ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2015-02

January 29, 2015

ALBERTA JUSTICE AND SOLICITOR GENERAL

Case File Number F7276

Office URL: www.oipc.ab.ca

Summary: The Applicant made a request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to Alberta Justice and Solicitor General (the Public Body) for records containing information about an incident in which he had been involved at the Edmonton Remand Centre.

The Public Body located four CCTV recordings and paper records. It denied access to information in paper records about other inmates of the Edmonton Remand Centre, and withheld CCTV recordings of the incident on the basis that these contained the personal information of other inmates.

The Adjudicator determined that the information severed from the paper records and one of the CCTV recordings was non-responsive. She determined that two of the CCTV recordings did not contain personal information and could not be withheld under section 17. She decided that it would not be an unreasonable invasion of inmates' personal privacy to give access to the final CCTV recording if the Applicant used and disclosed the information in it exclusively for the purposes of instructing counsel and pursuing a legal case, as these purposes outweighed the presumptions against disclosure. The Adjudicator noted that use or disclosure for any other purpose would be an unreasonable invasion of third parties' personal privacy. She ordered the Public Body to give access to the CCTV recording by allowing the Applicant and / or his legal counsel to examine the record at the Public Body's premises, as doing so would ensure that the personal information was safeguarded from use or disclosure for any other purpose.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 6, 13, 17, 20, 40, 72; *Corrections Act*, R.S.A. 2000, c. C-29, s. 1

Authorities Cited: AB: Orders F2012-24, F2014-12, F2014-16, F2014-17

Cases Cited: *Conway v. Canada* [1993] 2 S.C.R. 872; *University of Alberta v. Pylypiuk*, 2002 ABQB 22

I. BACKGROUND

[para 1] The Applicant made a request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to Alberta Justice and Solicitor General (the Public Body) for records containing information about an incident in which he had been involved at the Edmonton Remand Centre. Specifically, the Applicant requested:

> 1. All records relating to [the Applicant's] placement on February [6], 2013;
> 2. All records relating to the force used on [the Applicant] at the Edmonton Remand Centre on February [6], 2013;
> 3. Copies of any CCTV recordings in existence with respect to the force used on [the Applicant] on February [6] 2013.

[para 2] The Public Body identified responsive records. It applied section 17 (disclosure harmful to personal privacy) to withhold information about other inmates from the Applicant. It denied access to the CCTV recordings on the basis of sections 17 and 20 (disclosure harmful to law enforcement).

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

[para 4] The parties exchanged submissions. In its initial submissions, the Public Body stated that it was no longer relying on section 20. In its rebuttal submissions, the Public Body clarified that it is unable to blur the faces of the inmates in the CCTV recordings, and therefore cannot sever the information to which it had applied section 17 and provide the remaining information to the Applicant.

II. INFORMATION AT ISSUE

[para 5] Information severed from the records under section 17 is at issue.

III. ISSUE

Issue A: Does section 17 of the Act (disclosure harmful to personal privacy) require the Public Body to withhold the information it severed from the records?

IV. DISCUSSION OF ISSUE

[para 6] Section 17 sets out the circumstances in which a public body may or must not disclose the personal information of a third party in response to an access request. It 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*
>
> > *[…]*
> >
> > *(g) the personal information consists of the third party's name when*
> >
> > > *(i) it appears with other personal information about the third party, or*
> > >
> > > *(ii) the disclosure of the name itself would reveal personal information about the third party[…]*
>
> *(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether*
>
> > *(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,*
> >
> > *(b) the disclosure is likely to promote public health and safety or the protection of the environment,*
> >
> > *(c) the personal information is relevant to a fair determination of the applicant's rights,*
> >
> > *(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,*
> >
> > *(e) the third party will be exposed unfairly to financial or other harm,*
> >
> > *(f) the personal information has been supplied in confidence,*
> >
> > *(g) the personal information is likely to be inaccurate or unreliable,*

> *(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and*
>
> *(i) the personal information was originally provided by the applicant.*

[para 7] Section 17 does not say that a public body is *never* allowed to disclose third party personal information. It is only when the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy that a public body must refuse to disclose the information to an applicant (such as the Applicant in this case) under section 17(1). Section 17(2) (not reproduced) establishes that disclosing certain kinds of personal information is not an unreasonable invasion of personal privacy.

[para 8] When the specific types of personal information set out in section 17(4) are involved, disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. To determine whether disclosure of personal information would be an unreasonable invasion of the personal privacy of a third party, a public body must consider and weigh all relevant circumstances under section 17(5), (unless section 17(3), which is restricted in its application, applies). Section 17(5) is not an exhaustive list and any other relevant circumstances must be considered.

[para 9] In *University of Alberta v. Pylypiuk*, 2002 ABQB 22, the Court commented on the interpretation of what is now section 17. The Court said:

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

[para 10] Section 17(1) requires a public body to withhold information only once all relevant interests in disclosing and withholding information have been weighed under section 17(5) and, having engaged in this process, the head of the public body concludes that it would be an unreasonable invasion of the personal privacy of a third party to disclose his or her personal information.

[para 11] Once the decision is made that a presumption set out in section 17(4) applies to information, then it is necessary to consider all relevant factors under section 17(5) to determine whether it would, or would not, be an unreasonable invasion of a third party's personal privacy to disclose the information. If the decision is made that it would be an unreasonable invasion of personal privacy to disclose the personal information of a third party, the Public Body must then consider whether it is possible to sever the

personally identifying information from the record and to provide the remainder to the Applicant, as required by section 6(2) of the FOIP Act.

[para 12] The Public Body has applied section 17(1) to sever information about other inmates from the paper records, and to withhold CCTV recordings. It has not applied section 17(1) to sever the images of its employees from the CCTV recordings, and it has provided to the Applicant information about its employees in the paper records where it appears.

[para 13] The first question I must address is whether all the information severed by the Public Body is personal information within the terms of the FOIP Act. Section 1(n) of the FOIP Act defines "personal information". It states:

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

[para 14] Information is personal information within the terms of the FOIP Act if it is recorded and is about an identifiable individual.

[para 15] With regard to the information severed from the paper records and from the CCTV recordings entitled "5a-2" and "tank 5" I agree that it may be considered to be about identifiable individuals. The information severed from the paper records is about another individual who was involved in an altercation with corrections officers. From this information one can learn about the individual's criminal history. The "5a-2" and "tank 5" CCTV recordings also contain the personal information of other inmates, as inmates

are visible in these recordings. In these recordings, the camera appears to be closer than it is in the administration area videos and the features of the inmates can be made out. While these features are not always clear, it is reasonable to expect that the inmates might be identifiable to someone who knows them. A person who can identify the individuals depicted in the CCTV recordings, could learn from the recordings that an individual was an inmate of the Edmonton Remand Centre on February 6, 2013. The images of the inmates are therefore the inmates' personal information.

[para 16] The two CCTV recordings entitled "ad-1" and "ad-3" do not contain images of inmates that would render the inmates identifiable. The cameras that created these recordings are trained on the area outside the "tank" where the inmates in recordings "5a-2" and "tank 5" were being held. While inmates do occasionally appear in these recordings, it is either from a distance where they are barely visible, with their faces further obscured by the frosted glass of a window, or moving with their faces turned away from the camera. The camera that took these recordings is placed further away from the inmates than in the tank recordings, and the features of individuals recorded in the administrative area are indistinct. Moreover, the inmates are all dressed in the same clothing, and so they cannot be identified on the basis of distinctive clothing.

[para 17] I find that the inmates in these recordings cannot be identified, and that these two recordings do not contain the personal information of identifiable individuals. I therefore find that the information in these two recordings cannot be withheld under section 17, and I will order them to be disclosed to the Applicant.

[para 18] Returning to the question of whether the information severed from the paper records and from recordings "5a-2" and "tank 5" is properly severed under section 17, I must consider whether section 17(2) authorizes disclosure, or whether a provision in in section 17(4) applies. (Section 17(2) lists types of personal information that it is not an unreasonable invasion of personal privacy to disclose. Section 17(4) lists types of information that are presumptively harmful to personal privacy when disclosed.) As discussed above, if information is subject to a provision of section 17(4), then it is subject to a presumption that it would be unreasonable invasion of personal privacy to disclose it.

[para 19] None of the provisions of section 17(2) appears to apply in this case. Section 17(4)(g), which creates a presumption that it would be an unreasonable invasion of personal privacy to disclose the name of an individual where it appears in the context of other information about the individual, applies to the paper records. I make this finding because the information severed from the paper records includes the name of an inmate and his criminal history.

[para 20] With regard to the images of inmates in recordings "5a-2" and "tank 5", I find that section 17(4)(g) also applies. Even though the names of the inmates depicted in recordings do not appear in the recordings, someone who can identify the inmates can also associate the names of the inmates with their images. Someone who knows an inmate in these recordings would be able to associate the name of the individual with the fact that the inmate was incarcerated in the Edmonton Remand Centre on February 6,

2013. I interpret information as "consisting of" a third party's name, within the terms of section 17(4)(g) when the name can be derived from the information, in this case an image, by someone to whom the person is known.

[para 21] In Order F2014-12, I commented on the application of section 17(4)(g) in situations where an individual appears in video or photographs, but the individual's name is not contained in the video or photograph. I said:

> Section 17(4)(g) makes specific reference to the name of a third party. Neither the photograph nor the video at issue contains the names of the inmates who appear in it. However, in some cases, where the inmates look straight at the camera, their faces are clear enough to be recognizable to someone who knows them. To anyone who knows the inmates and could identify them on viewing the video or the photograph, the name would be available. Essentially, the name of an individual is associated with the individual when the individual is identifiable, as an individual's name is part of the individual's identity.
>
> As discussed above, anyone who views the video or the photograph and knows an inmate who appears in the video or photograph would also know the name of the individual and would be able to learn that the individual was an inmate at the Edmonton Remand Centre on June 28, 2011. The name of the individual is therefore associated with the images in the video and the photograph, in association with the fact that the individual was incarcerated in the Edmonton Remand Centre on a given day. I therefore find that section 17(4)(g) applies, as the information in the photograph and the video would effectively reveal to some persons the name of the individual in addition to other personal information about the individual.

This reasoning would apply to the images of inmates appearing in recordings "5a-2" and "tank 5".

[para 22] As I find that a presumption against disclosure applies to the information of the inmates, I will consider whether this presumption has been rebutted.

[para 23] In relation to the information the Public Body severed from the paper records, it argues:

> The Public Body was transparent in the disclosure of the records, listing all staff members involved as well as the details of interactions which were released in records such as "Control Tactics Reports" and "Incident Reports." The Public Body submits that the Public Body was forthcoming in all information pertaining to the treatment of the Applicant. Information withheld from disclosure was limited to third party information only. The third party personal information does not pertain to the Applicant or his treatment by Correctional Officers. Therefore, subsection 17(5)(d) of the Act does not apply to the records at issue.
>
> In regards to subsections 17(5)(b), (g), and (i), the Public Body submits that these provisions are not relevant to the paper records at issue.
>
> The Applicant has not demonstrated how the disclosure of third party personal information is relevant to a fair determination of the Applicant's rights. The Public Body submits that section 17(5)(c) weighs against disclosure.
>
> As per subsections 17(5)(e) and 17(5)(h), the Public Body submits that third parties would be exposed unfairly to financial or other harm and likely experience unfair damage to the reputation of the third parties if their personal information was disclosed to the Applicant. This

would include a breach of privacy if their personal information (i.e. identification of the third parties) was disclosed to the Applicant.

Further, as per section 17(5)(f), the Public Body submits that third parties would have the implicit understanding that their personal information in correctional records would remain private and confidential within government and would not be released to a third party.

The Public Body reviewed all circumstances under subsections 17(4) and 17(5) of the *FOIP Act* and maintains that the circumstances weigh against disclosure of third parties personal information in the written records.

[para 24] The Public Body argues in relation to the CCTV recordings:

Video footage captures personal information in the form of physical images, including a third party's racial or ethnic origin, which could reasonably identify third parties. The Public Body relies on section 17(1) of the *FOIP Act* and maintains that it properly applied the Act in withholding third party personal information from the Applicant.

It is important to note that the CCTV videos are surveillance footage within a correctional centre. The records at issue are not photographic images taken at a public event (e.g. sporting event) where the expectation of privacy is lessened, as per section 17(2)(j) of the Act. Confidentiality and privacy are implied as the personal information is collected and used for surveillance and security purposes, and not for public dissemination. The Public Body argues that disclosure would contravene the collection, use and disclosure principles of the Act if disclosed.

As stated above with the paper records, the Public Body submits that subsections 17(5)(a) and (d) do not apply to the third party information in the video records. In regards to subsections 17(5)(b), (g), and (i), the Public Body submits that these provisions are not relevant to the CCTV video records at issue.

As with the paper records, as per 17(5)(c), the Applicant has not demonstrated how the disclosure of third party personal information in CCTV videos is relevant to a fair determination of the Applicant's rights, and as such, weighs against disclosure.

In addition with the paper records, and per section 17(5)(e), the Public Body argues that third parties would be exposed unfairly to financial or other harm including a breach of privacy if their personal information (i.e. identification of the third parties) in the CCTV video records is disclosed to the Applicant.

Further, as per section 17(5)(f), the Public Body submits that third parties would have the implicit understanding that video footage of the individuals in correctional facilities would remain private and confidential within government and would not be released publicly. This is not a public event; the expectation of personal privacy is implied.

The Public Body submits that the disclosure of video evidence of third parties could reasonably be expected to unfairly damage the reputation of any person referred to in the records (i.e. inmates). The Public Body maintains that section 17(5)(h) weighs against disclosure.

In addition, it is noted that the Applicant has been incarcerated with some of the affected third parties and therefore it is not unreasonable to believe that the Applicant would be able to identify a number of third parties in the records at issue. The Public Body submits that once a record is disclosed and released into the public domain, any individual who views the records may be able to identify third parties.

[para 25] The Applicant argues:

> The Public Body states that it "is aware of no argument advanced by the Applicant to rebut the presumption inherent in section 17(4) that disclosure would constitute an unreasonable invasion". In its initial submissions, the Applicant argued that:
>
> > b. The disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta to public scrutiny pursuant to s. 17(5)(a);
> >
> > c. The disclosure is relevant to a fair determination of the applicant's rights pursuant to s. 17(5)(c);
> >
> > d. the disclosure will assist in validating the claims of the applicant of mistreatment by Edmonton Remand Centre staff pursuant to s. 17(5)(d). The applicant is aboriginal, and aboriginal persons are grossly overrepresented in the correctional system;
> >
> > e. no third party is being exposed unfairly to financial or other harm pursuant to s. 17(5)(e);
> >
> > f. there is no basis upon which to conclude that any of the information was supplied in confidence pursuant to 17(5)(f);
> >
> > g. the video files are likely to be accurate and reliable pursuant to s. 17(5)(g), and the records made by correctional officers in the course of their employment duties are generally presumed to be accurate and reliable; and
> >
> > h. there is no reason to believe that the disclosure would unfairly damage the reputation of any person referred to in the records pursuant to s. 17(5)(h).
>
> It is further significant that the records relate to individuals in a prison setting, which entails a "substantially reduced level of privacy":
>
> > Imprisonment necessarily entails surveillance, searching and scrutiny. A prison cell is expected to be exposed and to require observation. The frisk search, the count and the wind are all practices necessary in a penitentiary for the security of the institution, the public and indeed the prisoners themselves. A substantially reduced level of privacy is present in this setting and a prisoner thus cannot hold a reasonable expectation of privacy with respect to these practices… There being no reasonable expectation of privacy, s. 8 of the *Charter* is not called into play; nor is s. 7 implicated.
> >
> > - *Conway v. Canada* [1993] 2 S.C.R. 872 [TAB 1]
>
> The third party inmates depicted in the CCTV recordings are witnesses to the use of force by correctional officers on the Applicant. The third party inmates whose names have been redacted from the paper records provided by the Public Body are believed to be individuals who witnessed the use of force against the Applicant and complained to correctional officers as a result of their perception that the correctional officers' use of force against the Applicant was unreasonable. Transparency with respect to all information pertaining to the treatment of the Applicant, including the perception of the Applicant's treatment by other inmates, is necessary in order to subject the activities of the Government of Alberta to public scrutiny and is relevant to a fair determination of the applicant's rights arising from the use of force by correctional officers. The correctional officers are in a position of trust relative to the inmates in their custody, and public scrutiny of the force used against inmates is in the public interest. The Public Body has apparently failed to consider these relevant considerations as required by s. 17(5)(a) and s. 17(5)(c) of the Act.

The Paper Records

[para 26] The Public Body has confined its severing to information regarding other inmates where it appears in the records requested by the Applicant. The information about the other inmates in these records does not appear to meet the terms of the Applicant's access request as it does not relate to his placement in the tank on February 6, 2013, or to the use of force by the Public Body's employees on the Applicant. Employees of the Public Body reported all the incidents taking place on that date, as opposed to incidents relating solely to the Applicant and the Public Body's use of force on the Applicant. For this reason, information about incidents not involving the Applicant was included in the records. The information in the records about other inmates in the paper records does not relate to the Applicant or describe the Public Body's use of force on him. There is no indication in the paper records or the CCTV recordings that the personal information of the inmates that appears in the paper records would be relevant to, or relate to, the use of force against the Applicant. The personal information of the other inmates in the paper records does not refer to any views or assessments of the use of force on the Applicant.

[para 27] The information about the other inmates in the records is non-responsive and is contained in the records only because these inmates were involved in incidents taking place on February 6, 2013.

The CCTV Recordings

"5a-2"

[para 28] Recording "5a-2" contains footage of inmates watching something taking place outside the range of the camera. Given the time of the recording, it would appear likely that they are watching corrections officers use force on the Applicant through the window of the holding cell. The Applicant is not visible in the recording. Two inmates, neither one of whom is the Applicant, are removed forcibly from the cell by corrections officers at different times.

[para 29] As noted above, the Applicant requested:

> All records relating to [the Applicant's] placement on February [6], 2013;
> 2. All records relating to the force used on [the Applicant] at the Edmonton Remand Centre on February [6], 2013;
> 3. Copies of any CCTV recordings in existence with respect to the force used on [the Applicant] on February [6] 2013.

[para 30] While the Applicant appears to argue that the observations of other inmates is the kind of information he has requested, and that he needs this information in order to pursue his case, I am unable to find that the personal information of inmates who observed the use of force falls within the terms of the Applicant's access request. Rather, I find that on the terms of his access request, CCTV recording "5a-2" is non-responsive

as it does not contain information about the Applicant's placement, or information regarding the corrections officers' use of force on him.

[para 31] As I find that CCTV recording "5a-2" is non-responsive, I will make no order in relation to it. If, at a later date, the Applicant determines that the contents of CCTV recording "5a-2" is relevant to his case, he is not precluded from making a new access request for it.

"tank 5"

[para 32] The "tank 5" recording depicts the Applicant speaking with a corrections officer and then being forcibly removed from the cell. As noted above, inmates other than the Applicant are present in the cell and could be identifiable to someone who knows them. The question is whether the Applicant is entitled to obtain a copy of the recording, given that it contains responsive information, but also contains the personal information of other inmates.

[para 33] The Public Body argues that it would be an unreasonable invasion of the inmates' personal privacy to disclose their personal information to the Applicant. It argues that it has been transparent in responding to the Applicant's access request, and provided the names of the corrections officers involved to the Applicant. The Public Body argues that no public interest would be served by disclosing the personal information of the inmates to the Applicant and that doing so would be reasonably likely to result in unfair damage to their reputations or result in financial or other harms to them. The Public Body also argues that the inmates in the video have an implicit understanding that information collected by the Public Body at the Remand Centre about them will be held in confidence. In essence, the Public Body reasons that there are no factors weighing in favor of disclosure, but that relevant factors weighing in favor of withholding the information apply.

[para 34] The Applicant argues that the personal information is necessary in order to subject the activities of the Government of Alberta to public scrutiny and in order that he may obtain a fair determination of his rights. He also argues that as an aboriginal person, section 17(5)(d), which weighs in favor of disclosure, is engaged. The Applicant also argues that none of the factors the Public Body relies on as weighing against disclosure apply.

[para 35] I will address each of the factors argued by the parties.

Section 17(5)(a) – disclosure of the information is desirable for the purposes of subjecting the activities of the public body to public scrutiny

[para 36] In Order F2014-16, the Director of Adjudication discussed appropriate factors to consider in determining whether public scrutiny is desirable. She said:

> In determining whether public scrutiny is desirable, I may consider factors such as:

1. whether more than one person has suggested public scrutiny is necessary;
2. whether the applicant's concerns are about the actions of more than one person within the public body; and
3. whether the public body has not previously disclosed sufficient information or investigated the matter in question.

(Order 97-002, paras 94 and 95; Order F2004-015, para 88).

It is not necessary to meet all three of the foregoing criteria in order to establish there is a need for public scrutiny. (See *University of Alberta v. Pylypiuk* (cited above) at para 49.) For example, in Order F2006-030, former Commissioner Work said (at para 23) that the first of these factor[s] "is less significant where the activity that has been called into question, though arising from a specific event and known only to those immediately involved, is such that it would be of concern to a broader community had its attention been brought to the matter", commenting that "[i]f an allegation of impropriety that has a credible basis were to be made in this case, this reasoning would apply".

[para 37] Reviewing the factors referred to in Order F2014-16, I am unable to find on the evidence before me that section 17(5)(a) applies in this case. Assuming that the Applicant's position that the Public Body's employees applied more force than was warranted is correct, there is no evidence before me to establish that such excessive use of force on the evening in question is anything more than an isolated incident that could not be appropriately addressed by legal remedies available to the Applicant. In the absence of evidence that the use of excessive force is frequent at the Remand Centre and therefore problematic, the use of such force is not clearly an "activity" of the Public Body requiring public scrutiny.

Section 17(5)(c)

[para 38] The Applicant argues that section 17(5)(c) applies. His submissions indicate that he requires the information about the use of force on him by correctional officers to seek redress, although he is not specific as to what form of redress he is considering. As neither he nor his counsel have had the opportunity to review the CCTV footage to evaluate its contents, it may be the case the Applicant is uncertain at this time to what extent he is in a position to make a complaint or seek a legal remedy.

[para 39] I note that a letter from the Applicant's counsel to the Public Body dated March 22, 2013 refers to the Applicant as having been "assaulted" by corrections officers, and also refers to the Applicant sustaining a wrist fracture as a result of this assault. Counsel for the Applicant requested that the Public Body preserve the CCTV footage and the Applicant's medical records. This letter may be taken as containing some indication that the Applicant is considering pursuing the matter in tort or by complaint, should the records support his account of events, and also considers the records necessary to pursue the matter.

[para 40] The paper records the Applicant requested contain the accounts of the Public Body's employees of the events depicted in CCTV recording "tank 5". However, the accounts contain interpretations and analysis; the CCTV recordings depict events as they happened, without explanation or interpretation. While the possibility exists that the

written accounts have a subjective dimension, the CCTV recordings are purely objective depictions of events. The CCTV cameras do not report or persuade; they simply record. In addition, the written accounts of the corrections officers are general, rather than specific. For example, the written accounts refer to the Applicant as "inciting inmates"; the CCTV recordings depict the conduct that was reported as "inciting inmates". In my view, the "tank 5" CCTV recording contains information that is not present in the written accounts and which may be necessary for the Applicant to evaluate his legal position, instruct counsel, or pursue a claim.

[para 41] I note that in Order F2014-17, the Adjudicator considered information relevant to a judicial review application to meet the requirements of section 17(5)(c) by reason of its relevance. In the case before me, the Applicant cannot advance a claim without first gaining access to the information in the "tank 5" CCTV recording as it is relevant to any claim he could make and the information it contains is not available from any other source. I therefore find that section 17(5)(c) applies and weighs in favor of disclosing the "tank 5" CCTV recording.

Section 17(5)(d)

[para 42] Section 17(5)(d) establishes that a factor weighing in favor of disclosure is whether disclosure of personal information will assist in researching or validating the claims, disputes or grievances of aboriginal people.

[para 43] The Applicant argues that section 17(5)(d) is a relevant consideration in this case because he "is aboriginal, and aboriginal persons are grossly overrepresented in the correctional system".

[para 44] I am not satisfied that section 17(5)(d) has any relevance in this case. The Applicant is seeking the information in the records because he is of the view that the information may support his position that corrections officers used excessive force on him; it is unclear how this purpose would have any bearing on the overrepresentation of aboriginal persons in the correctional system. Moreover, the Applicant is seeking the information to pursue his own personal rights, rather than the rights of aboriginal persons as a whole. While there may be some argument about the relevance of the fact that the Applicant is aboriginal to what transpired in this case, the Applicant has not made such an argument.

[para 45] As section 17(5)(d) does not apply, it neither weighs for, nor against, disclosure.

Section 17(5)(e)

[para 46] Section 17(5)(e), cited above, is a factor weighing in favor of withholding personal information. It applies when it can reasonably be expected that a third party will be exposed unfairly to financial or other harm if a public body were to disclose personal information to an applicant. The Public Body argues that if the CCTV recordings are

given to the Applicant, the inmates in these recordings will be exposed unfairly to financial or other harm.

[para 47] It is unclear from the Public Body's arguments the linkage it sees between disclosing the "tank 5" CCTV recording to the Applicant and the inmates depicted in this recording experiencing unfair financial or other harms. If the Applicant and his counsel were to use the recording for the limited purpose of pursuing his legal rights in relation to the Public Body's use of force, it does not appear likely that this harmful outcome could result from disclosure. However, it may be that the Public Body's concern is that if it discloses the recording, there would be no safeguards to prevent the recording from becoming publicly available. If the "tank 5" recording were to be made public or to "go viral", persons such as the employers or prospective employers could view it, recognize the inmates as employees or prospective employees, and then end the inmate's employment or choose not to enter an employment relationship with the inmate because of negative impressions created by the inmate's apparent incarceration and by perceived associations with criminality. Such harm would be arguably unfair, given that the inmates may not ultimately be convicted of criminal offences. If that is the Public Body's concern, then it is a harm that could reasonably be expected to result from widespread publication of the recording, assuming that no restrictions are imposed on the use that the Applicant could make of it.

Section 17(5)(f)

[para 48] Section 17(5)(f) weighs against disclosure when it applies. Section 17(5)(f) applies to personal information that has been supplied to a public body in confidence. The Public Body argues that section 17(5)(f) applies to the CCTV recordings.

[para 49] The term "supply" typically means "to provide what is necessary or required." The phrase "supplied in confidence" appears to refer to information that is actively provided by a third party, and in those circumstances where the third party is in a position to impose terms of confidentiality. With regard to the "tank 5" CCTV recording, none of the inmates had any choice but to wait in the room referred to as "tank 5" and be the subject of CCTV recordings. Moreover, it does not appear that the inmates had any ability to impose restrictions as to the extent to which the Public Body could use, or disclose the information recorded by the CCTV cameras, provided the use or disclosure conformed to the requirements of Part 2 of the FOIP Act. In any event, even if I am wrong that the personal information of inmates captured on CCTV recordings cannot be said to be supplied in confidence, the Public Body has provided no evidence regarding the expectations of the inmates regarding confidentiality or the terms and conditions under which the inmates "supplied" their personal information to the Public Body. The Public Body states that inmates have an "implicit understanding" that their personal information will be held in confidence; however, no evidence to support this position has been put forward.

[para 50] For the reasons above, I am unable to find that section 17(5)(f) has any application to the personal information in the records.

Section 17(5)(h)

[para 51] The Public Body argues that section 17(5)(h) applies and weighs in favor of withholding the personal information in the records. Section 17(5)(h) applies when the reputation of a third party referred to in a record could be damaged by disclosing the information to an applicant.

[para 52] If the Applicant were to use the information in the CCTV recording for the sole purpose of pursuing a claim against the Public Body, it is unclear how the reputation of inmates would be unfairly damaged through this use. However, if the contents of the recording were widely disseminated, for example, on the internet, it is conceivable that damage to the reputations of the remand centre inmates depicted in the CCTV recording could result. While some of the inmates may be, or may have been, convicted of criminal offences, it is not necessarily the case that all the inmates identifiable in the CCTV recording would be or would have been. If the CCTV recording were widely distributed, it is possible that the reputation of an inmate who was ultimately not found guilty of a criminal offence, would, by virtue of the third party being in a recording of inmates in a remand centre, suffer unfair damage.

[para 53] Section 17(5)(h) can be said to apply should the CCTV recording become widely available to the public.

Reduced expectation of privacy

[para 54] The Applicant argues that expectations of privacy are diminished on incarceration. The Applicant points to C*onway v. Canada* [1993] 2 S.C.R. 872, which holds that expectations of privacy are greatly reduced in the prison setting. The Applicant reasons that the same holds true for personal information collected in a remand centre.

[para 55] I note that a remand facility operated by the province, such as the Edmonton Remand Centre, falls within the terms of the definition of "correctional institution" set out in section 1(b) of the *Corrections Act.* I agree with the Applicant that expectations of privacy are diminished in a correctional institution setting. Moreover, there are lesser expectations of privacy in relation to the kinds of personal information that may be collected, used or disclosed by a correctional facility.

[para 56] Section 40 of the FOIP Act sets out the circumstances in which a public body may disclose the personal information of a third party. This provision states, in part:

> *40(1) A public body may disclose personal information only*
>
> > *(d) if the individual the information is about has identified the information and consented, in the prescribed manner, to the disclosure […]*

> *(q) to a public body or a law enforcement agency in Canada to assist in an investigation*
>
> > *(i) undertaken with a view to a law enforcement proceeding, or*
> >
> > *(ii) from which a law enforcement proceeding is likely to result,*
>
> *(aa) for the purpose of supervising an individual under the control or supervision of a correctional authority […]*
>
> *[…]*
>
> *(dd) to a lawyer or student-at-law acting for an inmate under the control or supervision of a correctional authority […]*

[para 57] The consent of a third party to disclosure is relevant only to section 40(1)(d). Section 40 contains several instances in which the personal information of inmates could potentially be disclosed without the knowledge of inmates and despite any objections they might have to disclosure. For example, if a CCTV recording were to depict a criminal assault, then the footage could be turned over to a law enforcement authority under section 40(1)(q). The information could be disclosed over the objections of any third parties depicted in the recording. Moreover, if the CCTV recording could be used in advancing the purpose of supervising an inmate, then the contents of the CCTV recording could be disclosed for that reason under section 40(1)(aa). Finally, if an inmate's counsel were to request a copy of the CCTV recording in order to represent an inmate, then the information in the recording could be provided to the inmate's counsel for that purpose under section 40(1)(dd), even though it may contain the personal information of other inmates, and even though the other inmates do not know about the disclosure or consent to it.[1]

[para 58] I agree with the Applicant that the fact that there are diminished expectations of privacy in relation to personal information collected by a Public Body in a correctional facility, not only for the reasons set out in *Conway*, *supra*, but also because there are several circumstances in which the information could be disclosed without the knowledge of the subject of the information. However, it does not follow that inmates

[1] Although the FOIP Act refers to a "correctional authority", rather than a "correctional institution" as set out in the *Corrections Act*, I conclude that the Edmonton Remand Centre may be considered to a "correctional authority". Not only is the Edmonton Remand Centre included in the definition of "correctional institution" in the *Corrections Act*, but inmates of the Edmonton Remand Centre may be subjected to the same kinds of supervision and disciplinary processes to which inmates of other kinds of correctional institutions are subject, and which may give rise to the right to counsel or the need to instruct counsel. As there does not appear to be any reason not to consider the Edmonton Remand Centre to be a correctional authority under section 40 of the FOIP Act, and because an inmate's counsel may require personal information gathered in the Edmonton Remand Centre for the same purpose that counsel may require the information in other correctional settings, I conclude that the Edmonton Remand Centre is a "correctional authority".

have *no* privacy interests in their personal information; there are circumstances in which the presumption that it would be an unreasonable invasion of personal privacy to disclose personal information is not rebutted, despite the fact that expectations of privacy are diminished.

[para 59] I find that the fact that expectations of privacy are diminished in the remand centre is relevant to the determination to be made under section 17(5).

Other relevant circumstances

[para 60] In Order F2012-24, the Director of Adjudicator noted that the provisions of section 40 reflect factors that may be relevant to the determination to be made under section 17(5). She said of section 40(1)(cc):

> I believe that the same compassionate element can be considered as a relevant factor under section 17(5) on an access request, despite the fact that it is not expressly enumerated therein. (The enumeration in section 40 can be understood as a reminder to public bodies that they have the ability to make such a disclosure regardless of an access request. I am reinforced in this view by the fact the provision is redundant in any event since public bodies may make such a disclosure regardless of familial relationships under section 40(1)(b) regardless of the familial status of the applicant.) Further, as a relevant factor under section 17(5), the consideration of compassion is not meant merely to serve in substitution for what the deceased person may themselves have disclosed; rather, it weighs in favour of giving as much information as possible to help meet the needs of families in the manner described in the Ontario decision. As well, it can be a consideration not only relative to the information of a deceased person, but also relative to the personal information of other third parties that in some way relates to the deceased.

[para 61] The Director of Adjudication held that the circumstances enumerated in provisions of section 40 could be considered as factors weighing in favor of granting access to personal information in circumstances where the provision would give a public body discretion to disclose the personal information in the absence of an access request.

[para 62] In the present case, I note that under section 40(1)(dd), cited above, the Public Body would have discretion to disclose the information requested by the Applicant to his counsel. Section 40(1)(dd) is not restricted to the personal information of an inmate, but applies to *any* personal information. While section 40(1)(dd) is not explicit as to the circumstances in which personal information may be disclosed, other than that it may be disclosed to legal counsel acting for an inmate. The reference to legal counsel "acting for an inmate" suggests that the personal information in question will be relevant to the purpose of acting for the inmate, or possibly, that the information will assist legal counsel in acting for the inmate.

[para 63] In her letter of March 22, 2013, the Applicant's legal counsel wrote the Director of the Edmonton Remand Centre to inform him that she was acting on behalf of the Applicant and asked the Director to preserve the CCTV recordings of the incident that is the subject of the access request, as well as to ask the Director to investigate the corrections officers' use of force on the Applicant. She did not request the records at that time; however, had she requested the CCTV recordings at that time, the Public Body had

discretion to provide them to her (and continues to have this discretion). Instead, she made an access request for this information on behalf of the Applicant on April 25, 2013.

[para 64] Even though the Applicant and his counsel decided to make an access request, section 40(1)(dd) continues to give the Public Body discretion to provide the records to the Applicant's counsel. The apparent purpose of this provision – to enable legal counsel to obtain personal information for the purpose of acting for an inmate, continues to apply. Moreover, this purpose may be considered in weighing the relevant considerations for and against disclosure under section 17(5) where section 40(1)(dd) could authorize disclosure.

[para 65] As I find that the information in the "tank 5" CCTV recording is relevant to any complaint the Applicant may make or action he may consider taking, it follows that I find that it is necessary for the Applicant's counsel to view the recording in order to act on his behalf. I find that this circumstance is relevant and weighs in favor of disclosure.

Conclusion and Remedy

[para 66] I have found that section 17(5)(c) applies and weighs in favor of disclosure as the evidence in the CCTV recording is relevant and necessary in relation to any action the Applicant may take, or consider taking, in relation to the incident of February 6, 2013. I have also found that privacy interests are diminished in a remand centre. I have also found that it is necessary for the Applicant's counsel to review the CCTV recording in order to act for the Applicant in relation to the incident of February 6, 2013. However, I have also accepted that it is conceivable that the inmates in the CCTV recording could suffer harm to their reputations or other kinds of harm should the CCTV recording become widely available.

[para 67] The factors weighing in favor of disclosure support disclosing the information for the limited purposes of enabling the Applicant to pursue a legal remedy and to obtain legal advice. The factors weighing against disclosure are relevant only in the circumstances where the CCTV recording would become widely available. I conclude that it would not be an unreasonable invasion of the privacy of third parties to disclose the CCTV recording to the Applicant for the purpose of evaluating or pursuing a legal action and the CCTV recording was not distributed for any other purpose but this purpose. However, I find that it would be an unreasonable invasion of the privacy of third parties who are depicted in the "tank 5" CCTV recording, if the contents of this recording were distributed for purposes unrelated to seeking legal advice and advancing a claim.

[para 68] The purpose of an Applicant in obtaining personal information is relevant to the determination that must be made under section 17(5). I say this because clauses 17(5)(a), (b), (c), and (d) all refer to the specific purposes for which information is requested. The weighing that takes place under section 17(5) often necessitates balancing the purpose of a requestor with the interests of a third party in maintaining personal privacy. In this case, the purpose of the Applicant in obtaining personal information is of

significant importance and, assuming that it is used and disclosed exclusively for the purposes of instructing counsel and pursuing a legal case, is not likely to result in the harms projected by the Public Body, or amount to an unreasonable invasion of personal privacy. The relevant interests weighing in favor of disclosure outweigh the presumption that it would be an unreasonable invasion of personal privacy to disclose third party personal information. However, if the personal information were not used and disclosed for those limited purposes, then the presumption would not be outweighed and it would be an unreasonable invasion of personal privacy to disclose the personal information.

[para 69] If I were to order the Public Body to give access to the records without restriction, then the order would not reflect my decision in relation to section 17, which is that it would not be an unreasonable invasion of third party personal privacy if the Applicant uses or discloses the personal information for the limited purposes of instructing counsel and pursuing a legal case. However, I am unable to order the Applicant to confine his use or disclosure of the personal information in the records to those purposes that weigh in favor of disclosure or to take measures to safeguard the information from unauthorized access or disclosure. This is because section 72 limits me to making orders applying only to public bodies.

[para 70] However, under section 72(4) of the FOIP Act, the Commissioner may specify any terms and conditions in an order disposing of the issues for inquiry. This provision states:

> *72(4) The Commissioner may specify any terms or conditions in an order made under this section.*

[para 71] In my view, this provision authorizes me, as the Commissioner's delegate, to specify terms or conditions in an order as to how a public body is to give an applicant access to records, once I have decided that access must be given.

[para 72] I also note that section 13 of the FOIP Act establishes that information may be disclosed to a requestor in two ways. This provision states, in part:

> *13(1) If an applicant is told under section 12(1) that access will be granted, the head of the public body must comply with this section.*
>
> *(2) If the applicant has asked for a copy of a record and the record can reasonably be reproduced,*
>
> > *(a) a copy of the record or part of it must be provided with the response[…]*
>
> *(4) If the applicant has asked to examine a record or for a copy of a record that cannot reasonably be reproduced, the applicant*
>
> > *(a) must be permitted to examine the record or part of it, or*

(b) must be given access in accordance with the regulations.

A public body may give access by providing a copy of a record, or, in the case where the record cannot reasonably be reproduced, the public body may give access by allowing the applicant to examine the record.

[para 73] In this case, it happens to be unclear whether the Public Body can reasonably reproduce a copy of any of the CCTV recordings in a format that would be useful to the applicant, as its evidence in the inquiry is that the format of the recording is no longer supported by the vendor and the format is no longer in use. The evidence does establish that the Public Body has the capacity to allow the Applicant or his counsel to examine the CCTV recording at the Public Body's premises.

[para 74] However, even though the circumstances may require the Public Body to give access to the Applicant by allowing the Applicant and / or his legal counsel to examine the CCTV recordings at its premises, I would order the Public Body to give access to the information in tank 5 in this way in any event as this process best accords with my decision in relation to section 17. Permitting the Applicant and / or his legal counsel to examine this record allows the Applicant to assess his legal position and to obtain legal advice, while ensuring that the Public Body may safeguard the personal information in the "tank 5" CCTV recording. In that way, the purposes acknowledged by sections 17(5)(c) and 40(1)(dd) are served, while the potential for harm that could arise from widespread distribution of the CCTV recordings is avoided, or substantially reduced.

[para 75] With regard to the "ad-1" and "ad-3" CCTV recordings, I have found that they do not contain personal information and must be disclosed to the Applicant. The Public Body may therefore make copies of these records and produce the copies to the Applicant. However, in the event that the Public Body is not able to reproduce a readable copy of these records for the Applicant, I will order it to permit the Applicant or his counsel to examine the recording at its premises.

V. ORDER

[para 76] I make this Order under section 72 of the Act.

[para 77] I order the Public Body to give access to the "ad-1" and "ad-3" CCTV recordings. If the Public Body is unable to reproduce a copy of these recordings in a readable format, then the Public Body must give access to these recordings by permitting the Applicant and / or his legal counsel to examine them at its premises.

[para 78] I order the Public Body to give access to the "tank 5" CCTV recording by permitting the Applicant and / or his legal counsel to examine this record at its premises.

[para 79] I confirm the decisions of the Public Body to sever information from the paper records and the "5a-2" CCTV recording for the reason that the information is non-responsive.

[para 80] I 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