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OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2015-32

November 2, 2015

LAKESHORE REGIONAL POLICE SERVICE

Case File Number F7023

Office URL: www.oipc.ab.ca

Summary: An individual made an access request to the Lakeshore Regional Police Service (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for "all information involving me. Complaints by me and complaints against me. Not exclusively but specifically any officer occurrence notes of [a named constable] or investigations he may have conducted involving me."

The Public Body located responsive records, but withheld information under sections 17, 18, 20, 21, 24, and 27 of the Act. The Public Body also determined that some records were not subject to the Act by application of section 4(1)(a). The Applicant requested a review of the Public Body's response.

The Public Body did not provide submissions or answer questions posed by the Adjudicator in support of its application of the cited exceptions.

The Adjudicator could not determine whether section 4(1)(a) applied to the record as cited by the Public Body; as the Adjudicator does not have jurisdiction over the record if section 4(1)(a) applies, the Adjudicator ordered the Public Body to determine whether the record consists of information copied from a court file. If not, the Public Body is to disclose the record to the Applicant.

The Adjudicator had insufficient evidence to conclude that sections 18, 20, 21, 24 or 27 applied to the records at issue and ordered the Public Body to disclose the information to which those exceptions were applied, subject to any application of section 17.

The Adjudicator upheld the Public Body's application of section 17(1) in some cases. However, she found that in many instances, the Public Body applied section 17(1) to information that was not about an identifiable individual or that was about public body employees acting in a professional capacity, and therefore section 17 could not be applied to withhold that information. The Adjudicator ordered the Public Body to disclose the latter category of information to the Applicant. The Adjudicator also found that the Public Body withheld personal information of third parties that had been originally supplied by the Applicant; she found that this factor in favour of disclosure outweighed the factors against disclosure, and ordered the Public Body to provide that information to the Applicant.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 4, 17, 18, 20, 21, 24, 27, 71, 72, 85.

Authorities Cited: AB: Orders 96-003, 96-006, 96-012, 97-002, 99-013, F2003-005, F2004-015, F2004-030, F2005-030, F2006-012, F2007-007, F2008-028, F2009-009, F2009-018, F2010-017, F2010-025, F2010-031, F2012-10, F2013-13, F2013-51, F2014-16, **Ont:** MO-1663-F, PO-3372.

Cases Cited: *Alberta (Attorney General) v. Krushell*, 2003 ABQB 252 (CanLII), 2003 ABQB 252, *Blank v. (Minister of Justice)*, 2006 SCC 39 (CanLII), [2006] 2 S.C.R. 319, *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, *Canada v. Solosky* [1980] 1 S.C.R. 821, *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61 (CanLII), [2002] 3 S.C.R. 209, *R. v. Campbell*, [1999] 1 SCR 565.

I. BACKGROUND

[para 1] An individual made an access request to the Lakeshore Regional Police Service (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for "all information involving me. Complaints by me and complaints against me. Not exclusively but specifically any officer occurrence notes of [a named constable] or investigations he may have conducted involving me."

[para 2] By letter dated February 19, 2013, the Public Body responded to the Applicant's request. It informed the Applicant that it located 88 pages of responsive records, as well as 2 videos, and that some information in these records was being withheld under sections 4, 17, 18, 20, 21, 24 and 27. This letter was signed by an Operations Officer with the Public Body.

[para 3] The Public Body's response to my April 10, 2015 letter stated that it was not the Public Body but Alberta Justice and Solicitor General that responded to the access request, and therefore the Public Body could not provide any rationale for the application of the cited exceptions.

[para 4] The individual named in the access request was invited to participate in the inquiry as an affected party but that individual did not respond to the invitation.

II. RECORDS AT ISSUE

[para 5] The records at issue consist of the withheld portions of 88 pages of records responsive to the Applicant's request dated January 14, 2013, as well as two responsive videos.

III. ISSUES

[para 6] The issues as set out in the Notice of Inquiry, dated January 8, 2015, are as follows:

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

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

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

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

5. Did the Public Body properly apply section 21(1) of the Act (disclosure harmful to intergovernmental relations) to the information in the records?

6. Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information in the records?

7. Did the Public Body properly apply section 27(1) of the Act (privileged information) to the information in the records?

8. Did the Public Body properly withhold information as non-responsive to the Applicant's request?

IV. DISCUSSION OF ISSUES

Preliminary discussion – no arguments from the Public Body

[para 7] By letter dated January 8, 2015, the Registrar of Inquiries informed the Public Body that records provided to this office for the inquiry were being returned because the records (which were provided in digital format) contained explanatory comments about the information that was withheld. The Registrar informed the Public Body that as these comments would not be exchanged with the Applicant in the course of the inquiry, I could not accept them unless the

Public Body could satisfy me that the comments were properly provided *in camera*. The Public Body subsequently provided a copy of the records without added comments.

[para 8] By letter dated March 2, 2015, the Registrar of Inquiries informed the Public Body that a letter sent to this Office by the Public Body would be returned as it was not copied to the Applicant. The Registrar reminded the Public Body of the procedures for making submissions to an inquiry. The Public Body did not respond, or provide another submission at that time.

[para 9] By letter dated March 24, 2015, I asked the Public Body to provide information in support of its application of exceptions to access to the records at issue. I said:

> The Public Body has the burden of proof with respect to the application of the above provisions, with the exception of section 17(1). This means that the Public Body must satisfy me that it has properly applied sections 4, 18, 20, 21, 24 and 27 to the information in the records at issue. The Public Body has not provided any submissions to this inquiry to justify its decisions to withhold the information under these provisions. Consequently, I cannot determine how the severed information meets the tests for sections 4, 18, 20, 21, 24 and 27 such that it can be withheld. The Public Body also hasn't specified which legal privilege it believes applies to the information withheld under section 27(1)(a) (in addition to how the information meets the relevant test for the legal privilege being claimed).
>
> The Public Body hasn't specified which information on pages 7-9, 13, 15, 16, 18-20, 23, 26, 27, 29, 31, 32, 39, 47-49 and 65 it believes is not responsive to the Applicant's request. It also has not told me what exceptions it has applied in withholding the two videos.
>
> Additionally, sections 18, 20, 21, 24 and 27 are discretionary exceptions. A discretionary exception to access means that, even where the exception applies to the information at issue, a public body must consider whether or not to disclose that information. In making that determination, the public body must consider all relevant factors, such as the purposes of the Act and the purposes of the particular exception on which it is relying. The Public Body has not provided me any explanations as to how it exercised its discretion to withhold information under the various discretionary exceptions it has applied.
>
> With respect to section 17, the Public Body must establish the information is the personal information of a third party, and may show how disclosure would be an unreasonable invasion of the third party's personal privacy (however, if a record contains personal information about a third party, it is up to the Applicant to prove disclosure would not be an unreasonable invasion of the third party's personal privacy). In some instances it is clear from the records whether section 17 can apply to the severed information; however, in other instances it is not clear why the Public Body has severed as much information as it has under section 17 (i.e. whether further information could have been provided to the Applicant once obvious identifiers were severed). Therefore, it is unclear whether all of the information withheld under section 17 is indeed personal information to which that exception applies.
>
> If I cannot determine from the records whether the cited exceptions apply to the withheld information, I cannot uphold the Public Body's decisions to apply those exceptions. As a result, I would have to order the Public Body to disclose the information to the Applicant.

> This seems to be a non-trivial consequence, especially given the significance of some of the exceptions applied by the Public Body (for example, sections 18(1)(a) and 27(1)(a)).

[para 10] The Public Body responded by letter dated March 26, 2015, in which it said:

> I have tried in past correspondence to advise your office, that although Lakeshore Regional Police Service is the Public Body subject of this inquiry, we are not directly responsible for the redacting of records at issue. On our behalf, the FOIP Unit of Alberta Justice & Solicitor General completed this task. I am therefore unable to address or answer any of the questions you may have as I do not have the requisite knowledge of the process in any aspect as it relates to this matter. Attempts were made with the FOIP Unit of Alberta Justice & Solicitor General for assistance, but were unsuccessful.

[para 11] By letter dated May 4, 2015, I informed the Public Body that it has the obligation under the FOIP Act to apply exceptions to access in response to a request for records. While the head of a public body may delegate this responsibility (under section 85 of the Act), it appeared that the head of the Public Body did not actually delegate this responsibility to Alberta Justice in this case. I said:

> The head of the Public Body must make the decision as to whether to withhold information from the Applicant in the responsive records. The head may delegate this authority, but that delegate must make the decision and be able to explain how he or she applied any exceptions to access, including how he or she exercised discretion in doing so (where applicable).
>
> For the reasons given, it is the duty of the head (or delegate) to review the responsive records and make his or her own decision regarding the information to be disclosed to the Applicant under the Act (including what information the head or delegate is *required* to withhold under section 17). The failure of a head to perform this duty can become the subject of this inquiry under section 11(2) of the Act (deemed refusal), and could result in an order under section 72 requiring that duty to be performed.

[para 12] By letter dated May 28, 2015, the Public Body responded:

> Chief of the Lakeshore Regional Police Service, […], sought advice and assistance from the FOIP office of Alberta Justice and Solicitor General to prepare redacted records for the application filed by [the Applicant]. In this aspect all original materials were forwarded by courier to the FOIP office for that purpose. Said records were prepared by the FOIP office with original and redacted records being returned to Lakeshore Regional Police Service.
>
> Your office has stated that Lakeshore Regional Police Service has not provided any submissions to the inquiry. All relevant material in the possession of Lakeshore Regional Police Service has been forwarded to your office, there is nothing further. Your request for information regarding application of the exceptions is as stated by the Act itself in those sections, there is nothing further that can be stated.
>
> The head of the Public Body, the Chief of Police, has reviewed and relies on the stated sections of exception as they apply to the redacted records at issue.

[para 13] The Public Body's position seems to be that the exceptions of the Act speak for themselves, and that the Public Body ought not to be required to justify its application of those exceptions. As I told the Public Body in my letter of March 24, 2015, the Public Body has the burden of proof with respect to the application of the above provisions, with the exception of section 17(1). With regard to section 17, the Public Body must satisfy me that the information withheld under that exception is personal information of a third party. I also explained in that letter that the Public Body had not yet met its burden with respect to much of the withheld information in the records at issue. In light of that letter, it is not clear to me why the Public Body continues to believe that it does not need to provide submissions to me for this inquiry.

[para 14] Nevertheless, under section 72 of the Act, I have a duty to dispose of the issues in this inquiry; therefore, I will determine whether the exceptions were properly applied by the Public Body based on the submissions of the Applicant and the records themselves.

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

[para 15] The Public Body applied section 4(1)(a) to page 82, which is a printout from the Justice Online Information Network (JOIN).

[para 16] If section 4(1)(a) applies to the records at issue, I do not have jurisdiction to review the Public Body's decision to withhold them.

[para 17] Section 4(1)(a) of the Act states:

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

[para 18] This provision applies to information taken or copied from a court file (Order F2004-030 at para. 20 and F2007-007 at para. 25); it also applies to information copied from a court file to create a new document, such as a court docket (*Alberta (Attorney General) v. Krushell*, 2003 ABQB 252 (CanLII), 2003 ABQB 252). However, these orders state that records emanating from the Public Body itself or from some source other than the court file are within the scope of the Act, even though duplicates of the records may also exist in the court file (Order F2010-031).

[para 19] In Order F2010-031, the Edmonton Police Service withheld a printout from the JOIN database under section 4(1)(a). At paragraphs 13 and 14 of that Order I said:

> In its submission, EPS referred to pages 268-305 as consisting of "criminal docket information from court files which are loaded on the JOIN database." I assume what EPS means is that the information is copied from the criminal docket into the database, essentially creating a copy of the docket in digital form, and not that the information in the JOIN database is merely the same information that appears in court dockets. Given that court dockets include general information such as names and addresses, many records will contain the same information; this is obviously not sufficient for section 4(1)(a) to apply.
>
> I agree that a record created by copying a court docket into the JOIN database, essentially creating a digital copy that can be printed out, falls within the scope of section 4(1)(a) of the Act. Therefore, I have no jurisdiction to review EPS' decision to withhold the records.

[para 20] In this case, the Public Body did not tell me anything about where page 82 originated. It may be the case that this record consists of information from a court file which was loaded onto JOIN and subsequently printed out; however, I do not know this to be the case for certain. The record contains information that seems like it could have originated from a court file but that is not sufficient for me to conclude that it is a record to which section 4(1)(a) applies.

[para 21] As this is a determination regarding my jurisdiction over page 82, I would usually ask the Public Body to provide me with further information about this record. However, the Public Body has made it clear that it will not be participating any further in this inquiry. Therefore, I will order the Public Body to determine whether this page consist of information copied from a court file. If not, the Public Body is to disclose the record to the Applicant (as the record does not contain third party personal information to which section 17(1) might apply). If the record *does* consist of information copied from a court file, the Public Body may disclose it or continue to withhold it; I would not have jurisdiction under the FOIP Act to order the Public Body to undertake either action.

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

Is the information personal information?

[para 22] The Applicant has stated that he is not seeking names or personal information about third parties. Therefore, my decision regarding the Public Body's application of section 17 is limited to whether the severed information is, in fact, personal information about a third party and whether, if personal information of the Applicant is intertwined with personal information of a third party, the Applicant's information must be disclosed to him.

[para 23] The Public Body applied section 17 to information on pages 2-65, 69-77, 79-81 and 83-84.

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

> *1 In this Act,*
>
> *…*

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

[para 25] The information withheld under section 17 includes names and contact information of third parties, as well as descriptions of incidents involving the third parties. All of the information is contained in police files. The Public Body disclosed information about its own employees in most cases, but not all.

[para 26] In some instances, the name and other information about an employee of the Public Body appeared in a personal context – that is, where the individual was not acting in his or her professional capacity. In most, but not all instances it is clear from the context of the record whether that individual was acting in a professional or non-professional capacity.

[para 27] Names, contact information and physical descriptions of third parties is personal information under the FOIP Act. However, previous orders from this office have found that section 17 does not apply to personal information that reveals only that the individual was acting in a formal, representative, professional, official, public or employment capacity, unless that information also has a personal dimension (Order F2008-028, para. 54). This principle has been applied to information about employees of public bodies as well as other organizations, agents, sole proprietors, etc. (Order F2008-028).

[para 28] In many instances, I cannot determine how information severed by the Public Body under section 17 is about an identifiable individual. Having no submissions from the Public Body, I can only use the records themselves to determine whether the severed information is about an identifiable individual such that section 17(1) may apply. I conclude that the following is *not* information to which section 17(1) can apply:

- The information severed on page 1, which does not appear to identify an individual;

- Page 2 has information severed under both sections 17(1) and 20(1)(m) that appears to be a code that identifies who printed the records or from where they were printed (i.e. they appear to identify a person, a workstation or a piece of equipment). This information appears in the header and/or footer of other records as well. I do not know whether these codes identify an individual. Even if they do, it would seem that in each case the code identifies a Public Body employee who printed the record – i.e. a Public Body employee acting in a professional capacity such that section 17(1) would not apply.
- Pages 2-3 have some paragraphs severed in their entirety while others have been provided to the Applicant with only the name of the third party (and pronouns referring to the third party) severed. It is not clear why the Public Body has determined that only discrete items of information need to be severed in some instances while entire paragraphs need to be severed in other instances. As I cannot determine from the records themselves why the information has been severed in this apparently inconsistent manner, I will order the Public Body to review its severing and determine whether it can provide more information to the Applicant without identifying the third parties;
- Page 39 and 47-48 are witness statements; I agree that most of the information withheld under section 17(1) is personal information of third parties, except the times and dates appearing in those pages;
- Pages 53-55 have been withheld in their entirety, while on pages 56-57 the same information has been provided to the Applicant with some information severed under section 17(1). I will order the Public Body to review its severing of these pages to ensure it is withholding only information that could identify a third party individual;
- Page 64 – only the name appearing in the first lines of the first and last paragraphs is information of a third party;
- Page 69 – the date severed under section 17(1) does not appear to identify an individual;
- Page 72 has been withheld in its entirety; however, section 17(1) could apply to only the same information to which it has been applied on page 69;
- Page 73 is an email. Section 17(1) could apply to the second name in the "to" field and the name in the first line of the body of the email, as well as the same information severed in pages 69 and 72;
- Page 74 has been withheld in its entirety; however, section 17(1) could apply only to the name of the third party appearing in the second paragraph of the body of the email. The remaining names in that email are those of public body employees. While the names of public body employees do not all appear in the context of their acting in their professional capacity, the names do appear in a context that results from the employees' positions, and is not *about* them in the sense that section 17(1) may apply;
- Page 75 does not contain personal information of third parties that could be withheld under section 17(1);
- Page 76 is an email that has been withheld in its entirety. The first paragraph in the body of the email and the last two sentences of the second paragraph all constitute information to which section 17(1) may apply; that exception does not apply to the remainder of the information on that page;
- Page 77 has been withheld in its entirety; however only the name of the individual appearing in the last line of the first paragraph in the body of the second email on that page is information to which section 17(1) may apply;
- Page 78 does not contain any information to which section 17(1) may apply;

- Page 79 includes information about an employee of another public body which is not information about him acting in his professional capacity. However, it is information that results from that employee's job, and is not *about* him in the sense that section 17(1) may apply. Only the information in the third-last paragraph on that page, between the words "involving" and "is something" is information to which section 17(1) may apply;
- Page 80 contains the same email as page 74 and only the name of the third party in the second paragraph of the body of the email is information to which section 17(1) may apply.

[para 29] The Public Body located two recorded interviews with witnesses responsive to the Applicant's request. These videos have been withheld in their entirety under section 17(1). I agree that the videos contain personal information of third parties.

[para 30] The Applicant has stated that he is not interested in the names of third parties appearing in the records. I will therefore not consider whether third party names ought to be disclosed to the Applicant, with one exception: the name of the constable identified in the Applicant's access request occurs in the records at issue in both a work and non-work capacity. As the Applicant specifically named the constable in his access request, I presume that he is interested in the constable's personal information, whether it is work-related or not.

[para 31] Additionally, some information of third parties is intertwined with the Applicant's personal information such that I must determine whether providing the Applicant with his own personal information in those cases would be an unreasonable invasion of the third parties' privacy.

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

[para 32] Section 17 states in part:

> *17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.*
>
> *...*
>
> *(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*
>
> *...*
>
> *(b) the personal information is an identifiable part of a law enforcement record, except to the extent that the disclosure is necessary to dispose of the law enforcement matter or to continue an investigation,*
>
> *...*
>
> *(g) the personal information consists of the third party's name when*
>
> *(i) it appears with other personal information about the third party, or*
>
> *(ii) the disclosure of the name itself would reveal personal information about the third party,*

(h) the personal information indicates the third party's racial or ethnic origin or religious or political beliefs or associations.

(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,

…

(c) the personal information is relevant to a fair determination of the applicant's rights,

…

(e) the third party will be exposed unfairly to financial or other harm,

…

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and

(i) the personal information was originally provide by the applicant.

[para 33] Section 17 is a mandatory exception: if the information falls within the scope of the exception, it must be withheld.

[para 34] Under section 17, if a record contains personal information of a third party, section 71(2) states that it is then up to the applicant to prove that the disclosure would not be an unreasonable invasion of a third party's personal privacy.

[para 35] Neither party has argued that section 17(2) or (3) apply to any of the withheld information, and from the face of the records, neither provision appears to apply.

Section 17(4)

[para 36] The Public Body has not made any arguments regarding the factors in section 17(4). Based on my review of the records, sections 17(4)(b), 17(4)(g)(i) and (ii), and 17(4)(h) may be relevant; each of these factors create a presumption that disclosing the information would be an unreasonable invasion of personal privacy.

[para 37] Section 17(4)(b) creates a presumption against disclosure of information contained in an identifiable part of a law enforcement record. Law enforcement is defined in section 1(h) of the Act, to include:

1 In this Act,

…

(h) "law enforcement" means

…

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

[para 38] The records at issue are part of a police file; some records include a header and/or footer that identify the record as belonging in a police file. Section 17(4)(b) applies to all of the personal information in the records that are *identifiable* as being part of a police file.

[para 39] Section 17(4)(g) (third party's name alone or with other information) also applies to all of the described personal information, weighing against disclosure.

[para 40] Section 17(4)(h) weighs against disclosure where the information indicates a third party's racial or ethnic origin. The jurisdiction of the Public Body appears to be in close proximity to the Swan River First Nation reserve. Some third parties are identified as being residents of the reserve; it seems that inferences can be made about the racial or ethnic origin of those third parties. Section 17(4)(h) would therefore weigh against disclosure of such information about those third parties.

Section 17(5)

[para 41] The factors giving rise to a presumption that disclosing the personal information is an unreasonable invasion of personal privacy must be weighed against any factors listed in section 17(5), or other relevant factors, that weigh in favour of disclosure.

[para 42] The Public Body did not provide any arguments regarding the factors in section 17(5).

[para 43] The Applicant's arguments indicate that sections 17(5)(a) and (c) may be relevant considerations. I will also consider whether sections 17(5)(h) and (i) weigh in favour of, or against disclosure.

Section 17(5)(a)

[para 44] In order for the desirability of public scrutiny to be a relevant factor, there must be evidence that the activities of the public body have been called into question, which necessitates the disclosure of personal information in order to subject the activities of the public body to public scrutiny. (See Order 97-002, at para. 94; Order F2004-015, at para. 88; Order F2014-16, at para. 34.)

[para 45] In Order F2014-16, the Director of Adjudication discussed appropriate factors to consider in determining whether public scrutiny is desirable. She said (at paras. 35-36):

> 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 "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 46] In his request for inquiry, the Applicant provided me with detailed background information regarding his relationship with the Public Body and the constable named in his access request. He appears to have had charges laid against him on several occasions and he alleges that in many cases those charges were based on false information from the constable or the Public Body more generally. The Applicant has told me that in many cases he did not receive information that ought to have been disclosed in the criminal proceeding process, and that on at least one occasion this resulted in the charges being stayed by a court.

[para 47] In his request for inquiry, the Applicant asked for "all information that [has] not currently been disclosed for matters that are currently before the court. Minus names and information of other individuals of course." However, in his initial submission to this inquiry, the Applicant clarified that he currently does not have any criminal charges pending against him and the only outstanding matter is an appeal of a recent conviction. He states:

> I was found guilty on three charges out of the initial 10 charges filed against me [on a specified date].
>
> …
>
> The conviction against me resulted in probation and is now set for appeal [on a specified date]. One of the main reasons for appeal is the crown withheld disclosure materials from defense.
>
> I am hoping to use this FOIP release to further prove my innocence and that the police intentionally withheld information that should have been disclosed.

[para 48] The Applicant's allegations are directed primarily toward one employee of the Public Body (the constable named in his access request), and one employee of another public body (a crown prosecutor). It seems that the Applicant's concerns relating to these individuals are being addressed through another avenue (the appeal of his conviction). Further, most of the personal information in the records at issue is about third parties *other than* the constable or crown prosecutor; therefore the disclosure of this personal information appears unrelated to the Applicant's goals (presumably the Applicant would agree, as he specified that he is not seeking information about third parties).

[para 49] For these reasons, I find that section 17(5)(a) does not weigh in favour of disclosing personal information in the records at issue. That said, the Applicant's arguments are relevant to the factor in section 17(5)(c).

Section 17(5)(c)

[para 50] Section 17(5)(c) weighs in favour of disclosing information that is relevant to a fair determination of an applicant's rights.

[para 51] Four criteria must be fulfilled for section 17(5)(c) to apply:

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

[para 52] The Applicant's arguments discussed above are relevant to this factor. The Applicant stated that the conviction he is currently appealing relates to impersonation and breach. I don't know what the Applicant means by "breach", except possibly a breach of conditions imposed by a court. Other charges, including charges of harassment, were not prosecuted. This limits the amount of information in the records that is relevant to the Applicant's arguments, as many of the records do not relate in any way to charges or investigations of impersonation or a breach of conditions.

[para 53] Appealing a criminal conviction is a right contemplated by section 17(5)(c). I must determine whether the personal information of third parties in the records has some bearing on or is significant to the appeal, and whether the information is required to prepare for the appeal.

[para 54] Some information on pages 61-63, 66-67, 83, and 84 appear to relate to a possible breach of a Band Council Resolution. This information appears in witness statements, which have been withheld almost entirely, with some header or similar information (such as dates) being disclosed. Only a small part of the statements relates to a breach of the Resolution. I do not know if this is the "breach" the Applicant refers to in his initial submission, or if breaching a Band Council Resolution could result in a criminal conviction. In any event, nothing in the witness statements would appear to be useful to the Applicant in an appeal of such a conviction, as the information appears to support a finding that the Applicant breached the Resolution. It is possible that the Applicant could use the witness statements if they contain information that contradicts what was provided to the court in the initial proceeding resulting in his conviction, but this is speculation on my part. Without further evidence of the Applicant's appeal, I cannot conclude that the information in the witness statements has any bearing on the Applicant's appeal. Therefore, I find that section 17(5)(c) does not weigh in favour of disclosing that information.

[para 55] Some information on pages 74, 79, and 80 relates to matters that could have resulted in impersonation charges; these pages were all withheld by the Public Body in their entirety. I have found above that most of the information in those pages is not personal information of third parties and cannot be withheld under section 17(1). The only information to which section 17(1) applies does not appear to be information about third parties that could help the Applicant in his appeal (i.e. it does not appear to be relevant to the charges or conviction). Therefore, I find that section 17(5)(c) does not weigh in favour of disclosing that information.

Section 17(5)(h)

[para 56] With respect to unfair damage to reputation, in Order F2010-025 the adjudicator stated:

> Certainly the nature of a record and the circumstances in which it is created are always relevant to this determination; however, a determination must be made, based on evidence, including the evidence of the information in the record itself and evidence regarding the individual's reputation, that disclosure would result in unfair damage to an individual's reputation, prior to finding that section 17(5)(h) applies.

[para 57] Some of the information in the records may paint an unflattering portrait of some third parties in the records but without further information on this point, I cannot conclude that the information would unfairly damage the reputation of the third parties. For instance, some of the information was provided by the individuals themselves. I find that this factor is not relevant with respect to those other individuals.

Section 17(5)(i)

[para 58] This factor weighs in favour of disclosing personal information of third parties where that information was provided by the Applicant. Pages 35-38, 40-43, 50 and 70 consist of letters written by the Applicant and addressed to either the Public Body or the RCMP. Based on my review of the records, I understand that the Public Body and RCMP often work together on investigations as their jurisdictions are in close proximity and investigations appear to often overlap.

[para 59] In my view, the fact that the Applicant provided the information in these records to the Public Body (or RCMP) weighs heavily in favour of disclosure of that personal information.

Weighing factors under section 17

[para 60] I have found that much of the information withheld by the Public Body is not information to which section 17(1) can be applied. Of the information to which this section *can* be applied, some has been provided by the Applicant to this Public Body or the RCMP, and some has not. I will consider those categories separately.

Information provided to the Public Body by the Applicant

[para 61] In my view, the fact that the Applicant provided some of the information in the records at issue to the Public Body or RCMP weighs heavily in favour of disclosure of that personal information. I note that in many cases, the Public Body has disclosed most of the information in the records at issue even where it seems possible that the identity of many of the individuals in the records is discernible by the Applicant from the context of the disclosed information (although the Applicant may not be able to pinpoint which individual is being referred to in every instance of severing).

[para 62] It seems to me that the factors weighing against disclosure are minimized with respect to the information originally provided by the Applicant. For example, the fact that personal information is contained in a law enforcement record may reveal sensitive information about a third party; however, the fact that certain third party names appear in the letters written by the Applicant does not necessarily indicate that those names occur elsewhere in the records (or if they do, where they occur).

[para 63] Further, it seems nonsensical to sever information from emails and other documents provided to the Public Body by the Applicant, when he likely already knows the content and may still have his own copies. Therefore I will order the Public Body to disclose the severed information in the copies of documents provided to the Public Body by the Applicant (pages 35-38, 40-43, 50 and 70 of the records at issue).

Information not provided to the Public Body by the Applicant

[para 64] Of the information to which section 17(1) may apply and that has not been provided to the Public Body or RCMP by the Applicant, one or more factors weigh against the disclosure of that information in each case. I have found that no factors weigh in favour of disclosure. As such, I find that this information must be withheld by the Public Body.

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

[para 65] The Public Body applied section 18(1)(a) in every instance that it applied section 17. Section 18(1)(a) states:

> *18(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to*
>
> *(a) threaten anyone else' safety or mental or physical health*
>
> ...

[para 66] In Order F2013-51, the Director of Adjudication reviewed past orders of this office regarding the application of section 18. She summed up those orders as follows (at paras 20-21):

> These cases establish that section 18 of the FOIP Act applies to harm that would result from disclosure of information in the records at issue, but not to harm that would result from factors unrelated to disclosure of information in the records at issue. Further, a public body applying section 18 of the FOIP Act must provide evidence to support its position that harm may reasonably be expected to result from the disclosure of information (as must a custodian applying section 11(1)(a) of the HIA).
>
> Following the approach adopted by the former Commissioner in Order 96-004, and in subsequent cases considering either section 18 of the FOIP Act or section 11 of the HIA, the onus is on the Public Body to provide evidence regarding a threat or harm to the mental or physical health or safety of individuals, to establish that disclosure of the information and the threat are connected, and to prove that there is a reasonable expectation that the threat or harm will take place if the information is disclosed.

[para 67] I agree with this analysis. In this case, the Public Body did not provide any arguments to support its application of section 18(1)(a). As the Public Body applied this section in every instance it applied section 17, it is possible that the Public Body believes the disclosure of personal information of third parties could reasonably be expected to lead to the harm set out in section 18(1)(a). However, I do not know this to be the case.

[para 68] Further, the Applicant is not seeking personal information of third parties. I have found above that some of the information severed by the Public Body is not information about an identifiable individual (once names and other identifiers are severed) such that section 17 could apply to it. As this information does not appear to identify third parties, its disclosure also could not result in the harm contemplated by section 18(1)(a).

[para 69] Where information of third parties is intertwined with the Applicant's personal information and I found that the Public Body is nevertheless not authorized to withhold the information under section 17 (as discussed above), I also find that section 18 does not apply. This is because it is not apparent from the records that the disclosure of this information would lead to the harm outlined in section 18(1)(a), and the Public Body has not provided any reason to find otherwise.

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

[para 70] The Public Body applied sections 20(1)(a), (f), (k), and (m) to information in the records at issue. These sections state:

> *20(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*
>
> *(a) harm a law enforcement matter,*
>
> *...*
>
> *(f) interfere with or harm an ongoing or unsolved law enforcement investigation, including a police investigation,*
>
> *...*
>
> *(k) facilitate the commission of an unlawful act or hamper the control of crime,*

> ...
>
> *(m) harm the security of any property or system, including a building, a vehicle, a computer system or a communications system*
>
> ...

[para 71] The Public Body did not provide any arguments to support its application of any of the subsections in section 20(1).

Sections 20(1)(a) and (f)

[para 72] Section 20(1)(a) has been interpreted as applying to specific, ongoing matters (Order F2006-012, at para. 25). If this requirement is met, the public body applying the exception must also meet the following "harms" test in order to determine whether there is a reasonable expectation of harm that would result from the disclosure as to the existence of the requested information:

> a. there must be a clear cause and effect relationship between the disclosure and the harm which is alleged;
>
> b. the harm caused by the disclosure must constitute "damage" or "detriment" to the matter and not simply hindrance or minimal interference; and
>
> c. the likelihood of harm must be genuine and conceivable.
> (See Order F2010-017, at para. 69)

[para 73] Similarly, section 20(1)(f) applies to ongoing or unsolved matters. The Public Body applied both sections to a small amount of information on page 1, which is described in the index of records as "list of files used." The list has seven rows (one file per row), with one row withheld. There is no indication from the record that the one withheld file is ongoing. Without evidence from the Public Body that the information related to the withheld file is ongoing, I cannot find that either section 20(1)(a) or (f) applies.

Section 20(1)(k)

[para 74] Section 20(1)(k) was applied to information on page 76. It is not clear from the record itself that disclosure could reasonably be expected to facilitate an unlawful act or hamper the control of crime. As I do not have any evidence to support this conclusion, I cannot find that this exception applies.

Section 20(1)(m)

[para 75] In order for section 20(1)(m) to apply to information, the disclosure of that information must meet the harms test: there must be a clear cause and effect relationship between disclosure of the withheld information and the outcome or harm alleged; the outcome or harm that would be caused by the disclosure must constitute damage or detriment, and not simply hindrance or minimal interference; and the likelihood of the outcome or harm must be genuine and conceivable (Order 96-003 at p. 6 or para. 21).

[para 76] The Public Body's index of records indicates that it applied section 20(1)(m) to numerical information on pages 2-4, and 58-64. Pages 2-4 and 61-64 are described in the Public Body's index of records as a "general report" and paged 58-60 are described as "occurrence summaries." The information severed from these records appears to be a code that identifies who printed the records or from where they were printed (i.e. they appear to identify a person, a workstation or a piece of equipment). This information appears in the footer of some records, and the header of others.

[para 77] The Public Body's index of records indicates that section 20(1)(m) was applied to information on pages 3 and 4; however, the records indicate that this exception was not applied to the code following "printed by" in the footer of those pages (i.e. it appears to have been disclosed to the Applicant). It may be that the codes were disclosed in error (as the Public Body's index indicates that section 20(1)(m) was applied to those pages but the records indicate otherwise). However, I do not know this with any certainty as the Public Body has not provided any arguments to this inquiry. In any event, I do not know why the codes indicating where/by whom/by what equipment the records were printed could result in the harm outlined in section 20(1)(m) if they were disclosed. Therefore, I cannot conclude that section 20(1)(m) applies to that information.

5. Did the Public Body properly apply section 21(1) of the Act (disclosure harmful to intergovernmental relations) to the information in the records?

[para 78] The Public Body applied section 21(1)(b) to information in pages 66-68 and 85-88 of the records. Section 21(1) states:

> *21(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*
>
> *(a) harm relations between the Government of Alberta or its agencies and any of the following or their agencies:*
>
> *(i) the Government of Canada or a province or territory of Canada,*
>
> *(ii) a local government body,*
>
> *(iii) an aboriginal organization that exercises government functions, including*
>
> *(A) the council of a band as defined in the Indian Act (Canada), and*
>
> *(B) an organization established to negotiate or implement, on behalf of aboriginal people, a treaty or land claim agreement with the Government of Canada,*
>
> *(iv) the government of a foreign state, or*
>
> *(v) an international organization of states,*
>
> *or*
>
> *(b) reveal information supplied, explicitly or implicitly, in confidence by a government, local government body or an organization listed in clause (a) or its agencies.*

[para 79] Pages 66-68 are described in the Public Body's index of records as a "general report." The Public Body's name as well as "RCMP-GRC" appears at the top of page 66. Pages

85-88 are described by the Public Body as occurrence summaries. As with the general report, "RCMP-GRC" appears at the top of pages 85, 86 and 87.

[para 80] In the Public Body's letter to the Applicant dated February 19, 2013, the Public Body states that the information withheld under this provision "could reasonably be expected to reveal information supplied by the Royal Canadian Mounted Police (RCMP). Should you require this information please contact the RCMP directly."

[para 81] Other than this letter, I do not have any further evidence from the Public Body regarding the application of this exception. It is not sufficient to state that the provision applies; the Public Body must provide evidence to satisfy me that it does. As the Public Body has refused to provide arguments for this inquiry, I have only the records themselves to make a determination. It is not clear whether the RCMP is the type of body such that section 21(1)(b) can apply, as it may be acting as a provincial police service within the meaning of the *Police Act* (see Order F2009-027, especially paragraphs 33-46). I do not have to decide this question as the records do not indicate that the information was supplied by the RCMP, or that it was supplied in confidence. I therefore do not have sufficient evidence to conclude that the Public Body properly applied section 21(1)(b), even if the RCMP is a body such that this provision could apply.

[para 82] As section 21(1)(b) is the only exception applied by the Public Body to these pages, I will order the Public Body to disclose the pages to the Applicant. However, section 17(1) is a mandatory exception, and must be applied by the Public Body to sever personal information of third parties that would be an unreasonable invasion if disclosed (if any such information appears in the records). The Public Body should consider my decisions regarding its application of section 17 to other records at issue in determining how section 17(1) applies to pages 66-68 and 85-88. For example, pages 85-88 are records of the same type as those comprising pages 58-60 and so it would be reasonable for the Public Body to sever them in a similar manner.

6. Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information in the records?

[para 83] The Public Body applied sections 24(1)(a), (b) and (c) to some information in the records. These sections state:

> *24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*
>
> *(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,*
>
> *(b) consultations or deliberations involving*
>
> *(i) officers or employees of a public body*
>
> *(ii) a member of the Executive Council, or*
>
> *(iii) the staff of a member of the Executive Council,*
>
> *(c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Alberta or a public body, or considerations that relate to those negotiations,*

...

Section 24(1)(a) and (b)

[para 84] In previous orders, the Commissioner has stated that the advice, proposals, recommendations, analyses or policy options under section 24(1)(a) should:

1. be sought or expected, or be part of the responsibility of a person by virtue of that person's position,
2. be directed toward taking an action,
3. be made to someone who can take or implement the action. (See Order 96-006, at p.9)

[para 85] In Order F2013-13, the adjudicator stated that the third arm of the above test should be restated as "created for the benefit of someone who can take or implement the action" (at paragraph 123).

[para 86] In Order F2012-10, the adjudicator clarified the scope of section 24(1)(b):

> A consultation within the terms of section 24(1)(b) takes place when one of the persons enumerated in that provision solicits information of the kind subject to section 24(1)(a) regarding that decision or action. A deliberation for the purposes of section 24(1)(b) takes place when a decision maker (or decision makers) weighs the reasons for or against a particular decision or action. Section 24(1)(b) protects the decision maker's request for advice or views to assist him or her in making the decision, and any information that would otherwise reveal the considerations involved in making the decision. Moreover, like section 24(1)(a), section 24(1)(b) does not apply so as to protect the final decision, but rather, the process by which a decision maker makes a decision.

[para 87] The first step in determining whether section 24(1)(a) and/or (b) were properly applied is to consider whether a record would reveal advice, proposals, recommendations, analyses, or policy options (section 24(1)(a)), or consultations or deliberations between specified individuals (section 24(1)(b)). Neither section 24(1)(a) nor (b) apply to a decision itself (Orders 96-012, at paras. 31 and 37).

[para 88] The Public Body applied section 24(1)(a) and (b) to information on pages 53-56, 61-64, 74, 77, and 79-80; it also applied section 24(1)(a) to information in page 78.

[para 89] Pages 53-56 are comprised of email chains involving Public Body employees and employees of an RCMP detachment. I do not have any information from the Public Body regarding the roles and responsibilities of the various employees involved in the emails.

[para 90] Most of the emails appear to be directions given by a superior regarding how to approach a situation, or informational updates. Such updates or directions do not fall within section 24(1)(a) or (b). Only one email (the second on page 53 and the first on page 55; these are the same email copied twice) is of the type that could be a consultation. However, I do not know whether the author was asked for his or her advice as part of the decision-making process. In other words, partly because the email chains are between employees of different public bodies, I

do not know if the email appearing on pages 53 and 55 was part of a deliberation or consultation process; the author may not have played a part in the decision-making process at all. Because the remaining emails in the chain do not indicate or reveal a decision-making process (including deliberations, consultations or advice) it does not appear that the one email copied on pages 53 and 55 meets the test for section 24(1)(a) or (b).

[para 91] The records do not indicate what information on pages 61-63 were severed under section 24(1)(a) or (b); the only notations on those pages are the application of sections 17, 18 and 20. Only part of page 64 includes a reference to section 24(1). As pages 61-64 are the pages of a general report (i.e. they comprise one record), I presume the Public Body has intended to apply section 24(1)(a) and (b) to part of that report, specifically the small section on page 64. That portion of page 64 consists of an email relaying information obtained from an employee of another public body; it is not information to which either section 24(1)(a) or (b) apply as there is no advice, deliberation etc. The Public Body has also applied section 27 to that information, which I will consider further in this order.

[para 92] The remaining pages to which sections 24(1)(a) and/or (b) have been applied are pages 74 and 77-80, all of which consist of emails. These emails appear to be among several Public Body employees as well as RCMP members (the Public Body has not told me about the roles of the various names appearing in the records so I can only make assumptions based on the context of the records).

[para 93] The email on pages 74 relays a conversation a Public Body employee had with a crown prosecutor. The purpose of the email appears to be passing along information; there is no indication that advice is being or has been sought or that the email related to consultations or deliberations. Therefore, section 24(1) does not apply. This email also appears on page 80.

[para 94] Page 77 is comprised of two emails. The first email appears to be a direction from one Public Body employee to another. The second email on that page is from an RCMP member to Public Body employees and seems to be merely relaying information. It also contains a request for future consultation but does not include details of what is to be discussed (only the topic). Page 78 is also an email containing direction to Public Body employees. In none of these cases does the information fit within section 24(1).

[para 95] Page 79 is also an email in which an RCMP member is informing the Public Body about an investigation it is conducting. Nothing in the language of the email suggests that the RCMP member is asking for or providing advice (section 24(1)(a), nor is there an indication of a consultation or deliberation requiring advice (section 24(1)(b)).

[para 96] Some of the information in the above-described records is information to which section 20(1) (harm to law enforcement) might have applied. However, except for discrete items of information withheld under sections 20(1)(k) and (m) (discussed above), the Public Body has not applied the discretionary exceptions in section 20(1).

Section 24(1)(c)

[para 97] The Public Body applied section 24(1)(c) to information in pages 74, and 76-80. For information to fall under section 24(1)(c), it must reveal positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the government or a public body, or considerations that relate to those negotiations. The intent of section 24(1)(c) is similar to 24(1)(a) and (b), in that it is to protect information generated during the decision-making process, but not to protect the decision itself (Order 96-012 at para. 37; Order F2005-030 at paras. 71 and 72).

[para 98] The information in these pages consists of discussions regarding the progress of an investigation, including discussions between the Public Body and other bodies. However, the fact that the Public Body had discussions with other bodies does not necessarily mean that those discussions were undertaken in the course of contractual or other negotiations. Nothing in the records indicates that there were contractual or other negotiations; therefore, I cannot find that this exception applies.

Conclusions regarding section 24(1)

[para 99] I do not have sufficient evidence to uphold the Public Body's application of sections 24(1)(a), (b) or (c) in any instance in which they were applied. In some cases, the Public Body has applied other exceptions to the same information withheld under section 24(1). However, for the reasons given in this order, I find that only section 17(1) applies to some information withheld by the Public Body. Therefore, I will order the Public Body to disclose information withheld under section 24(1), subject to my findings regarding section 17.

7. Did the Public Body properly apply section 27(1) of the Act (privileged information) to the information in the records?

[para 100] The Public Body applied section 27(1)(a) to information on pages 53-54, 72-74, 76, 77, and 79-80.

[para 101] The Public Body's index and the records themselves indicate only that the Public Body applied section 27(1) to information in pages 53-54, without indicating a subsection. In the Public Body's letter to the Applicant in which it responded to his access request (letter dated February 19, 2013), the Public Body stated that it applied section 27(1) "as this information is subject to legal privilege." Given this, and the fact that the Public Body applied only section 27(1)(a) to information in other records and did not apply sections 27(1)(b) or (c) to information in any other records, I will assume that the Public Body intended to apply section 27(1)(a) to the information in pages 53-54.

[para 102] This provision states the following:

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

[para 103] It is not clear which privilege the Public Body is claiming regarding the information in the records at issue. Solicitor-client privilege and litigation privilege are the only privileges that may be supported based on the records themselves; therefore I will consider whether either apply to the information severed under section 27(1)(a).

Solicitor-client privilege

[para 104] The test to establish whether communications are subject to solicitor-client privilege is set out by the Supreme Court of Canada in *Canada v. Solosky* [1980] 1 S.C.R. 821. The Court said:

> … privilege can only be claimed document by document, with each document being required to meet the criteria for the privilege--(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties.

The requirements of this privilege are met if information is a communication between a solicitor and a client, which was made for the purpose of seeking or giving of legal advice and intended to be kept confidential by the parties.

[para 105] As stated in Order F2009-018 (at paragraph 41):

> Legal advice means a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications (Order 96-017 at para. 23; Order F2007-013 at para. 73). The test for legal advice is satisfied where the person seeking advice has a reasonable concern that a particular decision or course of action may have legal implications, and turns to his or her legal advisor to determine what those legal implications might be; legal advice may be about what action to take in one's dealings with someone who is or may in future be on the other side of a legal dispute (Order F2004-003 at para. 30).

[para 106] Pages 53-54 consist of a chain of emails that appears to be among Public Body employees and one or more members of the RCMP (based on the names contained in the records). There is no indication that any of the email authors is a lawyer, nor is there any indication that the authors are discussing advice obtained from a lawyer. In other words, there is no indication from the records themselves how the information in these pages could be protected by solicitor-client privilege.

[para 107] Pages 72-4, 76-77 and 79-80 also consist of a chain of emails that appears to be among Public Body employees and one or more members of the RCMP (based on the names contained in the records). Several of these pages contain references to statements made by a crown prosecutor about what he may do in a given circumstance, as well as questions posed by the crown prosecutor to the Public Body or RCMP employees.

[para 108] In Orders 96-020 and 99-013, former Commissioner Clark said that solicitor-client privilege applies to information in written communications between officials or employees of a

public body in which the officials or employees quote or discuss the legal advice given by the public body's solicitor.

[para 109] In this case, it is not clear that there is a solicitor-client relationship between the Public Body and the crown prosecutor such that any communications could be withheld under that privilege.

[para 110] In *R. v. Campbell*, [1999] 1 SCR 565 (*Campbell*), the Supreme Court of Canada found that communications between a Crown prosecutor and a member of the RCMP could be subject to solicitor-client privilege in certain circumstances. In finding that solicitor-client privilege applied to communications between an RCMP member and a Crown prosecutor, the Court said:

> The solicitor-client privilege is based on the functional needs of the administration of justice. The legal system, complicated as it is, calls for professional expertise. Access to justice is compromised where legal advice is unavailable. It is of great importance, therefore, that the RCMP be able to obtain professional legal advice in connection with criminal investigations without the chilling effect of potential disclosure of their confidences in subsequent proceedings.

[para 111] In Order MO-1663-F, an adjudicator with the Office of the Ontario Information and Privacy Commissioner rejected the argument that *Campbell* stands for the proposition that a Crown prosecutors' office acts as "in-house counsel" for municipal police services. She said:

> The Court [in *Campbell*] found that the consultation by an officer of the Royal Canadian Mounted Police (the RCMP) with a Department of Justice lawyer over the legality of a proposed "reverse sting" operation by the RCMP fell squarely within the functional definition. The Court emphasized that it is not everything done by a government (or other) lawyer that attracts solicitor-client privilege, providing some examples of different responsibilities that may be undertaken by government lawyers in the course of their work. The Court stated that
>
> > [w]hether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered.
>
> *R. v. Campbell* has been applied in orders of this office, such as in PO-1779, PO-1931 and MO-1241. In each of these orders, a solicitor-client privilege was found on the basis that the police (a municipal police service or the Ontario Provincial Police) sought legal advice from Crown counsel. All communications within the framework of this relationship were found to qualify for solicitor-client privilege under either section 12 of the Act, or section 19 of the provincial Act. In addition, in Order PO-1779, in relation to the OPP, Assistant Commissioner Tom Mitchinson analysed the relationship between the OPP and the Crown as follows:
>
> > However, there is one further aspect to consider before concluding that solicitor-client communications privilege is established. In Order P-613, section 19 was not applied on the basis that there is no solicitor-client relationship between Crown counsel and the OPP. However, in my view, this interpretation is no longer supportable as a result of the recent Supreme Court of Canada decision in *R. v. Campbell*, [1999] 1 S.C.R. 565. In that case, the Court concluded that a solicitor-client relationship did exist between counsel with the federal Department of Justice and the R.C.M.P. The decision sees the R.C.M.P. as a "client department" of the Department of

> Justice and, therefore, it is difficult to see how the same conclusion could not apply vis à vis the Ministry of the Attorney General and the OPP. In my view, a solicitor-client relationship exists between the OPP and Crown counsel.
>
> This analysis has been followed in subsequent orders applying the solicitor client privilege under the provincial Act to communications between the OPP and Crown counsel.
>
> The circumstances described in Order PO-1779 do not apply to the relationship between a municipal police force and Crown counsel. Even the Police in this case do not assert that they can be viewed as a "client department" of Crown counsel. Therefore, whether a solicitor-client relationship can be established in a particular instance depends on the application of the functional definition set out in *Descôteaux v. Mierzwinski* and approved in *R. v. Campbell*, above. In MO-1241, former Adjudicator Holly Big Canoe specifically found that the Police sought legal advice from the assistant crown attorney. Other than MO-1241, I am not aware of any orders of this office which have applied *R. v. Campbell* to communications between a municipal police force and Crown counsel.
>
> In the appeal before me, I find there is an insufficient basis to conclude that the communications on pages 122 and 123 were in relation to the seeking or giving of legal advice. It would not be surprising for the Police and the Crown to be in communication during any given prosecution, as they were here. However, there is nothing in the specific communications at issue, in the surrounding circumstances, or in the submissions before me, to establish that these communications occurred as part of the seeking of legal advice by the Police from the Crown. I find, accordingly, that the Police have not established that these communications occurred within the framework of a solicitor-client relationship.

[para 112] This analysis was also followed in Ontario Order PO-3372. I agree with the Adjudicator's reasoning in this order. Based on the records alone, I do not see any evidence of a functional need for the crown prosecutor and Public Body employees to enter a solicitor-client relationship.

[para 113] Even if I could find that a solicitor-client relationship existed, there is no indication from the records themselves as to what legal advice was sought or given or how the communications relate to legal advice. The emails do not appear to reveal advice sought or given, or even that advice was sought or given. Discussing details of a police investigation is not the same as giving or obtaining advice, even if one of the persons involved in the discussion is a lawyer.

[para 114] Further, I do not know that the communications were meant to be kept confidential. The communications involved employees not only of the Public Body but also another body (the RCMP). If I had found that the communications otherwise met the test for solicitor-client privilege, this "sharing" of the communications may not have necessarily persuaded me that the communications were not intended to be kept confidential (for example, if both the Public Body an RCMP were involved in the investigation leading to a proceeding). However, without further evidence supporting confidentiality, I cannot conclude that the communications were intended to be kept confidential.

Litigation privilege

[para 115] The extent of litigation privilege was considered by the Supreme Court of Canada in *Blank v. (Minister of Justice)*, 2006 SCC 39 (CanLII), [2006] 2 S.C.R. 319. Litigation privilege applies to communications between a lawyer and third parties, or a litigant and third parties, when the communications are made for the dominant purpose of preparing for litigation. It also applies to records created or gathered for the dominant purpose of conducting litigation, or assisting in that purpose. Litigation privilege ends when the litigation (or related litigation) for which communications were prepared or compiled has ended. In *Blank*, the Court said:

> The purpose of the litigation privilege, I repeat, is to create a "zone of privacy" in relation to pending or apprehended litigation. Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose — and therefore its justification. But to borrow a phrase, the litigation is not over until it is over: It cannot be said to have "terminated", in any meaningful sense of that term, where litigants or related parties remain locked in what is essentially the same legal combat.
>
> Except where such related litigation persists, there is no need and no reason to protect from discovery anything that would have been subject to compellable disclosure but for the pending or apprehended proceedings which provided its shield. Where the litigation has indeed ended, there is little room for concern lest opposing counsel or their clients argue their case "on wits borrowed from the adversary", to use the language of the U.S. Supreme Court in *Hickman*, at p. 516.

[para 116] As the conversations between the crown prosecutor and Public Body or RCMP employees occurred in the context of a police investigation, it seems at least possible that the communications occurred for the primary purpose of preparing for a criminal proceeding. The Applicant's submissions indicate that many proceedings involving him have ended, but that he is currently appealing a conviction. However, I do not know specifically which proceedings have ended and which are ongoing, or which proceeding (if any) each record pertains to. The records are from several years ago, and offer no hints regarding whether any relevant proceedings are ongoing. Further, I have no evidence that the dominant purpose of any of the records were to prepare for litigation. Absent further evidence, I cannot conclude that the information in these records is protected by litigation privilege.

Conclusion regarding section 27(1)(a)

[para 117] In conclusion, the Public Body did not provide me with sufficient evidence to find that the information in the records at issue is protected by legal privilege.

[para 118] It is possible that some of the information reveals the exercise of prosecutorial discretion but the Public Body did not make that argument, nor did it apply the relevant exception to access (section 20(1)(g)).

[para 119] To say that protecting solicitor-client privilege is important is an understatement. The Supreme Court of Canada recently stated in *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7 (discussing its prior decision in *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61 (CanLII), [2002] 3 S.C.R. 209):

> The core principle of the decision is that solicitor-client privilege "must remain as close to absolute as possible if it is to retain relevance": *Lavallee*, at para. 36. This means that there must be a "stringent" norm to ensure its protection, such that any legislative provisions that interfere with the privilege more than "absolutely necessary" will be found to be unreasonable: para. 36.

[para 120] Because of this, before ordering a public body to disclose information over which it has claimed solicitor-client privilege, I would usually ask further questions of the public body. However, the Public Body in this case has made it clear that it will not participate further in this inquiry. In my letter dated March 24, 2015 (excerpted above), I informed the Public Body of the possible consequence of not participating in the inquiry. I said:

> If I cannot determine from the records whether the cited exceptions apply to the withheld information, I cannot uphold the Public Body's decisions to apply those exceptions. As a result, I would have to order the Public Body to disclose the information to the Applicant. This seems to be a non-trivial consequence, especially given the significance of some of the exceptions applied by the Public Body (for example, sections 18(1)(a) and 27(1)(a)).

[para 121] As a result of my findings regarding the application of section 27(1)(a), I cannot do other than to order the Public Body to disclose the relevant records to the Applicant, subject to the application of section 17(1), discussed previously in this Order.

8. Did the Public Body properly withhold information as non-responsive to the Applicant's request?

[para 122] The Public Body withheld information on pages 5-32, 39, 47-49, and 65 as non-responsive to the Applicant's request. The Public Body has not explained why it considered some of the information in the records to not be responsive to the Applicant's request.

[para 123] Pages 6 and 22 are blank forms for a statement or transcript certification. They do not appear to relate specifically to the records requested from the Applicant; as such I agree that they are not responsive to his request.

[para 124] Pages 5, 7-21 and 23-32 are transcripts of witness statements. Various portions have been withheld as non-responsive. It is not clear to me why the Public Body has decided that only portions of the statements are not responsive, when the statements appear to relate to one topic. Without explanation from the Public Body to support this severing, I find that the Public Body cannot withhold this information as non-responsive.

[para 125] Pages 39 and 49 are handwritten witness statements, with portions severed as non-responsive. Pages 47-48 consist of witness statement forms, with portions severed as non-responsive. Page 65 is an email with part of a sentence severed as non-responsive. For the reasons stated above, I do not uphold the Public Body's decision to withhold any of this information as non-responsive. Therefore, with the exception of pages 6 and 22, I will order the Public Body to disclose information withheld as non-responsive, subject to my findings regarding section 17.

V. ORDER

[para 126] I make this Order under section 72 of the Act.

[para 127] I cannot make a determination regarding the Public Body's application of section 4(1)(a) to page 82 of the records. As this is a determination regarding my jurisdiction over this page, I order the Public Body to make the determination set out at paragraph 21. If page 82 consists of information copied from a court file I do not have jurisdiction under the FOIP Act to order the Public Body to either disclose or withhold that information. If it does not, I order the Public Body is to disclose the record to the Applicant.

[para 128] I find that much of the information withheld by the Public Body under section 17(1) is not personal information to which that section may be applied. I order the Public Body to disclose information per the instructions set out at paragraph 28.

[para 129] I find that the Public Body did not properly apply section 17(1) to the information on pages 35-38, 40-43, 50 and 70 of the records. I order the Public Body to disclose these pages to the Applicant, in their entirety.

[para 130] I find that the Public Body properly applied section 17(1) to the personal information *not* described in paragraphs 128 and 129, and uphold the Public Body's application of that section to that information.

[para 131] I find that section 18(1) does not apply to the information in the records at issue.

[para 132] I find that section 20(1) does not apply to the information in the records at issue.

[para 133] I find that section 21(1)(b) does not apply to pages 66-68 and 85-88 of the records at issue. I order the Public Body to disclose the information withheld under that section, subject to the application of section 17(1), as discussed at paragraph 82.

[para 134] I find that section 24(1) does not apply to the information in the records at issue.

[para 135] I find that section 27(1) does not apply to the information in the records at issue.

[para 136] Of the information withheld by the Public Body as non-responsive, I uphold only the withholding of pages 6 and 22.

[para 137] In each case in which I found the Public Body did not properly apply an exception to access, or did not properly withhold information as non-responsive, I order the Public Body to disclose the information withheld under that section. However, the Public Body must sever personal information of third parties that would be an unreasonable invasion of their privacy if disclosed (if any such information appears in the records), as required by section 17(1). The Public Body should consider my decisions regarding its application of section 17 to other records at issue in determining how section 17(1) applies.

[para 138] I further order the Public Body to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

_____
Amanda Swanek
Adjudicator