ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2016-18

May 20, 2016

ALBERTA HUMAN SERVICES

Case File Number F8091

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Summary: An individual made an access request to Alberta Human Services (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for records relating to an investigation conducted by the Joint Investigation Child Abuse Team in Calgary. She requested her personal information as well as that of her two children. The Public Body responded, providing the Applicant with responsive records containing her personal information and that of her children while they were in her care. The Public Body severed some information pursuant to sections 4, 17, 21, 24, and 27 of the Act.

The Applicant requested an inquiry into the Public Body's response.

The Adjudicator determined that the information withheld under section 4 is information from a court file and as such, she does not have jurisdiction to review the Public Body's response with respect to that information.

The Adjudicator found that the Public Body properly applied section 17(1) in most cases, but ordered the Public Body to disclose information withheld in copies of correspondence that had already been sent between the Public Body and the Applicant.

The Adjudicator found that the Public Body properly applied section 21(1)(b) to information provided to the Public Body in confidence by a police service.

The Adjudicator determined that the Public Body did not properly apply section 24(1)(b) to a record, and ordered the Public Body to disclose that record to the Applicant, after determining whether severing is required under section 17(1).

The Adjudicator upheld the Public Body's application of section 27 in conjunction with the *Child, Youth and Family Enhancement Act*, which creates a statutory privilege protecting persons who make a report under that Act.

Statutes Cited: AB: *Child, Youth and Family Enhancement Act*, R.S.A 2000, c. C-12, ss. 4, 126.1, *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 4, 17, 21, 24, 27, 71, 72.

Authorities Cited: AB: 96-003, 96-012, 97-017, 97-019, F2004-016, F2004-018, F2004-026, F2004-030, F2005-009, F2006-006, F2007-007, F2008-012, F2008-027, F2008-031, F2009-033, F2010-025, F2010-031, F2011-009, F2012-06, F2012-10, F2012-12, F2014-02.

Cases Cited: *Alberta (Attorney General) v. Krushell*, 2003 ABQB 252 (CanLII), 2003 ABQB 252, *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (CanLII), [2012] 1 S.C.R. 23 , *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)***,** 2014 SCC 31 (CanLII).

I. BACKGROUND

[para 1] On January 22, 2014, an individual made a request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) to Alberta Human Services (the Public Body) for records relating to an investigation conducted by the Joint Investigation Child Abuse Team in Calgary. She requested her personal information as well as that of her two children.

[para 2] On March 19, 2014, the Public Body responded, providing the Applicant with responsive records containing her personal information and that of her children while they were in her care. The Public Body severed some information pursuant to sections 4, 17, 21, 24, and 27 of the Act.

[para 3] The Applicant requested a review of the response from the Public Body. The Commissioner authorized an investigation; this was not successful and the matter was set down for inquiry.

II. RECORDS AT ISSUE

[para 4] The records at issue consist of the withheld portions of the 403 pages of responsive records located by the Public Body.

III. ISSUES

[para 5] The issues as set out in the Notice of Inquiry dated October 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 21(1) of the Act (disclosure harmful to intergovernmental relations) to the information in the records?

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

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

IV. DISCUSSION OF ISSUES

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

[para 6] The Public Body withheld 4 pages of records in their entirety under section 4(1)(a) of the Act. 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 7] 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 8] This provision applies to information taken or copied from a court file (Orders 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 9] The Public Body states only that pages 113, 114, 234 and 235 consist of information contained in a court file. Having reviewed the records, I note that these pages have been stamped as having been filed with the court; I agree that these pages consist of information from a court file. Therefore, I do not have jurisdiction to review the Public Body's decision to withhold these records.

[para 10] However, I note that the Public Body's response to the Applicant, dated March 19, 2014, states:

> Severing was necessary because **section 4(1)(a) states that the head of a public body must refuse to disclose information** in a court file, a records 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 of a record relating to support services provided to the judges of any of the courts referred to in this clause. (Emphasis mine)

[para 11] This is not quite correct. A record that falls within the scope of section 4(1)(a) is excluded from the scope of the FOIP Act. A public body may therefore decide whether or not to disclose that information *outside the FOIP Act*. The FOIP Act does not (and cannot) prohibit the disclosure of information that falls outside the scope of the Act.

[para 12] This has been explained in many past orders of this Office (see Orders 97-017, 97-019, F2011-009). In Order F2012-12, I said that even if responsive records fall within the scope of an exclusion in section 4(1), "[t]he Public Body may still choose to disclose the record at its discretion, but this would not be a disclosure under Part 1 of the Act (see Order 97-017, at para. 10)."

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

[para 13] The Public Body withheld information in many of the responsive records under section 17(1).

[para 14] Section 17 states in part:

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

> *(ii) the disclosure of the name itself would reveal personal information about the third party,*
>
> …
>
> *(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether*
>
> …
>
> *(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,*
>
> *(f) the personal information has been supplied in confidence,*
>
> …
>
> *(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 15] Section 17 is a mandatory exception: if the information falls within the scope of the exception, it must be withheld.

[para 16] 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. Names and other information about third parties appear throughout the records at issue, including the information about the Applicant's children. However, the Applicant has the authority to request the personal information of her children, so that information has been disclosed to her. I also note that the Public Body did not apply section 17(1) to information about any public body employee acting as such. The Public Body has applied section 17(1) only to the names and other information about third parties other than the Applicant or her children.

[para 17] Neither party has argued that sections 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 18] The Public Body argues that sections 17(4)(g)(i) and (ii) apply to the personal information, creating a presumption that disclosing the information would be an unreasonable invasion of personal privacy. I will consider these factors, as well as the factor set out in section 17(4)(b).

[para 19] 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 20] The Applicant's access request was for records relating to an investigation conducted by the Public Body. The Public Body conducts investigations under the *Child, Youth and Family Enhancement Act* (*CYFEA*); that Act provide for penalties (such as the removal of a child) as a result of investigations by the director. Therefore, information in records created during (or as a result of) a *CYFEA* investigation is information contained in a law enforcement record. Section 17(4)(b) has an additional requirement, that the relevant record must be *identifiable* as a law enforcement record. In this case, most of the records at issue are identifiable as a law enforcement record, since there are headers, footers, letterhead, and forms that identify the type of records they are. In some cases, it is the involvement of certain Public Body employees that would identify the record as a law enforcement record (for example, emails from a Public Body employee tasked with carrying out the investigation).

[para 21] Section 17(4)(g)(i) weighs against disclosure of a third party's name when it appears with other personal information about the third party; section 17(4)(g)(ii) weighs against disclosure when the disclosure of the third party's alone would reveal personal information about that third party. I agree with the Public Body that both factors apply. In most cases, the names of third parties appear with other information about them. In any instance in which a name appears alone, the context of the record also reveals information about that individual.

Section 17(5)

[para 22] The Public Body argues that sections 17(5)(c), (e), (f) and (h) apply to the third party personal information in the records at issue. For the reasons that follow, I find that section 17(5)(i) is also relevant.

[para 23] Section 17(5)(c) weighs in favour of disclosure where the personal information is relevant to a fair determination of the Applicant's rights. Four criteria must be fulfilled for this section 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 24] The Applicant states that one named individual "waived any entitlement to privacy or privilege by deciding to publicly disclose his identity as the source of the multiple false complaints lodged against me with [the Public Body] by attaching his correspondence with [a Public Body employee], the [Public Body] investigator, to his affidavit filed in the Court of Queen's Bench of Alberta in his attempt to use these deviously lodged false complaints to gain leverage in ongoing custody proceedings over our son." (Request for Review form dated April 3, 2014). The Applicant provided me with a partial copy of an affidavit sworn by the named individual, which included as an attachment an email between a Public Body investigator and the named individual, concerning an investigation about the Applicant.

[para 25] The Applicant's argument indicates that the records at issue (or some information therein) may be relevant to a custody dispute; however, she does not provide further explanation. She indicates that the documents she provided with her Request for Review are evidence that the named individual lied in a sworn affidavit and made false allegations about her to the Public Body. Presumably, the Applicant believes there is information in the records at issue about the named individual; however, she has not told me how she expects to be able to use that information. It seems reasonably likely that the Applicant seeks to show that the named individual was the individual (or one individual) who reported her to the Public Body. However, even if the named individual did report the Applicant to the Public Body, the Public Body is prohibited from disclosing the identity of a reporter under the *CYFEA* (I will discuss this prohibition further, when discussing the application of section 27(1)(a). Pursuant to this prohibition, the Public Body has also withheld from me any information in the records that would identify who reported the Applicant to the Public Body). Further, I do not know if the Applicant's custody dispute remains ongoing, or how the personal information of the named individual (or other third parties) in the records would be relevant to a fair determination of her rights. The Applicant has not provided sufficient information for me to find that section 17(5)(c) applies in this case.

[para 26] Section 17(5)(e) weighs against disclosure of third party personal information if the disclosure would unfairly expose the third party to financial or other harm, and section 17(5)(h) weighs against disclosure that may unfairly damage the reputation of a third party. The Public Body states that it "is not in a position where it can assume that no harm would ensue. Harm could include damage to the reputation, emotional and psychological wellbeing of the individual to whom it pertains" (Initial submission, page 6). The Public Body's arguments are somewhat speculative on these points.

[para 27] With respect to section 17(5)(h), 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. (At para. 54)

[para 28] I agree with this analysis. It is not sufficient to say that the possibility of harm cannot be ruled out; there must be some reasonable expectation that harm could result from disclosure. With respect to both section 17(5)(e) and (h), the harm must be unfair. It seems possible that disclosing the fact that a third party was in any way involved in an investigation under the *CYFEA* could cause harm to that third party's reputation, given the stigma that could be attached to such an investigation. However, it is not clear what kind of financial or similar harm could result. Therefore I find section 17(5)(h) weighs against disclosure, and that section 17(5)(e) is not relevant.

[para 29] Section 17(5)(f) weighs against disclosure of information that has been supplied in confidence. Information that identifies a reporter must be held in confidence pursuant to the *CYFEA*. Given the sensitivity of the nature of investigations conducted under the *CYFEA*, it is reasonable to assume that third parties providing information to the Public Body for such an investigation have some expectation of confidentiality. This is the argument put forward by the Public Body and I agree that this factor is a relevant consideration.

[para 30] Lastly, section 17(5)(i) weighs in favour of disclosing personal information that was originally provided by the Applicant. There are several instances in which the Public Body has severed third party personal information from copies of correspondence that had been sent between the Public Body and the Applicant.

[para 31] The fact that the Applicant provided some of the information in the records at issue to the Public Body, or received the records from the Public Body in the past, weighs heavily in favour of disclosure of that personal information. It seems nonsensical to sever information from emails and other documents provided to the Public Body by the Applicant or provided by the Public Body to the Applicant, when she likely already knows the content and may still have her own copies.

[para 32] Order F2014-02 addressed a similar situation, in which information originally provided to a public body by the applicant had become part of an investigation file. The public body in that case argued that disclosing the third party personal information originally provided by the applicant would make redactions in *other* records from that police file pointless. I said "[t]he fact that the Applicant talked about certain individuals in correspondence with the Public Body does not necessarily indicate that those names occur elsewhere in the records (or if they do, where they occur)." (At para. 60)

[para 33] This reasoning also applies here; the fact that correspondence between the Public Body and the Applicant is now in that investigation file does not indicate that names or other information of third parties cited by the Applicant in the correspondence occur elsewhere in the file.

[para 34] To be clear, this factor weighs in favour of disclosing information in copies of correspondence that was sent between the Applicant and Public Body. As I said in Order F2014-02, "where the Public Body has taken information supplied by the Applicant and discussed it, investigated it, provided an analysis of it etc., it is no longer merely information provided by the Applicant, and in my view, section 17(5)(i) no longer weighs in favour of disclosure." (At para. 70)

Weighing factors under section 17

[para 35] With the exception of information in correspondence between the Public Body and Applicant, there are several factors that weigh against disclosing third party personal information, and no factors weighing in favour. Therefore, I agree with the Public Body's application of section 17(1) in those cases. However, I will order the Public Body to disclose the severed information in the copies of correspondence between the Applicant and Public Body.

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

[para 36] 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 37] Section 21(1) addresses intergovernmental relations, or exchanges of information *between* the Government of Alberta and a government listed in section 21(1)(a), as discussed in Order F2008-027. For section 21(1)(a) to apply, there must be an entity listed in section 21(1)(a) with which its relations will be harmed. Section 21(1)(b) applies to information that was supplied to a public body by a government, local government body, or organization listed in section 21(1)(a), or one of its agencies. The Public Body may withhold information if either sections 21(1)(a) or (b) apply to that information.

[para 38] The Public Body states the information withheld under section 21(1)(a) was provided by a police service, which is included in the definition of "local government body" in section 1(i)(x)(B) of the Act. I agree that this is the type of information to which section 21(1)(a) may apply.

[para 39] In order to apply section 21(1)(a), the Public Body must satisfy the "harm test" articulated in previous Orders of this Office:

- there must be a clear cause and effect relationship between the disclosure and harm alleged;
- the harm that would be caused by the disclosure must constitute damage or detriment and not simply hindrance or minimal interference; and
- the likelihood of harm must be genuine and conceivable (Order 96-003 at para. 21; Order F2005-009 at para. 32).

[para 40] In *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner), 2014 SCC 31 (CanLII),* the Supreme Court of Canada stated that the harm test set out in *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3 (CanLII), [2012] 1 S.C.R. 23 is to be used where an access-to-information provision permits the withholding of information where disclosure could reasonably be expected to cause the identified harm. It said at paragraph 54:

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences": *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41, at para. 40.

[para 41] The Public Body states that the disclosure of the information provided by the police service would risk compromising the relationship between the Public Body and the police service. It states:

> …the relationship between the Children and Family Services Division and the various police services is critical as there are a number of investigations and enforcement activities that require collaboration if not collateral processes. The information that may be in the custody of the police service is vital to establishing the grounds for any protection issues when the Public Body is investigating child protection reports (initial submission, at page 6).

[para 42] The harm alleged by the Public Body is harm to the relationship between it and the police services that provide it with information. However, the Public Body did not explain why disclosing the information could harm that relationship. As stated in Order F2006-006, "[t]he fact that the Public Body's relationship with the local government body is critical, and that the

latter provides vital information, may establish the importance of the intergovernmental relationship, but it does not establish a reasonable expectation of harm to that relationship if information were disclosed" (at para. 124).

[para 43] The Public Body has also applied section 21(1)(b), stating that the information was supplied by the police service implicitly in confidence. In Order F2004-018, the Commissioner stated that four criteria must be met before section 21(1)(b) applies:

> There are four criteria under section 21(1)(b) (see Order 2001-037):
>
> a) the information must be supplied by a government, local government body or an organization listed in clause (a) or its agencies;
>
> b) the information must be supplied explicitly or implicitly in confidence;
>
> c) the disclosure of the information must reasonably be expected to reveal the information; and
>
> d) the information must have been in existence in a record for less than 15 years.

[para 44] The Public Body states:

> …the police service has an implicit expectation that the information will be held in confidence and not be disclosed. The Public Body has had past consultation with the police service in 2003 regarding the disclosure of information in the custody of the Public Body that has been provided by the police service. The police service advised that they would prefer to either be consulted if we intend on disclosing the records, or, to not disclose them if we have not consulted. The Public Body made the decision to withhold the information under section 21 and therefore did not consult with the police service. (At page 7)

[para 45] The test set out in Order F2004-018 has been met in this case. As discussed, the police service that supplied the information is a local government body; further, the disclosure of the records withheld under section 21(1)(b) would reveal the information that was supplied by the police service, and that information has been in existence in a record for fewer than 15 years. Lastly, the information withheld under section 21(1) is such as would reasonably be provided with an expectation that it is provided in confidence.

[para 46] The Public Body also stated:

> [T]he Public Body reconsidered its decision and disclosed some additional information to the Applicant. The additional information identifies to the Applicant that the information withheld is information from the police service and provides the police service file number the Public Body considers the information to be in the control of the police service and the Applicant can make an access request directly to the police service. (Initial submission, at page 8)

[para 47] Although the Public Body's conversation with the police service took place over a decade ago, it is reasonable to expect that the police service's position would remain the same. It is reasonable to expect that the police service would want to be consulted on any disclosure to ensure that information would not be disclosed that the police service would withhold. Rather than undertaking such a consultation, the Public Body provided the Applicant with enough

information to enable her to make another access request to the police service for that information.

[para 48] In this case the police service is a public body under the FOIP Act. Due to the nature of the records, it is very likely that the police service has them and that the Applicant can therefore request access to them. The police service is also in a better position than the Public Body to know what information can be disclosed to the Applicant. For these reasons, I find that section 21(1)(b) applies to the information withheld under that provision, and that the Public Body properly exercised its discretion to withhold it.

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

[para 49] The Public Body applied section 24(1)(b) to information on page 393 of the records. This section states:

> *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*
>
> …
>
> *(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.*

[para 50] In Order F2012-06, the adjudicator stated, citing former Commissioner Clark's interpretation of "consultations and deliberations", that

> It is not enough that records record discussions or communications between employees of a public body; rather, a consultation takes place only when the individuals listed in section 24(1)(b) are asked for their views regarding a potential course of action, and a deliberation occurs when those individuals discuss a decision that they are responsible for, and are in the process of, making. (At para. 115)

[para 51] 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. (At para. 37)

[para 52] Further, sections 24(1)(a) and (b) apply only to the records (or parts thereof) that reveal substantive information about which advice was sought or consultations or deliberations were being held. Information such as the names of individuals involved in the advice or

consultations, or dates, and information that reveals only the fact that advice is being sought or consultations held (and not the substance of the advice or consultations) cannot generally be withheld under section 24(1) (see Order F2004-026, at para. 89). As well, neither sections 24(1)(a) nor (b) apply to a decision itself (Order 96-012, at paras. 31 and 37).

[para 53] The Public Body argues that the information withheld under section 24(1)(b) contains "consultation on workflow of several cases and employee administration of the cases." (Initial submission, at page 8)

[para 54] The information withheld on page 393 contains information that cannot be withheld under that provision, such as the names of employees involved, dates, etc. The 'substantive' portion of the information is not a deliberation between Public Body employees; rather, it communicates a decision that has been made and instructs employees how to put it into action. None of the information on that page reveals advice that was sought or given or the consideration of advice sought or given. Therefore, section 24(1)(b) does not apply. I will order the Public Body to disclose this page to the Applicant, after the Public Body has applied section 17(1) to withhold the information (names and file numbers) of third parties (these third parties do not appear to relate to the Applicant's file in any way).

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

[para 55] Section 27 of the Act states:

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

[para 56] The package of unredacted records at issue provided by the Public Body for this inquiry did not include information to which section 27(1) had been applied. By letter dated July 20, 2015, the Registrar of Inquiries asked the Public Body to provide a complete copy of the unredacted records at issue. The Public Body responded on July 27, 2015, stating:

> Human Services received direction in May 2014 that the Government of Alberta's current position with respect to privileged records is to not provide any such records neither at the mediation, investigation, nor at the inquiry stage over which section 27 has been claimed. Any exceptions would require further legal advice.

In relation to the records for this particular request information was withheld under section 27 in relation to section 126.1 of the *Child, Youth and Family Enhancement Act* which states:

Privileged information

126.1

(1) Despite section 126(1), the name of a person who makes a report to the director under section 4 of *5* and information that would identify that person is privileged information of the person making the report and is not admissible in evidence in any action or proceeding before any court or an Appeal Panel or before any inquiry without the consent of the person.

(2) Despite subsection (1), the Minister may direct the release of information under subsection (1) that would identify the person.

(3) If there is a conflict or inconsistency between subsection (1) and the *Freedom of Information and Protection of Privacy Act*, subsection (1) prevails.

Section 4 states:

Reporting child in need

4

(1) Any person who has reasonable and probable grounds to believe that a child is in need of intervention shall forthwith report the matter to a director

(2) Subsection (1) applies notwithstanding that the information on which the belief is founded is confidential and its disclosure is prohibited under any other Act.

As also discussed, it is our understanding that even with a Court Order for records, the records are vetted through our Legal Services to remove the Reporter Information as the information is privileged and disclosure is prohibited.

[para 57] By letter dated August 31, 2015, to the Public Body, I said:

I acknowledge that section 126.1(1) of the *CYFEA* prevents the admission into a proceeding of information that would identify a reporter and that this prohibition prevails over the FOIP Act. Despite this, I believe that certain information that is being withheld from my review may be disclosable for that purpose, for the following reasons.

First, section 126.1 of the *CYFEA* prohibits disclosure of information *that names or would identify* a reporter. In providing records for my review, I believe the Public Body may withhold only as much information as is necessary for it to conform with the *CYFEA*. There may be information in the records that, even though it might permit another individual with knowledge of the case to identify a reporter, would not allow *me* to identify the reporter as long as the person's name is redacted. It seems, therefore, that section 126.1(1) of the *CYFEA* may permit the Public Body to disclose information to me, *in camera*, that does not reveal the identity of a reporter *to me*, to help me to determine whether the information is subject to the section 126(1) privilege and is thus withholdable under section 27 of the Act.

Second, because section 59(3) of the FOIP Act prohibits me from disclosing information that a public body is authorized or required to withhold, I may not disclose any information in the course of the inquiry that could identify the reporter to others. As well,

> section 27 of the Act requires me to uphold the Public Body's ability to withhold privileged information from a requestor, including information that is privileged under section 126.1(1). In other words, disclosure of such information into this inquiry, on an *in camera* basis, would not have the undesired effect of revealing the identity of reporters that the privilege created by section 126.1 is intended to prevent. (Any order that I make that the records be disclosed is also subject to judicial review.)
>
> Finally, I note section 126.1(2) states that the Minister may authorize the disclosure of information that would identify a reporter. Therefore, I believe it is open to me to ask the Minister to consider authorizing disclosure of information for my review, with the name redacted, having regard to the considerations just discussed.

[para 58] The Public Body agreed to review the records, and withhold from this inquiry only information that might identify the reporter(s) *to me*. In some cases, the Public Body redacted only the name of the reporter(s), but in other cases, redacted some additional information that may identify the reporter(s), even to me. Having reviewed the new copy of records at issue, I appreciate the care taken by the Public Body to provide me with as much information as possible to allow me to review the Public Body's application of section 27, while remaining cognizant of its duties under the *CYFEA*. The Public Body provided me with a new copy of the records at issue on October 1, 2015.

[para 59] In Order F2009-033 the Director of Adjudication considered the application of sections 126.1 and 4 of the *CYFEA*, and their intersection with section 27 of the FOIP Act. She found that a public body properly applied section 27 of the Act to "information identifying persons who were reporters within the terms of section 4 of the *CYFEA*" (at para. 57). She also noted that "pursuant to section 126.1(1) of the *CYFEA*, the legal privilege that attaches to identifying information of the reporter under section 4 is that person's privilege. It is not the privilege of the Public Body." I agree that section 126.1 creates a statutory privilege such that section 27 applies to the information that identifies a reporter under the *CYFEA*. I also agree that the privilege belongs to the reporter, and not the Public Body. Therefore, section 27(2) appears to prohibit the disclosure by the Public Body.

[para 60] As noted above, I have not reviewed all of the information withheld under section 27; in some cases, the Public Body withheld significant amounts of information under that provision. I can say that in many cases the withheld information clearly would identify a reporter, given the context of the redactions. However, I cannot be absolutely certain of that in every case. This is a case in which the Public Body knows better than I do what information might reveal the reporter(s) to the Applicant. In the instances in which the Public Body continued to apply section 27 but provided me with the unredacted information (as that information would not reveal the identity of the reporter(s) to *me*), I can understand how the information might identify the reporter(s) to someone who knows him or her.

[para 61] As discussed earlier in this Order, the Applicant argued that one named individual waived his right to privacy or privilege by "deciding to publicly disclose his identity as the source of the multiple false complaints lodged against me with [the Public Body] by attaching his correspondence with [a Public Body employee], the [Public Body] investigator, to his affidavit filed in the Court of Queen's Bench of Alberta in his attempt to use these deviously lodged false complaints to gain leverage in ongoing custody proceedings over our son." I do not

know whether this named individual is a reporter under the *CYFEA* (or one of the reporters; I also do not know how many reporters are identified in the records). I have read the portions of the affidavit provided by the Applicant, as well as portions of the transcript from the questioning of the named individual on his affidavit. Possibly this evidence indicates that the named individual could have been a reporter under the *CYFEA*; however, I don't find the evidence conclusive on that point. It also seems possible that the named individual spoke with a Public Body investigator, even initiated contact with the investigator, yet was not considered a "reporter" under the *CYFEA*. Therefore, even if the named individual's identity is being withheld under section 27, I do not accept the Applicant's argument that the named individual waived any right to privacy or privilege.

[para 62] I uphold the Public Body's application of section 27.

V. ORDER

[para 63] I make this Order under section 72 of the Act.

[para 64] I find that pages 113, 114, 234 and 235 are excluded from the scope of the Act pursuant to section 4(1)(a) and are outside my jurisdiction.

[para 65] I find that the Public Body properly withheld information under section 17(1) of the Act in most cases, but that it did not properly apply that exception to information described in paragraph 30. I order the Public Body to disclose that information to the Applicant.

[para 66] I find that the Public Body properly withheld information under section 21(1)(b) of the Act.

[para 67] I find that section 24(1)(b) does not apply to the information on page 393. I order the Public Body to disclose that information to the Applicant; however, before disclosing the information, it must first sever the information of third parties under section 17(1).

[para 68] I find that the Public Body properly withheld information under section 27 of the Act.

[para 69] I further order the Public Body to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

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Amanda Swanek
Adjudicator