

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2014-22

May 30, 2014

CALGARY POLICE SERVICE

Case File Number F5992

Office URL: www.oipc.ab.ca

Summary: The Applicant requested all information obtained or created by the Calgary Police Service (the Public Body) for the investigation into her daughter's death. She also requested information regarding a Crown prosecutor's recommendation that charges not be laid in relation to her daughter's death.

The Public Body provided records of its investigation, but applied section 27(1)(b) (information prepared for the purpose of providing legal services) of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to withhold a copy of a memorandum that had been sent to it by the Assistant Chief Crown Prosecutor, detailing the Crown's prosecutor's recommendation that charges not be laid. The Public Body had consulted with Alberta Justice and Solicitor General (Alberta Justice) as to whether it could disclose the memorandum to the Applicant; however Alberta Justice refused consent.

The Adjudicator found that section 27(1)(b) applied to the memorandum. However, she found that the Public Body had not demonstrated that it appropriately exercised its discretion when it decided to withhold the memorandum. The evidence did not establish that the Public Body considered all relevant interests for or against disclosure when it made its decision to withhold the information under section 27(1)(b) from the Applicant. Moreover, the Public Body had not explained what factors were relevant to its decision to withhold the memorandum in its entirety as it did. The Adjudicator ordered the Public Body to reconsider its decision to withhold the entire memorandum from the Applicant.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 17, 20, 27, 40, 67, 72; **CA:** *Access to Information Act* RSC 1985, c. A-1, s. 23

Authorities Cited: **AB:** Orders 98-016, F2012-24, OIPC External Adjudicator Order #4

Cases Cited: *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23; *Blank v. Canada (Minister of Justice)*, 2006 SCC 39

I. BACKGROUND

[para 1] On August 21, 2011, the Applicant made an access request to the Calgary Police Service (the Public Body). She requested all information obtained or created by the Public Body for the investigation into her daughter's death and she also requested information in its custody or control regarding a Crown prosecutor's decision that criminal charges should not be laid in relation to her daughter's death.

[para 2] Initially, the Public Body made a decision to withhold records under section 17(1) of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act). The Applicant requested review by the Commissioner of the decision to deny access to the information she had requested. The Commissioner authorized mediation. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

[para 3] This office issued Order F2012-24 in the interim. This order establishes that compassionate considerations are relevant to the exercise of discretion under section 17 in cases where family members are seeking the personal information of a deceased relative.

[para 4] The Public Body reconsidered its decision to withhold information from the Applicant under section 17. The Public Body decided to provide the majority of the records to the Applicant. The issue of the application of section 17 was resolved by the parties to their satisfaction.

[para 5] On January 28, 2013, following consultation with the Chief Crown Prosecutor, the Public Body withheld a memorandum prepared by a Crown prosecutor (the memorandum) under section 27 of the FOIP Act.

[para 6] Alberta Justice and Solicitor General (Alberta Justice) was identified as a party affected by the Applicant's request for review under section 67(1)(a)(ii) of the FOIP Act and was invited to participate. Alberta Justice, the Public Body, and the Applicant exchanged submissions for the inquiry. The Public Body clarified in its submissions that the memorandum was being withheld under section 27(1)(b) of the FOIP Act.

II. RECORDS AT ISSUE

[para 7] A memorandum created by a Crown prosecutor dated July 12, 2010 is at issue.

III. ISSUE

Issue A: Did the Public Body properly apply section 27(1)(b) to the information in the records?

IV. DISCUSSION OF ISSUE

[para 8] Section 27 states, in part:

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 Solicitor General¹,

(ii) an agent or lawyer of the Minister of Justice and Solicitor 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 Solicitor General,

(ii) an agent or lawyer of the Minister of Justice and Solicitor 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 Solicitor General or by the agent or lawyer.

[para 9] For section 27(1)(b) to apply to information, the information in question must be prepared by a lawyer or someone acting under the direction of a lawyer for the purpose that the lawyer will use the information in order to provide legal services to a public body.

¹ The version of the FOIP Act in force at the time of the Applicant's access request refers to the "Minister of Justice and Attorney General", the former title of the Minister of Justice and Solicitor General.

[para 10] The memorandum at issue was prepared by a Crown prosecutor and reviewed by the Assistant Chief Crown Prosecutor. The Public Body's submissions describe the memorandum in the following way:

On April 15, 2010 the Applicant's 23 year old daughter passed away. The Public Body conducted a criminal investigation into the circumstances surrounding her death. On June 3, 2010 Detective [...] of the Public Body provided the records of the investigation to the office of the Crown Prosecutor for their opinion as to whether criminal charges should be laid. On August 1, 2010 Detective [...] received the written Memorandum of Mr. [...] Q.C. of the Crown's Office advising that no criminal charges should be laid in relation to the death.

[para 11] The memorandum is an opinion of the likelihood of the Crown obtaining conviction at trial if charges were laid and the matter prosecuted. As described by the Public Body in its exchangeable submissions, the opinion concludes with the recommendation that criminal charges not be laid.

[para 12] In my view, preparing and providing a legal opinion of this kind is an example of a legal service. The legal opinion was provided to Alberta Justice and subsequently to the Calgary Police Service, which are both public bodies. I therefore find that the memorandum was prepared by the Crown prosecutor for the purposes of providing legal services to a public body or public bodies.

[para 13] Having found that section 27(1)(b) applies to the information in the memorandum, I turn now to the question of whether the Public Body properly applied its discretion when it decided to withhold the information from the Applicant under this provision.

Exercise of Discretion

[para 14] In *Hearings Before Administrative Tribunals*, 2nd Edition², McCauley and Sprague describe how discretion is to be exercised when a statute confers discretion to make a decision. They state:

When Parliament [or the Legislature] gives a decision-maker the discretion to make a decision, it expects the decision maker to make each decision on the basis of the circumstances in each individual case.

If the Legislature [or Parliament] did not want this to be so it would not have granted the decision-maker discretion in the first place. It would have set out the circumstances and the thing to be done or authorized that those specifications be set out in regulation. The fact that Parliament granted the power in terms of a grant of discretion means that Parliament wanted the discretion to be exercised on a case-by-case basis.

The underlying purpose in granting a decision-maker discretion is to guarantee flexibility and responsiveness in administrative decision-making. The decision-maker cannot frustrate this purpose by choosing to exercise that power on some other basis that the decision-maker feels is more efficient, effective or expeditious. The decision-maker must take its power as it gets it.

² Robert W. McCauley and James L.H. Sprague, *Hearings Before Administrative Tribunals* 2nd Edition (Toronto: Thomson Canada Ltd. 2002) pp. 5B-15 – 5B-16

The decision-maker will err if, rather than considering the [...] decision on a case by case basis, it simply applies or follows earlier developed procedure or policy without considering whether that policy is appropriate to the particular case. This is known as fettering discretion.

Having to decide a matter on a case-by-case basis means that the decision-maker must apply his or her mind to each matter, and all the components of that matter, and decide each of those components on the basis of their merit in those circumstances. This means that the decision-maker must keep an open-mind on all aspects of the matter – procedural just as much as substantive – and decide what to do with the merits of each case.

[para 15] In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, the Supreme Court of Canada explained the process for applying discretionary exceptions in freedom of information legislation and the considerations that are involved. The Court illustrated how discretion is to be exercised by discussing the discretionary exception in relation to law enforcement:

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

[para 16] While the foregoing case was decided in relation to the law enforcement provisions in Ontario's legislation, it is clear from paragraphs 45 and 46 of this decision that its application extends beyond law enforcement provisions to the application of discretionary provisions in general and to the discretionary provisions in freedom of information legislation in particular. Section 27(1)(b) of Alberta's FOIP Act is an example of a discretionary exception.

[para 17] Discretion must be exercised on a case by case basis. After determining that section 27(1)(b) applies, the head of a public body must then consider and weigh all relevant factors, including relevant public and private interests weighing in favor of disclosure or nondisclosure, in making the decision to sever information under this provision or to disclose it.

[para 18] 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 19] As described by the Supreme Court of Canada in *Ontario (Public Safety and Security)*, (*supra*) applying a discretionary exception is a two-step process: first, it must be found that the exception applies; second, a decision must be made to withhold the information under the discretionary exception or to disclose it. When making the decision to disclose or withhold information, “the head must go on to ask whether, having regard to all relevant interests, including the public interest in disclosure, disclosure should be made”. As discussed in *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at paragraph 52, the discretionary wording of exceptions is intended to encourage the head of a public body to disclose information, unless he or she forms the opinion that it is in the public interest to withhold the information.

[para 20] Alberta Justice and the Public Body both drew my attention to Order 98-016, in which former Commissioner Clark found that Alberta Justice had properly exercised its discretion when it elected to sever information prepared by Crown prosecutors under what is now section 27(1)(b). He said:

In an inquiry, a public body must provide evidence on how a particular exception applies; and secondly, on how the public body exercised its discretion. A public body must show that it took into consideration all the relevant factors when deciding to withhold access to information. Consequently, Alberta Justice must show that it considered the purposes of the Act, one of which includes allowing access to information.

I find that Alberta Justice provided direct evidence through its witness to show that sections 26(1)(b) and 26(1)(c) applied to the Records. However, Alberta Justice did not provide direct evidence to show how the head exercised its discretion. Often, this evidence can be given by the public body’s FOIP coordinator or the person responsible for reviewing the records.

Nonetheless, Alberta Justice did provide by way of argument and by written submission that it did exercise its discretion properly under this Request for Access. It is preferable, especially in an oral inquiry, to have a witness give evidence on this point.

However, I find from a review of the Records and the submissions that it appeared that Alberta Justice exercised its discretion properly under sections 26(1)(b) and 26(1)(c).

[para 21] Former Commissioner Clark did not reproduce those portions of the records and the submissions that led him to conclude that discretion had been exercised appropriately. In addition, he did not assign a purpose to section 27(1)(b), or explain why he believed severing the information from the records served this purpose. I therefore lack the benefit of the former Commissioner’s reasons and am unable to extrapolate them and apply them in the case before me. In any event, Order 98-016 precedes *Ontario (Public Safety and Security)* and therefore lacks the benefit of the Supreme Court of Canada’s guidance as to how the head of a public body’s exercise of discretion should be reviewed.

[para 22] McMahan J., stated the following regarding sections 27(1)(b) and (c) in OIPC External Adjudication Order #4:

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

It would be difficult to draft a more general or exclusionary clause.

[para 23] Section 27(1)(b) authorizes the head of a public body to withhold information prepared by a lawyer in relation to the provision of legal services where the information is not privileged or confidential, and disclosure would not result in harm to the public body or anyone else. If this provision has the purpose to which McMahon J. assigned it, then it would be difficult for a public body to exercise discretion in favor of withholding information under section 27(1)(b) by considering only the provision's purpose.

[para 24] In my view, the harm that section 27(1)(b) is intended to guard against is unclear. However, if a public body is able to put forward a public interest that is served by withholding the specific kinds of information that section 27(1)(b) authorizes it to withhold and explains why this public interest outweighs competing interests in disclosure, then the public body will have established that it exercised its discretion reasonably to sever information under this provision.

Has the Public Body established that it exercised its discretion reasonably?

[para 25] I turn now to the question of whether the Public Body has demonstrated that it exercised its discretion reasonably when it withheld the memorandum from the Applicant.

[para 26] The Applicant argues that the Public Body did not exercise its discretion appropriately when it decided to withhold the memorandum from the Applicant. The Applicant argues:

Discretion exercised by the public body, much like a court, should be exercised judicially. (See, e.g. *Miller v. Miller* 2000 ABQB 764), and with a view to the achievement of the objects in the legislation and, as a consequence of the main purpose of the legislation to be to promote disclosure, the public body should only redact those portions of the Prosecutor's Letter which would result in the disclosure of personally identifying information about a third party (and thus offend section 17) or which would result in the disclosure of legal advice or legal opinion (and thus offend section 27) but should not redact those portions which merely state facts that the prosecutor considered in reach the legal opinions or giving the legal advice that presumably was given in the Prosecutor's Letter.

The Applicant submits that a blanket refusal to disclose any of the contents of the Prosecutor's Letter when disclosing statements of fact set out in the letter would not offend section 17 or section 27 of the FOIP Act is a failure of the public body to exercise its discretion properly.

[para 27] The Public Body explains the rationale for its decision to withhold the memorandum from the Applicant in its initial submissions. It stated:

The Public Body submits that its FOIP Section Manager, who held the delegated authority to apply the section 27 exception, considered all of the relevant circumstances, as well as the purposes of the Act, in withholding the Crown Memorandum. The Public Body submits that its employee took into account the limited purpose for which the Memorandum had been provided to the investigators, which was to assist them in understanding the Crown's analysis, as well as the fact that the Memorandum as provided by the Assistant Chief Crown [Prosecutor] in confidence, and that the Chief Crown Prosecutor of the province did not consent to the disclosure of the Memorandum to the Applicant.

The Public Body further submits that its employee considered whether or not the Crown Memorandum could be severed [...]

The Public Body submits that the Crown Memorandum cannot be so severed, since the facts as they are described in the Crown Memorandum are themselves opinions gleaned from the evidence provided by the investigators.

The Public Body further submits that the Applicant has received all of the same information that was provided to the Crown's office, and that therefore the withholding of the Crown Memorandum is not withholding any information to which she is entitled under the Act.

The Public Body submits that in light of the foregoing, its withholding of the Crown Memorandum was not a "blanket refusal" to disclose the contents of the Crown Memorandum, as the Applicant has stated, but was a proper exercise of its discretion under s. 27(1)(b).

[para 28] The affidavit of the Public Body's Barrister and Solicitor and Manager of the Freedom of Information and Protection of Privacy Section of the Calgary Police Service (the head's delegate) provides further explanation of the Public Body's decision to withhold the memorandum from the Applicant. This affidavit states:

The Chief of Police, head of the CPS, has delegated the ability to exercise discretion regarding section 27 of the Alberta *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to my position.

That on or about November 7, 2012 I partially disclosed 360 pages of records to [the Applicant] in response to her request for records relating to the investigation into the death of her daughter [...].

That in processing the responsive records, I withheld three pages in their entirety consisting of a Crown Memorandum prepared by Crown Prosecutor [...] dated July 12, 2010. A copy of this Crown Memorandum was provided by Assistant Chief Crown Prosecutor [...] to Detectives [...] and [...] of the CPS on July 21, 2010.

In withholding this Crown Memorandum in its entirety, I considered the purpose for which it had been provided to Detectives [...] and [...], specifically, to assist them in understanding the analysis behind the Crown's opinion that no criminal charges should be laid.

In withholding the Crown Memorandum in its entirety, I also considered the fact that the Assistant Chief Crown Prosecutor provided the Memorandum in confidence to Detectives [...] and [...] that it not be copied or disclosed further without the written permission of the Chief Crown Prosecutor.

[...]

Having reviewed the Crown Memorandum, I verily believe it consists of [the Crown prosecutor's] conclusions as to facts drawn from evidence provided by the CPS to [the Crown prosecutor], and [the Crown prosecutor's] opinions as to the viability of criminal charges arising out of those conclusions. I verily believe that such conclusions are themselves opinions as to what [the Crown prosecutor] believes is the available evidence in relation to the investigation into [the Applicant's daughter's] death.

I verily believe that [the Applicant] has received in the 360 pages of records that were provided to her, all of the same facts provided to [the Crown Prosecutor] for the formation of his opinion, and therefore nothing has been withheld from [the Applicant] except the Crown's opinions regarding criminal charges against a third party in relation to this investigation.

In deciding whether information should be excepted from disclosure to [the Applicant], I considered the purposes of the Act and specifically the purposes of section 27(1)(b). I reviewed OIPC Order number [F2012-24] in relation to providing records to family members of deceased persons. In light of the foregoing, I verily believed and do believe that [the Applicant's] right to access records in the custody or control of the CPS does not extend to a right to access a Crown opinion as to whether criminal charges should be laid against a third party. In light of my beliefs, I did not consider that disclosure of the Crown Memorandum in this matter was in the public interest, or that it would fulfill the purposes of the Act.

[para 29] In its initial submissions, Alberta Justice argued:

On January 21, 2013, the Affected Party was consulted regarding a copy of a Crown opinion to the Calgary Police Service (Public Body, CPS). The provided records consist of a Memorandum from the Crown Prosecutor's Office prepared by Crown Prosecutor [...] dated July 12, 2010 and a copy of this Crown Memorandum was provided by Assistant Chief Crown Prosecutor [...] to CPS Detectives [...] and [...] dated July 21, 2010. On January 21, 2013, the Affected Party advised the Public Body that Crown opinions are subject to work product privilege and requested that the information continue to be withheld from disclosure as privileged information under [...] the *Freedom of Information and Protection of Privacy (FOIP) Act*.

[...]

The Crown's memorandum was written to the Assistant Chief Crown Prosecutor in confidence and was provided to CPS Detectives for the purpose of assisting the CPS in understanding the Crown's analysis. The memorandum at issue consists of the Crown Prosecutor's conclusions drawn from evidence provided by the CPS and his opinions arising out of those conclusions.

In Order 98-016, the Information and Privacy Commissioner concluded that records prepared by lawyers of the Minister of Justice and Attorney General [now Minister of Justice and Solicitor General] in relation to a matter involving the provision of legal services, including criminal prosecutions, may be withheld under section 26(1)(b) [now section 27(1)(b)] of the *FOIP Act*.

As the Crown memorandum was prepared by and for lawyers of the Minister of Justice and Solicitor General in relation to a matter involving the provision of legal services [i.e. criminal prosecutions], it is [Alberta Justice's] position that the records continue to be withheld under section 27(1)(b) of the *FOIP Act*.

[para 30] In its rebuttal submissions, Alberta Justice raised the following argument for the first time:

Evidence will often be discussed in opinions that are not public knowledge. In any criminal case, it is important that involved parties (e.g. witnesses) only know about information they themselves are aware of and not information obtained elsewhere, including written legal opinions. In addition, investigative techniques are often discussed in opinions and police or prosecution practices should not be revealed to the public. Should more evidence become available at a later date, and the reasonable likelihood of a conviction change, the disclosure of information could jeopardize the strength of a case.

The disclosure of a legal opinion as a result of the provision of legal services could compromise ongoing investigations or affect reviving an investigation when new evidence becomes available. It is [Alberta Justice's] position that the integrity of the legal opinion would be compromised by disclosure to the public.

[para 31] The affidavit of the head's delegate, reproduced above, indicates that she considered the fact that the memorandum contained a Crown prosecutor's opinion about the viability of criminal charges to be relevant to her decision. The head's delegate also states that the fact that the right of access does not extend to Crown opinions was relevant to her decision.

[para 32] It is not clear to me from the affidavit what public interest the head's delegate considered to be served by withholding the Crown prosecutor's memorandum. Possibly, the head's delegate's view was similar to that presented by Alberta Justice in its rebuttal submissions – that disclosure of an opinion regarding the likelihood of obtaining a conviction “could compromise ongoing investigations or affect reviving an investigation when new evidence becomes available.”

[para 33] I agree with Alberta Justice that the possibility that disclosure of an opinion could interfere with an ongoing investigation, or the revival of an investigation, would be a harm that should be taken into consideration when applying section 27(1)(b), if this factor were established to be relevant. However, I note that Alberta Justice appears to raise this concern in relation to disclosure of legal opinions in general, and without consideration of whether there is any chance or likelihood that the conduct of a prosecution could actually be harmed or interfered with by disclosure of the contents of the memorandum at issue. As set out in *Hearings Before Administrative Tribunals*, reproduced above, when a statute confers discretion on a decision maker, the decision must be made on a case by case basis:

The decision-maker will err if, rather than considering the [...] decision on a case by case basis, it simply applies or follows earlier developed procedure or policy without considering whether that policy is appropriate to the particular case. This is known as fettering discretion.

Applying a broad policy that Crown opinions should never be disclosed because they may harm prosecutions, without consideration of whether the opinion in question actually could have this effect, does not satisfy the requirement that discretion be exercised on a case by case basis.

[para 34] The head's delegate states that she also considered that there is no right of access to a Crown opinion in making her decision. I agree with the head's delegate that there is no "right" of access to a Crown opinion, given that section 20(1)(g) (or section 27(1)(b), which was applied in this case) of the FOIP Act creates an exception to the right of access for information such as Crown opinions. However, this does not mean there is no public interest in disclosure of this kind of information or that the public interest in disclosure is always outweighed by the public interest in nondisclosure when Crown opinions are at issue. On the contrary, section 20(6) of the FOIP Act recognizes a circumstance in which it may be in the public interest to disclose a Crown opinion.

[para 35] Section 20(6) of the FOIP Act 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, or

(b) to any other member of the public, if the fact of the investigation was made public.

[para 36] Section 20(6) of the FOIP Act creates discretion for the head of a public body to disclose the reasons for a decision not to prosecute to the relative of a victim. The presence of this provision indicates that the FOIP Act contemplates circumstances in which it may be in the public interest to disclose information from a Crown opinion. Although exceptions to disclosure may apply to a Crown opinion, it does not follow that the FOIP Act requires these kinds of records to be withheld at all times or in their entirety. Rather, the reasons for the Applicant's access request and the content of the Crown opinion should be considered when making the decision to grant or deny access to records containing Crown opinions.

[para 37] While I take the head's delegate's point that there is not necessarily a right in an applicant to gain access to a Crown opinion, the head of a public body must still demonstrate that discretion has been appropriately exercised to withhold a Crown opinion. Where the balance of the public interest favors disclosure, an applicant may have the ability to access the information, even if, strictly speaking, there is no absolute *right* of access to Crown opinions.

[para 38] The head's delegate also refers to the fact that the memorandum states that it is not to be disclosed without the consent of the Chief Crown Prosecutor and to the fact that the Chief Crown Prosecutor did not consent to disclosure as relevant to her decision. I agree that when a record contains a caution that it should not be disclosed without the consent of another public body, it may be advisable to contact that public body to determine the reasons for the caution. Doing so may assist in the determination as to whether an exception to disclosure applies, and may also serve as a means to gather

information as to how to exercise discretion, should an exception apply. However, the fact that another public body does not consent to disclosure of the information is not, in and of itself, a reason to withhold information from an applicant. Rather, it is the reasons why a public body refuses to give consent (if they are relevant to the exception being applied), that may properly inform the exercise of discretion.

[para 39] In the affidavit, the head's delegate also refers to the fact that the Applicant has received 360 pages of records in response to her access request. The head's delegate states that these records contain the same facts that appear in the Crown's memorandum and reasons that nothing is being withheld from the Applicant except the Crown's opinions. Possibly, the head's delegate means that she considered the fact that the Applicant received other information as weighing in favor of severing the memorandum. However, the fact that the Applicant has received other kinds of information to which she is entitled under the FOIP Act, does not have any bearing on the decision to be made under 27(1)(b). The decision to exercise discretion must be based on the content of the information under consideration and the public interests weighing for or against disclosure, and not the fact that an applicant received other kinds of information.

[para 40] In its initial submissions, Alberta Justice describes its reasons for refusing to consent to disclosure in the following terms:

On January 21, 2013, [Alberta Justice] advised the Public Body that Crown opinions are subject to work product privilege and requested that the information continue to be withheld from disclosure as privileged information under the *Freedom of Information and Protection of Privacy (FOIP) Act*.

It does not appear that Alberta Justice provided the reasons that it now provides in its rebuttal submissions when the Public Body requested its permission to disclose the memorandum.

[para 41] Although Alberta Justice apparently referred to the possibility that the memorandum was subject to Crown work product privilege when it denied consent to disclose the memorandum, it did not explain why discretion should be exercised in favor of nondisclosure as a result of the application of this privilege. (I note that the Public Body applied section 27(1)(b), a provision that authorizes a public body to withhold information prepared by a lawyer that is not privileged, rather than section 27(1)(a), which authorizes withholding privileged information. Given the absence of argument from both the Public Body and Alberta Justice as to the application of privilege, and the fact that the public body did not apply section 27(1)(a) to the memorandum, I infer that neither the Public Body nor Alberta Justice is relying on privilege to withhold the memorandum.)

[para 42] In its rebuttal submissions, Alberta Justice also raised the argument for the first time that the memorandum contains advice and that discretion was properly exercised in favor of nondisclosure for that reason. It stated:

When legal advice is sought, the expectation of frank credible assessments and discussion of various factors of the evidence is required. There is a pressing interest in having a matter reviewed and commented on in an objective and fair manner with a critical eye as to the evidence and possible charges. It is the Affected Party's position that disclosure would hinder advice sought and given by a lawyer of the Minister of Justice and Solicitor General.

As with its arguments in relation to the harm to a prosecution that may result from disclosing a memorandum, there is no evidence that Alberta Justice made this argument to the Public Body when it sought Alberta Justice's consent to disclose the memorandum. It is therefore unclear whether this argument informed the Public Body's decision to exercise its discretion in the way that it did.

[para 43] I accept that the memorandum contains information that is consistent with advice or recommendations. However, the fact that the memorandum contains recommendations does not mean that discretion was appropriately applied to withhold it. If disclosure of the contents of the memorandum could reasonably be expected to interfere with the candour of Crown prosecutors in the future, then the public interest may be served by withholding the contents of the memorandum, if the interest in preserving candour outweighs any competing interests in disclosure. However, I am unable to find, on the evidence before me, that interests in preserving candour would be engaged by the contents of the memorandum.

[para 44] As with Alberta Justice's argument regarding the effects of disclosing Crown opinions on prosecutions, its argument in relation to advice is framed in generalities. Its argument does not speak to the contents of the memorandum, or explain why it is reasonably likely that disclosure of the particular information in question is reasonably likely to have the effect it projects. Moreover, if it were always the case that disclosing the contents of a Crown opinion interferes with the candour of Crown prosecutor to the extent that this interference outweighs all public interest in disclosing them, then it is unclear why such opinions are provided to members of the Public Body for their review, or why section 20(6) authorizes disclosure of Crown opinions in certain circumstances.

[para 45] In Order F2012-024, the Director of Adjudication explained the application of section 40(1)(cc) and discussed the value of disclosing the personal information of a deceased individual to a family member. She said:

In my view, in appropriate circumstances, section 40(1)(cc) permits public bodies to disclose personal information to family members, even though there is nothing to suggest that the deceased would themselves have disclosed it; in other words, the purpose is also to meet the needs of the family members to deal, whether emotionally or practically, with the death and its consequences (as long as there is no unreasonable invasion of the deceased's privacy). In such circumstances, presumably the fact and nature of the relationship to the deceased is a factor that may be taken into account in determining whether the disclosure would invade the deceased's privacy.

The foregoing excerpt acknowledges that there is a benefit to disclosing information to family members to assist them to deal emotionally or practically with the death of a family member and its consequences. While Order F2012-024 is primarily concerned

with personal information under section 17, the interest in assisting bereaved family members is one that may arise in relation to information other than personal information. Moreover, the presence of section 20(6) in the FOIP Act supports finding that this interest extends to information in Crown opinions.

[para 46] The Public Body was clearly alive to the public interest in disclosing information for compassionate reasons to family members, as it has disclosed a great deal of information in the records that it originally withheld under section 17, for this reason. Moreover, it took the step of requesting permission to disclose the memorandum, presumably because it was aware that disclosing the memorandum to the Applicant would serve a compassionate purpose. However, Alberta Justice refused to consent to disclosure of the memorandum. From my review of the Public Body's submissions and the head's delegate's affidavit, I am unable to say that it exercised its discretion in favor of nondisclosure for reasons other than Alberta Justice's refusal to consent to disclosure. As discussed above, the refusal of another public body to consent to disclosure is not relevant to the exercise of discretion; rather, it is the reasons for the other public body's refusal that may be relevant. However, there is no evidence before me that Alberta Justice provided reasons as to why it believed that it was in the public interest for the records to be withheld from the Applicant.

[para 47] While the Public Body has provided an affidavit explaining the circumstances surrounding its decision to withhold the memorandum from the Applicant, as Order 98-016 indicates a public body should do, the affidavit does not establish that the Public Body considered relevant public and private interests weighing in favor of disclosure or nondisclosure when it made its decision to withhold the memorandum in its entirety. Moreover, the affidavit indicates that the refusal of Alberta Justice to give consent to disclosure, and the idea that there is no ability to access to Crown opinions, given that they are subject to exceptions under the FOIP Act, were determinative of the decision to deny access. However, as I have found above, these factors are not relevant to the exercise of discretion under section 27(1)(b). There is no indication that the arguments Alberta Justice made for the inquiry were ever made to the Public Body at the time when it was considering how to exercise its discretion, and the affidavit does not refer to these arguments. Moreover, Alberta Justice's arguments do not refer to the contents of the records. Relying on a principle that it is always harmful to disclose Crown opinions, without regard to the content of the opinion or the circumstances under which an access request is made, does not give sufficient weight to section 20(6) of the FOIP Act and amounts to fettering discretion. I must therefore require the Public Body to reconsider its decision to withhold the memorandum from the Applicant and to consider only interests and factors that are established as relevant to the decision it must make.

[para 48] In making the new decision, the Public Body should consider the arguments made by Alberta Justice in its rebuttal submissions and determine whether disclosure of the contents of the memorandum is reasonably likely to result in the harms projected by Alberta Justice. If so, then this would be a factor weighing in favor of nondisclosure which must then be weighed against the Applicant's interests in obtaining the information. As discussed above, there is a public interest in disclosing information if

doing so would serve the compassionate purpose of meeting an applicant's need to deal, emotionally or practically, with the consequences of the death of a family member. This interest has been established as applicable in the inquiry.

[para 49] If the Public Body considers the interests in disclosure outweigh the interests in nondisclosure with respect to some or all of the information in the memorandum, then the Public Body may exercise its discretion in favor of disclosure. Conversely, if the Public Body considers that the factors weighing in favor of nondisclosure outweigh the factors weighing in favor of disclosure, then discretion may be properly exercised in favor of nondisclosure. The Public Body's new decision will be subject to review by this office if it is in favor of nondisclosure.

V. ORDER

[para 50] I make this Order under section 72 of the Act.

[para 51] I order the head of the Public Body to reconsider the decision to withhold the information in the memorandum under section 27(1)(b) without consideration of the irrelevant consideration that Alberta Justice refused consent to disclose the memorandum. In making the new decision, the Public Body must consider the contents of the memorandum, the interests of the Applicant in obtaining the information, and any other factors weighing for or against disclosure that it determines to be relevant.

[para 52] The new exercise of discretion, if it is in favor of withholding the information from the records, would be reviewable by this office should the Applicant request review of it, as it would be a new decision regarding access. In keeping with the Supreme Court of Canada's decision in *Ontario (Public Safety and Security)*, any such review would require consideration of whether the new exercise of discretion was made without consideration of irrelevant factors and whether the new decision contains sufficient reasons supporting the exercise of discretion.

[para 53] 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.

Teresa Cunningham
Adjudicator