

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2017-44

April 28, 2017

ALBERTA JUSTICE AND SOLICITOR GENERAL

Case File Number F7317

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Summary: An individual made a request to Alberta Justice and Solicitor General (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for access to all records relating to the investigation and prosecution of a complaint she had made against an individual, which ultimately resulted in his pleading guilty to a criminal offence.

The Public Body located 769 pages of responsive records and several DVDs, but severed much of the information under sections 4 (records to which the FOIP Act does not apply), 17 (disclosure harmful to personal privacy), 20 (disclosure harmful to law enforcement), 21 (disclosure harmful to intergovernmental relations) and 27 (privileged information) of the Act.

The Applicant requested an inquiry into the Public Body's response. The inquiry was divided into two parts. Part 1 of the inquiry resulted in Order F2016-31, which addressed the Public Body's application of section 4(1)(a) to several pages of records, section 17(1) to three pages of records, and the Public Body's claim of solicitor-client privilege to the remainder of the records.

This Order concludes the second (and final) part of the inquiry, which addresses the Public Body's application of sections 17(1), 20(1)(g), 21(1)(b) and 27(1) to the remaining records at issue.

The Public Body applied section 20(1)(g) (information relating to the exercise of prosecutorial discretion) to the information in most of the records at issue in their entirety. The Adjudicator found that this provision did apply to the information in most of the records, including all of the information contained in the DVDs. The Adjudicator also confirmed the appropriate test for this provision, from past Orders of the Office and more recent case law (at paras. 25-27)

The Public Body has also applied sections 21(1) and 27(1)(b) and (c) to information in many of the records at issue. The Adjudicator considered the application of these exceptions only to the information in the records to which section 20(1)(g) was not applied by the Public Body or to which that provision was found not to apply.

The Adjudicator found that the Public Body did not properly apply section 21(1)(b) to three pages of the records at issue. The Public Body failed to show that the information in two pages was provided in confidence. One of the pages is a record in existence for more than 15 years; therefore, section 21(4) applies such that the information cannot be withheld under section 21(1).

The Adjudicator found that the Public Body did not properly apply sections 27(1)(b) or (c) to 14 pages of records at issue. Some of the information to which sections 27(1)(b) and/or (c) was applied was not prepared by or for, or in correspondence between, someone listed in those provisions (see paras. 57-59). The remainder of the information did not reveal the *substance* of a legal service, as required for the application of either provision (see para. 61).

The Adjudicator found that section 17(1) applied to some, but not all, of the information on five pages of the records. The Adjudicator ordered the Public Body to withhold some of the information and disclose the remainder.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 4, 17, 20, 21, 27, 71, 72; **Can:** *Canadian Victims Bill of Rights*, S.C. 2015, c. 13, s. 2, ss. 7, 20.

Authorities Cited: **AB:** Orders 97-002, 97-007, F2004-015, F2004-026, F2007-021, F2008-008, F2008-032, F2009-027, F2010-007, F2010-036, F2014-R-01, F2014-16, F2014-38, F2016-31

Cases Cited: *Krieger v. Law Society of Alberta* [2002] 3 S.C.R. 372, *Ontario (Public Safety and Security) v. Criminal Lawyers Association*, 2010 SCC 23, *R v. Anderson*, [2014] 2 SCR 167, 2014 SCC 41, *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332, 2004 SCC 43.

I. BACKGROUND

[para 1] On April 2, 2013, an individual made a request to Alberta Justice and Solicitor General (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for access to all records relating to the investigation and prosecution of a

complaint she had made against an individual, which ultimately resulted in his pleading guilty to a criminal offence.

[para 2] The Public Body located 769 pages of responsive records and several DVDs (the Public Body's response to the Applicant states that 11 DVDs were located, but the records provided for the inquiry shows that 12 DVDs were located). Much of the information in the responsive records was severed under sections 4 (records to which the FOIP Act does not apply), 17 (disclosure harmful to personal privacy), 20 (disclosure harmful to law enforcement), 21 (disclosure harmful to intergovernmental relations) and 27 (privileged information) of the Act.

[para 3] The Applicant requested a review of the Public Body's response. The Commissioner authorized an investigation to settle the matter. This was not successful; the Applicant requested an inquiry.

[para 4] Most of the records to which sections 17(1), 20(1)(g), 21(1)(b) and 27(1)(a), (b) and/or (c) have been applied are records over which the Public Body had claimed solicitor-client privilege; these records were initially not provided to this Office for the inquiry. The inquiry was therefore divided into two parts.

[para 5] Part 1 of this inquiry considered the application of section 4(1)(a) to pages 10, 11, 16, 17, 593, 608-613, 620, 626-638, 642, 647, 648, 683-715, 743-747, and 753-757; the application of section 17(1) to pages 14, 616 and 645, and the Public Body's claim of solicitor-client privilege over the remainder of the records.

[para 6] In the resulting Order (Order F2016-31), I found that pages 10, 11, 16, 17, 593, 608-613, 620, 626-638, 642, 647, 648, 683-715, 743-747, and 753-757 are excluded from the scope of the Act pursuant to section 4(1)(a). I also found that the Public Body had properly withheld pages 14 and 645 under section 17(1) of the Act. I found that section 17(1) applied to some of the information on page 616 and ordered the Public Body to disclose the remainder of that page to the Applicant. None of these pages are at issue in Part 2 of this inquiry.

[para 7] I also found that the Public Body had not properly claimed solicitor-client privilege over the remaining information. Therefore, I made the following order:

I find that the Public Body did not meet its burden to show that it properly claimed solicitor-client privilege over the information in the remaining records at issue. I order the Public Body to review those records and respond to the Applicant without relying on that privilege. The Public Body is to copy that response to me. I retain jurisdiction to review the Public Body's application of sections 17(1), 20(1) and 27(1) in Part 2 of this inquiry. In order that I may do so, the Public Body is to provide me with a copy of the unredacted records at issue with the redactions highlighted, or otherwise noted, and the relevant section numbers of the Act identified on the records. (At para. 85)

II. RECORDS AT ISSUE

[para 8] The records at issue consist of the 769 pages of responsive records and all of the responsive DVDs, except the information listed at paragraph 6 (above), about which I have made a decision in Order F2016-31.

III. ISSUES

[para 9] The issues as set out in the Notice of Inquiry, dated October 31, 2016, are as follows:

1. Does section 17(1) of the Act (disclosure an unreasonable invasion of personal privacy) apply to the information in the records?
2. Did the Public Body properly apply section 20(1)(g) of the Act (disclosure harmful to law enforcement) to the information in the records?
3. Did the Public Body properly apply section 21(1)(b) of the Act (disclosure harmful to intergovernmental relations) to the information in the records?
4. Did the Public Body properly apply section 27(1) of the Act (privileged information) to the information in the records?

[para 10] I will discuss these issues in the following order:

1. Did the Public Body properly apply section 20(1)(g) of the Act (disclosure harmful to law enforcement) to the information in the records?
2. Did the Public Body properly apply section 21(1)(b) of the Act (disclosure harmful to intergovernmental relations) to the information in the records?
3. Did the Public Body properly apply section 27(1) of the Act (privileged information) to the information in the records?
4. Does section 17(1) of the Act (disclosure an unreasonable invasion of personal privacy) apply to the information in the records?

IV. DISCUSSION OF ISSUES

Preliminary matter – Non-responsive records

[para 11] The Public Body has withheld pages 237, 454, 741 and 742 as not responsive to the Applicant's request. The appropriateness of this designation by the Public Body is not listed as in issue in this inquiry. However, for the sake of completeness and to assure the Applicant should she question this designation, I have reviewed the records and confirm that they are not related to the Applicant's access request.

Preliminary matter – Issues raised by the Applicant not part of this inquiry

[para 12] In her submissions, the Applicant has raised many issues that are not part of this inquiry, such as her treatment by law enforcement, and the collection, use and disclosure of her personal information.

[para 13] In her rebuttal submission, the Applicant states the reasons for pursuing this access request as follows:

My motives include being lied to by the RCMP, [misled] by the Crown Prosecutors' office. Numerous DNA hits that were never answered, destroyed evidence, and etc. Under what rules, guideline, statutes, case law, Acts, Laws etc. were these actions authorized? I cannot attempt to change them if you hide the information. It has been insinuated I am a junkie, on more than one occasion and would like to see the supporting documentation. (At page 4)

[para 14] The manner in which the RCMP conducted its investigation or the Crown prosecutor proceeded are not at issue in this inquiry. However, the Applicant's motives for seeking the requested records are relevant and I will consider them at the appropriate points.

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

[para 15] The Public Body applied section 20(1)(g) to all but 9 pages in the records at issue (four of the nine pages were withheld as not responsive). It also applied this provision to the all of the information in the responsive DVDs.

[para 16] Section 20(1)(g) states:

20(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

...

(g) reveal any information relating to or used in the exercise of prosecutorial discretion,

...

[para 17] The Applicant's submissions on this point are not directly relevant to whether the information in the records relates to, or was used in the exercise of prosecutorial discretion. For example, she argues:

Prosecutorial discretion is an important part of the judicial process and must be exercised. The impartial decision is exercised prior to court, post sentencing the impartiality of the decision is not at risk. If information is reliable enough to be taken into court, let it stand the test of public scrutiny? It should still be accessible information, not a secret. What about the crown decisions need to be kept in secret, is the crown prosecutor's office not following Canadian legislation? Impartiality keeps leading to a government agency being

embarrassed, makes people think you're above the law, or not honoring it. (Rebuttal submission, at page 10)

[para 18] I understand the Applicant's position to be that the relevant criminal proceedings are concluded so there is no harm in revealing the information relied on by the prosecutor.

[para 19] Section 20(1)(g) does not include a harms test; in other words, the Public Body does not have to show that disclosure of the information relating to or used in the exercise of prosecutorial discretion would lead to harm. It only has to show that the information *is* related to or was used in the exercise of prosecutorial discretion. However, as this provision is a discretionary exception to access, the likelihood of harm from disclosure is a relevant factor to the Public Body's exercise of discretion in deciding to withhold the information from the Applicant. I will therefore consider her arguments in that part of the discussion.

[para 20] In its submissions, the Public Body cites the Supreme Court of Canada in *Krieger v. Law Society of Alberta* [2002] 3 S.C.R. 372 (*Krieger*), in which that Court considered the scope of prosecutorial discretion. It stated (at paras. 43, 46 and 47):

“Prosecutorial discretion” is a term of art. It does not simply refer to any discretionary decision made by a Crown prosecutor. Prosecutorial discretion refers to the use of those powers that constitute the core of the Attorney General's office and which are protected from the influence of improper political and other vitiating factors by the principle of independence.

...

Without being exhaustive, we believe the core elements of prosecutorial discretion encompass the following: (a) the discretion whether to bring the prosecution of a charge laid by police; (b) the discretion to enter a stay of proceedings in either a private or public prosecution, as codified in the *Criminal Code*, R.S.C. 1985, c. C-46, ss. 579 and 579.1; (c) the discretion to accept a guilty plea to a lesser charge; (d) the discretion to withdraw from criminal proceedings altogether: *R. v. Osborne* (1975), 25 C.C.C. (2d) 405 (N.B.C.A.); and (e) the discretion to take control of a private prosecution: *R. v. Osiowy* (1989), 1989 CanLII 4780 (SK CA), 50 C.C.C. (3d) 189 (Sask. C.A.). While there are other discretionary decisions, these are the core of the delegated sovereign authority peculiar to the office of the Attorney General.

Significantly, what is common to the various elements of prosecutorial discretion is that they involve the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for. Put differently, prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it. (At paras. 43, 46 and 47, emphasis in the original)

[para 21] That case was considered in Order F2009-027, which addressed the application of section 20(1)(g) to information in a Crown prosecutor's file; it provides a clear explanation of the test for applying this provision and is directly on point here. In that Order, the adjudicator said (at para. 14):

Section 20(1)(g) does not state that information need only be reasonably expected to have been used in, or relate to, the exercise of prosecutorial discretion. Rather, section 20(1)(g) states that it applies to information that would *reasonably be expected to reveal* any information relating to or used in the exercise of prosecutorial discretion. The phrase “could reasonably be expected,” in section 20(1), modifies the verb “reveal” in clause (g), and not the phrases “used in” or “relating to”. Consequently, a public body seeking to withhold information under this provision must establish the following facts on the balance of probabilities: (1) prosecutorial discretion was exercised, (2) there is information that relates to or was used in this exercise of that discretion, and (3) disclosure of the information in the records withheld under section 20(1)(g) could reasonably be expected to reveal this information.

[para 22] In Order F2007-021 the adjudicator concluded that section 20(1)(g) cannot be applied to information for the sole reason that it is located in a Crown prosecutor file. He stated (at para. 51):

However, I do not accept the Public Body’s statements that “any information in a Crown prosecutor’s file may reasonably be expected to relate to the exercise of prosecutorial discretion and therefore may be protected from disclosure” and that “the simple presence of records in the file that may contain such information engages the provisions of this exception.” To accept these assertions would be to judge information by its location rather than its substance. While it may be the case that most or all information in a Crown prosecutor’s file usually falls under section 20(1)(g) of the Act, information must still be reviewed on a record-by-record basis.

[para 23] The adjudicator in Order F2009-027 summarized the above analysis as follows:

Order F2007-021 holds that if information was available to the Crown prosecutor when making the decision to exercise prosecutorial discretion, and is not extraneous, there is a relationship between the information and the exercise of prosecutorial discretion such that the information relates to the exercise of prosecutorial discretion. (At para. 19)

[para 24] In its submission, the Public Body also cites a more recent Supreme Court of Canada decision, *R v. Anderson*, [2014] 2 SCR 167, 2014 SCC 41, which expanded on *Krieger*. In *Anderson*, the Court stated:

In an effort to clarify, I think we should start by recognizing that the term “prosecutorial discretion” is an expansive term that covers all “decisions regarding the nature and extent of the prosecution and the Attorney General’s participation in it” (*Krieger*, at para. 47). As this Court has repeatedly noted, “[p]rosecutorial discretion refers to the discretion exercised by the Attorney-General in matters within his authority in relation to the prosecution of criminal offences” (*Krieger*, at para. 44, citing *Power*, at p. 622, quoting D. Vanek, “Prosecutorial Discretion” (1988), 30 *Crim. L.Q.* 219, at p. 219 (emphasis added)). While it is likely impossible to create an exhaustive list of the decisions that fall within the nature and extent of a prosecution, further examples to those in *Krieger* include: the decision to repudiate a plea agreement (as in *R. v. Nixon*, 2011 SCC 34 (CanLII), [2011] 2 S.C.R. 566); the decision to pursue a dangerous offender application;

the decision to prefer a direct indictment; the decision to charge multiple offences; the decision to negotiate a plea; the decision to proceed summarily or by indictment; and the decision to initiate an appeal. All pertain to the nature and extent of the prosecution. (At para. 44)

[para 25] I agree with the analyses of both Orders F2007-021 and F2009-027, and that *Anderson* is instructive in this case. To summarize the lengthy discussion above, a public body seeking to withhold information under section 20(1)(g) must establish:

1. prosecutorial discretion was exercised in matters within the prosecutor's authority concerning the prosecution of offences,
2. there is information that relates to or was used in this exercise of that discretion, and
3. disclosure of the information could reasonably be expected to reveal this information.

[para 26] Regarding the first part of the test, prosecutorial discretion comprises "decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it", including (but not limited to) decisions:

- to negotiate or repudiate a plea agreement
- to proceed summarily, by indictment or direct indictment
- to charge multiple offences
- to pursue a dangerous offender application
- to initiate an appeal

[para 27] Regarding the second part of the test, information in a Crown prosecution file is generally information available to the Crown prosecutor when making the decision to exercise prosecutorial discretion. However, information that is extraneous to the exercise of discretion cannot be withheld under this provision just because it is contained in a Crown prosecution file.

[para 28] In my view, most of the information withheld in the paper records under section 20(1)(g) falls within that provision. Only a small amount of information withheld under section 20(1)(g) is "extraneous" to the exercise of prosecutorial discretion. Some of the records consist of emails by way of which events were organized, that do not appear to relate to prosecutorial discretion. Discussions about what may occur at these events may reveal information relating to the exercise of prosecutorial discretion, but setting up the events generally will not.

[para 29] I considered whether the dates of the emails, dates of the proposed events, the subject lines of the emails, the participants in the emails, or the participants in the proposed events would reveal information that relates to the exercise of prosecutorial discretion; I conclude that the information described below does *not* relate to the exercise of prosecutorial discretion:

- The information on page 716, except the second of three sentences, in the body of the email. This email also occurs on pages 717 and 718 and the same applies to those pages.
- The information on page 717, except as above and except the information after “that” in the body of the second of three emails on the page.
- The information on page 718, except as above and except for the beginning of the sentence up to “and” in the body of the second of three emails on that page.
- All of the information on pages 719 and 720.
- The information on page 721, except the last sentence (of three sentences) in the body of the first email, and the middle paragraph (of three paragraphs) in the body of the second email.
- All of the information on page 722.
- The information on page 724 except the top half of the page (which is a continuation of the correspondence on page 723).
- All of the information on pages 725 and 726.
- All of the information on page 740.

[para 30] All of the information listed above was also withheld by the Public Body under sections 27(1)(b) and (c). I will therefore consider whether one of those exceptions applies.

[para 31] Regarding the responsive DVDs, the information contained in the DVDs is comprised of evidence from the Crown file, in the form of photos and audio/video files. Much of the information also exists in hardcopy format in the paper records (e.g. printouts and transcriptions). This information is clearly part of the Crown prosecution file, and is not extraneous to the exercise of prosecutorial discretion. Therefore, I find that section 20(1)(g) applies to the DVDs in their entirety.

Section 20(1) – exercise of discretion

[para 32] Sections 20(1)(g) is a discretionary provision. In *Ontario (Public Safety and Security) v. Criminal Lawyers Association*, 2010 SCC 23, the Supreme Court of Canada commented on the authority of Ontario’s Information and Privacy Commissioner to review a head’s exercise of discretion. The Court confirmed the authority of the Information and Privacy Commissioner of Ontario to quash a decision not to disclose information pursuant to a discretionary exception and to return the matter for reconsideration by the head of a public body. The Court also considered the following factors to relevant to the review of discretion:

- the decision was made in bad faith
- the decision was made for an improper purpose
- the decision took into account irrelevant considerations
- the decision failed to take into account relevant considerations

[para 33] In Orders F2008-032 and F2010-036 the adjudicator considered the application of the above decision of the Court to Alberta's FOIP Act:

While this case was decided under Ontario's legislation, in my view, it has equal application to Alberta's legislation. Section 72(2)(b) of Alberta's FOIP Act establishes that the Commissioner may require the head to reconsider a decision to refuse access in situations when the head is authorized to refuse access. A head is authorized to withhold information if a discretionary exception applies to information. Section 72(2)(b) provision states:

72(2) If the inquiry relates to a decision to give or to refuse to give access to all or part of a record, the Commissioner may, by order, do the following:

(b) either confirm the decision of the head or require the head to reconsider it, if the Commissioner determines that the head is authorized to refuse access...

[para 34] In order to properly exercise discretion in determining whether to withhold information, a public body should consider the FOIP Act's general purposes, the purpose of the particular provision on which it is relying, the interests that the provision attempts to balance, and whether withholding the records would meet the purpose of the Act and the provision in the circumstances of the particular case (Order F2004-026 at para. 46).

[para 35] The Applicant's submissions indicate that she believes that the RCMP and Crown prosecutor mishandled the file relating to the complaint she made against an individual, who ultimately pled guilty to a criminal offence.

[para 36] The Applicant states that she wants access to her "person information in [its] entire form and/or correcting any inaccuracies or false information." She further states (Rebuttal submission, at page 4):

I do believe there is false documentation on record for the requested information and myself that is causing an unethical interference in my life, including slander. I have questions about the judicial system, I have questions about my rights, and I have questions about why the judicial system would make the decisions it does about myself and many other situations. According to Vancouver sun (Re), (2004)2 S.C.R. 332, 2004 SCC 43. I have the right to make my own decision about how the court system works and this is further stated in the Canadian Charter of Rights and Freedoms.

[para 37] The Applicant cites the Supreme Court of Canada's decision *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332, 2004 SCC 43, as support for her position that the information in the Crown prosecution file should be disclosed. That decision discusses the importance of the open court principle in relation to *in camera* judicial investigation hearings under the *Criminal Code*. The Court states (at para. 25)

Public access to the courts guarantees the integrity of judicial processes by demonstrating "that justice is administered in a non-arbitrary manner, according to the rule of law": *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*, at para. 22. Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and the public's understanding of the administration of justice. Moreover, openness is a principal

component of the legitimacy of the judicial process and why the parties and the public at large abide by the decisions of courts.

[para 38] The open court principle is somewhat different from the public interest in shielding from disclosure information relating to the exercise of prosecutorial discretion. The open court principle applies to the court proceedings; prosecutorial discretion refers to the decisions made by the Crown regarding how to manage its side of the case, including whether and how to advance the case to court.

[para 39] The Supreme Court in *Krieger* stated (at para. 32):

The quasi-judicial function of the Attorney General cannot be subjected to interference from parties who are not as competent to consider the various factors involved in making a decision to prosecute. To subject such decisions to political interference, or to judicial supervision, could erode the integrity of our system of prosecution.

[para 40] The public interest in withholding information relating to the exercise of prosecutorial discretion lies in preventing interference with the prosecutorial system.

[para 41] The Applicant also refers to her rights under the *Charter* and the federal *Canadian Victims Bill of Rights*. The latter statute grants victims of crime the right to request information, including information about the status and outcome of the investigation and the court proceeding (section 7). The right to request information does not extend to the prosecutor's file; rather, section 20 of that Act states that it is to be construed in a manner that is not likely to interfere with prosecutorial discretion (section 20(a)(ii)). Further, as the Applicant acknowledges, this federal Act does not override the FOIP Act.

[para 42] Nevertheless, the fact that the Applicant is the victim of the crime to which the records at issue relate is a factor the Public Body should take into account in its exercise of discretion to withhold the information.

[para 43] The Public Body states that it took into account the Applicant's rights and the principles enshrined in the *Charter* and the *Victims of Crime Act*. It cites *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* (cited above), in which the Supreme Court of Canada stated (at paras. 44 and 48):

As jurisprudence surrounding concepts such as informer privilege and prosecutorial discretion attests, there is a strong public interest in protecting documents related to law enforcement.

...

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

finding at the first stage that disclosure may interfere with law enforcement is implicitly a finding that the public interest in law enforcement may trump public and private interests in disclosure. At the second stage, the head must weigh the public and private interests in disclosure and non-disclosure, and exercise his or her discretion accordingly.

[para 44] The Public Body also states that it considered the following:

Consideration of the broad immunity afforded prosecutorial discretion and critical need to sustain the prosecutors' ability to collect, review and protect information in order to allow them to make decisions impartially on questions of justice and public interest.

The maintenance of an orderly justice system rests in part on the unrestricted exchange of confidential information among public bodies burdened either with applying or enforcing the law. (Initial submission at paras. 68-69)

[para 45] The Public Body argues that disclosing the type of information found in a Crown prosecutor file – such as information about the police investigation, witness statements, legal analyses of the case – would compromise future relationships with police and witnesses, and may result in parties not coming forward with information in the future.

[para 46] In my view, the Public Body has considered appropriate factors in deciding to withhold the information to which section 20(1)(g) applies. The Public Body considered statements from the court that indicate significant public interest in protecting information relating to the exercise of prosecutorial discretion from disclosure. It also considered the Applicant's interest in disclosure, as well as the legal principles in place to support victims of crime. I am satisfied that the Public Body properly exercised its discretion to withhold information under this provision.

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

[para 47] The Public Body applied section 21(1)(b) in conjunction with section 20(1)(g), in most instances. For the reasons provided in the discussion of section 20(1)(g), I have found that provision applies. Therefore, I do not need to consider the application of section 21(1)(b) to that information. I will consider the Public Body's application of section 21(1)(b) only to the information on pages 15, 232 and 646 (pages 15 and 646 are copies of the same record).

[para 48] 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.*

...

- (4) *This section does not apply to information that has been in existence in a record for 15 years or more.*

[para 49] Pages 15 and 646 are comprised of correspondence from a constable of an out-of-province police service to a constable with the RCMP. Nothing in the Public Body's submissions and nothing on these pages indicate that the information was supplied in confidence, which is a requirement of section 21(1)(b). Further, the information on these pages bears no indication that it was supplied in confidence. The Public Body has also withheld these pages under sections 17(1) and 27(1)(c), which I will consider below.

[para 50] The Public Body also withheld page 232 in its entirety, under section 21(1)(b). This page is comprised of a letter dated 1999. Section 21(4) states that section 21(1) cannot be applied to information in a record that in existence for more than 15 years.

[para 51] The Applicant's access request was made in April 2013; the information in page 232 would have been in existence in a record for 14 years at that point. By now, this record has been in existence for almost 18 years and it cannot be withheld under section 21(1)(b). As this was the only exception applied by the Public Body to the information on this page, I will order the Public Body to disclose it to the Applicant.

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

[para 52] The Public Body applied sections 27(1)(b) and/or (c) in conjunction with section 20(1)(g), in most instances. For the reasons provided in the discussion of section 20(1)(g), I have found that provision applies. Therefore, I do not need to consider the application of section 27(1) to that information. I will consider the Public Body's application of section 27(1)(b) only to the information in pages 15, 605, 646, 716, 717, 718, 719, 720, 721, 722, 724, 725, 726, and 740.

[para 53] Sections 27(1)(b) and (c) state:

27(1) *The head of a public body may refuse to disclose to an applicant*

...

(b) *Information prepared by or for*

(i) *the Minister of Justice and Attorney General,*

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

(iii) *an agent or lawyer of a public body*

in relation to a matter involving the provision of legal services, or

(c) *information in correspondence between*

(i) *the Minister of Justice and Attorney General,*

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

(iii) *an agent or lawyer of a public body,*

and any other person in relation to a matter involving the provision of advice or other services by the Minister of Justice and Attorney General or by the agent or lawyer.

[para 54] Orders F2014-R-01 and F2014-38 both specify that sections 27(1)(b) and (c) require the information withheld under those provisions to reveal the *substance* of the relevant legal services. Order F2014-R-01 states:

Information “prepared by or for an agent or lawyer of a public body” within the terms of section 27(1)(b) is *substantive* information, and the section does not apply to information that merely refers to or describes legal services without revealing their *substance* (Order F2013-51 at para. 85). Similarly, the purpose of section 27(1)(c) is to protect the *substance* of advice and services by an agent or lawyer of a public body, and the section does not extend to such information as dates or the names of the senders and recipients of correspondence (Order F2009-018 at paras. 45 to 47). (Order F2014-R-01, at para. 69)

[para 55] Past Orders of this Office have made clear that where the Act says “by or for”, it means “by or on behalf of” (see Orders 97-007, at para. 29, F2008-008, at paras. 42-44). In other words, for section 27(1)(b) to apply, the information must have been “prepared by the lawyer or someone acting under the direction of the lawyer for the purpose that a lawyer will use the information in order to provide legal services to a public body (Order F2010-007, at para. 37).

[para 56] In Order F2014-38, the adjudicator further clarified that section 27(1)(b) does not apply to information sent to an agent or lawyer of the public body, or to information that was created *in connection with* a legal service but not created *for* that purpose (at para. 87).

[para 57] Page 605 consists of a form that appears to have been filled out by a third party (or possibly by his counsel); the Public Body applied section 27(1)(b) to that

information. As stated in Order 2014-38, information received by the Crown prosecutor's office is not the same as information prepared by or for someone listed in section 27(1)(b)(i)-(iii), even if it was received by someone listed therein.

[para 58] As this form appears to have been filled out by a third party (or his counsel), I find that it is not information to which section 27(1)(b) can apply. The Public Body did not apply section 27(1)(c) to this information.

[para 59] Pages 15 and 646 are copies of the same record. They consist of correspondence between an out-of-province police service *to* another constable; the Public Body has applied only section 27(1)(c) to the information on these pages. Although it has ended up in a Crown prosecutor file, neither of the correspondents is someone listed in section 27(1)(c). Therefore, that provision cannot apply.

[para 60] The Public Body applied both sections 27(1)(b) and (c) to the information on pages 716, 717, 718, 719, 720, 721, 722, 724, 725, 726, and 740; I found that section 20(1)(g) did not apply to some of the information on these pages.

[para 61] I described the information on these pages as emails relating to the organization of events. As noted above, neither section 27(1)(b) nor (c) applies to information that merely relates to a legal service, without revealing the *substance* of the legal service. In this case, the legal service being provided is the prosecution of an offence. I have found that some of the information in these pages related to the exercise of prosecutorial discretion, and was properly withheld under section 20(1)(g). However, some of the information, such as the dates of emails, names of participants, etc. did not relate to the exercise of prosecutorial discretion. Following the analyses in the orders cited above, I also find that this information does not reveal the *substance* of a legal service, as required by both sections 27(1)(b) and (c).

[para 62] I find that sections 27(1)(b) and/or (c) does not apply to the information on pages 716, 717, 718, 719, 720, 721, 722, 724, 725, 726, and 740, that is described in paragraph 29 of this Order (i.e. the information that I found was "extraneous" to the exercise of prosecutorial discretion). As I have found that section 20(1)(g) also does not apply, and the Public Body did not apply any other provision, I will order the Public Body to disclose this information to the Applicant, with the exception of a third party name appearing on page 725; I will consider the application of section 17(1) to that name, below.

[para 63] I find that sections 27(1)(b) and/or (c) do not apply to the information withheld under those provisions on pages 15, 605 and 646. The Public Body has also applied section 17(1) to the information on these pages, and I will consider the application of section 17(1) below.

4. Does section 17(1) of the Act (disclosure an unreasonable invasion of personal privacy) apply to the information in the records?

[para 64] The Public Body applied section 17(1) in conjunction with section 20(1)(g), in most instances. For the reasons provided in the discussion of section 20(1)(g), I have found that provision applies to most of the information for which it was claimed. Therefore, I do not need to consider the application of section 17(1) to that information. I will consider the application of section 17(1) only to the information pages 15, 605, 618 and 646 (pages 15 and 646 are copies of the same record), and the third party name appearing on page 725, as I have found that the Public Body did not properly apply sections 20(1) or 27(1) to the information on that page.

[para 65] The first question under section 17(1) is whether the relevant information is personal information as defined in the Act.

[para 66] 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 67] The information withheld under section 17 includes the names of third parties, as well as additional law enforcement-related information.

[para 68] Pages 15 and 646 contain a third party’s name and other law enforcement information that falls within section 1(n)(vii). This information is contained in the

handwritten notations in the middle of the page, below the bolded line (the last portion of information on the page). The remainder (top portion) of the page is not personal information to which section 17(1) can apply.

[para 69] Page 605 consists of a filled-out form that contains a third party's name, signature, charges filed against the individual, court date and location of appearance, telephone number, and the name of the individual's defence counsel. This is personal information; however, the form itself (i.e. the standard information in the form) is not personal information to which section 17(1) can apply.

[para 70] Page 618 is a copy of page 616, which was the subject of Order F2016-31. This page contains different handwritten notations than those on page 616; however, in both cases the handwritten notations are not personal information. As with page 616, the "Re" line and the body of the letter contain personal information of a third party.

[para 71] In many cases, severing the name and other identifying information about the third party will be sufficient to render the remaining information non-identifying. However, with respect to the personal information described above, it is not sufficient to sever *only* the name of the third party appearing on this page, because the identity of that third party is obvious in the context of the records. It is for this reason that I find that dates etc. are also personal information.

[para 72] Page 725 consists of several emails; the name of a third party appears in the body of the fourth of five emails. This third party does not appear to be relevant to the case in which the Applicant was the victim; only the name is personal information.

[para 73] 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

(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,

...

[para 74] Section 17 is a mandatory exception: if disclosure of the information would be an unreasonable invasion of a third party's privacy, it must be withheld.

[para 75] 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 76] 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.

[para 77] Section 17(4)(b) weighs against disclosure of information that is an identifiable part of a law enforcement record. "Law enforcement" is defined in section 1 of the Act as follows:

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 78] The records at issue are part of the Crown file and are identifiable as part of a law enforcement record. Therefore this factor applies to create a presumption of unreasonable invasion with respect to disclosure of these records.

[para 79] Section 17(4)(g) creates a presumption of unreasonable invasion with respect to personal information where the name of a third party appears with other information or in a context that provides other information about the individual. On pages 14 and 645, the name appears in a form, and on page 616 it appears in the context of a court appearance. Therefore, section 17(4)(g) also gives rise to a presumption of unreasonable invasion of privacy.

Section 17(5)(a)

[para 80] 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 81] 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 82] The Applicant argues that the information in the records at issue "most likely belongs to [the perpetrator], and/or RCMP members, and/or Judicial officials/ lawyers. These are publically held documents, the responsibility and knowledge of the use and disclosure of the professional identity of people entrusted to uphold the laws of Canada was job/career criteria." (Rebuttal submission, page 1)

[para 83] She further states:

I was a Victim of a Torturous crime that lead me to do as I had always been told to do, I went to the police. I was lied to; I assume under an investigative technique. I have no problem with the implied consent into my personal information. Although I do expect to have access to the information gathered and the ability to defend any accusations gathered. That is my intent throughout my requests. I have never contacted any of the individuals named in the information that I have gathered. I have never offered any information to be published. (At page 5)

[para 84] The Applicant seems to question the handling of a particular investigation by police, and the subsequent prosecution by a Crown Prosecutor. However, the third party personal information appearing on pages 15, 605, 618, 646 and 725 does not appear to be directly relevant to the actions of the Crown Prosecutor or police; indeed, these particular pages of records do not seem to be relevant to the Applicant's reason for making her access request. For this reason, I find that section 17(5)(a) does not weigh in favour of disclosing the personal information on these three pages.

Weighing factors under section 17

[para 85] The Applicant has not provided any other reasons weighing in favour of disclosing the names on pages 15, 605, 618, 646 and 725 to which section 17(1) could be applied. At least two factors weigh against disclosure and I cannot see any factors that weigh in favour. Therefore I uphold the Public Body's decision to withhold the personal information under section 17(1).

V. ORDER

[para 86] I make this Order under section 72 of the Act.

[para 87] I find that the Public Body properly applied section 20(1)(g) to the information in the records at issue, including the information in the DVDs, with the exception of the information described at paragraph 29.

[para 88] I find that the Public Body did not properly apply section 21(1)(b) to some of the information in the records at issue. I order the Public Body to disclose the information on page 232 to the Applicant.

[para 89] I find that the Public Body did not properly apply sections 27(1)(b) or (c) to some of the information in the records at issue. I order the Public Body to disclose the information described at paragraphs 62 and 63 of this Order, withholding only the information to which section 17(1) applies (per paragraph 90, below).

[para 90] I find that section 17(1) applies to some of the information on pages 15, 605, 618, 646 and 725, as described in paragraphs 68-72 of this Order. This information cannot be disclosed to the Applicant. I order the Public Body to disclose the remainder of the information on those pages.

[para 91] 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