ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2017-58

July 7, 2017

EDMONTON POLICE SERVICE

Case File Number F7384

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Summary: The Criminal Trial Lawyers' Association (the Applicant) made a request for access under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to the Edmonton Police Service (the Public Body). The Applicant requested the following records:

> Please provide me with all records as defined by s. 1(q) relating to the investigation into the findings of misconduct by Judge Wenden against [Officer A] in the matter of *R v Kubusch* (2003) ABPC 156 copy enclosed.

The Public Body responded to the Applicant's access request on July 5, 2013. It granted access to two records, and denied access to the remaining 514 responsive records under sections 4(1)(a) (application of the Act), 17(1) (disclosure harmful to personal privacy), 20(1) (disclosure harmful to law enforcement), 21(1) (disclosure harmful to intergovernmental relations), 24(1) (advice from officials), and 27(1) (privileged information) of the FOIP Act.

The Adjudicator agreed with the Public Body that section 4(1)(a) of the FOIP Act applied to materials such as records filed with the Court, Court decisions, and official Court transcripts. She found that section 17(1) did not require the Public Body to sever the information of Officer A or the defendant in most cases, as the public availability of the information essentially extinguished any reasonable expectations of privacy in the information. However, for personal information that was not publicly available, the Adjudicator determined that the Public Body was required to withhold that information from the Applicant.

The Adjudicator determined that there was insufficient evidence to support finding that the RCMP had supplied information from the Canadian Police Information Centre database (CPIC) regarding an accused's criminal records in confidence.

The Adjudicator agreed that section 24(1)(a) applied to the information to which the Public Body had applied this provision. However, she required the Public Body to reconsider its decision to withhold records under section 24(1)(a), as it had not considered the age of the records in making its decision.

The Adjudicator did not support the Public Body's claim of privilege over the records for two reasons. First, she found that the records the Public Body described as a "legal opinion" were a decision by a Crown prosecutor regarding conducting a prosecution. The Adjudicator determined that a Crown prosecutor does not act as a solicitor when making decisions of this kind. Second, she found that records created by the Public Body's legal services area, and which contained a description of the Crown prosecutor's decision, had been provided to Officer A, who was opposed in interest to the Public Body in regard to the matter that was the subject of the records. The Adjudicator determined that any privilege attaching to the records created by the legal services area, had been lost. The Adjudicator determined section 20(1)(g) (prosecutorial discretion) applied to the Crown prosecutor's decision and to references to this decision in the records created by the legal services area.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 2, 4, 6, 17, 20, 21, 24, 27, 65, 68, 69, 70 ,71, 72; *Police Act*, R.S.A. 2000 c. P-17, s. 45

Authorities Cited: AB: Orders F2007-021, F2008-028, F2009-010, F2009-024, F2013-13, F2014-25, F2015-22, F2015-29, F2015-31, F2016-20, F2016-31 **ON:** Orders PO-3372, MO-1663-F, MO-3052, MO-3052I, PO-2489, PO-2751, MO-1329, PO-2380

Cases Cited: *R. v Kubusch* (2003) ABPC 156; *WIC Radio Ltd. v. Simpson* [2008] 2 SCR 420 ; *Calgary Police Service v. Alberta (Information and Privacy Commissioner)*, 2010 ABQB 82; *Dagg v. Canada (Minister of Finance)*, [1997] 2 SCR 403; *F.H. v. McDougall* [2008] 3 S.C.R. 41; *R. v. Campbell*, [1999] 1 SCR 565; *R. v. Wijesinha*, [1995] 3 SCR 422; *Di Iorio v. Warden of the Montreal Jail*, [1978] 1 SCR 152; *British Columbia (Attorney General) v. Davies*, 2009 BCCA 337; *Descôteaux et al. v. Mierzwinski*, [1982] 1 SCR 860; *Canada v. Solosky* [1980] 1 S.C.R. 821; *Kalick v. The King*, [1920] S.C.R. 175; *Krieger v. Law Society of Alberta*, [2002] 3 SCR 372; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23

I. BACKGROUND

[para 1] On May 2, 2013, the Criminal Trial Lawyers' Association (the Applicant) made a request for access to the Edmonton Police Service (the Public Body). The Applicant requested the following records:

> Please provide me with all records as defined by s. 1(q) relating to the investigation into the findings of misconduct by Judge Wenden against [Police Officer A] in the matter of *R v Kubusch* (2003) ABPC 156 copy enclosed.

[para 2] The Public Body responded to the Applicant's access request on July 5, 2013. It granted access to two records, and denied access to the remaining 514 responsive records under sections 4(1)(a), 17(1), 20(1), 21(1), 24(1), and 27(1) of the FOIP Act.

[para 3] The two records it provided to the Applicant, are a letter sent by the Applicant to the Public Body on September 23, 2003, and the Public Body's response to that letter of September 25, 2003. The Public Body severed the name of Officer A and the name of the accused in the case cited by the Applicant from both pieces of correspondence.

[para 4] The Applicant's letter of September 23, 2003 states:

> The Criminal Trial Lawyers' Association, Police Conduct Committee, has been following this issue and has noted that, as reported on the television news recently and in the Edmonton Sun on September 16, 2003, the police have launched an internal investigation into the incident. We trust that the investigation will be handled by a police service other than the Edmonton Police Service because, obviously, any investigation by the Edmonton Police Service would not be seen as objective because the investigation relates to the conduct of [Officer A].
>
> If we are wrong and the Edmonton Police Service is conducting this investigation, then please consider this to be our request that, pursuant to section 45(5)(ii) of the *Police Act*, you conclude that it would be in the public interest for another police service to handle the investigation and disposition and that you request that the Edmonton Police Commission make the necessary arrangements to do that.

[para 5] The Public Body's September 25, 2003 responding letter to the Applicant was written by the Manager, Legal Services Branch. The letter states:

> Your correspondence to [the Chief of Police] dated 2003 September 23 has been referred to my attention.
>
> I can advise that the Edmonton Police Service will be conducting the investigation referred to in your correspondence.

[para 6] The Applicant sought review of the Public Body's decision to deny access to the records it had requested.

[para 7] The Commissioner authorized a mediator to investigate and attempt to settle the matter. As this process was unsuccessful, the matter was set down for a written inquiry.

II. RECORDS AT ISSUE

[para 8] The information withheld from the Applicant by the Public Body is at issue.

III. ISSUES

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

Issue B: Does section 17(1) of the Act (disclosure harmful to personal privacy) require the Public Body to withhold the information in the records from the Applicant?

Issue C: Did the Public Body properly apply section 20(1) of the Act (disclosure harmful to law enforcement) to the information it severed from the records under this provision?

Issue D: Did the Public Body properly apply section 21(1) of the Act (disclosure harmful to intergovernmental relations) to the information it severed from the records under this provision?

Issue E: Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information it severed from the records under this provision?

Issue F: Did the Public Body properly apply section 27(1) of the Act (privileged information) to the information it severed from the records under this provision?

IV. DISCUSSION OF ISSUES

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

[para 9] Section 4(1)(a) states:

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

> *judicial administration record or a record relating to support services provided to the judges of any of the courts referred to in this clause […]*

[para 10] If section 4(1)(a) applies to information, then the FOIP Act does not apply to it. In other words, when a provision of section 4 encompasses information, the information cannot be the subject of an access request or a complaint.

[para 11] The Public Body argues that section 4(1)(a) excludes records 41, 43, 46, 51, 93 – 95, 101 – 103, 106, 122 – 130, and 401 – 462 from the application of the FOIP Act. These records consist of a search warrant, a report to a justice, an order of a justice, materials submitted by the Crown and the accused in the *Kubusch* hearing, official court transcripts, and copies of the Court decision in *Kubusch*.

[para 12] With regard to the transcripts, the Public Body argues:

> Official court transcripts are transcriptions of court hearings produced by Transcript Management Services from recordings made during the court hearings and are typically contained within a court file. Further, it is a copy of the recording of proceedings contained on a court file and thus is extracted from information on a court file.

[para 13] The Applicant disputes that the hearing transcripts fall within the terms of section 4(1)(a). It argues:

> The EPS states that the court transcripts are transcriptions of court hearings produced by Transcript Management Services from recordings made during court hearings. The Applicant agrees with that assertion. However, the EPS also claims that the transcripts are usually contained on the court file and, in any event, the transcripts are extracted from information on a court file.
>
> The Applicant also notes that the Review in this matter cited a prior OIPC decision in support of the proposition that all court transcripts are information from a court file [Order F2007-021] […]
>
> The relevant portion of that decision states the following at para 23:
>
> > Copies of transcripts of court proceedings emanate from a court file, as they **are prepared by or on behalf of the court and not the Public Body**. I find that the Court transcripts therefore constitute information in a court file and are excluded from the application of the Act under section 4(1)(a). [emphasis added by the Applicant]
>
> The Applicant submits that these circumstances are distinguishable from that decision. In that case, the transcripts in question appear to have been ordered by the court rather than the Public Body. In this case, the Applicant believes that the transcripts were ordered by the Public Body and not the court. This is a noteworthy point because, generally, transcripts of a matter are only placed on the court file if the court orders them. If another party orders transcripts, they are prepared by Transcript Management Services and are only provided to the party that requested them.

[para 14] The Applicant submitted the affidavit of a legal assistant, which states:

> During my work as a criminal legal assistant, I have had numerous experiences with ordering transcripts of legal proceedings from Transcript Management Services.
>
> It is my understanding from speaking to court clerks on various files that the court file will not include a transcript of proceedings unless the court has requested that a transcript be produced. In cases where the Crown or defence has requested a transcript, they must provide the court with a copy if they want the court to have a copy of the document.

[para 15] If the Applicant's theory is correct, then court transcripts would not be subject to the FOIP Act when the Court requires a copy of them and places that copy on a file, but transcripts would be subject to the FOIP Act when a Court does not do so. In my view, this position is untenable.

[para 16] If Court transcripts are subject to the FOIP Act, then they could be the subject of mandatory exceptions to disclosure created by the FOIP Act, and also the subject of a complaint regarding collection, use, and disclosure of personal information. Members of the public could not obtain transcripts, as it would be necessary for personal information in the transcripts to be severed prior to disclosing it. Such a result would be contrary to the "open court principle".

[para 17] The Applicant, like anyone else, is entitled to obtain the official Court transcript of the *Kubusch* hearing from Transcript Management Services on request and payment of fees. If the FOIP Act applied to an official Court transcript, the Applicant, like other members of the public, would not be able to obtain a copy of it in this way, unless there were no exceptions under Part 1 of the FOIP Act that were applicable to the information in the transcript.

[para 18] I note that the transcript in the records contains a court file number, which is evidence to suggest that the transcript is information emanating from a court file.

[para 19] In Order F2007-021, the Adjudicator said:

> Copies of transcripts of court proceedings emanate from a court file, as they are prepared by or on behalf of the court and not the Public Body.

In my view, the Adjudicator considered section 4(1)(a) to apply because transcripts of court proceedings emanate from a court file. Where he refers to the transcript of court proceedings as "being prepared by or on behalf of the court" I believe he means that they are created under the ultimate authority of the Court, and not under the authority of a public body. I say this because Courts are in control of their own processes and the decision whether a transcript may be made available or is the subject of a sealing order is a decision made by the Court.

[para 20] From my review of the records to which the Public Body applied section 4(1)(a), I agree with the Public Body that they are exempt from the application of the FOIP Act through operation of section 4(1)(a).

Issue B: Does section 17(1) of the Act (disclosure harmful to personal privacy) require the Public Body to withhold the information in the records from the Applicant?

[para 21] The Public Body applied section 17(1) to sever all the records requested by the Applicant, in their entirety, but for the letters of September 23, 2003 and September 25, 2003 between the Applicant and the Public Body. The Public Body severed the name of Officer A where it appears in the Applicant's correspondence and in its own correspondence, under section 17(1). It also severed the name of a defendant from style of cause in the subject line of the Applicant's correspondence under section 17(1).

[para 22] Section 17 sets out the circumstances in which a public body may or must not disclose the personal information of a third party in response to an access request. It states, in part:

> *17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.*
>
> *[…]*
>
> *(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*
>
> > *[…]*
> >
> > *(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,*
> >
> > *[…]*
> >
> > *(d) the personal information relates to employment or educational history,*
> >
> > *[…]*
> >
> > *(g) the personal information consists of the third party's name when*
> >
> > > *(i) it appears with other personal information about the third party, or*
> > >
> > > *(ii) the disclosure of the name itself would reveal personal information about the third party[…]*

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

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

(b) the disclosure is likely to promote public health and safety or the protection of the environment,

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

(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,

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

(f) the personal information has been supplied in confidence,

(g) the personal information is likely to be inaccurate or unreliable,

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

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

[para 23] Section 17 does not say that a public body is never allowed to disclose third party personal information. It is only when the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy that a public body must refuse to disclose the information to an applicant under section 17(1). Section 17(2) (not reproduced) establishes that disclosing certain kinds of personal information is not an unreasonable invasion of personal privacy.

[para 24] When the specific types of personal information set out in section 17(4) are involved, disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. To determine whether disclosure of personal information would be an unreasonable invasion of the personal privacy of a third party, a public body must consider and weigh all relevant circumstances under section 17(5), (unless section 17(3), which is restricted in its application, applies). Section 17(5) does not contain an exhaustive list and any other relevant circumstances must be considered.

[para 25] Section 17(1) requires a public body to withhold information once all relevant interests in disclosing and withholding information have been weighed under section 17(5) and, having engaged in this process, the head of the public body concludes

that it would be an unreasonable invasion of the personal privacy of a third party to disclose his or her personal information. If the head determines that it would be an unreasonable invasion of an individual's personal privacy to disclose the individual's name and personally identifying information, the head must then determine, as required by section 6 of the FOIP Act, whether this information can reasonably be severed, and the remainder provided to the Applicant.

[para 26] Section 1(n) of the FOIP Act defines "personal information". It states:

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

[para 27] The records at issue contain information regarding a police investigation, and transcripts of the *Kubusch* hearing in which Officer A gave evidence, the Provincial Court Judge's decision in relation to Officer A's evidence during the hearing, as well as records documenting Officer A's investigation and decisions whether criminal charges should be laid or disciplinary proceedings instituted with regard to Officer A. The

information the Public Body severed under section 17(1) from the records at issue is personally identifying information about Officer A and the defendant in the *Kubusch* decision within the terms of section 1(n) of the FOIP Act.

[para 28] The Public Body argues that section 17(4) applies and creates a presumption that it would be an unreasonable invasion of personal privacy to disclose the information:

> Section 17(4) of the FOIPP Act establishes the circumstances in which disclosure is presumed to be an invasion of a third party's privacy. The following factors suggest that disclosure of the information that was withheld under s.17 would constitute an unreasonable invasion of privacy:
>
> • The personal information is an identifiable part of a law enforcement record (s. 17(4)(b);
> • The personal information relates to employment or educational history (s. 17(4)(d)); and
> • The personal information consists of a third party's name and it appears with other personal information about the third party (s. 17(4)(g)(i)).

[para 29] Officer A also argues that sections 17(4)(b), 17(4)(d) and 17(4)(g) apply.

[para 30] I agree with the Public Body and Officer A that sections 17(4)(b), (d), and (g) apply to the personal information of Officer A and the defendant in the records. As a result, a presumption arises that it would be an unreasonable invasion of privacy to disclose the personal information of Officer A and the defendant. The next step in section 17 analysis is to determine whether this presumption is outweighed or not by relevant considerations under section 17(5).

[para 31] The Applicant argues that section 17(5)(a) applies and weighs in favor of disclosing the personal information of Officer A.

[para 32] The Public Body argues that sections 17(5)(e) and (h) apply and strengthen the presumption that it would be an unreasonable invasion of Officer A's personal privacy to disclose his personally identifying information. It argues that section 17(5) does not apply.

[para 33] Officer A argues that section 17(5)(a) has no application to the records but that section 17(5)(h) applies to his personal information and weighs in favor of nondisclosure. Officer A relies on *Calgary Police Service v. Alberta (Information and Privacy Commissioner)*, 2010 ABQB 82 in support of his position.

[para 34] I turn now to consideration of the factors that the Public Body, Officer A, and the Applicant argue are relevant (or not) to the decision to be made under section 17(5).

Section 17(5)(a)

[para 35] Cited above, section 17(5)(a) establishes that a relevant consideration in determining whether a presumption under section 17(4) is rebutted or not is whether disclosure of the personal information is desirable for the purpose of subjecting the

activities of a public body to public scrutiny. If it applies, section 17(5)(a) weighs in favor of disclosure.

[para 36] The Applicant argues:

> The EPS correctly notes that the mere fact of an investigation being commenced is not enough for the OIPC to find that public scrutiny is required. However, in this case, there is more than the mere fact of an investigation being commenced.
>
> Generally, the ongoing conduct of the officer in question and the promotion policies of the EPS have been in the public eye in the Edmonton area and have garnered significant media attention. Members of the public have been engaged in the issue in an unusually fulsome way, including through ongoing debate, engagement with the Edmonton Police Commission, and by multiple different public protests.
>
> […]
>
> This element brings the public scrutiny factor into play. Members of the public are unusually engaged on this issue and have been protesting what they perceive to be wrongful favourable treatment of this officer by the EPS. In the records at issue, the member was investigated for serious allegations that were brought to light by a member of the judiciary. Although the member was cleared of the charges, the public interest in this matter is whether the EPS engaged in a fair and impartial investigation of the conduct. This issue remains relevant at the current time because the member in question has been promoted above noteworthy public outcry.

[para 37] The Applicant attached a copy of a report of the CBC dated December 4, 2014 regarding Officer A's promotion and public reaction to it in support of his arguments.

[para 38] Officer A argues:

> The following facts counter any argument that the presumptions in 17(4) can or should be displaced in this case on the basis of the need for public scrutiny described in 17(5)(a):
>
> > The alleged misconduct and related complaint occurred over 12 years ago;
> >
> > The alleged misconduct is preserved in a publically accessible court record;
> >
> > The complaint was thoroughly investigated by the EPS at the time it was made, as is evident by the number and nature of documents described in the "responsive records" listing; and
> >
> > There was media coverage of that court decision and the fact that there would be a disciplinary investigation.
>
> As submitted by the EPS, there is simply no indication that the activities of the EPS in this case require any further public scrutiny. Even if they did, such scrutiny would do little to increase public accountability of the EPS given the level of institutional change experienced by the EPS over the past 12 years, including revision of policies and turnover of management and employee personnel.

[para 39] In response to the submissions and newspaper articles submitted by the Applicant, Officer A states:

> The newspaper articles presented by the Applicant are not relevant to the present decision as they do not indicate that the activities of the EPS in this particular case require any further public scrutiny in order to permit "meaningful discussion of a matter of public importance." The articles each address the issue of the Edmonton Police Service's promotion policies as they relate to promotion of officers who have been convicted of criminal offences, and [Officer A] in particular. The last article illustrates that the policies in issue have now been changed. In other words: the accountability sought in relation to the issue of promoting officers charged with criminal offences was ultimately achieved.

[para 40] The Public Body argues:

> There is no basis or evidence provided by the Applicant suggesting that the activities of EPS require further scrutiny in this circumstance or that the disclosure of additional portions of the Responsive Records would further the purpose stated at section 17(5)(a). Moreover, the Applicant has provided no evidence that the activities of the EPS are being brought into question with respect to this particular case, or more broadly.

[para 41] The Applicant raises the question of whether the Public Body conducted a fair and impartial investigation into the issues raised by Wenden Prov. Ct. J in *Kubusch*. It argues that this issue remains relevant as Officer A was recently promoted and his promotion resulted in public controversy.

[para 42] It is not clearly the case that there is a public interest in subjecting the activities of the Public Body in relation to its investigation of Officer A in 2003 to public scrutiny. I am unable to say what relationship (if any) exists between the 2003 investigation and the promotion of Officer A in 2014. In saying this, I note that manner in which the Public Body conducted its investigation, which is the information the Applicant is seeking, is not the personal information of Officer A, but information about the Public Body. Section 17(1) has been applied to this information by the Public Body only because the personal information of Officer A is linked to this information, as his conduct was the subject of the investigation.

[para 43] With regard to section 17(5)(a), I find that it has not been established that there is a need for public scrutiny in relation to the investigation conducted by the Public Body that would weigh in favor of disclosing the personal information of Officer A, which, is inextricably linked to the investigation, given that his conduct was the subject of it.

[para 44] I note that the conduct of Officer A, which led to that investigation, and the fact of the investigation itself, is in the public domain, given that it is described in a Court decision, contained in transcripts, and the subject of a letter to the Applicant confirming the existence of an investigation of Officer A's conduct. However, the public nature of the personal information in question does not engage section 17(5)(a), but is relevant to the application of the "absurd result" factor, which I will discuss below.

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

[para 45] Cited above, section 17(5)(e) applies to information that would subject an individual unfairly to financial or other harm, while section 17(5)(h) applies to information that may unfairly damage the reputation of an individual referred to in the record. Both factors weigh against disclosing personal information when the evidence establishes that they apply.

[para 46] Officer A argues:

> Furthermore, as per section 17(5)(h), releasing Officer A's name in conjunction with the complaint allegation and other personal information could unfairly damage his personal and professional reputation. That unfairness would be amplified where the requested documents to be released 12 years after the matter was investigated and found not to warrant disciplinary citations or sanction. Officer A should be able to trust that he can put this matter behind him as he moves forward in his personal and professional life.

[para 47] Officer A concludes these submissions, stating:

> The Supreme Court of Canada has observed that "a person's reputation is not to be treated as "unavoidable road kill" on the highway to access to information".

[para 48] The Public Body argues that sections 17(5)(e) and (h) apply, not only to the personal information of Officer A, but to the information of the defendant in the *Kubusch* decision :

> Section 17(5)(h) of the FOIPP Act requires specific consideration of whether "the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant".
>
> In considering sections 17(5)(e) and 17(5)(h), it is worth recalling McMahon J's observations regarding reputation in […] *Calgary Police Services v. Alberta (Information and Privacy Commissioner)*:
>
> > To paraphrase the colourful words of Binnie J. in *WIC Radio Ltd. v. Simpson*, 2008 SCC 40 (CanLII), [2008] 2 S.C.R. 420, at para. 2: A person's reputation is not to be treated as "unavoidable roadkill" on the highway to access to information.

[para 49] Both the Public Body and Officer A cite Justice McMahon's reference to *WIC Radio Ltd. v. Simpson* [2008] 2 SCR 420 in support of their position that section 17(5)(h) outweighs all other considerations under section 17(5)(h). In *WIC Radio Ltd.*, Binnie J. stated:

> The Court's task is not to prefer one over the other by ordering a "hierarchy" of rights (*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835), but to attempt a reconciliation. An individual's reputation is not to be treated as regrettable but unavoidable road kill on the highway of public controversy, but nor should an overly solicitous regard for personal reputation be permitted to "chill" freewheeling debate on matters of public interest. As it was put by counsel for the intervener Media Coalition, "No one will really notice if some [media] are silenced; others speaking on safer and more mundane subjects will fill the gap" (Factum, at para. 14). [my emphasis]

[para 50] In that case, the Court was tasked with determining whether a defendant, who was a member of the media, was entitled to rely on the defense of "fair comment" in a defamation lawsuit. The Court found that while the defendant's statements were defamatory, the defense of "fair comment" remained available. In support of modifying or relaxing the conditions necessary to establish this defense, the Court said:

> The function of the tort of defamation is to vindicate reputation, but many courts have concluded that the traditional elements of that tort may require modification to provide broader accommodation to the value of freedom of expression. There is concern that matters of public interest go unreported because publishers fear the ballooning cost and disruption of defending a defamation action. Investigative reports get "spiked", the Media Coalition contends, because, while true, they are based on facts that are difficult to establish according to rules of evidence. When controversies erupt, statements of claim often follow as night follows day, not only in serious claims (as here) but in actions launched simply for the purpose of intimidation. Of course "chilling" false and defamatory speech is not a bad thing in itself, but chilling debate on matters of *legitimate* public interest raises issues of inappropriate censorship and self-censorship. Public controversy can be a rough trade, and the law needs to accommodate its requirements.

It is unclear to me how the foregoing case has any bearing on making decisions under section 17(5)(h) of the FOIP Act, except to the extent that it acknowledges that interests in protecting personal reputation may give way to the need to debate issues of public interest and concern.

[para 51] That being said, I agree with Officer A and the Public Body that a person's reputation should not be harmed unnecessarily. Moreover, section 17(5) requires weighing considerations such as whether any damage to reputation or exposure to harm resulting from disclosure would be unfair, when such considerations can be said to apply.

[para 52] In this case I am unable to say that either section 17(5)(e) or (h) applies. This is because the personal information of both Officer A and the defendant in the *Kubusch* decision that may be learned from the records at issue, is already publicly available. The conduct giving rise to the criminal investigation with regard to the defendant is publicly available in the *Kubusch* decision and in the transcript of the hearing. Wenden Prov. Ct. J.'s findings, which led to the investigation of Officer A, are also publicly available in the *Kubusch* decision. The information on which these findings are based, is also to be found in the transcript of the hearing, which is also publicly available. Further, the Public Body confirmed to the Applicant in 2003 that it was conducting an investigation of Officer A's conduct. Finally, the Public Body and Officer A have both confirmed in their submissions that an investigation was conducted, and that it was determine that no criminal charges should be laid and that a disciplinary hearing was not warranted. As a result, it is unclear how Officer A's reputation could be harmed by disclosing information that his conduct was criticized by the Provincial Court, that he was the subject of a criminal and disciplinary investigation and that it was subsequently determined that criminal and disciplinary proceedings were not warranted, when this information has already been made public.

[para 53] As will be discussed below in relation to the issue of public availability, the only personal information that is not public knowledge that could be learned from disclosing the records is the Public Body's reasons for concluding that criminal charges and disciplinary proceedings were not warranted. As noted above, such information is not the personal information of Officer A, and section 17(1) would not apply to it. For the purposes of section 17(5)(h), there is no reason to expect that disclosure of the records, which contain personal information that is already publicly available, would unfairly damage Officer A's reputation. I find that section 17(5)(h) has not been established as relevant.

[para 54] With regard to the Public Body's arguments in relation to section 17(5)(e), I am unable to say that disclosure of the information in the records would result in unfair exposure to financial or other harm. Again, the information that would be disclosed about either Officer A or the defendant, is already publicly available in the Court decision and in the materials available from the Court. It is therefore unclear how disclosing records that contain this same personal information to the Applicant would result in the harms recognized by section 17(5)(e).

[para 55] I note, however, that of all the records, records 480 – 485 contain information about Officer A that is not publicly known or available, in addition to information that is both publicly known and available. However, I find that sections 17(5)(e) and (h) are not engaged by the information in these records, as I am unable to say that they could subject Officer A financial or other harm, or result in damage to his reputation.

[para 56] For these reasons, I find that sections 17(5)(e) and (h) have not been demonstrated as applicable.

Is the personal information to which the Public Body has applied section 17(1) publicly available? If so, does the application of section 17(1) result in absurdity?

[para 57] As noted above, section 17(5) analysis is not confined to consideration of the factors expressly set out in section 17(5). Rather, all relevant circumstances must be considered. In my view, the extent to which the personal information of Officer A and the defendant is publicly known is a relevant circumstance. I say this because withholding information from the Applicant when the facts that may be construed as personal information are already publicly available and known to the Applicant would not serve the purpose of section 17(1) and amount to an absurd result.

[para 58] In Order F2013-13 I said:

> I agree with the Public Body that where information in the records is *not* about the Third Party, that information, or similar information, has not necessarily been revealed at the disciplinary hearing. However, where the information in the records of the investigation can be construed as being *about* the Third Party, and therefore qualifies as his personal information, with the exception of information about his private life, (by which I mean information that refers to his domestic situation, his friends, and his off-duty life that is not the subject of the charges), many of the facts revealed in the investigation records are essentially the same as those appearing in

> the disciplinary decision. Section 17 may be applied only to personal information. If the personal information in the records is essentially the same information that is already public, then the public nature of the information must be considered, regardless of the purpose in creating a record.
>
> I accept that there are situations in which the presence of personal information in a particular kind of record may allow one to learn additional personal information about an identifiable individual by virtue of the nature of the record. In this case the records were prepared for an investigation, and therefore one can learn from the presence of facts about the Third Party in these records that he was the subject of an investigation. However, it is clear from the disciplinary decision and from media reports that an investigation was conducted. Therefore, the fact that the Third Party's personal information appears in the context of records documenting a criminal and disciplinary investigation and the procedures followed in the course of the investigations, does not convey anything about the Third Party that is not publicly known.
>
> I also accept that there is more detailed information in the investigation records than appears in the records of the disciplinary hearing. However, in my view, this does not alter my finding that much of the personal information revealed in the disciplinary decision, and that appearing in the investigation records, is essentially the same. To illustrate, a portion of the disciplinary decision that was provided to the Applicant refers to the Third Party's use of "foul and inappropriate language," while the investigative records document the accounts of witnesses as to what was said. From reading either the investigation or the disciplinary decision, one can come to the conclusion that the Third Party used foul and inappropriate language. In other words, the information one can learn about the Third Party from either the disciplinary decision or this portion of the records of the investigation is essentially the same.

[para 59] In the foregoing case, I determined that the public availability of the information being withheld weighed strongly in favor of disclosure. I also determined that personal information is publicly available even where it appears in a record that is not available to the public, if the same information is contained in, or can be inferred from information that is available to the public.

[para 60] In this case, it is publicly known from the *Kubusch* decision, from the transcripts of the Court hearing relating to this case, and from newspaper articles, that Officer A conducted an investigation, obtained a search warrant, gave evidence in Court regarding obtaining a warrant and that the Court was highly critical of his evidence and the means by which he obtained the search warrant[1]. According to the information the Public Body provided to the Applicant in 2003, and from its submissions for this inquiry, and those of Officer A, it is also known that the Public Body conducted an investigation regarding the concerns expressed by the Court in *Kubusch*. The investigation did not result in criminal charges or a disciplinary hearing. Despite this, the Public Body seeks to withhold records that would reveal this information. It states:

> The investigation and associated documents are directly related to Officer A's employment with the EPS and include evidence and opinions from third parties about Officer A's conduct. While he was not cited or sanctioned for misconduct, the information is still associated with allegations of wrong doing and is therefore personal information. The records at issue are consequently an identifiable part of Officer A's employment history and releasing them would presumptively be an unreasonable violations of Officer A's personal privacy.

[1] The transcripts of the *Kubusch* hearing remain available to the public at the Court house, while the full text of the *Kubusch* decision is available to the public on CanLII and Quicklaw.

[para 61] I do not question that the records are part of Officer A's employment history and contain his personal information; however, information regarding the allegations or wrong doing to which the Public Body alludes are contained in a reported decision. Moreover, the Public Body has already told the Applicant that it conducted an investigation into the allegations of misconduct and what the outcome was. With regard to the defendant, all the information contained in the records at issue that could be construed as his personal information is contained in the Court decision and in the hearing transcript. The question becomes whether there are any privacy interests remaining in the information the Public Body seeks to withhold.

[para 62] In Order MO-3052, an adjudicator with the Ontario Office of the Information and Privacy Commissioner described the "absurd result principle" as a factor that may be relevant when determining whether it would be an unreasonable invasion of personal privacy to disclose personal information to an applicant. The adjudicator stated:

> […] According to the absurd result principle, whether or not the factors or circumstances in section 14(2) or the presumptions in section 14(3) apply, where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 14(1), because to find otherwise would be absurd and inconsistent with the purpose of the exemption.
>
> One of the grounds upon which the absurd result principle has been applied in previous orders is where the information is clearly within the requester's knowledge.

[para 63] In Ontario Order MO-3025-I, this principle was found to be relevant and to weigh in favour of disclosing personal information. In that case, the Adjudicator said:

> In my view, however, the absurd result principle is relevant in the circumstances of this appeal. Although the appellant did not specifically address this point during my inquiry into the appeal, the circumstances raise the possible application of the "absurd result" principle. According to the absurd result principle, whether or not the factors or circumstances in section 14(2) or the presumptions in section 14(3) apply, where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 14(1), because to find otherwise would be absurd and inconsistent with the purpose of the exemption. One of the grounds upon which the absurd result principle has been applied in previous orders is where the information is clearly within the requester's knowledge.

PO-2489, para 41; PO-2751, para 52; MO-1329, para 36; PO-2380, para. 111 are also examples of orders applying this principle. Moreover, I applied this principle in Order F2016-20.

[para 64] I note, too, that in *Calgary Police Service v. Alberta (Information and Privacy Commissioner)*, 2010 ABQB 82, McMahon J. stated:

> All of the decisions which are the subject of this judicial review disclose personal information of police officers as defined. The question to be asked in respect of each decision is whether that disclosure is an unreasonable invasion of personal privacy given Section 17(5)(a) – the desirability of public scrutiny. There is no reasonable single answer.

In that case, the Court granted a judicial remedy to the Calgary Police Service, on the basis that it was unreasonable for the Commissioner to consider that section 17(5)(a) outweighed the privacy interests of individual police officers named in the records and whose information was the subject of a disclosure order by the Commissioner. The Court considered it necessary to ask whether it is an unreasonable invasion of personal privacy in all the circumstances to disclose personal information with regard to each individual officer's circumstances.

[para 65] In this case, I do not consider section 17(5)(a) to apply, and so I need not consider all of McMahon J's comments on the application of this provision. However, I believe that his statement that must one consider whether it is an unreasonable invasion of personal privacy to disclose personal information is on point. For the foregoing reasons, I find that the public availability of the facts and details that constitute Officer A's and the defendant's personal information, removes any reasonable expectations of privacy with regard to that information.

[para 66] Although the Public Body severed the EPS member's name and personally identifying information from all the records, Officer A's personal information cannot be meaningfully severed. This is because the Officer A is named in the *Kubusch* decision (supra) and this decision, as noted above, includes the Court's assessment of Officer A's conduct. As discussed above, the transcript of the testimony, evidence and arguments before the Court in *Kubusch* is available from Court Services. Moreover, the Kubusch decision is also publicly available and has been discussed in the media.[2]

[para 67] The Public Body itself wrote the Applicant in 2003 and confirmed that it would conduct an investigation with regard to the Court's conclusions in *Kubusch*, stating:

> I can advise that the Edmonton Police Service will be conducting the investigation referred to in your correspondence.

Finally, both the Public Body and Officer A confirmed in their submissions that Officer A was the subject of a criminal and disciplinary investigation, but that the decision was made that criminal and disciplinary proceedings were not warranted.

[para 68] Severing the name of Officer A from the Applicant's correspondence, and from the records in general, serves only to inconvenience the reader in this case, as there is only one EPS member who could be the subject of the Applicant's access request, given its terms. Moreover severing Officer A's personal information from the Applicant's letter cannot serve to sever it from the Applicant's memory.

[para 69] The Public Body has attempted to sever the name of Officer A from information in the public realm to which the name of Officer A is permanently linked. In responding to the Applicant's correspondence of September 23, 2003, the Public Body

[2] The Court's conclusions regarding the conduct of Officer A in the Kubusch decision is discussed in a CBC article dated December 4, 2014. The Applicant submitted this article for the inquiry.

confirmed the identity of Officer A and the fact that it was conducting an investigation in relation the Court's findings in *Kubusch*. Further, the media has also reported on the *Kubusch* decision.

[para 70] The Public Body has severed all the requested records under section 17(1) on the basis that they would reveal that Officer A was the subject of a criminal / disciplinary investigation with regard to his evidence in the *Kubusch* case. However, this information is already in the public domain and was provided by the Public Body to the Applicant in September, 2003.

[para 71] As a result, the Public Body's severing of the personally identifying information of the Officer A (and that of the defendant in *Kubusch*) from the record serves no purpose. When severing serves no purpose, doing so undermines the principle purpose of access legislation, by which an applicant is entitled to access.

[para 72] In Order F2009-010, I noted that the public availability of information was a factor that could be considered under section 17(5) when relevant. I believe this factor to be relevant in this case. In that decision I said:

> The issue of whether information is publicly available is relevant for the purposes of section 40(1)(bb), which states that a public body may disclose personal information that is available to the public. However, this provision does not state that a public body must automatically disclose personal information available to the public. Further, this provision refers to the general authority of public bodies to disclose information, as opposed to the decisions they must make in relation to access requests. When making a determination as to whether personal information may be disclosed to an applicant who has made an access request under the FOIP Act, the head of a public body must consider and apply the provisions of section 17 and follow the processes set out in sections 30 and 31 of the FOIP Act. The public availability of personal information may reduce or negate an individual's expectation of privacy in that information in some cases, such as when the information is both widely reported and available; however, it will not have that effect in every case. Public availability of information is therefore a factor that may be weighed under section 17(5); whether the presumptions under section 17(4) are rebutted will depend on the extent to which the information is readily available to members of the public, and the existence or absence of other factors under section 17(5).

[para 73] I find that in this case, the public availability of Officer A's personal information (and that of the defendant) in relation to the *Kubusch* matter negates any expectations of privacy that either Officer A (or the defendant) has in relation to that information and outweighs the presumption created by section 17(4).

[para 74] I note that in her affidavit, the Disclosure Analyst states that she considered the following when making the decision under section 17(5):

> a)the objectives and purposes of the FOIPP Act, including the Applicant's right of access;
>
> b) that the Applicant does not appear to have a pressing need of any third party personal information;
>
> c) whether there is a public interest in the disclosure of the Responsive Records and whether public scrutiny is desirable;

> d) that disclosure is not relevant to a fair determination of the Applicant's rights;
>
> e) that third parties may be exposed unfairly to harm;
>
> f) that personal information may have been supplied in confidence and that release of the information would impact the EPS's ability in the future to have frank discussions with third parties (within and outside the EPS) that have been promised confidentiality;
>
> g) that personal information may be inaccurate or unreliable and may not have been challenged by the individuals to whom the information relates;
>
> h) that disclosure may unfairly damage the reputation of any person referred to in the Responsive Records;
>
> i) that the requested personal information was not information originally provided by the Applicant;
>
> j) that if personal information in complaint and investigation files is disclosed, the integrity and confidentiality of the complaint and discipline process will be undermined;
>
> k) that the release of the information may result in future investigative and discipline processes being less candid and comprehensive; and
>
> l) whether other available information, including information available through public processes, may satisfy any need for public scrutiny.

The Disclosure Analyst lists a number of factors, although she does not explain how these factors weighed in her decision. It is unclear to me why she considered as a factor that the Applicant did not provide any of the personal information that was requested; as noted above, the Public Body severed personal information from a letter sent to the Public Body by the Applicant. Further, many of the considerations listed are contradicted or undermined, by the fact that the personal information severed from the records is available from public sources.

[para 75] It appears that the Public Body considered the public availability of the personal information only in terms of whether this would satisfy any need for additional public scrutiny, and concluded that no additional scrutiny was necessary. However, in this case, given how extensively the information is available, I believe the Public Body should also have asked whether there could be any expectations of privacy left in relation to the information.

[para 76] My conclusions regarding the public availability of the personal information in the records does not apply to records 480 – 485, which, as noted above, contain personal information about Officer A that is not publicly available. As there are no factors weighing for or against disclosure in relation to records 480 - 485, I find that the presumption created by section 17(4) is not rebutted. I will therefore confirm the Public Body's decision in relation to these records.

[para 77] For the foregoing reasons, I find that the head of the Public Body is not required to withhold the information to which it applied section 17(1) from the Applicant,

but for records 480 – 485, and I will order it to give the Applicant access to this information.

Issue C: Did the Public Body properly apply section 20(1) of the Act (disclosure harmful to law enforcement) to the information it severed from the records under this provision?

[para 78] The Public Body applied section 20(1)(m) to withhold an employee's payroll number from record 2.

[para 79] In its rebuttal submissions, the Applicant states that it does not take issue with the Public Body's decision to apply section 20(1)(m) to this information.

[para 80] As there is no dispute with respect to the Public Body's application of section 20(1)(m), I need not address this issue further.

Issue D: Did the Public Body properly apply section 21(1)(b) of the Act (disclosure harmful to intergovernmental relations) to the information it severed from the records under this provision?

[para 81] Section 21(1)(b) requires the head of a public body to sever information that may reveal information supplied in confidence by government entities. The relevant provisions of section 21 state:

> *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 82] The Public Body applied section 21(1)(b) to records 131 and 132. These contain information obtained from the CPIC system, which is a national law enforcement database maintained and administered by the Royal Canadian Mounted Police (RCMP).

[para 83] The Disclosure Analyst states:

> From my experience with the CPIC system, it is my understanding that information is contributed to the CPIC system in confidence by the originating agency and is to be used in confidence by other law enforcement agencies. From my review of the information withheld from the Responsive Records pursuant to section 21(1)(b), it is my belief that this information has been contributed to CPIC by the RCMP, as is apparent from the listing of the information that these portions originated with the RCMP. It is my belief that this information remains in the control of the RCMP and there is no reason to believe that the RCMP would permit release of this information in relation to this Access Request.

[para 84] The evidence of the Public Body with regard to the expectations of the RCMP with regard to confidentiality is contradictory. It states that CPIC information is confidential; however records 131 and 132 were cited in the *Kubusch* decision at paragraph 41. It therefore appears that whatever the terms between the RCMP and the Public Body may be, with respect to use of CPIC, it is understood that the Public Body is not bound to keep the records it creates with the information in this database in complete confidence.

[para 85] In any event, records 131 – 132 appear to have been created approximately 14 years and 11 months ago. While they do not have a date on them, I note that they appear with materials that are dated August 1, 2002. The Public Body states:

> The Applicant does not take issue with the EPS' position in relation to the application of s. 21(1)(b) to pages 131 and 132 of the subject records, but notes that the Review found the information in question has been in existence for over 15 years and therefore suggests that s. 21(l)(b) does not apply. The Review that took place in the mediation stage should not be relied upon at this Inquiry.
>
> The EPS applied s. 21(1)(b) to Canadian Police Information Centre ("CPIC") records. There is no dispute that the CPIC records would typically fall under s. 21(1)(b) as the information constitutes information supplied in confidence by the Royal Canadian Mounted Police to the EPS. However, the

> section does not apply to information that has been in existence in a record for 15 years or more per s. 21(1)(4). Section 21(1)(4) does not apply in this instance.
>
> The CPIC records list the criminal history of an accused person. While the criminal history contains events that date back more than 15 years, the CPIC record itself was actually generated at a later date, and represents a reflection of what is contained in the CPIC database about an accused person at the time that the search was actually performed. In this instance, because the investigation of the accused in this matter did not take place until 2002, the CPIC records generated from the investigation, that are part of the subject records, would have been in existence for less than 15 years.
>
> While the criminal history information itself may have been in existence for more than 15 years, the information has been in existence in the CPIC record for less than 15 years. As a result, the EPS properly applied 21(1)(b) and the CPIC records should continue to be withheld.

[para 86] While the Public Body states that the records are actually less than 15 years old, it does not point to a date in which it believes the RCMP supplied the information to it in confidence. In my view, it appears to be the case that they were created on August 1, 2002[3].

[para 87] As the information before me does not establish that records 131 – 132 were supplied by the RCMP to the Public Body in confidence, I must require the Public Body to disclose these records to the Applicant.

Issue E: Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information it severed from the records under this provision?

[para 88] The Public Body applied section 24(1)(a) to sever information from records 6 – 7, 34, and 36 – 37. Section 24 states, in part:

> *24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*
>
> > *(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council […]*
>
> *(2) This section does not apply to information that*
>
> > *(a) has been in existence for 15 years or more […]*

[para 89] In Order F2015-29, the Director of Adjudication interpreted sections 24(1)(a) and (b) of the FOIP Act and described the kinds of information that fall within the terms of these provisions. She said:

> The intent of section 24(1)(a) is to ensure that internal advice and like information may be *developed* for the use of a decision maker without interference. So long as the information described in section 24(1)(a) is developed by a public body, or for the benefit or use of a public

[3] On August 2, 2017, the information at issue will have been in a record for 15 years or more within the terms of section 20(4) of the FOIP Act.

> body or a member of the Executive [Council], by someone whose responsibility it is to do so, then the information falls under section 24(1)(a).

[para 90] I agree with the analysis of the Director of Adjudication as to the purpose and interpretation of sections 24(1)(a), and agree this provision applies to information generated when advice is developed for a public body to assist it to make a decision or evaluate a course of action. To establish that section 24(1)(a) applies, a public body must establish that the advice it seeks to withhold has been developed for a public body, either as part of a person's responsibilities to the public body, or at the request of a public body.

[para 91] From my review of the records 6 – 7, 34, and 36 – 37, I agree with the Public Body that these records contain advice and recommendations developed for senior officials in the Public Body to assist them in making a decision. I agree that the substantive portions of these records fall within the terms of this provision.

[para 92] I turn now to the question of whether the Public Body has properly applied its discretion to withhold these records from the Applicant.

[para 93] In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, the Supreme Court of Canada explained the process for applying discretionary exceptions in freedom of information legislation and the considerations that are involved. The Court illustrated how discretion is to be exercised by discussing the discretionary exception in relation 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 94] While the foregoing case was decided in relation to the law enforcement provisions in Ontario's legislation, it is clear from paragraphs 45 and 46 of this decision that its application extends beyond law enforcement provisions to the application of discretionary provisions in general and to the discretionary provisions in freedom of information legislation in particular. The provisions of section 24(1) of Alberta's FOIP Act are discretionary.

[para 95] Applying the principles in *Ontario (Public Safety and Security),* a finding that section 24(1)(a) or (b) applies means that the public interest in ensuring that public bodies obtain candid advice *may* trump public or private interests in disclosing the information in question. After determining that section 24(1)(a) or (b) applies, the head of a public body must then consider and weigh the public and private interests in disclosure and non-disclosure in making the decision to withhold or disclose the information.

[para 96] 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 97] The Disclosure Analyst states that the following considerations were included in the decision to withhold information under sections 24(1)(a) and (b):

[para 98] The Disclosure Analyst states that she considered the following when exercising discretion to withhold records 6 – 7, 34, and 36 – 37 from the Applicant:

> The impact the disclosure would reasonably be expected to have on the EPS's ability to carry out similar decision-making processes in the future;
>
> That the members of the EPS had a reasonable expectation that their deliberations, consultations, advice, analyses and recommendations would be kept confidential; and
>
> The objectives and purposes of the Act, including the Applicant's right of access.

[para 99] I agree with the Disclosure Analyst that the first and third factors are relevant to the exercise of discretion under section 24(1)(a). However, with regard to the second factor, that is, the expectation of confidentiality, this is a condition precedent for the application for section 24(1)(a), rather than a factor to be weighed in the exercise of discretion. This point was made in Order F2013-13 at paragraph 181:

> The factors the Public Body states it considered when it made its decision to withhold information from records 149 – 150 and 1284 – 1285 are in keeping with factors that should be considered when making the decision to exercise discretion under section 24(1)(a) and (b). However, the third factor to which the Public Body refers, that regarding confidentiality, is not so much an interest that is to be weighed in exercising discretion, but a factor that must be present in order to support withholding information under section 24(1). If the information to which a provision of section 24 is being applied is not intended to be confidential, or has not been kept confidential, then the public interest recognized by section 24(1) would not necessarily be served by withholding the information.

[para 100] Regardless, I note that the Public Body has not addressed the age of the information to which it has applied section 24(1)(a). The records in question were created in September, 2003. In September of 2018, it will not be possible for the Public Body to apply a provision of section 24(1) to them given the terms of section 24(2)(a), should the Applicant make a new request for the information.

[para 101] The presence of section 24(2)(a) in the FOIP Act indicates the acknowledgement of the Legislature that the older advice is, the less its disclosure is likely to disrupt the functioning of a public body or interfere with its decision making. It is unclear whether it is truly the case that the Public Body's decision making processes will suffer interference if access is given to the Applicant, and it has not explained why it believes this outcome is likely to result given the age of the records.

[para 102] I must therefore ask the Public Body to reconsider its decision to withhold records 6 – 7, 34, and 36 – 37 from the Applicant, and to consider the age of the information as a factor in making its new decision.

Issue F: Did the Public Body properly apply section 27(1) of the Act (privileged information) to the information it severed from the records under this provision?

[para 103] The Public Body applied section 27(1)(a), (b), and (c) to sever records 9 – 20 and 22. It originally severed records 52 – 54 and 91 of the records under sections 27(1)(a), (b), and (c). In its initial submissions, it explained that it was no longer relying on section 27(1)(a) in relation to records 52 – 54 and 91. It noted that it was no longer applying any provisions of section 27(1) to record 55, but was relying solely on section 17(1) in relation to record 55.

Does section 27(1)(a) apply to records 9 – 20 and 22?

[para 104] The Public Body provided the following description of the records over which it is applying section 27(1)(a).

> The records withheld under s. 27 include a legal opinion provided by the Office of the Chief Crown Prosecutor in Calgary (the "Legal Opinion") (pages 14-18), communications within the Office of the Chief Crown Prosecutor relating to the Legal Opinion (13, 19, 20), and communications between the EPS and the Office of the Chief Crown Prosecutor relating to the Legal Opinion (page 9, 22). Also contained within these records is an internal EPS legal Memorandum written by an EPS legal advisor which incorporates sections of the Legal Opinion (pages 10-12).

[para 105] From the foregoing, I understand that the Public Body is asserting solicitor-client privilege over records 14 – 18, which contain a document described as a legal opinion, prepared by a Crown prosecutor. Records 13, 19, 20, contain correspondence between the EPS and the Office of the Chief Crown Prosecutor regarding records 14 – 18. Records 10 – 12 consist of an internal memorandum written by an EPS legal advisor which contains reference to the document prepared by the Crown prosecutor. Record 7 describes the contents of record 14 - 18.

[para 106] In its submissions regarding the application of section 27(1)(c), the Public Body describes the records as:

> Pages 9, 13, 19, 20 and 22 of the Responsive Records are correspondences between lawyers at the Office of the Chief Crown Prosecutor and other persons in relation to a matter involving the provision of advice or other services (in this case being legal advice or services […]

[para 107] From these various descriptions, I understand that records 14 – 18 contain a Crown prosecutor's review of a police investigation and decision. It appears that solicitor-client privilege is being asserted over records 9 – 13, 19 – 20, and 22 as they either refer to records 14 – 18 or to the content of these records.

Section 27(1)(a)

[para 108] Before addressing the substantive question of whether the Public Body properly applied section 27(1)(a) to the records at issue, I have decided to address my jurisdiction to make such a decision under the FOIP Act when a public body has asserted solicitor-client privilege over the records. I do so because the Public Body has challenged the Commissioner's jurisdiction to make decisions of this kind in relation to Order F2013-13 and F2017-47.

Who decides under the FOIP Act whether information that a public body has withheld under section 27(1)(a) on the basis of solicitor-client privilege is subject to this privilege?

[para 109] Section 65 states, in part:

> *65(1) A person who makes a request to the head of a public body for access to a record or for correction of personal information may ask the Commissioner to review any decision, act or failure to act of the head that relates to the request.*
>
> *[…]*
>
> *(5) This section does not apply*
>
> > *(a) to a decision, act or failure to act of the Commissioner when acting as the head of the Office of the Information and Privacy Commissioner,*
> >
> > *(b) to a decision by the Speaker of the Legislative Assembly that a record is subject to parliamentary privilege, or*
> >
> > *(c) if the person who is appointed as the Commissioner is, at the same time, appointed as any other officer of the Legislature, to a decision, act or failure to act of that person when acting as the head of that office.*

Unless section 65(5) applies, an applicant may request review of any decision made by the head of a public body.

[para 110] Section 27 of the FOIP Act authorizes the head of a public body to sever privileged information. It states, in part:

> *27(1) The head of a public body may refuse to disclose to an applicant*
>
> > *(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,*
>
> *[…]*
>
> *(3) Only the Speaker of the Legislative Assembly may determine whether information is subject to parliamentary privilege.*

A decision to sever information under section 27(1) is a decision of the head of a public body in relation to a request within the terms of section 65(1) (cited above) of the FOIP Act.

[para 111] Section 65(5) excludes only three types of access decisions from the ability of a requestor to request review by the Commissioner: (1) when the Commissioner is the head of the public body that made the decision for which review is sought, (2) when the decision under review is the decision of the Speaker to find that parliamentary privilege applies to a record under section 27(3), and (3) when the Commissioner is also the head of another public body and has made a decision regarding access in that capacity. While section 65(5) excludes parliamentary privilege from the purview of the Commissioner, it does not exclude solicitor-client privilege. Other than in section 65, parliamentary privilege is only referred to in section 27 of the FOIP Act. Solicitor-client privilege is referred to in section 27 of the FOIP Act and nowhere else.

[para 112] Section 69 of the FOIP Act requires the Commissioner to conduct an inquiry if a matter has not been settled under section 68, or the Commissioner has not refused to conduct an inquiry under section 70. Section 69(1) states:

> *69(1) Unless section 70 applies, if a matter is not settled under section 68, the Commissioner must conduct an inquiry and may decide all questions of fact and law arising in the course of the inquiry.*

Section 69 of the FOIP Act grants the Commissioner the authority to decide all issues of fact and law in an inquiry. The application of solicitor-client privilege to records in a public body's custody or control is a question of both fact and law.

[para 113] Section 72 requires the Commissioner to make an Order disposing of the issues at the conclusion of an inquiry.

[para 114] For the reasons that follow, I find that the Legislature intended that the Commissioner review a public body's decision to sever information under solicitor-client privilege.

[para 115] Section 65(1) empowers a requestor to seek review by the Commissioner of *any* decision of the head of a public body that relates to a decision relating to the request. Logically, a decision to deny access on the basis of solicitor-client privilege necessarily falls within the category of "any decision".

[para 116] Section 65(5) sets out three kinds of decisions that the Legislature has excluded from the scope of "any decision" within the context of section 65(1). Section 65(5) explicitly excludes decisions of the Speaker regarding the application of parliamentary privilege from the purview of the Commissioner. From the reference to parliamentary privilege in section 65(5), it is clear that the Legislature reviewed section 27 (since this is the only other place where the Legislature refers to parliamentary privilege in the Act) and determined that of the privileges within its scope, only parliamentary privilege would be removed from the Commissioner's purview. Decisions of the head of a public body to apply solicitor-client privilege to records are not excluded under section 65(5), and therefore fall within the category of "any decision" within the terms of section 65(1).

[para 117] Not only does the language of section 65 and the context created by sections 27 and 65(5) support finding that the Commissioner has the authority to conduct an inquiry regarding the head of a public body's decision to apply solicitor-client privilege, but the purpose of the FOIP Act also supports this conclusion.

[para 118] In *Dagg v. Canada (Minister of Finance)*, [1997] 2 SCR 403, LaForest J.[4] described the purpose of freedom of information legislation in the following terms:

> As society has become more complex, governments have developed increasingly elaborate bureaucratic structures to deal with social problems. The more governmental power becomes diffused through administrative agencies, however, the less traditional forms of political accountability, such as elections and the principle of ministerial responsibility, are able to ensure that citizens retain effective control over those that govern them; see David J. Mullan, "Access to Information and Rule-Making", in John D. McCamus, ed., *Freedom of Information: Canadian Perspectives* (1981), at p. 54.
>
> The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry. As Professor Donald C. Rowat explains in his classic article, "How Much Administrative Secrecy?" (1965), 31 *Can. J. of Econ. and Pol. Sci.* 479, at p. 480:
>
> > Parliament and the public cannot hope to call the Government to account without an adequate knowledge of what is going on; nor can they hope to participate in the decision-making process and contribute their talents to the formation of policy and legislation if that process is hidden from view.

[para 119] The foregoing analysis considers the purpose of the Legislature in enacting freedom of information legislation to be to create a right of access, which in turn

[4] Although Laforest J. was speaking in dissent, the majority agreed with his analysis of freedom of information legislation at paragraph 1.

assist the Legislature in performing its constitutional function of supervising and holding the executive branch to account. That this is a purpose of the Legislature in enacting the FOIP Act is supported by section 2 of the FOIP Act, which states, in part:

> *2 The purposes of this Act are*
>
> > *(a) to allow any person a right of access to the records in the custody or under the control of a public body subject to limited and specific exceptions as set out in this Act,*
> >
> > *(b) to control the manner in which a public body may collect personal information from individuals, to control the use that a public body may make of that information and to control the disclosure by a public body of that information,*
> >
> > *[…]*
> >
> > *(e) to provide for independent reviews of decisions made by public bodies under this Act and the resolution of complaints under this Act.*

[para 120] The FOIP Act creates a right of access to records in the custody or control of public bodies and the ability to seek an independent review of a decision made by a public body regarding access, such as the Public Body in this case, and imposes duties as to how information is maintained, collected, used, and disclosed. In doing so, it promotes the purpose of increasing transparency of the executive branch of government (public bodies) by enabling citizens and the Legislature to obtain records. On a functional level, the purpose of the FOIP Act is to make public records held by the government available to the public on request, subject to any applicable exceptions.

[para 121] If section 65(1) is interpreted in such a way that a requestor cannot request review by the Commissioner of a decision of the head of a public body when the decision relates to the application of solicitor-client privilege, or alternatively, that the Commissioner is bound to accept the decision of the head of the public body that a record is subject to solicitor-client privilege, then the purpose of freedom of information legislation – that of increasing the accountability of the executive branch to the citizenry and the Legislature – and the legislation's stated objective of providing for independent reviews of decisions regarding access made by public bodies, would be obviated. This is particularly so when the public body has not supported the claim of privilege with sufficient evidence, or has provided evidence that contradicts the claim of privilege,

[para 122] In my view, in considering the language of the FOIP Act, the context created by sections 2, 27, 65, 69, and 72 of the FOIP Act, the Legislature intended that the Commissioner make the decision as to whether public records in the custody of the administrative branch of government are subject to section 27(1)(a), including in situations when the basis for a public body's application of section 27(1)(a) is solicitor-client privilege.

Who bears the burden of proof when a public body asserts solicitor-client privilege over records?

[para 123] Section 71(1) of the FOIP Act sets out the burden of proof in an inquiry. It states, in part:

> *71(1) If the inquiry relates to a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part of the record.*

[para 124] Section 71(1) imposes the burden of proof in an inquiry on the public body to prove that an applicant has no right of access.

[para 125] The standard of proof imposed on a public body under section 71(1) of the FOIP Act is not the criminal standard, which requires proof beyond a reasonable doubt, but the civil standard, which requires proof on the balance of probabilities. In other words, a public body must prove that it is more likely than not that an exception under Division 2 of Part 1 applies to the information it seeks to withhold from an applicant.

[para 126] In *F.H. v. McDougall* [2008] 3 S.C.R. 41, the Supreme Court of Canada described the qualities of evidence necessary to satisfy the balance of probabilities. The Court stated:

> Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.

[para 127] In an inquiry under the FOIP Act, a public body must provide sufficiently clear, convincing, and cogent evidence to discharge its burden of proving that a discretionary exception to disclosure applies to information it has withheld from an applicant. As the Public Body decided to apply section 27(1)(a) to withhold information from the Applicant, it has the burden of proof under section 71(1) to prove that section 27(1)(a) applies to this information with evidence that is sufficiently clear, convincing, and cogent to meet this purpose.

[para 128] The Public Body decided not to provide the records to which it applied solicitor-client privilege for my review, but elected to provide affidavit evidence from an investigative manager and a solicitor in support of its claim that solicitor-client privilege applies to these records.

[para 129] The test to establish whether communications are subject to solicitor-client privilege is set out by the Supreme Court of Canada in *Canada v. Solosky* [1980] 1 S.C.R. 821. Speaking for the Court, Dickson J. (as he then was) said:

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

[para 130] If a public body can establish through evidence the three preconditions to a finding of solicitor-client privilege, with regard to each document it has withheld under this privilege, then the public body will have established that the records are subject to solicitor-client privilege.

[para 131] The Public Body's Disclosure Analyst has sworn an affidavit to support the Public Body's claims of solicitor-client privilege over the records. This affidavit states:

> I have reviewed pages 9 – 20, and 22 of the Responsive Records and do believe that these Records relate to a written legal opinion provided by the Office of the Chief Crown Prosecutor to the EPS Professional Standards Branch on or about May 19, 2004 (the "Legal Opinion"). The Legal Opinion is authored by a Crown Prosecutor, whom I believe is a lawyer.
>
> The Legal Opinion (found in pages 14-18 of the Responsive Records) was sought by the EPS from the Office of the Chief Crown Prosecutor. It is my belief that this type of legal opinion involves the Office of the Chief Crown Prosecutor providing the EPS with a legal opinion about a legal issue, including advice regarding a recommended course of action based on legal considerations.
>
> The Legal Opinion was sought about these matters as outlined in correspondence sent from EPS Professional Standards Branch to the Chief Crown Prosecutor in Edmonton on or about April 6, 2004. The Request for a Legal Opinion is found at page 22 of the Responsive Records. The Request for a Legal Opinion is subsequently [forwarded] to the Chief Crown Prosecutor in Calgary by the Assistant Chief Crown Prosecutor in Edmonton. This correspondence is found at pages 19 and 20 of the Responsive Records (page 19 being a copy of page 20, with a stamp indicating the correspondence was received by the Office of the Chief Crown Prosecutor in Calgary).
>
> The legal advice provided in the Legal Opinion consisted of a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications. Legal advice was sought and given regarding a question that has a legal aspect, and it is my belief that this legal opinion called upon the legal expertise of Crown Prosecutors in Calgary.
>
> It is my belief that the legal advice was sought from a professional legal advisor acting in his capacity as such. The Office of the Chief Crown Prosecutor was acting in the capacity of a legal advisor to the EPS in connection with the Professional Standards Branch investigation. In seeking and obtaining the Legal Opinion, the EPS is the recipient of confidential legal advice.
>
> It is my understanding and belief that because of the nature of this type of legal opinion, it is provided to the EPS by the Office of the Chief Crown Prosecutor with an expectation of both the EPS and the Office of the Chief Crown Prosecutor that it will remain confidential.

> The Legal Opinion on page 14 of the Responsive Records indicates "[t]he opinions expressed in this memo and any attachments thereto are subject to solicitor/client privilege and are not to be disclosed without the permission of the Chief Crown Prosecutor".
>
> Furthermore, under the covering letters enclosing the Legal Opinion (pages 9, 13), the Legal Opinion is provided by the Office of the Chief Crown Prosecutor in Calgary to the Office of the Chief Crown Prosecutor in Edmonton. The Office of the Chief Crown Prosecutor in Edmonton forwards the Legal Opinion to EPS Professional Standards Branch and repeats "[t]he opinion(s) expressed in this letter and any attachments hereto are subject to solicitor/client privilege and are not to be disclosed without the permission of the Chief Crown Prosecutor". The Office of the Chief Crown Prosecutor has not, to my knowledge, provided the EPS with permission to disclose the Legal Opinion.
>
> […]
>
> It is my belief that the Legal Opinion was provided by the Office of the Chief Crown Prosecutor, and received by the EPS, on the explicit condition that it was subject to solicitor-client privilege and that it is not to be disclosed without the permission of the Chief Crown Prosecutor.
>
> I have reviewed pages 10 – 12 of the Responsive Records, and do believe that these records relate to a memorandum written by a legal advisor of the EPS Legal Advisors' Section to the [Manager] of the Legal Services Branch (the "EPS Legal Memorandum"). My further review of pages 10 – 12 of the Responsive Records indicates that these portions of the records quote directly from, or make reference to, portions of the Legal Opinion. It is my belief that release [of] the EPS Legal Memorandum would permit the recipient to gain access to information contained in the Legal Opinion.

The Public Body's position that records 14 – 18 are privileged is based on the view that the Public Body entered a solicitor-client relationship with a Crown prosecutor. Its position that records 9 and 13 are privileged is based on the fact that they are covering letters to records 14 – 18 and refer to the content of records 14 – 18. Record 22 is characterized as a request for legal advice in the affidavit; in its submissions for inquiry, the Public Body characterizes record 22 as a record between the EPS and the Office of the Chief Crown Prosecutor "relating to the legal opinion". To summarize, the Public Body's position that all the records over which it is asserting solicitor-client privilege are subject to this privilege is based on its position that records 14 – 18 contain legal advice from a Crown prosecutor to the Public Body and that the other records refer to this advice in some way.

Did the Public Body and a Crown prosecutor enter a solicitor-client relationship?

[para 132] It is not clearly the case that a Crown prosecutor has a client, or that a Crown prosecutor's working papers could reveal solicitor-client confidences. In saying this, I accept that there may be situations in which a police officer or police service and a solicitor who is a Crown prosecutor may form such a relationship. As the Supreme Court of Canada stated in *R. v. Campbell*, [1999] 1 SCR 565:

> The RCMP must be able to obtain professional legal advice in connection with criminal investigations without the chilling effect of potential disclosure of their confidences in subsequent proceedings. Here, the officer's consultation with the Department of Justice lawyer fell squarely within this functional definition, and the fact that the lawyer worked for an "in-

> house" government legal service did not affect the creation or character of the privilege. Whether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered. [my emphasis]

[para 133] In *Campbell*, a member of the police service sought legal advice as a client as to the legality of an undercover criminal investigation he was conducting and then acted on the advice. In that case, the Court found that the member sought legal advice as a client from an employee of the justice department in the employee's capacity as a lawyer. In arriving at this conclusion, the Court stated:

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

[para 134] *Campbell* establishes that communications between a police officer, or a police service, and a government lawyer *may* be subject to solicitor-client privilege but are not necessarily so; whether the privilege attaches to communications between the two depends on the nature of the relationship, the subject of the advice and the circumstances in which it was sought and rendered. If the "functional needs of the administration of justice" require that a party seeking legal advice obtain it from a lawyer from a justice department, then the relationship may be privileged.

[para 135] In *Kalick v. The King*, [1920] S.C.R. 175, Brodeur J. offered the following definition of "administration of justice" in his concurring reasons:

> I am of opinion that the "administration of justice" mentioned in section 157 of the Criminal Code should not be restricted to what takes place after an information had been laid; but it includes the taking of necessary steps to have a person who has committed an offence brought before the proper tribunal, and punished for his offence. It is a very wide term covering the detection, prosecution and punishment of offenders.

In *R. v. Wijesinha*, [1995] 3 SCR 422 and *Di Iorio v. Warden of the Montreal Jail*, [1978] 1 SCR 152, the Supreme Court of Canada cited the foregoing definition and noted that it has been accepted in the case law. The "administration of justice" in the criminal context, then, refers to the investigation, prosecution, and punishment of criminal offences.

[para 136] In Order MO-1663-F, an Adjudicator with the Office of the Ontario Information and Privacy Commissioner rejected the argument that *Campbell* stands for the proposition that a Crown prosecutors' office acts as "in-house counsel" for municipal police services in all cases.

> The Court [in *Campbell*] found that the consultation by an officer of the Royal Canadian Mounted Police (the RCMP) with a Department of Justice lawyer over the legality of a proposed "reverse sting" operation by the RCMP fell squarely within the functional definition. The Court emphasized that it is not everything done by a government (or other) lawyer that attracts

solicitor-client privilege, providing some examples of different responsibilities that may be undertaken by government lawyers in the course of their work. The Court stated that

> [w]hether or not solicitor-client privilege attaches in any of these situations depends on the nature of the relationship, the subject matter of the advice and the circumstances in which it is sought and rendered.

R. v. Campbell has been applied in orders of this office, such as in PO-1779, PO-1931 and MO-1241. In each of these orders, a solicitor-client privilege was found on the basis that the police (a municipal police service or the Ontario Provincial Police) sought legal advice from Crown counsel. All communications within the framework of this relationship were found to qualify for solicitor-client privilege under either section 12 of the Act, or section 19 of the provincial Act. In addition, in Order PO-1779, in relation to the OPP, Assistant Commissioner Tom Mitchinson analysed the relationship between the OPP and the Crown as follows:

> However, there is one further aspect to consider before concluding that solicitor-client communications privilege is established. In Order P-613, section 19 was not applied on the basis that there is no solicitor-client relationship between Crown counsel and the OPP. However, in my view, this interpretation is no longer supportable as a result of the recent Supreme Court of Canada decision in *R. v. Campbell*, [1999] 1 S.C.R. 565. In that case, the Court concluded that a solicitor-client relationship did exist between counsel with the federal Department of Justice and the R.C.M.P. The decision sees the R.C.M.P. as a "client department" of the Department of Justice and, therefore, it is difficult to see how the same conclusion could not apply vis à vis the Ministry of the Attorney General and the OPP. In my view, a solicitor-client relationship exists between the OPP and Crown counsel.

This analysis has been followed in subsequent orders applying the solicitor client privilege under the provincial Act to communications between the OPP and Crown counsel.

The circumstances described in Order PO-1779 do not apply to the relationship between a municipal police force and Crown counsel. Even the Police in this case do not assert that they can be viewed as a "client department" of Crown counsel. Therefore, whether a solicitor-client relationship can be established in a particular instance depends on the application of the functional definition set out in *Descôteaux v. Mierzwinski* and approved in *R. v. Campbell*, above. In MO-1241, former Adjudicator Holly Big Canoe specifically found that the Police sought legal advice from the assistant crown attorney. Other than MO-1241, I am not aware of any orders of this office which have applied *R. v. Campbell* to communications between a municipal police force and Crown counsel.

In the appeal before me, I find there is an insufficient basis to conclude that the communications on pages 122 and 123 were in relation to the seeking or giving of legal advice. It would not be surprising for the Police and the Crown to be in communication during any given prosecution, as they were here. However, there is nothing in the specific communications at issue, in the surrounding circumstances, or in the submissions before me, to establish that these communications occurred as part of the seeking of legal advice by the Police from the Crown. I find, accordingly, that the Police have not established that these communications occurred within the framework of a solicitor-client relationship.

[para 137] In the foregoing order, the Adjudicator determined that whether a solicitor-client relationship can be established in a particular instance depends on the application of the functional definition set out in *Descôteaux et al. v. Mierzwinski*, [1982] 1 SCR 860, subsequently approved and applied in *Campbell*. I agree with the Adjudicator's reasoning in this order. In *Campbell*, a police officer required a legal

opinion in the course of conducting an undercover criminal investigation; the Supreme Court of Canada accepted that it was a functional requirement of the administration of justice that the officer obtain legal advice in the circumstances.

[para 138] In Order PO-3372, a 2014 order of an Adjudicator of the Office of the Information and Privacy Commissioner of Ontario, the Adjudicator rejected a claim that information exchanged between the Ottawa Police Service and the Attorney General's office regarding an individual's request for a name change, was subject to solicitor-client privilege, finding that the parties did not enter a solicitor-client relationship. The Adjudicator followed the reasoning in Order MO-1663-F, stating:

> In the appeal before her, Senior Adjudicator Liang found it not surprising for the municipal police and the Crown to be in communication in the course of a prosecution. However, she found nothing in the specific communications at issue, in the surrounding circumstances, or in the submissions before her to establish that these communications occurred as part of the seeking of legal advice by the police from the Crown.
>
> I agree with Senior Adjudicator Liang's analysis and adopt it for the purposes of this appeal. I have reviewed page 56 and have considered the nature of the relationship between the Attorney General and the police, and the circumstances of the communications reflected in page 56. In this case, the Ottawa Police were assisting the Attorney General in carrying out its mandate the *CNA*. They were gathering information in respect of, and evaluating the appellant's request for a confidential change of name, and then communicating that information and evaluation to ministry counsel. Having reviewed the communications at issue and the parties' representations, and taking into account the surrounding circumstances, I am not persuaded that these communications were made for the purpose of or in the course of obtaining or giving professional legal advice as between ministry counsel and the Ottawa Police. I am also not persuaded that the communications reflect legal advice given or sought as among any other parties or were made within that context. Consequently, the ministry's arguments based on a "continuum of communications" must also fail.
>
> Further, I am not satisfied that this memo to file was prepared for Crown counsel "for use in giving legal advice". Rather, it simply reflects the communications made for the purpose of gathering information about and evaluating the appellant's change of name request.

[para 139] In Order F2016-31, a recent decision of this office, the Adjudicator adopted the reasoning of Ontario Orders PO-3372 and MO-1663-F. She rejected the argument in that case that communications between a Crown prosecutor and a municipal police service were solicitor-client communications in the absence of evidence that there was a functional need for the two entities to enter a solicitor-client relationship.

[para 140] In *British Columbia (Attorney General) v. Davies*, 2009 BCCA 337, the British Columbia Court of Appeal rejected the argument that when a Crown prosecutor reviews information to determine whether a prosecution should be conducted, this process and the resulting decision are subject to solicitor-client privilege. The Court said at paragraphs 101 – 105:

> In examining relevant information and documents and deciding whether or not to approve a prosecution, Crown counsel is neither a client of another lawyer, nor a solicitor advising more senior officers in the Criminal Justice Branch. He or she is an officer of the Crown,

independently exercising prosecutorial discretion. While he or she may well consult with and obtain information from others, he or she does not take legal advice from them.

The fact that the Assistant Deputy Attorney General is able to review a subordinate's decision and override it does not convert the earlier decision into legal advice. The Commissioner was correct in finding that charging decisions made by Crown counsel are not covered by solicitor-client privilege, because they are not made within any solicitor-client relationship. [my emphasis]

In holding that solicitor-client privilege is inapplicable to the functions of Crown counsel in the charge approval process, we have carefully considered the rationale for solicitor-client privilege. In *R. v. Campbell*, at para. 49, Binnie J. recalled Lamer C.J.C.'s comment in *R. v. Gruenke*, [1991] 3 S.C.R. 263 at 289:

> The *prima facie* protection for solicitor-client communications is based on the fact that the relationship and the communications between solicitor and client are essential to the effective operation of the legal system. Such communications are inextricably linked with the very system which desires the disclosure of the communication ….

For the substantive conditions precedent to the right of the "lawyer's client to confidentiality" he recalled the Supreme Court's adoption in *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860 at 873 of Wigmore's formulation:

> Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications related to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the adviser, except the protection be waived.

Solicitor-client privilege is designed primarily as a means to ensure that clients are not reluctant to obtain legal advice, or reticent in discussing their situations with their solicitors. It is a means to foster the proper taking and giving of legal advice. These considerations are not germane to the situation of Crown counsel in charge approval decisions. [my emphasis]

[para 141] In "The Accidental Consistency: Extracting a Coherent Principle from the Jurisprudence Surrounding Solicitor Client Privilege between the Police and the Crown"[5], Marc S. Gorbet posits the following:

> The requirements for solicitor client privilege are straightforward and easily understood though the Wigmore articulation: "Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived." The key to understanding this definition and how it relates to the role of the Crown is distinguishing the varying roles of the Crown. A Crown who is prosecuting a matter is first and foremost an officer of the court and could not be considered a professional legal advisor. As noted by The Royal Commission on the Donald Marshall, Jr., Prosecution: "the Crown prosecutor occupies what has sometimes been characterized as a quasi-judicial office, a unique position in our Anglo-Canadian legal tradition." In instances where the issue of solicitor client privilege arises between the police and a Crown who is acting as a prosecutor, the Crown cannot be considered a solicitor of the police for the purpose of obtaining privilege. As will be seen, several cases have espoused this idea.
>
> On the other hand, where the Crown is not prosecuting the matter before the court and has merely provided advice to the police, there is nothing in the requirements for solicitor client

[5] (2004) 41 Alta. L. Rev. 825 - 852

> privilege that would appear to exclude this relationship. The Crown is being consulted by the police in the Crown's capacity as a legal advisor. Providing that the communications offered meet the requirement of being an opinion, this situation is a solicitor client relationship. The Integrated Proceeds of Crime Sections of the Royal Canadian Mounted Police (RCMP) throughout Canada have Department of Justice lawyers working as in-house counsel. Providing that they only advise on matters, and are not prosecuting, these Department of Justice lawyers are within the definition of solicitor. In no way is this example in conflict with the traditional rule. By delineating the precise role of the Crown as either a prosecutor or an advisor, the traditional rule of solicitor client privilege can remain coherent in the police/Crown context.

The foregoing article contains a review of case law in which courts found, or did not find, that a Crown prosecutor and a police officer / service entered a solicitor-client relationship. The author arrives at the conclusion that when Crown counsel acts as a Crown prosecutor, he or she *cannot* enter a solicitor-client privileged relationship with a party, including the police, regarding the prosecution, for the reason that the Crown does not act as a solicitor in a prosecution, and because taking on a client in relation to a prosecution would conflict with the function and duties of Crown counsel. However, when the police seek legal advice in the course of a criminal investigation, and the matter is not being prosecuted, it is possible for Crown counsel to act as a solicitor, and the police and the Crown in such a case could enter a solicitor-client relationship. This analysis, is, in my view, consistent with what the Supreme Court of Canada held in *Campbell* (*supra*).

[para 142] In reviewing the Public Body's claim of privilege over the records provided to it by the Assistant Chief Crown Prosecutor, I will apply the principles in *Campbell* and consider the nature of the relationship between the Crown prosecutors and the Public Body, the subject matter of the records and the circumstances in which the records were provided to the Public Body.

How are records 14 – 18 best characterized?

[para 143] As cited above, the Public Body's Disclosure Analyst characterizes records 14 – 18 as a "legal opinion" prepared by a Crown prosecutor as solicitor, for the Public Body, as client.

[para 144] However, records 1 – 8 of the records at issue contain descriptions of the substance of records 14 – 18, in addition to records 10 – 12. These records support finding that the Public Body provided all the records of a criminal investigation it had conducted to Alberta Justice and Solicitor General (Alberta Justice) so that Alberta Justice could determine whether to conduct a prosecution. The statutory authority to do this is (and was at the time there records were created) is section 45(2)(a) of the *Police Act*.

[para 145] Alberta Justice provided records 14 – 18 to the Public Body following review of the investigation materials the Public Body had gathered and submitted to it. The Public Body then provided these records, along with its criminal investigation, to a Crown prosecutor who was seconded to its Legal Services Branch, for review in order to make recommendations regarding disciplinary proceedings (records 4, 6 – 7). The

seconded Crown prosecutor's recommendations were provided to the Chief and then to Officer A (record 4).

[para 146] I conclude that the purpose of the review or reviews by Alberta Justice was to decide whether to conduct a prosecution. I draw support for this conclusion from the Public Body's submissions and from records 2 and 6 – 7.

[para 147] To summarize, from the evidence and the submissions of the parties, I find that the records can be characterized in the following way:

- Records 9 and 13 are copies of the cover letter attached to records 14 – 18
- Records 10 – 12 contain the recommendations of a Crown prosecutor seconded to the Public Body's Legal Services area. These records contain references to the content and conclusions contained in records 14 – 18 and were provided to Officer A.
- Records 14 – 18 contain a decision or opinion of a Crown prosecutor as to whether charges should be laid and a prosecution conducted
- Records 19 – 20 forward a matter from the Edmonton Crown prosecutors' office to the Calgary Crown prosecutors' office
- Record 22 is a record created by the Public Body and sent to Alberta Justice in order that Alberta Justice could make a decision regarding laying charges and conducting a prosecution.

What is the subject matter of the records?

[para 148] As noted above, I find that the subject matter of the records is a Crown prosecutor's decision as to whether an offence had been committed. Records 10 – 12 contain references to the Crown prosecutor's decision, in addition to comments made by a Crown prosecutor seconded to the Public Body's Legal Services area intended to provide insight.

What was the nature of the relationship between the Crown prosecutors and the Public Body?

[para 149] From the records that I have been provided, and from the descriptions provided by Public Body and contained in the records, I conclude that a Crown prosecutor created records 14 – 18 in the Crown's capacity as a Crown prosecutor, and not as the Public Body's solicitor. This conclusion is based on my review of the case law and authorities, which indicate that when a Crown prosecutor makes a decision regarding prosecution, the prosecutor acts as an officer of the Court and an agent of the Attorney General and must be independent of partisan concerns.

[para 150] The decision to prosecute is a decision made in the exercise of prosecutorial discretion. In *Krieger v. Law Society of Alberta*, [2002] 3 SCR 372 the Supreme Court of Canada described prosecutorial discretion and necessity for such decisions to be made independently in constitutional terms:

> The gravity of the power to bring, manage and terminate prosecutions which lies at the heart of the Attorney General's role has given rise to an expectation that he or she will be in this respect fully independent from the political pressures of the government. In the U.K., this concern has resulted in the long tradition that the Attorney General not sit as a member of Cabinet. See Edwards, *supra*, at pp. 174-76. Unlike the U.K., Cabinet membership prevails in this country. However, the concern remains the same, and is amplified by the fact that the Attorney General is not only a member of Cabinet but also Minister of Justice, and in that role holds a position with partisan political aspects. Membership in Cabinet makes the principle of independence in prosecutorial functions perhaps even more important in this country than in the U.K.
>
> It is a constitutional principle in this country that the Attorney General must act independently of partisan concerns when supervising prosecutorial decisions. Support for this view can be found in: Law Reform Commission of Canada, *supra*, at pp. 9-11. See also Binnie J. in *R. v. Regan*, [2002] 1 S.C.R. 297, at paras. 157-58 (dissenting on another point).

[para 151] Forming a solicitor-client relationship with a police service in the course of making decisions about prosecuting an offence – with the effect that the Crown would be acting on the instructions of its client, the police service, in electing to prosecute or not – would be antithetical to the constitutional requirement of independence to which the Court in *Krieger* refers. In my view, the proper functioning of the administration of justice, to which *Campbell* refers, requires finding that the Crown prosecutor did *not* enter a solicitor-client relationship with the Public Body in making decisions regarding prosecution. In *Campbell*, the police officer and a government lawyer entered a solicitor-client relationship in the course of the investigation conducted by the police in which the police officer had no other means of accessing legal advice; in the case before me, I note that the Public Body had *completed* the investigation and referred the results of the investigation to the Minister of Justice and Solicitor General. As a result, the functional needs of the administration of justice in *Campbell* and the case before me are different.

[para 152] From the evidence before me, it appears that investigative materials were provided to Alberta Justice so that a decision whether to prosecute could be made. The decision to prosecute or not was a decision made in the exercise of prosecutorial discretion. In my view, the functional needs of administrative justice require that a Crown prosecutor act independently when making such a decision, as opposed to forming a solicitor-client relationship with a police service whose investigation is the subject of the Crown's review. I therefore find that the Crown prosecutor who created records 14 – 18 did not enter a solicitor-client relationship with the Public Body. It follows that I find that records 14 – 18 are not subject to solicitor-client privilege.

[para 153] I also find that there is evidence before me that establishes that the communications contained in records 14 – 18 were not kept in confidence by the Public Body. Record 4 is a memorandum from a Staff Sergeant of Internal Affairs to Officer A. This memorandum indicates that it includes an attached copy of the memorandum of the seconded Crown prosecutor (records 10 – 12). The Public Body's evidence is that records 10 – 12 contain explicit references to the content of records 14 – 18. The Public Body and Officer A were parties opposed in interest in relation to the subject matter of both records 10 – 12 and records 14 – 18.

[para 154] Possibly, although the Public Body does not make this argument in its submissions, the Public Body considers Officer A and itself to have had a "common interest" in records 10 – 12, and the subject matter of records 14 – 18, if these records are considered a communication between solicitor and client) with the effect that privilege would not be lost if records 10 – 12, and the substance of records 14 – 18, were provided to Officer A.

[para 155] In Order F2015-31, the Director of Adjudication discussed the common interest exception to waiver and said:

> I begin by acknowledging the somewhat general statements made in the *Ziegler Estate* case (at para 58) relative to this "common interest" exception to waiver, which the Public Body quoted. These are:
>
> - the common interest must already be established at the time at which the information is provided;
> - the common interest can exist even if there is some issue outstanding between the parties;
> - the legal advice sought to be protected by common interest must be relevant to the claim of the parties claiming the common interest, not just the one party.
>
> These principles pertain to a particular legal claim, but I also accept the point made by the Public Body by reference to *The Law of Privilege in Canada* (11-59) that common interest privilege can arise in the absence of specifically-contemplated litigation.
>
> Nevertheless, I reject the Public Body's contention that common interest privilege applies in the present case such that any privilege in the information was not waived when the ACPS communicated the information to the CPA.
>
> This is because, for the privilege to arise, there must be a common or self-same interest with regard to the very matter at hand, with regard to which the shared information is relevant. Thus, in *Hospitality Corp. of Manitoba Inc. v. American Home Assurance Co*., the Manitoba Court of Queen's Bench (upheld on this point by the Manitoba Court of Appeal) limited the common interest to legal advice "relevant to the claim of the parties claiming the common interest".
>
> The idea that there must be a mutuality of interest in information relevant to a particular issue, in contrast to a mutual interest in some broader goal, is variously stated in the materials supplied by the Public Body.
>
> For instance, in the *Ziegler Estate* case, the court quotes from cases offering the following examples or descriptions as to instances of common interest:
>
> > Owners of adjoining houses complain of *a nuisance which affects them both equally*. Both take legal advice. Both exchange relevant documents. But only one is a plaintiff. An author writes a book and gets it published. It is said to contain a *libel* or to be an *infringement of copyright*. *Both author and publisher* [*may be held responsible* and] take legal advice. Both exchange documents. But only one is made a defendant.
> >
> > … common interest privilege "is a privilege that permits legal counsel *on the same side of an issue* to share information without waiving privilege …"
> >
> > …it may be necessary for certain outsiders, *such as a co-accused* and counsel, to be present to assist in the preparation of a client's defence. [emphasis added in original]

> I do not dispute that the CPS and the CPA (as well as the ACPS) have a common interest in effective criminal justice and police integrity.
>
> However, that common interest is one that operates at a much higher level of generality than the specific interests of the two institutions in the present case.
>
> The subject matter of the information was the Applicant's suitability as an investigator and witness for the prosecution. On that matter, the interests of the CPS and the CPA are not common, they are not "on the same side", and indeed they could be in direct opposition. The CPA had the goal, as its correspondence with the ACPS indicated, of supporting the interests of the Applicant in relation to his employment. It may be presumed the CPS had the goal of ensuring the Applicant's employment was dealt with in a manner that best suited the CPS as employer and as policing agent for the City, and the Public Body conceded that the consequence of the communication could have been some action by the CPS that was adverse to the employment interests of the Applicant (and consequently, would be adverse to the CPA as his representative). (Similarly, to the extent this is relevant, the interests of the CPA and the ACPS were not common, as is indicated by the content of the CPA's letter to the Chief Prosecutor (which prompted his June 29, 2012 letter to the CPS).

[para 156] I agree with the Director of Adjudication's summary of the case law regarding common interest and with her analysis.

[para 157] I am informed by the evidence of the Public Body and by the records at issue, that records 10 – 12 provide legal advice to the Public Body as to whether it should conduct disciplinary proceedings against Officer A. Even if it were the case that the advice to the Public Body was ultimately in favor of not conducting such proceedings, this would not mean that the advice was also prepared for Officer A as a client, given that the Public Body and Officer A were not on the same side of the proceedings under consideration.

[para 158] As noted above, solicitor-communications are communications between solicitor and client, that are intended to be confidential, and which involve the giving or seeking of legal advice. I cannot find that any of the records over which the Public Body is claiming solicitor-client privilege were intended to be confidential between the Public Body and the Crown prosecutor or between the Public Body and its Legal Services Area, given that the Public Body disclosed records 10 – 12 to Officer A, and its evidence establishes that these records reveal the substance of records 14 – 18. Moreover, as its claim of privilege over the other records is by reference to records 14 – 18, it follows that I find that privilege over these records was also lost when the opinion of the prosecutor seconded to the Public Body's Legal Services area was provided to Officer A.

[para 159] As I find that the Public Body has not established that section 27(1)(a) applies to any of the records to which it has applied this provision, I must now consider whether it has established that sections 27(1)(a) and (b) apply to them.

Sections 27(1)(b) and (c)

[para 160] Sections 27(1)(b) and (c) authorize the head of a public body to withhold certain types of information that are not privileged. These provisions 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 Solicitor General,
(ii) an agent or lawyer of the Minister of Justice and Solicitor 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 Solicitor General,
(ii) an agent or lawyer of the Minister of Justice and Solicitor 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 Solicitor General or by the agent or lawyer.

[para 161] In Order F2015-31, the Director of Adjudication discussed the application of sections 27(1)(b) and (c), stating:

> I note with respect to each of these provisions that they apply to information that is either prepared by, or is in correspondence involving, one of the listed people, that is in relation to a matter involving the provision of legal services, or of advice or other services.
>
> The Public Body says it also applied sections 27(1)(b) and 27(1)(c) "to the records at issue" (although in the index it supplied in its initial submission it indicated it did not apply section 27(1)(b) to sixteen of the records). More particularly, it says in its initial submission (at para 25) that:
>
> > The records withheld under subsection 27(1)(b) were prepared by lawyers of the Minister of Justice and Solicitor General in relation to matters involving the provision of legal services.
>
> In its January 6, 2015 submission (at para 14), it adds to this explanation by saying that this provision was applied because the records "were prepared 'by or for' a lawyer of the Minister of Justice and Attorney General, in connection with the provision of a legal service, i.e. the advice given by the Crown to the CPS as to the suitability of the Applicant as a witness in legal proceedings".
>
> As to section 27(1)(c), in its initial submission (at para 26) the Public Body says that it relied on this provision:
>
> > … to withhold information in correspondence between lawyers of the Minister of Justice and Solicitor General and other persons (i.e. CPS and CPA) in relation to matters involving the provision of advice and other legal services by the Public Body's

> Crown Prosecution. Correspondence includes letters, memorandums and emails where legal services are being provided, whether internally or externally.
>
> For the same reasons that I found above that these communications sent to the CPS and CPA by the Chief Crown Prosecutor do not consist of legal advice, I find that these letters do not consist of the provision of a legal service, or of advice or other services, by the ACPS to the CPS. In my view, "advice" in the context of section 27, whether legal or otherwise, is information that provides counsel or guidance, in the sense of giving options, recommendations and reasons as to what it is best to do.

[para 162] The term "legal services" is undefined in the FOIP Act. In Order F2008-028, the Adjudicator reviewed past orders of this office interpreting this phrase and said:

> Section 27(1)(b) gives a public body the discretion to refuse to disclose to an applicant information prepared by or for certain persons in relation to a matter involving the provision of legal services. Those persons are the Minister of Justice and Attorney General, his or her agent or lawyer, or an agent or lawyer of a public body. The term "legal services" includes any law-related service performed by a person licensed to practice law (Order 96-017 at para. 37; Order F2007-013 at para. 67).
>
> Pages 298 and 299 are memoranda that refer to proposals, recommendations and options for government. In the absence of more specific submissions from the Public Body, I find that the information is not in relation to a matter involving the provision of legal services. There is no evidence, on the face of pages 298 and 299, that the information on them relates to a law-related service performed by a person licensed to practice law. While one of the pages refers to amendments, these are stated as being proposed by a public body, rather than being prepared by a lawyer. Legislative amendments can also be proposed from a policy – rather than legal – perspective. Although the reference in section 27(1)(b) to information "in relation to" legal services has been recognized as quite broad (Order 96-017 at para. 38), a public body must provide evidence that the information in the particular record is indeed in relation to legal services[…]

[para 163] In the foregoing order, the Adjudicator followed previous orders and determined that the term "legal services" includes any law-related service performed by a person licensed to practice law. He also determined that a public body must provide evidence that information in the particular record is in relation to legal services in order to succeed.

[para 164] Order F2009-024 states:

> Information "prepared for an agent or lawyer of the Minister of Justice and Attorney General" then, is information prepared on behalf of an agent or lawyer so that the agent or lawyer may provide legal services. Information sent to an agent or lawyer of the Minister of Justice and Attorney General in circumstances where the sender is seeking to obtain legal services, is not captured by section 27(1)(b), as the information is not prepared on behalf of the agent or lawyer.
>
> It also follows that section 27(1)(b) does not cover the situation where a person, even a person who is one of the persons listed in subclauses i – iii, creates information that is connected in some way with the provision of legal services but is not created for that purpose. For example, section 27(1)(b) does not apply to information that merely refers to or describes legal services without revealing their substance.

[para 165] In Order F2014-25, the Adjudicator reviewed decisions of this office relating to section 27(1)(b). She said:

> In Order F2008-021, the adjudicator discussed the scope of section 27(1)(b)(ii). She said:
>
> > It follows, then, that the person contemplated by the provision who is preparing the information, is doing so for the purpose of providing legal services, and therefore must be either the person providing the legal service or a person who is preparing the information on behalf of, or, at a minimum, for the use of, the provider of legal services, who is, in this case, an Alberta Justice lawyer.
>
> In Order F2009-024 she stated:
>
> > Information "prepared for an agent or lawyer of the Minister of Justice and Attorney General" then, is information prepared on behalf of an agent or lawyer so that the agent or lawyer may provide legal services.
>
> The Public Body did not provide specific arguments regarding the application of section 27(1)(b)(ii) to the information in the records at issue generally, or page 12 specifically. As I discussed above, it is not clear to me that the briefing note was created in relation to a legal service, as opposed to being created for the purpose of providing policy advice. Further, section 27(1)(b) applies only to substantive information, and not to information such as dates, letter head, names and business contact information (see Orders F2008-028 and F2013-51). For these reasons, the Public Body has not met its burden to show that section 27(1)(b)(ii) applies to the information on page 12. I will therefore order the Public Body to disclose the information on page 12 that I have found is responsive, and to which section 24(1)(a) does not apply.

[para 166] In Order F2008-028, the Adjudicator considered that the Legislature's use of the term "prepared" in section 27(1)(b) meant that section 27(1)(b) applies to substantive information about the legal services being provided only, and did not apply to information such as dates. The term "prepared" in section 27(1)(b) in its ordinary sense means "made or got ready for use." The term "prepared" is not synonymous with "writing" or "creating", and "writing an email" is not the same thing as "preparing an email." Had the Legislature worded section 27(1)(b) so that it encompassed *any* information "written by an agent or lawyer of a public body in relation to a matter involving the provision of legal services" it could have easily done so. However, the Legislation chose the word "prepared" to describe a lawyer's interaction with the information covered by this provision. To put the point differently, section 27(1)(b) is intended to encompass information that a lawyer or Crown prosecutor intends to use in relation to a matter, such as "work product", although it is not necessarily restricted in its application to such information.

[para 167] In any event, to fall within section 27(1)(b), information must be prepared by, or at the direction of, a lawyer or agent, or the Minister of Justice and Attorney General, in relation to a matter involving the provision of legal services. At a minimum, to establish that this provision applies, a public body must provide clear evidence that the information was prepared by or for one of the persons enumerated in the provision, and that the purpose for preparing the information was for use in the provision of legal services.

[para 168] Section 27(1)(c) contemplates information in correspondence between a public body's lawyer or agent, and any other person; however, the correspondence must be in relation to a matter which involves the provision of advice or services by the lawyer. At a minimum, a public body seeking to rely on this provision must establish that the lawyer (or agent) involved in the correspondence in question is providing advice or services that relate to the matter that is the subject of information in the correspondence. As a result, a public body must provide convincing evidence regarding the matter, the subject of the correspondence, and the role of the lawyer or agent, in order to meet its burden.

[para 169] In Order F2015-22, I interpreted the word "matter" in section 27(1)(c) in the following way:

> In my view, the fact that a "matter" within the terms of section 27(1)(c) is one "involving the provision of advice or other services" by a lawyer, indicates that the legislature is referring to a "legal matter", as this is the type of matter for which a lawyer might provide advice or services. The *Canadian Oxford Dictionary*[3] offers the following definition of "matter," where that term is used in a legal context: "*Law*: a thing which is to be tried or proved".

In my view, where section 27(1)(c) refers to a "matter" it is referring to a legal matter, in relation to which a lawyer may provide advice or services.

[para 170] Section 27(1)(c) applies, then, to information in correspondence between a lawyer or agent and someone else, in relation to a legal matter, for which the lawyer or agent is providing advice or other services.

Record 9

[para 171] The evidence of the Disclosure Analyst, cited above, with regard to the Public Body's claim of privilege is that record 9 is a covering letter to records 14 – 18.

[para 172] In support of the Public Body's application of section 27(1)(b) and (c) to this record, she states:

> The documents relating to the receipt of the Legal Opinion in pages 9 and 13 contained information prepared by or for a lawyer of the Minister of Justice and Solicitor General in relation to a matter involving the provision of legal services, also formed information in correspondence between a lawyer of the Minister of Justice and Solicitor General.

[para 173] The most specific evidence I have before me regarding the content of records 9 and 13, is that these records are a cover letter created by the office of the Chief Crown Prosecutor in Calgary. I find that the Public Body's evidence falls short of establishing that section 27(1)(b) applies. Section 27(1)(b) applies to information *prepared* by a lawyer *in relation to a matter involving the provision of legal services*. Writing a covering letter is not the same thing as preparing a record for use in the provision of legal services. As noted above, the term "prepare", by definition, means "make ready or get ready for use". In the context of section 27(1)(b), information must be

made ready for use in relation to a matter involving the provision of legal services. It is not clear to me that a cover letter could serve this purpose. Rather it appears to be the case that the covering letter would inform the Public Body that records 14 – 18 were attached. Without an explanation being provided as to how the information in the covering letter could be said to have been made ready for use in relation to a matter involving the provision of legal services, I am unable to find that the covering letter falls within the terms of section 27(1)(b).

[para 174] Further, section 27(1)(c) has not been shown to apply. Section 27(1)(c) applies to information in correspondence that is in relation to a matter involving the provision of advice or services by the Minister of Justice and Solicitor General or her agent or lawyer. While I accept that making a decision to prosecute or not, may be construed as a legal service that the Minister of Justice and Solicitor General provides for the benefit of the public, I have insufficient evidence before me to establish that records 9 and 13 contain information relating to, or concerning, this decision, such that records 9 and 13 may be characterized as containing information "in relation to" this matter. I know nothing more than that records 9 and 13 are covering letters that warn that the records attached to them should not be disclosed without the consent of the Chief Crown Prosecutor" (paragraph 44 of the affidavit). That records 9 and 13 are covering letters, or were attached to records 14 – 18, does not, without more, make the information they contain "in relation to a matter involving the provision of advice or other services by the Minister of Justice and Solicitor General".

[para 175] As I find that sections 27(1)(a), (b), and (c) have not been established as applying to records 9 and 13, I must require the Public Body to give access to them.

Records 10 – 12

[para 176] As discussed above, records 10 – 12 contain legal advice from a Crown prosecutor seconded to the Public Body's Legal Services Area as to whether the Public Body should commence disciplinary proceedings. This advice also refers to information in the Crown prosecutor's charging decision.

[para 177] I found above that records 10 – 12 were disclosed to Officer A. Accordingly, I found records 10 – 12 were either not intended to be confidential, or alternatively, that privilege was lost when they were provided to Officer A.

[para 178] In support of the application of section 27(1)(b), the Disclosure Analyst states the following in her affidavit, with reference to the Public Body's application of section 27(1)(b) and (c) to records 10 – 12:

> The EPS Memorandum at pages 10 – 12 was information prepared by a lawyer of a public body (the EPS) in relation to a matter involving the provision of legal services, and also formed information in correspondence between a lawyer of a public body and any other person in relation to a matter involving the provision of advice by a lawyer of the public body.

[para 179] From the evidence of records 4 and 6 – 7, and the evidence of the Disclosure Analyst, I have found that records 10 – 12 are a legal opinion prepared by a Crown prosecutor who was seconded to the Public Body's Legal Services Area. This opinion was intended to provide legal advice to the Public Body.

[para 180] In Order F2015-31, the Director of Adjudication said:

> In other words, the parts of records that seek, provide or discuss legal advice, and thereby reveal it, themselves *constitute* the legal advice/service; they cannot sensibly be said to be 'information *in relation to* a matter involving the provision of legal services (or advice or other services)' within the terms of the latter two provisions. To say, for example, that legal advice prepared by a lawyer *relates to* a matter involving the provision (as a service) of that legal advice by that lawyer is to say something grammatically and logically incoherent.

I agree with the analysis in Order F2015-31. Applying this analysis to records 10 – 12, I find that these records are not subject to section 27(1)(b) or (c), as these records constitute legal advice.

[para 181] I find that the Public Body has not established that sections 27(1)(a), (b), and (c) apply to records 10 – 12. However, as it appears possible that records 10 – 12 may contain references to a Crown prosecutor's exercise of discretion, I will address these records below in my discussion of prosecutorial discretion in relation to records 14 – 18.

Records 14 – 18

[para 182] The Disclosure Analyst states the following in support of the application of sections 27(1)(a) and (b) to records 14 – 18. She states:

> [The] Legal Opinion in pages 14 – 18 was prepared by a lawyer of the Minister of Justice and Solicitor General in relation to a matter involving the provision of legal services, and also formed information in correspondence internally with other lawyers of the Minister of Justice and Solicitor General and was intended to be provided to an agent or lawyer of a public body (the EPS) in relation to a matter involving the provision of advice by the Minister of Justice and Solicitor General […]

[para 183] From records 6 – 7 and the Public Body's submissions, I understand that records 14 – 18 consist of the decision of a Crown prosecutor as to whether charges should be laid and a prosecution brought in relation to a matter investigated by the Public Body.

[para 184] I have found above that records 14 – 18 do not constitute legal advice, but a decision made in the exercise of prosecutorial discretion. I find that this decision was provided to the Public Body so that it could accommodate or otherwise address the decision of the Crown prosecutor.

[para 185] I am unable to say that the Crown prosecutor who made the decision contained in records 14 – 18 "prepared" these records in relation to a matter involving the provision of legal services. As noted above, the term "prepared" means to "make ready

for use". In this case, records 14 – 18 could not be said to have been made ready for use in the provision of legal services, as the Crown prosecutor's decision was that charges should not be brought. In other words, as a consequence of the decision, there was no matter involving the provision of legal services for which the records could be said to have been prepared. As a result, it does not seem likely, based on the evidence before me, that the records were created for use in relation to a matter involving the provision of legal services.

[para 186] Further, I find that section 27(1)(c) does not apply to records 14 – 18. As discussed above, in Order F2015-31, the Director of Adjudication noted that information that constitutes legal advice or a legal service does not fall within the terms of section 27(1)(c) as to say "that legal advice prepared by a lawyer *relates to* a matter involving the provision (as a service) of that legal advice by that lawyer is to say something grammatically and logically incoherent."

[para 187] In this case, the charging decision that is contained in records 14 – 18 is the legal service provided by the Minister of Justice and Solicitor General. As a result, it cannot reasonably be described as relating to a matter involving the provision of that service within the terms of section 27(1)(c).

[para 188] For the foregoing reasons, I find that records 14 – 18 do not meet the terms of sections 27(1)(b) of (c).

[para 189] Having found that the terms of sections 27(1)(a), (b), and (c) are not met, I would ordinarily order disclosure of the records, given that the provisions the Public Body applied are not supported. However, in this case, I note that the Public Body's reason for severing records 14 – 18, if its assertions of solicitor-client privilege are put aside, appears to be concern that it should not disclose records created by Crown prosecutors that it has been provided in confidence. This concern is not inconsistent with the terms of section 20(1)(g), which 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[…]*

Section 20(1)(g) enables the head of a public body to withhold information from an Applicant if the information could reasonably be expected to reveal information relating to or used in the exercise of prosecutorial discretion.

[para 190] In Order F2008-016, the Adjudicator was faced with a situation where a Public Body withheld information under one provision, but its arguments indicated to her that it had really withheld information in accordance with another provision. She said:

> Although sections 27(1)(b) and 27(1)(c) were not explicitly referred to on the responsive documents or in the EPS' submissions, I find that the substance of the EPS submissions allows

> me to find that it took into consideration all appropriate elements of sections 27(1)(b) and 27(1)(c) when severing the records, even though the EPS ultimately decided to sever under a provision of the Act that was not correct. Since the principle the EPS used to withhold these records (the confidential seeking of advice or consultations with lawyers employed at the Ministry of Justice) fits within section 27(1)(c), I see no reason to deprive the EPS of its ability to apply section 27(1)(c) at this point.

Given that records 14 – 18 contain a charging decision, I accept that these records likely contain information that may reveal information relating to or used in the exercise of prosecutorial discretion. Given that it appears that the Public Body's concerns regarding records 14 – 18 (and the references in records 10 – 12 to records 14 – 18) stem from the Chief Crown Prosecutor's requirement that the records be kept confidential, I accept that it may have taken into consideration elements supporting the application of section 20(1)(g), even though it ultimately applied the wrong provisions of the FOIP Act to the information. As in order F2008-016, I have decided that the Public Body should not be precluded from applying section 20(1)(g) at this point. That being said, I unable to accept that the Public Body exercised discretion appropriately when it withheld portions of records 10 – 12 referring to records 14 – 18 and records 14 – 18 from the Applicant, given that it considered the purpose of inapplicable provisions when it did so. As a result, I must order the Public Body to reconsider its exercise of discretion to withhold records 14 – 18 from the Applicant and those portions of records 10 – 12 that refer to records 14 - 18. In making the new exercise of discretion, the Public Body should consider the purpose and terms of section 20(1)(g) of the FOIP Act. The Applicant is not precluded from requesting review of the Public Body's reconsideration decision.

Records 19 – 20, 22

[para 191] The affidavit of the Disclosure Analyst states:

> The documents relating to the Request for a Legal Opinion in pages 19 and 20 was information prepared by or for a lawyer of the Minister of Justice and Solicitor General in relation to a matter involving the provision of legal services, and also formed information in correspondence between a lawyer of the Minister of Justice and Solicitor General and any person in relation to a matter involving the provision of advice by a lawyer of the Minister of Justice and Solicitor General.

[para 192] Based on the Disclosure Analyst's description of these records in support of the application of solicitor-client privilege, I understand that record 22 contains a request that Alberta Justice make a determination regarding conducting criminal proceedings, while records 19 and 20 serve to forward this request to the Chief Crown Prosecutor in Calgary.

[para 193] In my view, requesting that a Crown prosecutor make a decision (record 22) is not the same thing as preparing information for a Crown prosecutor in relation to a matter involving the provision of legal services. In this provision, as discussed above, "for" has the meaning of "on behalf of". Section 27(1)(b) cannot apply to record 22 as it was not created by or for a Crown prosecutor (or other lawyer listed in section 27(1)(b)).

[para 194] Moreover, as discussed above, section 27(1)(b) applies to information prepared by or on behalf of a Crown prosecutor for use in the provision of legal services. There is no indication that records 19 – 20 were prepared for use in the provision of legal services by a Crown prosecutor. Rather, the evidence of the Public Body is that records 19 – 20 were created in order to forward correspondence to the office of the Chief Crown Prosecutor in Calgary. I find that section 27(1)(b) has not been demonstrated as applying in relation to records 19 – 20.

[para 195] I find that section 27(1)(c) does apply to records 19 – 20 and 22, as these records can be described as between a Crown prosecutor and another person in relation to a matter involving the provision of services by a Crown prosecutor i.e. making a decision whether or not to prosecute.

[para 196] I am unable to support the Public Body's exercise of discretion in relation to records 19 – 20, and 22.

[para 197] As discussed above, in *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 the Supreme Court of Canada explained the process for applying discretionary exceptions in freedom of information legislation and the considerations that are involved. Once a public body has determined that an exception to disclosure applies, the public body must then weigh considerations for or against disclosure.

[para 198] As I noted in Order F2013-13, sections 27(1)(b) and (c) are drafted in such a way that they apply to information regardless of whether disclosure of the information would result in harm or disadvantage. These provisions may be said to apply to information that is not privileged or confidential, and would not result in harm if disclosed. If a lawyer or agent (or someone acting at the direction of the lawyer or agent) has prepared information for use in the provision of advice or legal services, section 27(1)(b) applies, and if the lawyer is a party to correspondence in relation to a matter for which the lawyer is providing advice or services, then section 27(1)(c) applies. However, when applying discretion to sever information under these provisions it is not sufficient to find that they apply; the Public Body must determine that there are reasons that support severing the information relevant to the purpose of the provision, that outweigh interests in disclosing the records.

[para 199] As noted above, section 27(1)(b) appears intended to protect a government lawyer's or Crown prosecutor's work product in relation to a matter involving the provision of legal services from disclosure, while section 27(1)(c) protects correspondence with other persons regarding a matter that a lawyer or Crown prosecutor has carriage of from disclosure. In my view, sections 27(1)(b) and (c) both serve to protect a public body's position in a legal matter, given that these provisions may be used to protect communications and work product in relation to legal matters from disclosure.

[para 200] Both litigation privilege and settlement privilege have evolved to protect the kinds of information that sections 27(1)(b) and (c) encompass. However, both

litigation privilege and settlement privilege relate to the admissibility of documents in the proceedings (or related proceedings) for which work product or settlement communications were made. As a result, it is not clearly the case that records containing work product or settlement communications are privileged in situations where their admissibility in proceedings is not at issue, as in the case where an access request is made for the records under the FOIP Act. Sections 27(1)(b) and (c) may have been considered necessary to protect work product and settlement communications from disclosure in matters outside the proceedings for which the work product or settlement communications were prepared. Arguably, it would be a disadvantage to a public body engaged in legal proceedings to disclose work product or settlement communications when adversaries in the private sector, who are not subject to freedom of information legislation, would not be required to disclose this information. That being said, I note that sections 27(1)(b) and (c) are not restricted to work product or settlement communications, but may also encompass non-privileged, and non-confidential work product or communications, or information that would not affect a public body's position in any way if disclosed.

[para 201] Exercising discretion is a process by which factors weighing in favor of withholding information must be weighed against those favoring disclosure. As a result, discretion cannot be exercised reasonably in favor of withholding records under section 27(1)(b) or (c), if a public body's position in a legal matter or litigation, for which a lawyer or agent created work product or communicated with other persons, would not be harmed in some way by disclosure. If no harm recognized by an exception to disclosure could come to the Public Body from disclosing information, then discretion is reasonably exercised by giving an applicant access to it. To put the point differently, even though sections 27(1)(b) and (c) do not refer to harm and may encompass information that would not affect a public body's conduct of legal matters or litigation if disclosed, to exercise discretion reasonably when applying this provision, a public body must consider whether harm or disadvantage to its conduct of a legal matter could potentially result from disclosure. If the answer is no, then the public body should, in most cases, exercise discretion in favor of disclosure.

[para 202] The Public Body's disclosure analyst provided the following explanation of her severing decisions under section 27(1) in an affidavit. She states:

> In confirming the decision to withhold information in the Responsive Records pursuant to s. 27 of the FOIPP Act, the EPS FOIPP Unit considered the nature of these portions of the Responsive Records, the purposes of the section, as well as the following:
>
> a) the impact the disclosure would reasonably be expected to have on the EPS's ability to carry out similar communications in the future;
>
> b) that the release of the information could make consulting with legal counsel less candid, open and comprehensive in the future if it is understood that such information would be made publicly available;
>
> c) that the members of the EPS had a reasonable expectation that consultations with legal counsel would be kept confidential;

d) the objectives and purposes of the Act, including the Applicant's right of access.

[para 203] For the reasons that follow, I disagree with the Public Body's position that the factors it considered in exercising discretion are relevant.

[para 204] The Public Body is required by section 45(2) of the *Police Act* to refer complaints of misconduct to the Minister of Justice and Solicitor General when it considers that an Act of Canada or Alberta may have been contravened after conducting an investigation. It is unclear why disclosure of its correspondence forwarding such a matter to the Minister would prevent the Public Body from complying with its duties under the *Police Act*. Moreover, records 19 – 20 were created by a Crown prosecutor, not the Public Body. As a result, it is unclear how disclosure would affect the Public Body's ability to carry out this kind of communication, given that it did not take part in it.

[para 205] I am also unable to accept that disclosure of these records would result in communications with legal counsel being less candid, given that none of the parties involved in records 19 – 20 and 22 acted as legal counsel or as client. Similarly, I do not accept that the Public Body's concern that any expectations on the part of EPS that communications with legal counsel would be kept confidential has any bearing, given that record 19 – 20 does not involve the Public Body, and record 22 does not involve a party acting as legal counsel.

[para 206] The Public Body has not considered whether its position, or that of the Government of Alberta, in the matter that is the subject of the records would be affected or harmed by disclosure of the records. However, as discussed above, I believe that this is a relevant factor that must be considered when applying section 27(1)(b) or (c). In this case, as the matter that was the subject of the records, did not proceed, it is unclear that it would be possible to exercise discretion reasonably in favor of withholding the information in records 19 – 20 and 22.

[para 207] As I find that the Public Body considered irrelevant factors in exercising its discretion to sever information from records 19 – 20 and 22, and failed to consider relevant provisions, I must ask the Public Body to reconsider its decision to withhold records 19 – 20 and 22 from the Applicant. The Applicant is not precluded from requesting review of the Public Body's new decision in relation to these records.

[para 208] For the foregoing reasons, I have decided that I must ask the Public Body to make a new decision as to whether it will sever or disclose information from records 19 – 20, and 22 that is based on considerations applicable to the information in the records and the purpose of sections 27(1)(b) and (c) rather than on irrelevant considerations.

Records 52 – 54 and 91

[para 209] Records 52 – 54 contain communications between the Public Body and a federal Crown prosecutor. Record 91 contains a letter from a federal Crown prosecutor to the Public Body.

[para 210] Although the Public Body no longer relies on section 27(1)(a) in relation to these records, it appears that it continues to rely on section 27(1)(b) and (c) in relation to them.

[para 211] As noted above, section 27(1)(b) of the FOIP Act applies to information prepared by or for the Minister of Justice and Solicitor General, an agent or lawyer of the Minister of Justice and Solicitor General or an agent or lawyer of a public body.

[para 212] Information prepared by or for a federal Crown prosecutor does not meet the terms of section 27(1)(b) as a federal Crown prosecutor is not listed in section 27(1)(b). Similarly, section 27(1)(c) cannot apply, as a federal Crown prosecutor is not listed in section 27(1)(c). Possibly, the Public Body considers a federal Crown prosecutor to be "a lawyer of the public body", given its theory that a Crown prosecutor and a police service enter a solicitor-client relationship in the course of prosecutions. I have already rejected the argument that a Crown prosecutor and a police service enter a solicitor-client relationship in the course of a prosecution. It follows that I find that a federal Crown prosecutor is not a lawyer of a public body within the terms of section 27(1)(b) or (c).

Conclusion

[para 213] To conclude I find that the Public Body has established that records 19 – 20 and 22 are subject to section 27(1)(c). However, I have found that it has not demonstrated that it exercised its discretion reasonably when it severed these records under this provision. I find that records 14 – 18 and portions of records 10 – 12 that reference records 14 – 18 are subject to section 20(1)(g). I have also found that the Public Body has not established that it exercised its discretion reasonably when it severed information from these records.

V. ORDER

[para 214] I make this Order under section 72 of the Act.

[para 215] I confirm the Public Body's decision that records to which it has applied section 4 are not subject to the Act.

[para 216] I confirm the Public Body's decision to sever Officer A's personally identifying information from records 480 – 485 under section 17(1) of the FOIP Act.

[para 217] I require the Public Body to reconsider its decision to withhold records 6 – 7, 34, and 36 – 37 from the Applicant and to make a new decision that takes into consideration the age of the records. The Applicant is not precluded from requesting review of the Public Body's new exercise of discretion.

[para 218] I require the Public Body to reconsider its decision to withhold records 14 – 18 and portions of records 10 – 12 that reference records 14 – 18. The new decision

should take into consideration those factors relevant to the application of section 20(1)(g) of the FOIP Act and the exercise of discretion under this provision.

[para 219] I require the Public Body to reconsider its decision to withhold records 19 – 20 and 22 from the Applicant. The new decision should take into consideration only those factors relevant to the application of section 27(1)(c) and the exercise of discretion under this provision, as discussed in the body of the order.

[para 220] I order the Public Body to give the Applicant access to all the remaining records in their entirety.

[para 221] 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 it.

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Teresa Cunningham
Adjudicator