ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2016-32

August 11, 2016

EDMONTON POLICE SERVICE

Case File Number F7453

Office URL: www.oipc.ab.ca

Summary: Pursuant to the *Freedom of Information and Protection of Privacy Act* (the Act), the Applicant made a request to the Edmonton Police Service (the Public Body) for a copy of a disciplinary decision. The Public Body responded by providing the Applicant with the decision; however, it severed the names of the accused/complainant and third party Officers and their badge numbers.

The Adjudicator found that any need for public scrutiny of the Public Body's actions had been met but that the information was publicly available to such an extent that it was a factor that weighed heavily in favour of disclosure. As a result, the Adjudicator found that the Public Body had not properly applied section 17 of the Act to the information at issue and ordered that all the severed information be disclosed.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 17, 20, and 72; *Police Service Regulation*, Alberta Regulation 356/90, s. 16.

Authorities Cited: AB: Orders 97-002, F2009-044, F2013-01, F2013-13, F2004-015, F2014-16, and F2015-30.

Cases Cited: *Calgary Police Service v. Alberta (Information and Privacy Commissioner)*, 2010 ABQB 82.

I. BACKGROUND

[para 1] On May 7, 2013, the Applicant made an access request to the Edmonton Police Service (the Public Body) pursuant to the *Freedom of Information and Protection of Privacy Act* (the Act) for a copy of a written disciplinary decision. The Public Body responded to the Applicant's access request and provided it with the decision it had requested; however, some of the information in the records had been severed pursuant to sections 17 and 20 of the Act. Subsequently, the Public Body disclosed the information it had previously withheld pursuant to section 20 of the Act.

[para 2] On August 26, 2013, the Applicant requested that the Office of the Information and Privacy Commissioner (this Office) review the Public Body's response to its access request. Mediation was authorized but did not settle the matter and on February 11, 2015, the Applicant requested an inquiry. I received submissions from both the Applicant and the Public Body. In addition, three Officers whose names appear in the records at issue made submissions in this inquiry as Affected Parties. The first, Officer A, was not the subject of the disciplinary hearing but during the hearing was accused by an individual of using excessive physical force when trying to restrain him. Officer A testified at the hearing. Officer B was cited for disciplinary misconduct and testified at the hearing. Officer C was not accused of disciplinary misconduct. He was at the scene of the incident but did not testify at the hearing. Several other Officers whose names appear in the records were invited to participate but did not provide submissions. This includes Officer D who was cited for misconduct as the result of the disciplinary hearing. Officers E, F, G, and H were witnesses at the hearing but not the subject of the hearing, and Officer I did not testify but was mentioned at the hearing.

II. INFORMATION AT ISSUE

[para 3] The information at issue is the severed portions of the responsive records provided to the Applicant by the Public Body in response to its access request of May 7, 2013.

III. ISSUE

[para 4] The Notice of Inquiry dated October 13, 2015 states the issue in this inquiry as follows:

> Does section 17 of the Act (disclosure harmful to personal privacy) require the Public Body to sever the names and badge numbers of police officers and the names of witnesses from the records?

IV. DISCUSSION OF ISSUE

Does section 17 of the Act (disclosure harmful to personal privacy) require the Public Body to sever the names and badge numbers of police officers and the names of witnesses from the records?

[para 5] Section 17 of the Act states that a public body must not disclose a third party's personal information where that disclosure would be an unreasonable invasion of the third party's personal privacy. Personal information is defined by section 1(n) of the Act which states:

> *1(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 6] The information that was severed by the Public Body consisted of the names of Officers that were involved in an incident involving an individual accused of a crime. The accused/complainant's name was also severed. These third parties' names are personal information as defined by section 1(n)(i) of the Act. In addition, the badge numbers of two Officers were also severed. Earlier Orders issued by this Office have found that police officers' badge numbers are personal information as defined by section 1(n) of the Act (see Order F2009-044 at para 15). Therefore, I find that all of the information severed by the Public Body was third parties' personal information.

Work Product:

[para 7] Regarding the names and badge numbers, severed from the responsive records, of Officers that were called as witnesses as part of their duty as police officers, this is a substantially similar situation to that in Order F2015-30, in which the Adjudicator held as follows:

> The information withheld under section 17 alone is comprised of the names of the Crown Prosecutor, a Constable and a Detective, who were witnesses in the disciplinary proceeding that resulted in the Decision.
>
> Names and contact information of third parties are personal information under the FOIP Act. However, the disclosure of the names and job titles of individuals acting in their professional capacities is not an unreasonable invasion of personal privacy under section 17 (see Orders 2001-013 at para. 88, F2003-002 at para. 62, F2008-028 at para. 53) unless that information has a personal dimension in the circumstances.
>
> The Public Body acknowledges that
>
> > [a]lthough the names and job titles/positions of third parties are strictly speaking, "personal information" under the Act, it has been noted that this alone may not suffice as "there is no personal dimension" to that information. Where, however, there is associated information that suggests that an individual performing "work-related responsibilities" was "wrongful" or may have an adverse effect on the individual, there is a personal dimension. (Initial submission, para 19)
>
> The Public Body argues that, in this case
>
> > ... the [Decision] contains comments by the Presiding Officer, or in the case of the Detective, allegations by the cited officer, that could be interpreted to have an adverse effect on the Third Parties. As such, there is the necessary personal dimension in this case so that what might seem innocuous information ought not to be disclosed. (Initial submission, para. 20)
>
> I agree with the Public Body that there is a personal dimension to the information about the Detective. Although he is not the subject of the Decision, allegations were made against him by the officer who was the subject of the Decision (the cited officer), and the propriety of the Detective's actions are discussed in the Decision. Specifically, the testimony cited in the Decision alleges that the Detective may have provided bad or erroneous advice to the cited officer, which calls his competence and/or integrity into question. I will consider whether the factors in section 17 weigh in favour of, or against, the disclosure of the Detective's name.
>
> There is far less information in the Decision about the Constable, and that information does not relate to the propriety of the Constable's actions in the same manner as the information about the Detective. I am inclined to find that the information about the Constable does *not* have a personal dimension such that section 17(1) could apply; however, the Decision refers to the Constable as being the Detective's partner. Therefore, it seems to me that revealing the Constable's name would also reveal the Detective's name. If I find that the Detective's name cannot be withheld under section 17(1), then the same finding will be made about the Constable's name. However, if I find that the Detective's name was properly withheld, the same finding will be made about the Constable's name.

> The third name withheld under section 17(1) only is the name of the Crown Prosecutor. The information about the Crown Prosecutor in the Decision relates only to her job duties as a Crown Prosecutor. I cannot find anything in the Decision that would have an "adverse effect" on the Crown Prosecutor such that the information about her had a personal dimension, as argued by the Public Body. The information relates the testimony of the Crown Prosecutor, which is comprised of her recollection of her interaction with the cited officer that occurred as part of her job duties. The Public Body has not identified any particular information in the Decision that could adversely affect the Crown Prosecutor. Part of the Decision provided to the Applicant reveals comments made by the presiding officer about the actions of the Crown Prosecutor that appear to be only a narrative of relevant facts, and do not seem to include any judgment about whether those actions were appropriate. For these reasons, I find that the information about the Crown Prosecutor does not have a personal dimension such that her name can be withheld under section 17. I will therefore order the Public Body to disclose her name to the Applicant.
>
> (Order F2015-30 at paras 18-24)

[para 8] The Presiding Officer who wrote the disciplinary decision spoke negatively about the incident in a general way and about the Officers' "tunnel vision", referring to the incident as a "misadventure". His comments were not directed at any particular Officer or Officers and could be attributed to every Officer present at the scene. As noted by the Affected Parties in their submission:

> As the Presiding Officer lumped all of the officers together in his comments, a reasonable reader might conclude that Officer A was one of the officers who acted unreasonably or improperly while performing his duties either on the night in question, or afterwards when he was making his notes.
>
> (Affected Parties' initial submission at para 39)

[para 9] I believe that this adds a personal dimension to the names of the Officers who were simply mentioned or gave testimony at the hearing but who were not the subject of the disciplinary hearing. The Presiding Officer's comments, I believe, were directed at all of the Officers present at the incident. While the comments are limited, they point to problems that the Presiding Officer felt were serious enough to mention even though they involved other Officers who were not the subject of the hearing and, therefore, arguably did not have a direct bearing on the issues he was tasked to decide.

[para 10] Based on the evidence I have before me, Officers A, C, E, F, G, H, and I were witnesses to the incident that gave rise to the disciplinary hearing. While they were not implicated in any substantial way in any wrong doing, the Presiding Officer's comments were somewhat critical of their actions. As such, I find their testimony akin to that of the Detective in Order F2015-30. Therefore, the information relating to them does have a personal dimension, and I will deal with those names below under section 17 of the Act.

[para 11] Section 17(2) of the Act sets out when the disclosure of a third party's personal information is not an unreasonable invasion of their personal privacy. Section 17(2)(c) provides that disclosure of personal information is not an unreasonable invasion of privacy if an Act of

Alberta authorizes or requires the disclosure). The *Police Service Regulation* was amended, as of May 1, 2011, to require the publication of disciplinary decisions. The decision requested by the Applicant was made January 23, 2009, but it argues that this regulatory change has a retrospective effect, and therefore applies to the information at issue. I note that Order F2013-13 holds that this enactment is not retroactive in its effect, but that case did not consider or decide the question of whether, as the Applicant argued, it is retrospective. I do not need to decide this question in this case, because I find, on the basis of other factors, that the information must be disclosed. However, if I were wrong in that finding, it would be necessary for me to make a decision about the Applicant's argument under section 17(2)(c).

[para 12] Section 17(4) of the Act lists circumstances where the disclosure of a third party's personal information will be presumed to be an unreasonable invasion of his or her personal privacy. Section 17(4) of the Act states:

> *17(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*
>
> > *(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,*
> >
> > *(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,*
> >
> > *(c) the personal information relates to eligibility for income assistance or social service benefits or to the determination of benefit levels,*
> >
> > *(d) the personal information relates to employment or educational history,*
> >
> > *(e) the personal information was collected on a tax return or gathered for the purpose of collecting a tax,*
> >
> > *(e.1) the personal information consists of an individual's bank account information or credit card information,*
> >
> > *(f) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations,*
> >
> > *(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,

or

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

[para 13] The Public Body and Affected Parties argue that sections 17(4)(b), 17(4)(d), and 17(4)(g) of the Act apply, creating a presumption that the disclosure of the names and badge numbers in the responsive records would be an unreasonable invasion of third parties' personal privacy.

Section 17(4)(b):

[para 14] Section 17(4)(b) of the Act creates a presumption that the disclosure of personal information found in a law enforcement record is an unreasonable invasion of a third party's personal privacy. Law enforcement is defined in section 1(h) of the Act as follows:

1(h) "law enforcement" means

(i) policing, including criminal intelligence operations,

(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, or

(iii) proceedings that lead or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the proceedings or by another body to which the results of the proceeding are referred;

[para 15] The Public Body and Affected Parties argue that since the decision being sought by the Applicant followed a disciplinary hearing, which resulted in a penalty or sanction as prescribed by legislation, it falls within this definition. The Public Body and Affected Parties also cite Order F2015-30 in support of their arguments. In that Order, the Adjudicator found that a police disciplinary decision met the definition of a law enforcement record. I agree with the Public Body and Affected Parties and find that section 17(4)(b) applies to the information at issue.

Section 17(4)(d):

[para 16] The Public Body and Affected Parties also argue that section 17(4)(d) of the Act applies to the information at issue because police disciplinary records contain information relating to police officers' employment history. Several Orders issued by this Office have also found this to be the case (see Order F2015-30). I agree that a disciplinary decision relates to the Officers who were the subjects of the disciplinary hearing's employment history. Currently, the Public Body is only withholding these Officers' names and badge numbers. Without this information, arguably, the disciplinary decision is not about identifiable individuals; however, if

the names were disclosed, it would be, and would make the entire disciplinary decision personal information that related to the cited Officers' employment history. As such, I find that section 17(4)(d) of the Act also applies and creates a presumption that disclosing the information at issue would be an unreasonable invasion of the cited Officers' personal privacy.

Section 17(4)(g):

[para 17] Finally, the Public Body and Affected Parties argue that because the disciplinary decision includes the names of the Third Parties and other personal information about the Third Parties, section 17(4)(g) of the Act applies. I have reviewed the disciplinary decision and find that the Third Parties' names appear along with information about their employment history, their non-professional opinions and opinions about them. Therefore, I also find that section 17(4)(g) of the Act applies to the information at issue.

Section 17(5):

[para 18] Even though I have found that there is a presumption that the disclosure of the information at issue would be an unreasonable invasion of the Third Parties' personal privacy, in order for the Public Body to have properly applied section 17 to the information at issue, the Public Body must have weighed the factors listed in section 17(5) of the Act and any other relevant factors to determine if it was appropriate to withhold the information at issue. Section 17(5) of the Act states:

> *17(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether*
>
> > *(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,*
> >
> > *(b) the disclosure is likely to promote public health and safety or the protection of the environment,*
> >
> > *(c) the personal information is relevant to a fair determination of the applicant's rights,*
> >
> > *(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,*
> >
> > *(e) the third party will be exposed unfairly to financial or other harm,*
> >
> > *(f) the personal information has been supplied in confidence,*
> >
> > *(g) the personal information is likely to be inaccurate or unreliable,*

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

[para 19] The Public Body argues that sections 17(5)(e) and 17(5)(h) of the Act weigh in favour of severing the information at issue. The Affected Parties argue that section 17(5)(h) of the Act weighs in favour of severing the information at issue and no other factors weigh in favour of disclosing the information. The Public Body also notes that the Third Parties object to the disclosure of their personal information and that this related, relevant factor weighs in favour of withholding the information at issue.

[para 20] The Applicant argues that section 17(5)(a) of the Act weighs in favour of disclosure of the information at issue, as does the public availability of the information at issue.

Section 17(5)(a):

[para 21] The Applicant states that the Public Body failed to take into consideration section 17(5)(a) of the Act. In order for section 17(5)(a) of the Act to apply there must be evidence that the activities of the public body have been called into question such that the disclosure of the information at issue is necessary to subject the activities of the Public Body to public scrutiny (see Orders 97-002 at para 94, F2004-015 at para 88, F2014-16 at para 34). In determining if public scrutiny is desirable, the factors to consider are:

> 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
>
> (See Order F2014-16 at paras 35)

[para 22] All three factors need not be met in order for section 17(5)(a) of the Act to apply and weigh in favour of disclosure (See Order F2014-16 at para 36).

[para 23] The Public Body argues that there is no basis or evidence provided by the Applicant that would suggest that there is a need for public scrutiny of the Public Body's activities in this circumstance.

[para 24] I agree that the Applicant has not provided evidence that public scrutiny of the Public Body regarding its actions surrounding or directly at issue in the disciplinary decision is desirable. In any event, the Public Body withheld only the names and badge numbers of the Officers who testified. The way the Public Body disciplined the Officers is obvious from the decision, as are the actions of the Officers in the actions they performed on behalf of the Public

Body. Therefore, the actions of the Public Body were disclosed and could be scrutinized by the public should there be a desire to do so.

[para 25] In addition, the Court of Queen's Bench has determined that in cases where public scrutiny is necessary, that role is fulfilled by public membership on the LERB in police disciplinary matters (see *Calgary Police Service v. Alberta (Information and Privacy Commissioner)*, 2010 ABQB 82).

[para 26] Given the foregoing reasons, I find that section 17(5)(a) of the Act does not apply to the information at issue.

Sections 17(5)(e) and 17(5)(h):

[para 27] The Public Body argues that sections 17(5)(e) and 17(5)(h) of the Act weigh against disclosure of the information at issue. Specifically it states:

> As noted earlier, the disciplinary decision in this matter concludes that only one allegation of misconduct had been proven at [the] hearing. The nature of the misconduct was administrative and related to note-taking. The misconduct did not relate to safety or harm to any individuals.
>
> Similarly to section 17(5)(e), in determining whether a disclosure of personal information constitutes an unreasonable invasion or a third party's personal privacy, section 17(5)(h) of the *FOIPP Act* requires consideration of whether "the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant".
>
> The EPS submits that section 17(5)(h) applies because the disclosure would represent an unfair damage to the reputation of third parties.
>
> The unfair nature of the disclosure becomes evident upon examination of section 22 of the *Police Service Regulation…*
>
> Section 22(c) requires that the record of the punishment be removed from the record of discipline and "destroyed" after a period has elapsed from the day that punishment is imposed on a police officer. The discipline in question was imposed in 2009. The relevant period leading to the destruction of records from the record of discipline relating to punishment has been exceeded.
>
> In *R v. Perreault*, the Honourable Mr. Justice D.R.G Thomas held that there was no significant difference between the objectives and operations of a criminal pardon and the procedures found at section 22 of the *PSR*.
> …
> In sum, section 22 suggests that the disclosure of the personal information found in the disciplinary decision would be unfair. Section 22 of the *PSR* informs the reasonableness analysis under section 17(5) and weighs in favour of the non-disclosure of the severed personal information.
>
> (Public Body's initial submissions at paras 69-77)

[para 28] The Affected Parties state:

> As Officer A was not the subject officer, the complainant's allegations against him were not the focus of the Presiding Officer's decision. While he was able to testify at the hearing, a finding as to whether or not Officer A actually kicked the complainant in the face was never made. Publishing Officer A's name would therefore subject him to unfair reputational harm on the basis of essentially untested accusations. That reputational harm would be further aggravated as a result of the Presiding Officer's general comments about the officers' actions on the night in question and the failure of some officers to take adequate notes. A reasonable observer might conclude that these comments were directed at Officer A.
>
> Officer C had even less of an opportunity to respond to the Presiding Officers' general allegations, as he did not even appear as a witness in the proceedings. Releasing Officer C's name in the context of this written decision could therefore unfairly damage Officer C's professional reputation.
>
> The risk of reputational harm to Officer B, who was charged only with a disciplinary offence, is well summarized in the CPC decision. Following that decision, the fact that Officer B was acquitted weighs heavily in favour of keeping his name from being published in the copy of the disciplinary decision released by the EPS.
>
> (Affected Parties' initial submissions at paras 52-54)

[para 29] The Applicant argued in its rebuttal submissions:

> The argument that "…it could be surmised that the members involved would suffer some degree of stress if their personal information was disclosed and that psychological harm would result" is nothing more than pure speculation and it would be unreasonable to surmise anything in this regard.
>
> As for the argument that the EPS determined that disclosing the names, "..would create an unfair exposure to harm to the respondent officers' reputation," this has no merit given that the names have already been disclosed in a highly public way.
>
> …
>
> The EPS relies on section 22 of the *Police Service Regulation* and the decision in *R v. Perreault*. This is irrelevant in this matter because this is not an application for disclosure in a criminal matter; it is a complaint that improper redactions have been made in what was disclosed.
>
> (Applicant's rebuttal submissions at paras 7-10)

[para 30] I agree that there could be some reputational harm in disclosing the Officers' names and that of the accused/complainant; however, while this factor weighs in favour of severing, as discussed further below, it would not outweigh the public availability of the information.

Public Availability of Information at Issue:

[para 31] In the past, our Office has found that the public availability of information is a factor to consider in deciding whether it ought to be disclosed. In the cases where it was found to be a factor that weighed in favour of disclosure, the public availability of the information was so great

or the information was presented in such detail that withholding the information would have been absurd. For example, in Order F2013-13, the disciplinary hearing was widely discussed, in detail, in the media by the public body and the third party whose information was being withheld. In Order F2013-01, the disciplinary decisions sought had been read out, verbatim, at the conclusion of the public hearing.

[para 32] On my review of the information at issue, there are nine Officers' names mentioned. Two were accused of misconduct, five were witnesses at the hearing, and two were mentioned in the information at issue as being at the scene of the incident but did not testify.

[para 33] The Applicant provided a copy of a court transcript which appears to detail the events that were the subject of the disciplinary decision. The transcript mentions four of the Officers whose names also appear in the information at issue as well as the accused/complainant. Specifically, the Applicant stated:

> …I have further submissions, which follow (which, of course, I do not claim to be my original work)
> …
> The Public Body pointed to the *Calgary Police Service v. Alberta (Information and Privacy Commissioner)*, 2010 ABQB 82 – a judicial review of Order F2008-009 – in support of its position. In *Calgary Police Service*, the court held that disclosure of personal information from disciplinary hearings involving police officers was an unreasonable invasion of those officers' privacy, unless the hearing related to an offence under a federal or provincial statute (e.g., the *Criminal Code*). In other words, a hearing or matter that results in an employment sanction is not sufficient to justify disclosure. Thus, the court found that names and other personal details about an officer could not be disclosed.
>
> There appear to be several distinctions between *Calgary Police Service* and the case at hand.
>
> This matter was also the subject of a Law Enforcement Review Board decision – No. 023-2010. LERB decisions are publically available. The names of the respondent officers, and their registration numbers, are not severed or withheld.
>
> Another difference is the fact that the two police officers' names were already disclosed (*i.e.*, in the public realm) in various news articles on or around November 20, 2007.
>
> Further, the names of the two police officers and witness officers were disclosed to the public criminal trial in *R. v. Jara*.
>
> Disclosure of the respondent police officers' names is not an unreasonable invasion of privacy, as the names were already disclosed in the LERB decision as well as in media reports and in a public criminal trial.
>
> (Applicant's initial submissions, pages 1 and 2)

[para 34] The Applicant provided a court transcript, the Law Enforcement Review Board (LERB) decision which occurred after the disciplinary hearing and several articles as part of its submissions.

[para 35] The Public Body and counsel for the Affected Parties point out that the names that were withheld from the disciplinary decision are not coextensive with those published in the criminal trial transcripts, or the LERB decision referenced by the Applicant. Specifically, the Public Body states:

> The Applicant has not provided any specific information about information available to the media regarding respondent members, and certainly not anything that relates to the personal information of third party witnesses. Even the list of names of witnesses at the criminal trial referred to by the Applicant is not coextensive with the list of third party police members whose names have been redacted in the Responsive Records. Even for those individuals whose names appear in the criminal decision, the information relating to them in the Responsive Records is different in context, character, and content than that contained in the Responsive Records. If limited information was known publicly some years ago, this may be one factor which would weigh to come degree in favour of release of that very same information (to be weighed against the other factors outlined below). However, it would not weigh in favour of release of different personal information, or in favour of the release of personal information for other individuals.
>
> The EPS submits that this is not a case like the one before the Adjudicator in Order F2013-13. In that Order, the Adjudicator found that the decision had been reported and discussed in the media, including by a third party, and the public discussion included details of the actions and the investigation giving rise to the charges. In this case, the Applicant merely refers to articles(s) which are claimed to provide the names of respondent police members, not the details of the hearing or the decisions itself which are contained in the Responsive Records.
>
> (Public Body's initial submissions, paras 47 and 48)

[para 36] The media reports provided to me mention the names of four of the Officers whose names appear in the information at issue. The media reports give some detail as to the testimony that was given at the hearing and some report on the decision of the Presiding Officer. The media reports were not always entirely accurate and had much less detail than the information at issue. Therefore, the media reports provided to me do not persuade me that the information at issue was available to enough of an extent or with enough detail to make the records at issue "publicly available".

[para 37] The LERB decision was also provided to me, and counsel for the Affected Parties also noted the LERB decision is publicly available. While the Officers who were the subject of the disciplinary hearing are mentioned, the LERB decision does not detail the events that led to the disciplinary hearing in as much detail as the disciplinary decision. Therefore, I do not find the public availability of the LERB decision alone to be enough to make the information at issue "publicly available".

[para 38] I also regard it as significant that the names mentioned in the articles, criminal trial transcript, and LERB decision are not coextensive. The Public Body is currently withholding more personal information than that which the Applicant says has been made publicly available. The articles and court transcript (which I was provided copies of) mention some Officers and the accused/complainant by name and mentions facts similar to those dealt with in the disciplinary decision.

[para 39] However, I noted that information about the disciplinary decision was contained in a news report (provided to me by the Applicant) that appeared the day after the hearing concluded. Therefore, I asked the parties to advise if the disciplinary decision had been read out at the conclusion of the hearing and if the disciplinary decision had ever been published on the Public Body's website.

[para 40] The Public Body responded that approximately 10 pages of the disciplinary decision were read out at the conclusion of the hearing. These pages name all but one of the Officers who were present, and describe the nature of their involvement in considerable detail. The only Officer who was not named does not appear to have been present at the incident, involving apprehension of an individual, to which the proceedings related, though the Officer had some involvement at an earlier point.

[para 41] The Public Body also told me that it is likely that some version of the disciplinary decision was posted on the Public Body's website for a period from some time after its issuance in January, 2009 until all such decisions were removed from the Public Body's website in July, 2010. I find, on a balance of probabilities, that the decision was available for a period of time. The Public Body mentions that the posted version of decisions were sometimes partially redacted, including, "in some instances" redactions of the names of police members. However, the Public Body provides no indication that such redactions were likely in this case, nor does it suggest any criteria for such redactions that might allow me to determine that this happened in the present case. Accordingly, I find on a balance of probabilities that the names of all the Officers whose names are contained in the decision were included in the version of the decision that had been posted on the website.

[para 42] I acknowledge that all such decisions were removed from the Public Body's website in 2010. However, it seems likely with respect to the decision at issue in this case that it was available to the public for over a year. Once available, its subsequent withdrawal from the public realm does not change the fact that there was a sustained opportunity for the information to be read and copied. Previous Orders of this Office have held that the very fact a decision is read out at the conclusion of a hearing may be sufficient to make disclosure not an unreasonable invasion of privacy (See, for example, Order F2013-01). In this case, the posting of the decision adds very significantly to the degree to which it was made public, and weighs heavily against the idea that disclosure would now be an unreasonable invasion of privacy.

[para 43] Given the evidence before me, I find that the degree to which the content of the disciplinary decision in question has already been made public weighs heavily in favour of disclosure, and outweighs the presumptions against disclosure that arise under section 17.

[para 44] The degree to which the withheld information has already been made public – the factor which I believe is determinative in this case in that it outweighs the presumptions against disclosure - is information which the Public Body itself supplied; it is thus a factor of which the Public Body was already aware when it made its decision to withhold the records. For this reason, I will not ask the Public Body to re-exercise its discretion in this case. Rather, as I

believe disclosure would not be an unreasonable invasion of privacy, and section 17(1) does not apply, I will order it to disclose the records.

V. ORDER

[para 45] I make this Order under section 72 of the Act.

[para 46] I find that the Public Body did not properly apply section 17 of the Act and I order the Public Body disclose the information at issue to the Applicant.

[para 47] 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.

_____

Keri H. Ridley
Adjudicator