the situations set out in point (ii); …

[para 116] While this obligation has not always been enforced in previous orders of this office, I believe the Supreme Court of Canada's directive in the *Merck Frosst* case must be adopted and observed going forward.

[para 117] Here, the circumstances were such that for some of the information there was a reasonable possibility that consent would be given if third parties were asked, and thus there was some "reason to believe that the information is subject to disclosure". This is clearly the case for any information provided to the investigator by the Applicant's

husband, and would likely be the case for information provided by any persons interviewed who may have been sympathetic to the Applicant's position or personally close to her. There could also have been persons interviewed who would have no objection to her knowing their views and accounts of events whether in favour of her allegations or not. Contacting third parties would have the added advantage that notified parties could assist with determining whether disclosure of the notes that recorded their statements would identify them as the providers of the recorded information (i.e., whether the information was their "personal information".

[para 118] As well, contacting the third parties would permit the Public Body to ascertain their roles in the events surrounding the investigations, to enable determination of whether they were acting in their personal or in representative capacities, or in the latter case, if the information they provided had any personal dimension.

[para 119] Thus, in my view, the duty of the Public Body under section 30 to give notice (which is by its terms limited to notice that it is practicable to give) was triggered, and the Public Body was obliged to give such notice to third parties to the extent it was practicable to do so.

[para 120] I note that on January 20, 2011, the Public Body wrote to the Applicant indicating that it was contacting third parties to give them an opportunity to either agree to disclosure, or say why it should not occur. However, in the Public Body's additional submission of January 18, 2013, it states that because the Public Body had determined that sections 17, 18 and 20 applied to support withholding of the information, "consent was not sought for the disclosure of third party personal information". The Public Body's submissions give no indication whether it would have been practicable to contact third parties, or whether it was successful in any effort it may have made to contact the third parties or any of them, nor does it indicate that any of them objected to disclosure. Thus there is still no information available to me as to whether third parties would consent, or not.

[para 121] I will deal further below with the fact that this information is lacking.

Sections 17(4) and 17(5)

[para 122] 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), and balance these against any presumptions arising under section 17(4). Section 17(5) is not an exhaustive list and any other relevant circumstances must be considered.

[para 123] The Public Body argues that it is plain on the face of the records that they contain personal information. It also argues that it "need only establish that the records contain third party personal information for the burden to shift to the Applicant".

[para 124] The Public Body also says that the burden in the inquiry shifts to an applicant once it is apparent that personal information is contained in a record. Clearly that cannot be case when the provisions of section 17(2) apply to personal information. Moreover, even in the case of information subject to a provision of section 17(4), section 17(5) imposes a duty on the 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 third party's personal information. A public body, not an applicant, is in the best position to explain what factors it considered to be relevant when making the decision that it would be an unreasonable invasion of personal privacy to disclose information. Thus I do not accept the Public Body's statement of the burden of proof under section 17 quoted above.

[para 125] The Public Body argues that section 17(5)(f) and (h) apply and were relevant factors in its decision to withhold information from the records.

Section 17(5)(f)

[para 126] Section 17(5)(f), cited above, addresses information that has been supplied in confidence. With regard to the application of this provision, the Public Body argues:

> An assumption of confidentiality can exist and this assumption is a relevant consideration. Even absent a direct assertion that personal information was supplied in confidence or once supplied would remain in confidence the Public Body can make an assumption of confidence based on the reasonable expectation of third parties that their personal information would not be disclosed.
>
> The Public Body submits that in matters such as those at inquiry, there is a reasonable expectation that the smallest number of individuals possible ought to be privy to the personal information of other individuals.
>
> Certain personal information of third parties, including names, may have been disclosed by the University of Calgary Investigator … This has no impact on whether or not this same information ought to be – or indeed, can be – disclosed under the provisions of the FOIP Act. The Public Body is charged with meeting its burden of protecting this information under FOIP, independent of what disclosure may have preceded the FOIP access request and response.
>
> Section 17(5)(f) is a relevant circumstance.

[para 127] The Public Body refers to information possibly having been disclosed by the University of Calgary's investigator, but states that this has no impact on the question of whether the information can be withheld from an applicant under the FOIP Act. I agree that that personal information that has been disclosed to a limited extent may still be withheld under section 17(1) on the basis that factors considered under section 17(5) weigh against disclosure. However, the fact that information has been disclosed by the person who received it weighs against finding that information has been supplied on the condition of confidentiality, if there is no evidence in relation to the supplier's intentions.

[para 128] As discussed in previous orders of this office, information may be supplied explicitly or implicitly in confidence. Whether information is supplied explicitly or implicitly in confidence, the expectation that information will be kept confidential must be objectively reasonable. Previous orders have considered the application of four factors to assess whether a party has an objectively reasonable expectation that information it supplies will be held in confidence, such that the information can be said to have been supplied in confidence. These factors ask whether information was

> 1. communicated to the public body on the basis that it was confidential and that it was to be kept confidential;
> 2. treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the public body;
> 3. not otherwise disclosed or available from sources to which the public has access;
> 4. prepared for a purpose which would not entail disclosure.

[para 129] In *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2012 ABQB 595, Ross J. confirmed that consideration of the foregoing factors is a reasonable way to assess whether information has been supplied in confidence within the framework of the FOIP Act.

[para 130] The records refer to the investigation conducted by the University of Calgary's investigator as having been confidential, and subject to confidentiality agreements, but I note that in Order F2003-005, the Adjudicator concluded that the interviews with witnesses during that investigation were not given in confidence. Further, with the exception of records 1-165, 1-166 and 1-167, I am unable to clearly identify any records among those before me that were prepared by this investigator. (In its arguments relating to section 17, the Public Body refers to the notes appearing in the first volume of the records as having been prepared by the University of Calgary's investigator as part of the University of Calgary's own investigation into the Applicant's complaint of harassment. However, in its submissions regarding the application of section 20, it refers to these same notes as having been prepared by its own investigators or conciliators. Given the content of the records, I believe the latter to be true, with the exception of records 1-165, 1-166, and 1-167 – which provide the names of witnesses and particular information they gave to the University's investigator, to the Public Body's investigator.)

[para 131] Record 1-165 does not impose conditions of confidentiality or refer to any such conditions. The fact that record 1-166 was provided to the Public Body's investigator is also an indicator that the names of interviewees and some of their statements were not held in confidence. If this information had been held in confidence, the University of Calgary's investigator would not have provided the names and statement summaries to the Public Body's investigator.

[para 132] With respect to the Human Rights Commission's investigation into the sexual harassment complaint, I note that the investigation report relative to the complaint prepared by the Public Body's investigator does not refer to confidentiality. Rather, this report – which record 2-32 indicates was provided to the Applicant – names those who

were interviewed and in some cases summarizes or refers to their evidence. I have found no clear references to confidentiality in the notes themselves, and the personal information of witnesses appears in the investigation report prepared by the Public Body's investigator.

[para 133] Therefore, I am unable to answer in the affirmative any of the questions for determining whether information has been supplied in confidence. From the investigation report, I can conclude that the identities of those interviewed and statements they made that were pertinent to the findings would have been made known to both sides of the dispute (the Applicant and to the University of Calgary). It does not appear that conditions of confidentiality were imposed. There is no evidence as to whether the witnesses themselves kept their accounts in confidence.

[para 134] Similarly, I have found no indicators of confidentiality in the interviews of witnesses in the records in the third volume relating to the 'retaliation' complaint.

[para 135] While I accept that the information withheld from the records is not publicly available, and that there may have been expectations that the personal information supplied for the investigations would not be widely distributed so as to become public, I am unable to conclude that personal information was supplied in confidence such that section 17(5)(f) could be said to apply. I therefore find that it has not been demonstrated for this inquiry that section 17(5)(f) has any application to the information withheld by the Public Body.

Section 17(5)(h)

[para 136] The Public Body argues the following in relation to the application of section 17(5)(h):

> The Freedom of Information and Protection of Privacy, Guidelines and Practices, 2009, Alberta Government Manual states, at page 134:
>
> > "Unfairly" means without justification, legitimacy or equity.
> > "Damage to reputation" of a person means to harm, injure or adversely affect what is said or believed about the individual's character. An example of information which, if disclosed, would unfairly damage a person' s reputation would be allegations of sexual harassment against an individual before an internal investigation is concluded.
>
> Allegations against a named individual in this instance have the potential to damage the reputation of that individual.
>
> Section 17(5)(h) is a relevant circumstance. Disclosure would constitute a threat of potential harm to the reputation of the named individual[s] [*sic*] and therefore must be withheld.

[para 137] I note that in Order F2010-025, the Adjudicator determined that prior to finding that section 17(5)(h) applies, "a determination must be made, based on evidence, including the evidence of the information in the record itself and evidence regarding the individual's reputation, that disclosure would result in unfair damage to an individual's reputation".

[para 138] I have reviewed the records with both these factors in mind, and I am unable to identify any information in the records that would expose third parties to harm or damage their reputations unfairly. I find that without more, the Public Body's idea that the subject matter of the Public Body's investigation justifies withholding the records is unsubstantiated.

[para 139] The circumstances of the case before me are not those in which an uninvestigated allegation of sexual harassment, such as that referred to in its submissions, would be revealed by disclosing the records.

[para 140] In this case, the Applicant herself made the allegation of sexual harassment. The Public Body completed an investigation under human rights legislation and found that the allegation was unsubstantiated. The steps taken in the investigation and the findings of the Public Body's investigator were disclosed in a report sent to both the Applicant and to the University of Calgary. The Public Body has disclosed to the Applicant information regarding her allegation of sexual harassment in response to her access request. Moreover, the Public Body has not withheld information that can be characterized as an allegation of sexual harassment; rather, it withheld the statements of individuals who did not allege sexual harassment either in a formal complaint to the Public Body, or in the portions of the statements that were withheld.

[para 141] For these reasons, I find that section 17(5)(h) has not been demonstrated to be a relevant consideration for the purpose of the balancing exercise required by section 17(5).

The Public Body's decisions under section 17

[para 142] In her submissions of January 4, 2012, the Applicant stated:

> The Applicant would also like to note that third parties (e.g. witnesses interviewed during the AHR investigations) were not contacted to determine if they consented to disclosure of records which pertained to themselves. For example, the Applicant's husband […] provided information to the AHR investigator […] and presumably the notes of his interview would be contained within the withheld documents. Yet the applicant's husband was never contacted to provide his consent to disclose such records, and would have given consent if asked. Therefore, some sections of the Act may allow for disclosure if consent is provided.

[para 143] In response, the Public Body stated:

> […] the applicant states that consent was not sought for the disclosure of third party personal information. The Public Body's review of the personal information in the records, determined that sections 17, 18, and 20 would be applied to the information. The factors considered, in regard to those sections, were such that the disclosure of this information would not be made regardless if consent was obtained. As such, third party notice was not required.

For the reasons given above, I have found that sections 18, 20, and 27 do not apply to the information severed by the Public Body under those provisions. However, the Public

Body's decision to withhold information under section 17, even where it is possible that the individuals who are the subject of the personal information would consent to its disclosure, was based in part on its view that these provisions also applied and would prevent disclosure in any event. If individuals consent to the disclosure of their personal information, the personal information cannot be withheld under section 17.

[para 144] 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.

[para 145] In Order F2012-24, I noted that section 17(5) imposes a duty on a public body to consider and weigh relevant circumstances when deciding whether disclosing personal information would be an unreasonable invasion of personal privacy. As I found that the public body had considered factors that had not been established as applicable as weighing against disclosure, and because it had not considered factors weighing in favor or disclosure, and had not obtained the views of third parties regarding disclosure of their information, I ordered the public body in that case to make a new decision under section 17(5). I 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 146] In my view, this approach has merit in this inquiry as well. There may or may not be factors weighing in favor of disclosing the personal information of third parties in this case. However, the fact the Public Body appears not to have had the benefit of their views means it may be lacking relevant information weighing in favor of (or against) disclosure. If the Public Body were to contact the third parties, it could learn whether they consent to disclosure, with the result that section 17(2)(a) would apply. It might also be able to determine which information could identify the third parties, and which information could not. As well, it may be able to determine, if the individuals were acting in a representative capacity, whether the information that was recorded about them had a personal dimension, or not.

[para 147] Ordering the Public Body to make a new decision under section 17 is also necessary because for many of the records, I am unable to determine whose personal information has been withheld. The notes do not always refer to the name of the individual who is the source of the information in the records. I cannot tell whether it is about an employee of the Public Body acting in the course of their duties, or whether an individual can be identified from the withheld information at all.

[para 148] It is also unclear, when information on a given record has been withheld under several provisions simultaneously, whether all or only some of the information has been withheld on the basis of section 17, or whether some of it was withheld only on the basis of sections 18, 20, or 27 (which I have found do not apply). The Public Body does not necessarily indicate in its severing the provisions under which particular items of information has been withheld.

[para 149] As well, the Public Body does not appear to have tried to sever such of the personally identifying information in the records as would identify third parties (which would enable it to provide the rest, as required by section 6 of the FOIP Act). For example, it appears the notation severed from record 1-15 was severed under section 17 because a name appears at the beginning of it. (It is also not clear that the name refers to an individual acting as a representative of a public body, or acting in the individual's private capacity.) Assuming that the name is the personal information of a third party, if the name were severed, the remainder could likely be disclosed, as it would not reveal personal information about anyone. Possibly the Public Body thinks that severing identifiers in this case would still leave parties identifiable; however, I do not believe that can be said for all the information it has withheld under section 17. Possibly in the Public Body's view, the information that would remain after severing would be meaningless or useless to the Applicant; however, that cannot be determined until the Public Body points to any information it considers would be meaningless in the absence of the identifying information.

[para 150] To conclude, I am not at present in a position to review the Public Body's decision. I must therefore require it, under section 72(3)(a), to make a new decision under section 17, that also reflects the requirement that a public body will sever information where possible, as required by section 6. The Public Body must also try to contact third parties whose personal information appears in the records to obtain their

views regarding disclosure, to the extent this is practicable. Finally, when making the new decision, the Public Body should weigh only considerations that have been established as relevant.

V. ORDER

[para 151] I make this Order under section 72 of the Act.

[para 152] I order the Public Body to disclose records 1-20, 1-21, 1-22, 1-23, 1-26, 1-28, 1-79, 1-80, 1-81, 1-82, 1-83, 1-85, 1-143, 1-147, 1-231, 1-232, 1-233, 1-243, 1-270, 1-360, 1-451, 1-489, 3-25, 3-26, 3-27, 3-34, 3-35, 3-36, 3-37, and 3-53 in their entirety.

[para 153] I require the Public Body to reconsider its decision under section 17(1) in view of the following:

- that it attempt to obtain the views regarding disclosure of those who are the subject of the information;

- that it consider only factors that have been established as relevant when making decisions under section 17(5);

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

- if, once the Public Body has made its new decision, it finds it necessary to consider severing information, it may withhold information only 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 154] 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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Christina Gauk, Ph.D.
Director of Adjudication