ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2014-02

January 17, 2014

MEDICINE HAT POLICE SERVICE

Case File Number F5956

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Summary: An individual made several access requests to the Medicine Hat Police Service (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act). This inquiry was requested by the Applicant to address the Public Body's decision to withhold information in records provided in response to one request (file F5956), and the decision to deny the Applicant's request for a fee waiver with respect to a second request (file F5957).

The first request was for access to records relating to an incident involving the Applicant and another individual. The Public Body located responsive records, but withheld information under section 17 (disclosure harmful to personal privacy), section 20 (disclosure harmful to law enforcement) and section 27(1)(c) (information in correspondence between a lawyer and another person) of the Act. The Public Body also determined that some records were not subject to the Act by application of section 4(1)(a). The Applicant requested a review of the Public Body's response.

The Adjudicator found that section 4(1)(a) applies to some of the withheld information and she does not have jurisdiction to review the Public Body's decision regarding that information.

The Adjudicator determined that the Public Body properly applied section 17 to some, but not all, of the information in the records. She ordered the Public Body to disclose further information.

The Adjudicator found that section 20(1)(m) applies to the information withheld under that provision and that the Public Body properly applied section 20(1)(g) to some of the information in the records. She also determined that the Public Body had properly applied section 27(1)(c) to information in the records but that it did not properly exercise its discretion to withhold that information. She ordered the Public Body to reconsider its decision to withhold some of the information withheld under that provision.

With regard to the Applicant's request for a fee waiver (file F5956), the Applicant paid the initial $25 fee, and the file was held in abeyance in order to allow the Public Body time to review the Applicant's request and determine whether further fees will be charged

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 4, 6, 17, 20, 27, 71, 72, 92; **ON:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 s.14, *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, s. 8.

Authorities Cited: AB: Orders 96-010, 96-020, 97-002, F2004-015, F2004-026, F2004-030, F2006-005, F2006-007, F2007-007, F2007-021, F2008-028, F2008-032, F2009-018, F2009-027, F2010-007, F2010-008, F2010-025, F2010-031, F2010-036, F2011-010, OIPC External Adjudication Order No. 4; **Ont:** PO-2970; *Sullivan and Driedger on the Construction of Statutes* 4th Edition (Markham: Butterworths, 2002) at 47.

Cases Cited: *Alberta (Attorney General) v. Krushell*, 2003 ABQB 252 (CanLII), 2003 ABQB 252, *Krieger v. Law Society of Alberta* [2002] 3 S.C.R. 372, *Ontario (Public Safety and Security) v. Criminal Lawyers Association*, 2010 SCC 23, *Privacy Commissioner of Canada v. R.B.C. Action Direct Inc.*, Federal Court file No. 05-T-17.

I. BACKGROUND

[para 1] An individual made several access requests to the Medicine Hat Police Service (the Public Body) under the FOIP Act. This inquiry was requested by the Applicant to address the Public Body's decision to withhold information in records provided in response to one request, and its decision to deny the Applicant's request for a fee waiver with respect to a second request.

Review of withheld information

[para 2] The Applicant requested access to records relating to an incident involving the Applicant and another individual; this request was made on March 29, 2011. The Public Body located responsive records, but withheld information under section 17 (disclosure harmful to personal privacy), section 20 (disclosure harmful to law enforcement) and section 27(1)(c) (information in correspondence between a lawyer and another person) of the Act. The Public Body also determined that some records were not subject to the Act by application of section 4(1)(a).

Request for fee waiver

[para 3] The Applicant made another request to the Public Body on August 29, 2011. The Public Body required the Applicant to pay the $25 initial fee, as the request was for general information. The Applicant requested a fee waiver under section 93(4) of the Act but the Public Body denied the request.

[para 4] The Applicant requested a review from this office. The Commissioner authorized a portfolio officer to investigate and try to settle the matter. This was not successful; the Complainant requested an inquiry and the matter was set down.

[para 5] During the course of the inquiry, the Applicant paid the $25 initial fee so that the Public Body would begin processing the request. However, in her request for a fee waiver, the Applicant was clear that she would also be requesting a waiver of any further fees assessed by the Public Body. By letter dated July 5, 2013, I informed both parties that file F5957 will be held in abeyance in order to allow the Public Body time to review the Applicant's request and determine whether further fees will be charged.

II. RECORDS AT ISSUE

[para 6] The records at issue consist of the withheld portions of approximately 962 pages provided to the Applicant in response to her request of March 29, 2011.

III. ISSUES

[para 7] The issues as set out in the Notice of Inquiry are as follows:

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

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

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

4. **Did the Public Body properly apply section 27(1)(c) of the Act (information in correspondence between a lawyer and another person) to information in the records?**

IV. DISCUSSION OF ISSUES

Preliminary issues

[para 8] The Applicant has raised several issues in her submissions that are not issues listed in the Notice of Inquiry. For example, the Applicant indicates that she believes the Public Body has attempted to cover up negligent actions by "inventing" false records. I

have no evidence that leads me to believe that the Public Body has falsified any of the records at issue.

[para 9] The Applicant has also asked me to order the entire notebooks of certain Public Body officers to be disclosed, or reviewed by a neutral third party. The Applicant is concerned that some pages have not been provided to her. She also alleges that some of the records that appear to be copies of one officer's notebook are not real copies. She states that the copy of the relevant page of the notebook "doesn't cast the shadow's [sic] or have the bulk of a 'book' but appears to be a simple piece of lined paper with no realistic fold in the center or edges showing it is a book with other pages and shadows like all the other photocopies of actual Black Book Notes that were provided in the FOIP requests."

[para 10] I am not persuaded by the Applicant's arguments that the Public Body has altered any of the records at issue. The Applicant asserts that the copies of one officer's notebook look different from copies of notebooks of other officers. There may be several reasons for this, such as using a different photocopier or a different manner of making a copy. Possibly the officers used different types of notebooks. I have no reason to believe, beyond the Applicant's assertions, that the "flat" appearance of the copies of one officer's notebook means that the copies are not in fact copies of that officer's notebook.

[para 11] I also have no reason to believe that the Public Body did not provide copies (entirely, or in severed form) of all relevant pages of the officers' notebooks. One of the records provided to the Applicant shows the first and last date of entry of one officer's notebook. The Applicant states that the last date of entry is the same as the date that officer responded to an incident involving the Applicant. She speculates that the officer may have continued his notes in a new notebook, copies of which were not provided to her. While it is possible that the officer may have continued taking notes in a different notebook, there is no indication from the records provided to the Applicant that any notebook entries are missing. The Applicant has also not provided me with any reason, beyond speculation, for believing that copies of notebook pages are missing.

[para 12] The Applicant also expressed concern that the Public Body has told her that some of the requested information is "slated for destruction." I have reviewed correspondence between the Applicant and Public Body, provided to me by the Applicant, that refers to the possibility of records being destroyed in accordance with the Public Body's record retention policy. In this email from the Public Body to the Applicant, dated August 2011, the Public Body provided the Applicant with information about how the Public Body responds to production orders (made under the Rules of Court). The Public Body noted that files are "purged" in accordance with its retention schedule and that the Applicant can request that records be preserved beyond that retention period. It further stated:

> We will not provide a blanket retention period extension to all your files and must have justification to extend retention periods.

[para 13] The FOIP Act prohibits a public body from destroying records in an attempt to evade an access request (section 92(1)(g)). If it is reasonable to expect that an individual will make an access request for certain records, those records must be retained beyond any normal retention period. That said, this particular email from the Public Body to the Applicant does not seem to be related to an access request under the FOIP Act, and I do not understand the Public Body to have intended or threatened to destroy records to which the Applicant has requested access. Nothing in the correspondence provided to me by the parties indicates that the Public Body informed the Applicant that records she requested under the FOIP Act were destroyed or scheduled to be destroyed before the request could be processed. Further, the records themselves date back several years, apparently to the Applicant's first interactions with the Public Body. While the Applicant does refer to records from a specific area of the Public Body that she believes had been destroyed in contravention of its own retention policy, before she requested access to them, based on the submissions and records before me, I have no reason to believe that such records existed.

[para 14] Lastly, the Applicant states in her submissions that she was told by the Public Body (at some point prior to or at the time of her access request) that there is a hard copy transcription of a 911 call made from a neighbour's residence. She states that she was told that she would have to obtain consent from the third party (the neighbour) for the copy. As I could not find a record that matched this description in the records at issue, I asked the Public Body whether this record exists. The Public Body responded that it searched all records related to the Applicant's request and could not find evidence that it had previously told the Applicant that she would require consent from a third party to obtain a copy of the 911 call. It also could not find the requested hard copy of the call and states that the copy of the call itself, if made, would have been kept for only two years (the call was allegedly made in 2005).

[para 15] The Public Body pointed to a statement made by the neighbour, which had been provided in the records at issue; this statement indicates that the neighbour did not make a 911 call as the Applicant believes. After reviewing the records, I am satisfied that the Public Body located of the relevant records and that it does not have a hard copy of a 911 call made by the Applicant's neighbour.

[para 16] In response to the Public Body's answer, the Applicant provided me with a copy of correspondence between her and the Public Body. In an email from the Public Body dated August 30, 2011, the Public Body stated, regarding the Applicant's request for the 911 call, "[i]f you have no personal information in other police records, then you have no entitlement to that data unless you have consent from the third party that made the call." This statement was made in response to a question from the Applicant as to why she received a copy of a 911 call made from her residence but not a copy of another 911 call. While this statement may be interpreted as indicating that a copy of the requested 911 call exists, the remainder of the email in which this statement was made indicates that the Public Body was explaining certain processes to the Applicant. I do not believe the Public Body said, or intended to say, that there was a copy of another 911 call and that the Applicant could not have it without third party consent.

[para 17] The idea of the Public Body that the Applicant must have consent from a third party to access records that do not contain the Applicant's personal information was also conveyed by the Public Body to the Applicant in a letter dated August 15, 2011, in which the Public Body stated "Please be advised that any third party information must have the consent of the third party for release. Under the Freedom of Information and Protection of Privacy Act, you are only entitled to your own personal information." In both instances, these statements were made by an employee responsible for responding to access requests.

[para 18] This is an inaccurate description of an applicant's rights under the FOIP Act. Applicants have a right of access to **any record in the custody or under the control of a public body** subject to the limited exceptions provided in the Act (section 6(1) and (2)). Section 17 *prohibits* a Public Body from disclosing personal information of a third party only if the disclosure would be an unreasonable invasion of the third party's privacy. Section 17(2) provides a list of information or circumstances in which it *would not be* an unreasonable invasion of privacy to disclose personal information – in other words a public body cannot rely on section 17 to withhold that information even though it is personal information of a third party. This list includes the circumstance that the third party has consented to the disclosure of his or her information (in the prescribed form). However, even where the third party has not consented to the disclosure, the information is to be disclosed if the disclosure would not unreasonably invade the privacy of the third party. Whether it is an unreasonable invasion requires the consideration of any relevant factors, not only whether the third party has consented.

[para 19] It seems to me that given the nature of the information in the custody and control of the Public Body, the other factors under section 17 would often be relevant in responding to an access request made to the Public Body. It is therefore concerning that the Public Body seems to misunderstand how the FOIP Act operates in this regard. I recommend that the Public Body obtain training for its FOIP staff for responding to access requests under the FOIP Act.

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

[para 20] If section 4(1)(a) applies to the records at issue, I do not have jurisdiction to review the Public Body's decision to withhold them. The Public Body applied this provision to pages 13, 15, 16, 32, 33, 62, 63, 328, 329, 408 and 409 of Record E; page 6 of Record F; pages 6 and 7 of Record G, pages 29, 32 and 33 of Record I; pages 2, 5-8, 11-13, 16 and 17 of Record J; pages 5, 7 and 9 of Record L; pages 1-4 of Record M[1]; and paged 34 and 35 of Record S.

[para 21] At the time of the Applicant's request, section 4(1)(a) of the Act stated the following[2]:

[1] The Public Body's index indicates that section 4(1)(a) was applied only to pages 2-4 of Record M; however page 1 is also noted on the record itself as having been withheld under this provision.
[2] A minor amendment was made to this provision, effective July 1, 2012.

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

[para 22] This provision applies to information taken or copied from a court file (Order F2004-030 at para. 20 and F2007-007 at para. 25); it also applies to information copied from a court file to create a new document, such as a court docket (*Alberta (Attorney General) v. Krushell*, 2003 ABQB 252 (CanLII), 2003 ABQB 252). However, these orders state that records emanating from the Public Body itself or from some source other than the court file are within the scope of the Act, even though duplicates of the records may also exist in the court file (F2010-031).

[para 23] Pages 15 of Record E, 6 of Record F, 7 of Record G, 29 and 33 of Record I; and 5 and 7 of Record J are all forms pursuant to the *Criminal Code*, filled out by an officer (presumably of the Public Body) and signed by a third party individual. These forms *may* have been filed on a court file, but there is nothing on the record to indicate that they *were in fact* filed on a court file. By letter dated May 29, 2013, I requested further information from the Public Body on its application of section 4(1)(a) to certain records that were not clearly encompassed under that section. The Public Body responded as follows:

> Section 4(1)(a) was applied as all the information pertains to court records or judicial administration records such as release documents including Undertakings or Recognizance or Warrant requests with a number applying to a third party. These documents are provided to the law enforcement file and are a requirement to ensure release documents and especially those with conditions of release are available as reference should any breach of conditions result. The file is accessed, as required, by both police officers and their supervisors. The Medicine Hat Police Service's general practice is to severe [sic] court documents signed by a Justice or Judge. As all above noted records are in relation to a third party, section 17(1) was also applied.

[para 24] While the Public Body states that "all the information pertains to court records or judicial administration records", I cannot read this as a statement that the records on which this information is found emanated from a court file, rather than from some other source, even if they were placed on a court file. In any event, the Public Body's argument does not assert that the records were placed on a court or judicial administration file, though it does refer to a "law enforcement file." As well, nothing on the face of the above-listed records indicates that they are part of a court file, signed by a

judge or justice of the peace, or otherwise meet the requirements of section 4(1)(a). Therefore I find that the provision does not apply and I have jurisdiction to review the Public Body's decision to withhold the information.

[para 25] Pages 408 and 409 of Record E and 34 and 35 of Record S are copies of a report or form that was clearly intended to be sent to a judge or justice of the peace. However, the copies in these pages are not signed, and therefore do not appear to be copies of the records *actually* sent to a judge or justice of the peace.

[para 26] In Order F2007-021, the Adjudicator drew a distinction between a version of a document that has been filed with the court, and copies of the same document that have not been filed:

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

Following the Adjudicator's reasoning in Order F2007-021, a signed version of the documents might become part of a court file, so that copies of the signed forms would constitute information in a court file. However, the records before me are unsigned copies, which would not be copies of filed records, and therefore *not* information to which section 4(1)(a) applies.

[para 27] Although the Public Body states in its response to my questions that it also applied section 17(1) to the records withheld under section 4, there is no indication in its index of records, previous submissions, or the records themselves that section 17(1) was also applied along with section 4. Previous orders of this office have held that the late raising of a discretionary exception by a public body would not be permitted if it resulted in delays or worked to the prejudice of a party (see Order 96-010). However, despite the fact that the Public Body has raised this issue for the first time so late in the inquiry, section 17 is a *mandatory* exception to access and therefore I will determine whether it applies to the information that I have found is not subject to section 4(1)(a).

[para 28] Pages 13, 16, 32, 33, 62, 63, 328, 329 of Record E; 6 of Record G, 32 of Record I; 2, 5-8, 11-13, 16 and 17 of Record J; 9 of Record L; and 1-4 of Record M are all records that emanated from the court, signed by a justice of the peace or judge in the exercise of his or her duties under the *Criminal Code*, or a signed copy of a form sent to a

justice of the peace. I find that section 4(1)(a) applies to the information withheld from these pages under section 4(1)(a) and I do not have jurisdiction to review the Public Body's decision regarding that information.

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

Is the information personal information?

[para 29] Section 1(n) defines personal information under the Act:

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

[para 30] The information withheld under section 17 includes primarily names of third parties involved in an incident with the Applicant, including individuals having a personal relationship with the Applicant, as well as individuals who worked with the Applicant on a professional basis. The Public Body also withheld contact information related to these individuals and in some cases physical descriptions. All of the information is contained in police files. In some cases, the Public Body also severed the names and contact information; however, it disclosed information about its own employees.

[para 31] Names, contact information and physical descriptions of third parties is personal information under the FOIP Act. However, previous orders from this office have

found that section 17 does not apply to personal information that reveals only that the individual was acting in a formal, representative, professional, official, public or employment capacity, unless that information also has a personal dimension (Order F2008-028, para. 54). This principle has been applied to information about employees of public bodies as well as other organizations, agents, sole proprietors, etc. (Order F2008-028).

[para 32] The names and contact information of employees of other public bodies appear in the records as a result of the employees performing their job duties (for example, page 17 of Record Q). Further, the names and contact information of two individuals working with or on behalf of the Applicant appear as a result of these individuals acting in their professional capacities (for example, pages 46-48, and 60-65 of Record Q). I was not told of any way in which this information could have a personal dimension for these individuals. I agree with the adjudicator in Order F2008-028 and find that it is not an unreasonable invasion of privacy to disclose the names and contact information of these individuals acting in their professional capacity.

[para 33] This conclusion also applies to the names in the 'To' and 'cc' line on the emails on pages 33 and 34 of Record Q that were withheld. The content of the emails has been disclosed, and it reveals that the email was sent to the mayor of the city. It is not clear who the individuals in the 'cc' line are; however, the email itself clearly relates to municipal business. From this I infer that the individuals cc'd on the email were also acting in their professional capacity; as the information does not appear to have a personal dimension, their names therefore cannot be withheld under section 17.

[para 34] One exception to the above is information severed on page 77 of Record Q; although the individual appears to be acting in his or her professional capacity, the email address withheld in the 'To' line of the second email on the page appears to be a personal email address rather than a business email address. For this reason, I will consider below whether that email address was properly withheld under section 17.

[para 35] In some instances where personal information is severed from forms, the Public Body correctly provided the standard form information (for example, headers and descriptors for fill-in boxes) with only the personal information severed. However, in other instances, the Public Body withheld entire forms instead of severing only the personal information. For example, pages 4-6 and 11-20 in Record A have been severed almost in their entirety, while elsewhere in the records (for example, page 3 of Record F) only the personal information has been severed from the form. Where the standard information on a form (the header etc.) does not reveal the personal information withheld on the form, the standard information cannot be withheld under section 17. I will order the Public Body to disclose the standard information on the following pages, as it does not reveal personal information of third parties (the filled-in content of the forms is personal information and will be discussed further): pages 4-6, 11-20 and 33-42 of Record A.

[para 36] Page 7 of Record A is a letter on an organization's letterhead. Although some of the content of the letter is personal information of a third party, the letterhead itself, the 'To' and 'From' lines (but not the 'Re' line) and the name and contact information of the author (who is acting in a professional capacity) are not personal information that can be withheld under section 17. Further, the last paragraph of the letter does not reveal other personal information in the letter and cannot be withheld.

[para 37] Pages 8-10 of Record A are attachments to the letter. The header and column headers on this page are not personal information and cannot be withheld under section 17, but the third party name, file number and content of the pages are personal information, which I will consider under section 17.

[para 38] Page 23 of Record F has names of third parties severed, including the name of a lawyer acting on behalf of another individual. In my view, disclosing the name of the lawyer (who is acting in his professional capacity) does not reveal personal information of the other third party in this case.

Would disclosure be an unreasonable invasion of a third party's personal privacy?

[para 39] Section 17 states in part:

> *17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.*
>
> …
>
> *(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*
>
> …
>
> *(b) the personal information is an identifiable part of a law enforcement record, except to the extent that the disclosure is necessary to dispose of the law enforcement matter or to continue an investigation,*
>
> …
>
> *(g) the personal information consists of the third party's name when*
>
> *(i) it appears with other personal information about the third party, or*
>
> *(ii) the disclosure of the name itself would reveal personal information about the third party,*
>
> …
>
> *(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether*
>
> *(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,*

> …
>
> *(c) the personal information is relevant to a fair determination of the applicant's rights,*
>
> …
>
> *(e) the third party will be exposed unfairly to financial or other harm,*
>
> …
>
> *(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 provide by the applicant.*

[para 40] Section 17 is a mandatory exception: if the information falls within the scope of the exception, it must be withheld.

[para 41] Under section 17, if a record contains personal information of a third party, section 71(2) states that it is then up to the applicant to prove that the disclosure would not be an unreasonable invasion of a third party's personal privacy.

[para 42] Neither party has argued that section 17(2) or (3) apply to any of the withheld information, and from the face of the records, neither provision appears to apply.

Section 17(4)

[para 43] The Public Body argues that sections 17(4)(b), 17(4)(g)(i) and 17(4)(g)(ii) apply to the personal information, creating a presumption that disclosing the information would be an unreasonable invasion of personal privacy.

[para 44] Section 17(4)(b) creates a presumption against disclosure of information contained in an identifiable part of a law enforcement record. Law enforcement is defined in section 1(h) of the Act, to include:

> *1 In this Act,*
> …
>
> *(h) "law enforcement" means*
> …
> *(ii) a police, security or administrative investigation, including the complaint giving rise to the investigation, that leads or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the investigation or by another body to which the results of the investigation are referred,*
>
> ...

[para 45] The records at issue are all part of a police file and all include a header with the Public Body name and file number; as such, section 17(4)(b) applies to all of the personal information in the records.

[para 46] Section 17(4)(g) (third party's name with other information) also applies to all of the described personal information, weighing against disclosure.

Section 17(5)

[para 47] The factors giving rise to a presumption that disclosing the personal information is an unreasonable invasion of personal privacy must be weighed against any factors listed in section 17(5), or other relevant factors, that weigh in favour of disclosure.

[para 48] The Applicant argues that the issue at inquiry is a matter of public interest; suggesting that section 17(5)(a) (disclosure desirable for public scrutiny) may apply to the severed information. Under section 17(5), the Public Body addresses only subsection 17(5)(i). I will also consider whether sections 17(5)(c) (fair determination of applicant's rights), 17(5)(e) (unfair financial or other harm), or (h) (unfair damage to reputation) apply to the information withheld under section 17.

Section 17(5)(a)

[para 49] Several orders from this office have emphasized the requirement for a public component in order to meet the public scrutiny test in section 17(5)(a). In Order F2006-007 the adjudicator stated:

> In Pylypiuk (supra) Gallant J. stated that the reference to public scrutiny of government or public body activities under what is now section 17(5)(a) requires some public component, such as public accountability, public interest and public fairness.
>
> > In my opinion, the reference to public scrutiny of government or public body activities in s. 16(5)(a) [as it then was] speaks to the requirement of public accountability, public interest, and public fairness.

[para 50] For section 17(5)(a) to apply, there must be evidence that the activities of the public body have been called into question, which necessitates the disclosure of personal information to subject the activities of the public body to public scrutiny (Order 97-002 at para. 94 and Order F2004-015 at para. 88).

[para 51] The Applicant states that without the withheld information, she "will not be able to prove any of the facts of [the Public Body's] obstruction of justice which created the limitations issue I am fighting…" The Applicant's submissions suggest that she believes that the actions of the Public Body in responding to an incident exacerbated the harm suffered by the Applicant as a result of the incident.

[para 52] I understand that the Applicant feels that members of the Public Body did not respond appropriately to an incident in which she was involved. However, the Applicant has not provided me with sufficient evidence, beyond her assertions, to find that the activities of the Public Body have been called into question in this case. Even if the Applicant had provided sufficient evidence of the need for public scrutiny, the

information withheld under section 17 (the names, contact information and/or physical descriptions of the third parties) would not, in my view, subject the activities of the Public Body to scrutiny. The Public Body disclosed to the Applicant much of the information in the records, including witness statements and police notes (with names, contact information and/or physical descriptions of third parties removed). The names, contact information and/or physical descriptions of third parties that have been withheld under section 17 would not shed light on the actions of the Public Body in responding to the incident involving the Applicant. (The names of Public Body officers were not withheld under section 17). Therefore, I find that section 17(5)(a) is not a relevant factor.

Section 17(5)(c)

[para 53] Section 17(5)(c) weighs in favour of disclosing information that is relevant to a fair determination of an applicant's rights. The Applicant argues that the withheld information is required for a civil case, presumably against one of the individuals involved in the incident with the Applicant. The Applicant has also criticized the actions of members of the Public Body; however, the Applicant's submissions are not clear as to whether she intends to bring any civil action against members of the Public Body.

[para 54] Four criteria must be fulfilled for section 17(5)(c) to apply:

> (a) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds;
>
> (b) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed;
>
> (c) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
>
> (d) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing. (Order F2008-012 at para. 55, Order F2008-031 at para. 112)

[para 55] As noted, the Applicant apparently intends to pursue civil action against an individual who allegedly caused physical harm to the Applicant. The Applicant's submissions suggest that she has already started the process. There is no doubt that the Applicant knows the identity of the person who allegedly assailed her. Although it may not be obvious in some of the records, it seems very likely that the Applicant knows the names of the individuals severed in most of them. (In many instances, the Applicant provided the record to the Public Body in the first place; I will discuss this further under the discussion of section 17(5)(i).) I acknowledge that it is possible that names of witnesses could be of value to the Applicant, if she doesn't already know the names. However, I do not have sufficient information from the Applicant regarding what information would be useful to her in any contemplated civil proceeding, or why the information withheld under section 17 (names, contact information, etc.) would be relevant to that proceeding to determine that section 17(5)(c) applies.

Section 17(5)(e)

[para 56] Section 17(5)(e) weighs against disclosure where it could cause unfair financial or other harm to a third party. The Public Body has argued that the disclosure of the third party personal information in the records could lead to financial harm or civil liability, but does not provide further detail. In Order F2011-010, the adjudicator acknowledged an earlier Order (96-020) holding that exposure to civil liability can constitute harm under section 17(5)(e) (then section 16(5)(e)). However, the adjudicator qualified the earlier Order by holding that unless a legal proceeding was frivolous, vexatious or similar, it does not constitute *unfair* harm (at para. 19). I agree with this standard; mere exposure to civil liability is not sufficient to trigger this provision.

Section 17(5)(h)

[para 57] With respect to unfair damage to reputation, some of the information in the records relates to allegations against the various third parties in the records, and some of the information was provided by the individuals themselves. In Order F2010-025 the adjudicator stated:

> Certainly the nature of a record and the circumstances in which it is created are always relevant to this determination; however, 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, prior to finding that section 17(5)(h) applies.

[para 58] From the submissions of the parties, there seems to have been a criminal proceeding or intention to proceed with criminal charges against one of the individuals whose information appears in the records. However, I do not know whether charges were laid, or any outcome, and I do not know whether the individual had an opportunity to defend himself against the allegations in the records. I have very little information other than the records themselves. Based on the records, I find that section 17(5)(h) weighs against disclosure of some of the information about the individual against whom criminal allegations have been made and apparently investigated. However, it is not clear to me from the records that the disclosure of the personal information withheld under section 17 would result in unfair harm to the reputations of other individuals whose information is contained in the records. Without further information on this point, I find that this factor is not relevant with respect to those other individuals.

Section 17(5)(i)

[para 59] The Public Body acknowledged that a substantial number of the records at issue were provided to the Public Body by the Applicant. It states:

> The applicant had submitted substantial unsolicited documentation and emails to the MHPS over the course of years involving the *Records at Issue*. The submitted documentation from the applicant became part of law enforcement records, and

> contains third party personal information. The MHPS is of the opinion that the third party personal information is so intertwined within the other law enforcement records, that failure to redact the third party personal information on the documents submitted by the applicant would service to identify other severed third parties [sic] personal information within the rest of the law enforcement records; making any redactions of any third party personal information pointless, in that it would not protect the third party information as contemplated by the Act.

[para 60] This factor weighs in favour of disclosing the information. I disagree with the Public Body's analysis that disclosing the names of third parties referred to in correspondence from the Applicant to the Public Body would make redactions in other records pointless. The fact that the Applicant talked about certain individuals in correspondence with the Public Body does not necessarily indicate that those names occur elsewhere in the records (or if they do, where they occur).

Other factors under section 17(5)

[para 61] The Applicant argued that *Privacy Commissioner of Canada v. R.B.C. Action Direct Inc.,* Federal Court file No. 05-T-17 (referenced in the Federal Privacy Commissioner's 2005 Annual Report) applies. I believe the Applicant is referring to the decision of the federal Privacy Commissioner that led to the federal proceeding; in that decision the Assistant Commissioner noted that information may be personal to more than one individual (in other words, information may be *about* more than one person). The Public Body argued that this case does not apply as "third party personal (non-consensual) information in law enforcement records substantially differ than [sic] third party personal information in a consensual situation such as joint bank account [sic]."

[para 62] I agree that information can be personal to more than one individual; past orders of this office have found this to be the case (for example, an opinion may be the personal information of the subject as well as the opinion-giver). Where information is personal to both an applicant and a third party, the interests of both must be weighed. In this case, the information of third parties in the records at issue may be said to also be personal information of the Applicant only by virtue of the fact the Applicant is the person who made the complaint to the police. In my view, this is not sufficient by itself to outweigh the factors in favour of withholding the information.

[para 63] The Public Body also makes an argument in relation to "ownership of information." It states:

> Issues of ownership of third party personal information should only be applied in rare and exceptional circumstances. The applicant has made it clear that her intent is to use the law enforcement records for civil action, which could expose a third party unfairly to financial or civil liability. It is our position the applicant has not provided a rare or exceptional reason to claim ownership of third party information or to override third party protections identified in the FOIP Act.

[para 64] The FOIP Act does not address or include the concept of ownership of information. It is not clear to me what the Public Body means by ownership of information, or how this relates to the factors found in section 17, and I do not accept this as an argument against disclosure.

Weighing factors under section 17

[para 65] With respect to section 17(4)(b), the Public Body states that "considering the nature of law enforcement records, it would appear that this section, sub-section was designed by the legislators to afford special protection to personal information of third parties contained within. It would be inconsistent with its intent to release personal information of a third party."

[para 66] Section 17(4)(b) creates a *presumption* that the disclosure of personal information in records that are identifiable as law enforcement records would be an unreasonable invasion of privacy. However, this presumption may be rebutted; section 17(5) specifically states that *all relevant circumstances* must be considered in determining whether disclosing information would be an unreasonable invasion. It is therefore *not* inconsistent with the intent of the provision to disclose personal information that is an identifiable part of law enforcement records if other circumstances exist that outweigh the presumption in section 17(4)(b). In fact, it is inconsistent with the intent of the provision to interpret section 17(4)(b) as creating a mandatory exception to disclosure, rather than treating it as one of many factors.

Information provided to the Public Body by the Applicant

[para 67] In my view, the fact that the Applicant provided some of the information in the records at issue to the Public Body weighs heavily in favour of disclosure of that personal information. The Public Body has argued that disclosing the personal information in the correspondence originally provided by the Applicant would effectively identify individuals in other information, because the information is so intertwined. I acknowledge that all of the records at issue are related (although they appear to relate to more than one police file) and therefore the names of some individuals that appear in information originally provided by the Applicant may also appear in information *not* originally provided by the Applicant. However, the Public Body has disclosed most of the information in the records at issue and I have no doubt that the identity of many (if not all) of the individuals in the records is discernible by the Applicant from the context of the disclosed information (although the Applicant may not be able to pinpoint which individual is being referred to in every instance of severing).

[para 68] Further, it seems to me that the factors weighing against disclosure are minimized with respect to the information originally provided by the Applicant. I agree with the Public Body that information contained in a law enforcement record is to be given special consideration; for example, the fact that an individual was being investigated by police or provided statements to police may be sensitive information about that individual.

[para 69] In the present context, however, it seems nonsensical to sever information from emails and other documents provided to the Public Body by the Applicant, when she likely already knows the content and may still have her own copies. Therefore I will order the Public Body to disclose the severed information in the copies of documents provided to the Public Body by the Applicant. This also applies to witness statements (and other statements) provided to the Public Body by the Applicant.

[para 70] However, where the Public Body has taken information supplied by the Applicant and discussed it, investigated it, provided an analysis of it etc., it is no longer merely information provided by the Applicant, and in my view, section 17(5)(i) no longer weighs in favour of disclosure. Further, the presumption against disclosure in section 17(4)(b) carries more weight, as the fact the information was considered by police in the course of an investigation adds sensitivity to the information, especially information of an accused. I find that there are no factors that weigh in favour of disclosure of such information.

Information not provided to the Public Body by the Applicant

[para 71] I find that there are no factors weighing in favour of disclosing other personal information that was not originally provided to the Applicant, such as occurrence reports and notes of police officers, the personal email address of the Applicant's advocate (on page 77 of Record Q), the content of the letter and attachment on page 7-10 of Record A (except the information I determined is not, and does not reveal, personal information), and the content of paged 33-42 of Record A (except the information in the forms that I determined is not personal information).

[para 72] Regarding the information to which I found section 4(1)(a) does not apply, section 17 does not apply to the page header or form header on those pages (14, 408 and 409 of Record E; 6 of Record F; 7 of Record G; 29 and 33 of Record I; 5 and 7 of Record L; and 34 and 35 of Record S). However, section 17 does apply to the remaining information on the pages. In my view, it is not sufficient to sever only the name of the third party appearing on these pages, as the Public Body has done in other records, because the identity of that third party is obvious in the context of the records at issue. The information in these pages is sensitive in nature and reveals law enforcement actions involving the third party. I have considered whether the information in these pages is information that would aid the Applicant in bringing or continuing a civil action against the third party and therefore whether section 17(5)(c) weighs in favour of disclosing these pages. However, I have little information from the Applicant regarding the civil action she discusses and I do not know if this information is relevant (it is possible that this information is not related to the actual incident that caused the Applicant harm). As such, I do not find that section 17(5)(c) outweighs the factors against disclosure of this information (specifically those arising under section 17(5)(h)).

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

[para 73] The Public Body applied section 20(1)(g) and (m) to some of the information in the records. 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*
> …
> *(g) reveal any information relating to or used in the exercise of prosecutorial discretion,*
> …
> *(m) harm the security of any property of system, including a building, a vehicle, a computer system or a communications system,*
> …

Section 20(1)(g)

[para 74] The Public Body applied section 20(1)(g) to pages 34, 35, 341 and 351-353 of Record E; page 8 of Record G; and pages 5, 8, 16, 18, 19, 21, 22, 24, 25, 27, 28, 39 and 95 of Record Q. The Public Body also applied section 27(1)(c) to the information in these pages.

[para 75] The Supreme Court of Canada in *Krieger v. Law Society of Alberta* [2002] 3 S.C.R. 372 (*Krieger*) determined that the exercise of prosecutorial discretion includes:

> Without being exhaustive, we believe the core elements of prosecutorial discretion encompass the following: (a) the discretion whether to bring the prosecution of a charge laid by police; (b) the discretion to enter a stay of proceedings in either a private or public prosecution, as codified in the Criminal Code, R.S.C. 1985, c. C-46, ss. 579 and 579.1; (c) the discretion to accept a guilty plea to a lesser charge; (d) the discretion to withdraw from criminal proceedings altogether: R. v. Osborne (1975), 25 C.C.C. (2d) 405 (N.B.C.A.); and (e) the discretion to take control of a private prosecution: R. v. Osiowy (1989), 50 C.C.C. (3d) 189 (Sask. C.A.). While there are other discretionary decisions, these are the core of the delegated sovereign authority peculiar to the office of the Attorney General.
>
> Significantly, what is common to the various elements of prosecutorial discretion is that they involve the ultimate decisions as to <u>whether</u> a prosecution should be brought, continued or ceased, and <u>what</u> the prosecution ought to be for. Put differently, prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it. (emphasis in the original)

[para 76] As noted in Order F2006-005, the phrase "exercise of prosecutorial discretion" is not defined in the Act. Ruth Sullivan notes on page 47 of *Sullivan and Driedger on the Construction of Statutes* 4th Edition (Markham: Butterworths, 2002) that

where a legislative instrument uses a legal term of art, it is generally presumed that the term is used in its correct legal sense."

[para 77] In that order, the adjudicator also stated

> While the Applicant argues that disclosure would not "reveal information" that has not already been revealed in open court, this interpretation does not give meaning to 20(1)(g) as a whole. Section 20(1)(g) creates an exception for the records and information on which a prosecutorial decision is based, not necessarily the decision itself. For example, a prosecutor's decision to call a particular witness at trial or to stay a proceeding becomes a matter of public record, but the information on which these decisions are based is subject to the exception in 20(1)(g).

[para 78] Section 20(1)(g) was also discussed in Order F2009-027, in which the adjudicator applied a more recent decision from the Alberta Court of Appeal regarding prosecutorial discretion:

> After the parties made their initial submissions, the Alberta Court of Appeal released, *R. v. Nixon*, 2009 ABCA 269, which summarizes the case law regarding prosecutorial discretion. The court noted the following at paragraph 20:
>
> > In *Krieger*, the Supreme Court drew a clear distinction between the exercise of the prosecutor's core functions and those decisions that merely govern a prosecutor's tactics or conduct before the court. Matters involving professional conduct, such as an alleged breach of ethical standards, are one example of the latter: *Krieger* at paras. 50-51. More specific examples include: a decision as to disclosure of relevant evidence (*Krieger* at para. 54); and a decision as to the order in which certain evidence may be called (*R. v. Felderhof* (2003), 235 D.L.R. (4th) 131, 68 O.R. (3d) 481 (ONCA) at paras. 53-54). Such decisions fall outside the scope of prosecutorial discretion, as they do not go to the nature and extent of a prosecution, and are properly subject to control by the court or regulation by law societies.
>
> I invited the parties to make submissions regarding the Court of Appeal's decision in *Nixon* as I was uncertain as to whether a decision not to call evidence is a decision made in the exercise of prosecutorial discretion, given that such a decision could also be construed, arguably, as conduct or tactics in court.
>
> ...
>
> However, I note that in *R. v. Power*, [1994] 1 S.C.R. 601, a majority of the Supreme Court of Canada held that a decision by a Crown prosecutor not to call further evidence, which led to a directed verdict of acquittal, was a decision made in the exercise of prosecutorial discretion and was not reviewable. While there may be reason to speculate that a decision not to call evidence could be considered a tactical decision, as opposed to a decision made in the exercise of prosecutorial discretion, I find that *Power* continues to represent the law on this point. I therefore find that a decision not to call evidence is a decision made in the exercise of prosecutorial discretion.

[para 79] I agree with the above interpretations of this provision. For section 20(1)(g) to apply, the information must relate to prosecutorial discretion or have been used in exercising prosecutorial discretion. Further, information merely *related to* information

used in exercising prosecutorial discretion is not covered by section 20(1)(g); information cannot be withheld under this provision merely because it relates to a case being prosecuted, unless the information also relates to the exercise of prosecutorial discretion.

[para 80] The Public Body applied section 20(1)(g) to all communications between the Crown Prosecutor and the Public Body regarding possible legal proceedings related to the incident involving the Applicant. The Public Body said

> The correspondence between the MHPS and Crown Prosecutor within the *Records at Issue* under Sections 20(1)(g), 27(1)(b), and 27(1)(c) all relate to advise [sic], gathering of information, management, control, opinion and direction in criminal prosecution. It is the belief of the Medicine Hat Police Service, that noted sub-sections in sections 20 and 27 overlap in applying to the severed information, as all the information was used by an agent of the Minister of Justice and Attorney General to assist in the exercising of prosecution discretion.

[para 81] Some of these communications reveal information that appears to have been used in the Prosecutor's exercise of prosecutorial discretion, such as discussions about the Crown's case. I find that section 20(1)(g) applies to information withheld on pages 34, 35, and 341 of Record E. The information on these pages reveals the information sought by the Crown Prosecutor from the Public Body in relation to possible charges. Although this does not reveal a decision regarding whether to prosecute or what charges to lay, it does indicate what evidence the Crown Prosecutors relied on to make prosecutorial decisions.

[para 82] Page 8 of Record G consists of a letter from the Prosecutor to the Public Body. The content of the letter clearly relates to information the Prosecutor considered in the course of exercising prosecutorial discretion.

[para 83] Page 8, the top of page 18, the bottom of page 21 and top of page 22, as well as pages 24, 27, and 39 of Record Q consist of correspondence between the Crown Prosecutor and the Public Body, and reveal information relating to the Prosecutor's planned approach to the criminal case and requests for specific information made by the Prosecutor for the case. Page 95 of Record Q is an email from the Crown Prosecutor's office, clearly written on behalf of the Prosecutor, to the Public Body, regarding evidence to be used in the case. I find that section 20(1)(g) applies to all of this information.

[para 84] However, the letterhead, dates, contact information, subject line, 'to' and 'from' line, and signature line on these pages do not reveal information relating to prosecutorial discretion or information used in the exercise of prosecutorial discretion, and cannot be withheld under section 20(1)(g). (In some circumstances a subject line may reveal information to which section 20(1)(g) applies but in this case the subject line on these pages is vague, or has already been disclosed in the main header of the page). Also, pages 25 and 28 of Record Q contain only signature lines from emails and cannot be withheld under section 20(1)(g).

[para 85] For some of the remaining information withheld by the Public Body under section 20(1)(g), the Public Body has provided insufficient evidence that the information relates to prosecutorial discretion or was used in exercising prosecutorial discretion. The information in pages 351, 352 and most of 353 of Record E consists of notes from the Public Body to the Crown Prosecutor that inform the Prosecutor of new evidence placed in the file and relay facts related to investigated incidents (which appear to be related to the Prosecutor's case). Similarly, in Record Q pages 5, 16, the bottom of page 18, page 19, and the bottom of page 22 consist of information provided to the Crown Prosecutor by the Public Body. However, unlike the information in pages 34-35, this information does not appear to have been requested by the Crown Prosecutor. Without further information from the Public Body, I cannot conclude from the records themselves that the information was used by the Prosecutor at all. Although the information relates to the Prosecutor's case, I cannot conclude that it played any part in the exercise of prosecutorial discretion.

[para 86] However, the third paragraph of page 353 discusses information about which the Prosecutor is to make a decision; I find that section 20(1)(g) applies to this information, but not to the remainder of page 353, or pages 351 and 352. I will consider whether section 27(1)(c) applies to the latter information.

Section 20(6)

The Applicant argues that section 20(6) applies to the withheld information. This provision states:

> *20(6) After a police investigation is completed, the head of a public body may disclose under this section the reasons for a decision not to prosecute*
>
> > *(a) to a person who knew of and was significantly interested in the investigation, including a victim or a relative or friend of a victim,*
> >
> > …

[para 87] I do not know, and cannot determine from the records at issue, whether the Crown Prosecutor proceeded with criminal charges in the relevant case or not. Therefore I find that section 20(6) does not apply to any of the withheld information, as that information does not reveal the reasons for a decision not to prosecute.

Section 20(1)(m)

[para 88] The Public Body applied section 20(1)(m) to six items of information on two pages of the records (pages 16 and 17 of Record N).

[para 89] In order for section 20(1)(m) to apply, the following test must be met:

- there must be a causal connection between the disclosure and the anticipated harm;
- the harm must constitute damage or detriment and not mere inconvenience; and

- there must be a reasonable expectation that the harm will occur

(see Order F2010-008, at para. 9)

[para 90] The Public Body states in its initial submission that this information "contains[s] proprietary computer codes internal to the police computer networks, outside the public domain, for the efficacy of a communication network…"

[para 91] I asked the Public Body to clarify how the severed information relates to a property or system of the Public Body and how its disclosure would harm that property or system, meeting the above test.

[para 92] The Public Body responded that

> The Canadian Police Information Centre – CPIC Reference Manual Revision 42-01 makes reference to several sections where the CPIC query format **must** be removed to protect the integrity of the CPIC system. The public release of this information may also jeopardize the CPIC system and its users. The withheld information under 20(1)(m) is part of this format. CPIC is a National system and the harm would be significant detriment to all law enforcement agencies if an unauthorized breach occurred.

It further stated:

> The information being withheld is a sequencing of numbers and letters that CPIC experts remain of the opinion that such information may well constitute a harm or an anticipated harm may occur if that information was to be obtained by someone with computer programing knowledge and expertise. It is for this reason that the Service respect the operational guidelines specified as a user of the system.

[para 93] Several orders from the Ontario Information and Privacy Commissioner's office have upheld the severing of CPIC access information (including query formats) under sections 14(1) of Ontario's *Freedom of Information and Protection of Privacy Act* and 8(1) of the *Municipal Freedom of Information and Protection of Privacy Act*, which are equivalent to section 20(1)(k) of the FOIP Act. Section 20(1)(k) states

> *20(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*
>
> …
>
> *(k) facilitate the commission of an unlawful act or hamper the control of crime,*
>
> …

In Ontario Order PO-2970 the adjudicator stated

> In its submissions that Ministry identifies that the records remaining at issue consist of CPIC access/transmission codes as well as CPIC query format information. It states:

> The Ministry submits that the release of CPIC access/transmission codes, as well as CPIC query format information, has the potential to compromise the integrity and ongoing security of the CPIC system and facilitate unauthorized access to the CPIC system.
>
> CPIC is a computerized system that provides the law enforcement community with informational tools to assist in combating crime by providing information on crimes and criminals. CPIC is operated by the RCMP under the stewardship of National Police Services, on behalf of the Canadian law enforcement community. Unauthorized access to the CPIC system has the potential to compromise investigations and other law enforcement activities and the privacy and safety of individuals.

With respect to the exemption in section 14(1)(l), the Ministry states:

> It is the view of the Ministry that disclosure of this information may reasonably be expected to facilitate the commission of an illegal act or hamper the control of crime.
>
> The Ministry has applied section 14(1)(1) to exempt from disclosure CPIC computer transmission/access codes, as well as CPIC query format information.
>
> Disclosure of this information may reasonably be expected to leave the CPIC computer system more vulnerable to security breaches. Security breaches could lead to data corruption, compromise data integrity and result in unauthorized/illegal disclosures of confidential law enforcement and personal information.
>
> The Ministry notes that Adjudicator Donald Hale in Order P-1214 determined that similar information met the requirements for exemption pursuant to section 14(1)(1). Adjudicator Hale stated:
>
> > ...the disclosure of the transmission access codes for the CPIC system which have been severed from Page 5 of the Police records could reasonably be expected to facilitate the commission of an unlawful act, the unauthorized use of the information contained in the CPIC system.

…

Findings

On my review of the representations of the parties and the portions of records remaining at issue, which consist solely of CPIC codes and query format information, I am satisfied that this information qualifies for exemption under section 14(1)(l) of the Act.

Previous orders of this office have addressed the issue of whether section 14(1)(l) applies to this type of information, and have found that it does. For example in Order MO-1335, Adjudicator David Goodis reviewed the application of the equivalent to section 14(1)(l) found in the *Municipal Freedom of Information and Protection of Privacy Act*, and stated:

> Where information could be used by any individual to gain unauthorized access to the CPIC database, an important law enforcement tool, it should be considered exempt under [section 14(1)(l)].…

Other orders have found that CPIC access codes, ORI numbers, or other information which could compromise the security and integrity of the CPIC computer system qualify for exemption under section 14(1)(l) (see, for example, Orders M-933, MO-1004, MO-1929).

The Ministry has stated that the release of CPIC access/transmission codes, as well as CPIC query format information, has the potential to compromise the

> integrity and ongoing security of the CPIC system and facilitate unauthorized access to the CPIC system. On my review of the portions of records remaining at issue, I am satisfied that it consists of CPIC access and/or transmission codes, as well as CPIC query format information. Some of the severed information is specific transmission, access or ORI codes. Although a few other severed numbers are not numbers of that nature, based on the representations of the Ministry I am satisfied that they, too, relate to access to the CPIC system. Other information consists of the format of the queries and the manner in which this information is input by the Police operator…

[para 94] I accept that the withheld information in the records at issue consists of an access code or identifier for the CPIC database. The Public Body's description of the information and the possible harm if the information is disclosed is similar to that described in the Ontario orders. As CPIC is a national database operated by the RCMP, it seems reasonable to conclude that if the disclosure of an access code or query format relating to an Ontario public body could harm that database, then so could the disclosure of an access code or query format relating to the Public Body in this case.

[para 95] It would have been preferable had the Public Body provided a more detailed account of how disclosure of the information could compromise the CPIC systems; however, given the high degree of concern about the need for confidentiality of this type of information expressed in the CPIC manuals (presumably written by or with advice from those with expertise in the area) I accept that there is a reasonable likelihood that the withheld information could permit an unauthorized user to gain access to the CPIC system, which would clearly compromise the integrity of the database resulting in significant harm to that database. Therefore, I find that section 20(1)(m) applies to this information.

Section 20(1) – exercise of discretion

[para 96] Sections 20(1)(g) and (m) are discretionary provisions. In *Ontario (Public Safety and Security) v. Criminal Lawyers Association*, 2010 SCC 23, the Supreme Court of Canada commented on the authority of Ontario's Information and Privacy Commissioner to review a head's exercise of discretion.

[para 97] The Supreme Court of Canada confirmed the authority of the Information and Privacy Commissioner of Ontario to quash a decision not to disclose information pursuant to a discretionary exception and to return the matter for reconsideration by the head of a public body. The Court also considered the following factors to relevant to the review of discretion:

- the decision was made in bad faith
- the decision was made for an improper purpose
- the decision took into account irrelevant considerations
- the decision failed to take into account relevant considerations

[para 98] In Orders F2008-032 and F2010-036 the adjudicator considered the application of the above decision of the Court to Alberta's FOIP Act:

> While this case was decided under Ontario's legislation, in my view, it has equal application to Alberta's legislation. Section 72(2)(b) of Alberta's FOIP Act establishes that the Commissioner may require the head to reconsider a decision to refuse access in situations when the head is authorized to refuse access. A head is authorized to withhold information if a discretionary exception applies to information. Section 72(2)(b) provision states:
>
> > *72(2) If the inquiry relates to a decision to give or to refuse to give access to all or part of a record, the Commissioner may, by order, do the following:*
> >
> > *(b) either confirm the decision of the head or require the head to reconsider it, if the Commissioner determines that the head is authorized to refuse access…*

[para 99] In order to properly exercise discretion in determining whether to withhold information, a public body should consider the FOIP Act's general purposes, the purpose of the particular provision on which it is relying, the interests that the provision attempts to balance, and whether withholding the records would meet the purpose of the Act and the provision in the circumstances of the particular case (Order F2004-026 at para. 46).

[para 100] By letter dated May 29, 2013, I asked the Public Body to explain how it exercised its discretion to withhold information under sections 20(1) and 27(1). I said:

> Sections 20(1) and 27(1) are discretionary exceptions to access; this means that even where the exception applies, a public body must consider whether to withhold or disclose the relevant information.
>
> …
>
> In order to properly exercise discretion relative to a particular provision of the Act, a public body should consider the Act's general purposes, the purpose of the particular provision on which it is relying, the interests that the provision attempts to balance, and whether withholding the records would meet the purpose of the Act and the provision in the circumstances of the particular case (Order F2004-026 at para. 46).

[para 101] The Public Body responded:

> Upon review of paragraph 46 – Order F2004-026, it is the view of the Medicine Hat Police Service that sections 20(1)(g), 27(1)(b) and 27(1)(c) were properly applied. Correspondence between the Medicine Hat Police Service and the Crown Prosecutor included opinion, direction, and requests on gathering information. The Crown's legal opinions are provided to MHPS with an understanding that they meet solicitor/client privilege under section 27.
>
> Order F2008-021 (par 108) provides similar circumstance and states the information is caught squarely under s. 27(1)(a) of FOIPPA, and also satisfies the broader tests for the exemption from disclosure under s. 27(1)(b)(ii) and s. 27(1)(c).

> Review of email correspondence – It is my understanding that correspondence between [the Applicant] and investigating officers was provided to the Crown Prosecutor's office with [the Applicant] also being in communication with the Crown Prosecutors [sic] office during the investigation process.
>
> The Medicine Hat Police Service attempts to balance the providing of information to the applicant and yet protect information in relation to prosecutorial discretion, and invasion of third party privacy.

[para 102] In Order F2006-005 the adjudicator made the following observations regarding the purpose of section 20(1)(g) (exercise of prosecutorial discretion):

> While I agree with the rationale provided for withholding the prosecutor's file, I would add that section 20(1)(g) protects even broader policy interests. As the Court noted in Krieger, *supra*:
>
> > The quasi-judicial function of the Attorney General cannot be subjected to interference from parties who are not as competent to consider the various factors involved in making a decision to prosecute. To subject such decisions to political interference, or to judicial supervision, could erode the integrity of our system of prosecution. Clearly drawn constitutional lines are necessary in areas subject to such grave potential conflict.

[para 103] Further, in Order F2007-021, the adjudicator noted:

> The Public Body's withholding of information in the Crown prosecutor's file, in order to protect the integrity of prosecutorial discretion, was a course of action chosen for good reasons and in good faith. It has been stated that prosecutorial decisions should not be subjected to interference from parties not as competent to consider the various factors involved in making such decisions (*Krieger v. Law Society of Alberta* at para. 32, cited in Order F2006-005 at para. 24). It is justifiable for a public body to protect prosecutorial discretion, unless there are factors that should be considered that outweigh the public interest in maintaining the immunity afforded to prosecutorial discretion (Order F2006-005 at para. 27).

[para 104] In a letter dated October 11, 2011, sent to this office as part of her request for review, the Applicant states

> I am requesting an investigation in order to challenge my right to see the UNOBSTRUCTED documents that were generated about me in direct reference to this crime. After dragging it out for 2-years, the police laid and crown stayed the wrong charge of assault in this Assault Causing Bodily Harm case. They refused me the right to lay the vast body of legally admissible evidence before a Judge and jury.

As was the case in Order F2006-005, the Applicant appears to want access to information considered by the Crown in relation to the alleged crime committed against the Applicant in order to review the handling of the case by both the Public Body and the Crown. I agree with the adjudicator's conclusion in that Order:

> As the Supreme Court of Canada noted in *Krieger* (*supra*), such a purpose may have the effect of eroding the integrity of Canada's system of prosecution.

[para 105] I have no reason to conclude that there are factors in this case that outweigh the public interest in maintaining the immunity afforded to prosecutorial discretion. Therefore I find that the Public Body properly exercised its discretion to withhold information under that provision.

[para 106] Regarding the Public Body's response to my questions, I am unclear as to the relevance of section 27(1)(a), as the Public Body confirmed in its submissions that it did not intend to claim solicitor-client privilege over any information in the records.

[para 107] With respect to the application of section 20(1)(m), I found that the information withheld under that provision could lead to harm to the CPIC database if disclosed. Therefore I find that the Public Body properly exercised its discretion to withhold information under that provision.

4. **Did the Public Body properly apply section 27(1)(c) of the Act (information in correspondence between a lawyer and another person) to information in the records?**

[para 108] The Public Body applied section 27(1)(c) to the same pages to which it applied section 20(1)(g). I found that section 20(1)(g) does not apply to pages 351, 352 and most of 353 of Record E, and pages 5, the bottom of page 18, 19, the bottom of page 22, and pages 25 and 28 of Record Q. I will therefore consider whether section 27(1)(c) applies to this information.

[para 109] 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 110] Section 27(1)(c) "permits non-disclosure of information in any correspondence between a lawyer of a public body (which would include all Alberta Justice lawyers), or an agent of a public body (which would extend to non-legal staff of Alberta Justice) on the one hand, and anyone else" (External Adjudication Order No. 4 (2003) at para. 12, emphasis in original).

[para 111] All of the information withheld under section 27(1)(c) consists of correspondence between a Crown Prosecutor and the Public Body, except page 95 of Record Q, which appears to be an email to the Public Body from a staff member at the Crown Prosecutor's office, created on behalf of the Crown Prosecutor. In each case, the information pertains to the Crown Prosecutor's work on a criminal file.

[para 112] To meet the requirements of section 27(1)(c), correspondence must involve the giving of advice or other services provided by the lawyer or agent. However, the provision does not seem to require that the services provided by the lawyer must be services provided *to* the person (including the public body) with whom the lawyer is corresponding. In other words, even if the Crown Prosecutor is not providing services *to* the Public Body when it prosecutes a case, I believe the Crown Prosecutor is providing a legal service generally. Therefore, the correspondence between the Public Body and Crown Prosecutor as it relates to the latter's services (whether or not those services are provided *to the* Public Body), is captured under section 27(1)(c).

[para 113] That said, the provision applies only to information "in correspondence", and not to related information such as the fact that the record is correspondence. In Order F2009-018, the adjudicator delineated the difference as follows:

> …section 27(1)(c) does not extend to the dates of the e-mails or the names of the senders and recipients in the "from", "sent", "to" and "cc" lines… Section 27(1)(c) does, however, extend to the information in the "subject" lines, as well as any indication of the "importance" of an e-mail, as this is part of the substantive "information in correspondence".

[para 114] In this case, the Public Body has disclosed most of "to", "from", "cc" etc. lines in the record, but it has withheld the name and contact information of the Crown Prosecutor and other individuals from the Crown Prosecutor's office. Following the above analysis, this information must be disclosed in each instance; further, similar header and contact information that I found cannot be withheld under section 20(1)(g) also cannot be withheld under section 27(1)(c). However, the main content of the correspondence is information to which section 27(1)(c) does apply.

Section 27(1)(c) – exercise of discretion

[para 115] In Order F2010-007, the adjudicator provided a detailed discussion regarding the exercise of discretion in withholding information under sections 27(1)(b) and (c):

> Unlike the other discretionary exceptions in the FOIP Act, section 27 does not refer to harm that would likely result to any aspect of a public body's operations or to a recognized head of public interest if information is disclosed. In the case of section 27(1)(a), the potential harm to the public body's operations or to a public interest can be presumed by the very fact that the provision addresses privileged information. Section 27(1)(a) is clearly intended to protect the various public interests the concept of privilege is intended to protect, by incorporation of the term "legal privilege." However, sections 27(1)(b) and 27(1)(c) do not appear

> to contemplate any potential harms, either to the operations of a public body or to a public interest. Moreover, it is unclear how disclosing information falling under either of these subsections, if the information is not privileged and already subject to section 27(1)(a) in any event, could result in harm to a public body or public interest that would outweigh the public interest in disclosure that the FOIP Act is intended to protect.
>
> …
>
> Assuming, for the sake of argument, that section 27(1)(b) authorizes the head of a public body to withhold information that is not privileged on the basis that it was created by a lawyer for the Public Body, it is difficult to imagine a situation in which considerations in favor of withholding information of this kind would outweigh the public right of access. …

[para 116] I accepted the Public Body's statements regarding its exercise of discretion to withhold information under sections 20(g) and 20(m). However, section 20(1)(m) specifically requires harm to be shown to apply the provision and section 20(1)(g) is intended to protect the public interest in maintaining the immunity afforded to prosecutorial discretion, not unlike the public interest in the concept of legal privilege, discussed in the excerpt, above.

[para 117] As stated by the adjudicator in Order F2010-007, section 27(1)(c) does not contemplate potential harm from disclosing the information. The Public Body's reasons for exercising its discretion to withhold information under this provision do not address what factors weigh against the public interest in disclosure. I will order the Public Body to reconsider its decision to withhold information under sections 27(1)(c).

V. ORDER

[para 118] I make this Order under section 72 of the Act.

[para 119] I find that section 4(1)(a) applies to the information withheld on pages 13, 16, 32, 33, 62, 63, 328, 329 of Record E; 6 of Record G, 32 of Record I; 2, 5-8, 11-13, 16 and 17 of Record J; 9 of Record L; and 1-4 of Record M. Therefore I do not have jurisdiction to review the Public Body's decision regarding that information.

[para 120] I find that the Public Body properly applied section 17 to some of the information in the records; however the Public Body did not properly apply section 17 to the information described in paragraphs 32-38, 67-70, and 72. I order the Public Body to disclose that information to the Applicant.

[para 121] I find that section 20(1)(g) applies to the information severed on pages 34, 35, 341 and the third paragraph of page 353 in Record E; and page 8, top of page 18, bottom of page 21, top of page 22, pages 24, 27, 39 and 95 of Record Q, except the information described in paragraph 84.

[para 122] I find that section 20(1)(m) applies to information severed on pages 16 and 17 of Record N.

[para 123] I find that section 27(1)(c) applies to the information severed on pages 351, 352 and most of 353 of Record E, and pages 5, the bottom of page 18, 19, the bottom of page 22, and pages 25 and 28 of Record Q, except the information described in paragraph 114; I order the Public Body to disclose the information as described in that paragraph.

[para 124] With respect to the information to which I found section 27(1)(c) applies, I find that the Public Body did not properly exercise its discretion to withhold that information. I order the Public Body to reconsider its decision to withhold information under section 27(1)(c). The new decision should take into consideration relevant public and private interests in disclosing and withholding the information. Should the Public Body decide to disclose further information previously withheld under section 27(1)(c), it should consider whether section 17 (which is a mandatory exception to access) applies so as to require personal information to be severed.

[para 125] 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.

_____
Amanda Swanek
Adjudicator