ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2017-81

November 3, 2017

ROYAL CANADIAN MOUNTED POLICE

Case File Number 000671

Office URL: www.oipc.ab.ca

Summary: An individual made a complaint to this Office under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) regarding a Vulnerable Sector Check (VS Check) conducted by the Red Deer RCMP Detachment. The Complainant alleges that the collection, use and/or disclosure of certain personal information in the VS Check was not authorized under the FOIP Act.

The Commissioner decided that this matter should proceed directly to inquiry to determine the preliminary issue as to whether the Commissioner has jurisdiction to review the use and/or disclosure of the Complainant's personal information by the Red Deer detachment of the RCMP.

The Adjudicator found that the RCMP detachment is not subject to the FOIP Act even when providing policing services to the City of Red Deer. As such, this Office does not have jurisdiction to consider a complaint regarding the collection, use and/or disclosure of personal information by the RCMP detachment. The Complainant was directed to make her complaint to the federal Privacy Commissioner.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 72, *Police Act*, R.S.A. 2000, c.P-17, ss. 1, 4, 5, 21, 22, 24, 25, 27, 28, 29, 30, 31, **BC**: *Criminal Records Review Act*, R.S.B.C 1996, C. 86, **Can:** *Criminal Records Act*, R.S.C. 1985, c. C-47, s. 6.3, *Privacy Act*, R.S.C. 1985, c. P-21, *Royal Canadian Mounted Police Act*,

R.S.C. 1985, c. R-10, **Ont***: Police Record Checks Reform Act, 2015* (S.O. 2015, Chapter 30, ss, 3, 10.

Cases Cited: *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, *Alberta (Attorney General) v. Putnam*, [1981] 2 S.C.R. 267, *L'Heureux v. Unum Life Insurance Co. of America*, 1998 ABQB 549 (CanLII), *Ontario (Criminal Code Review Board) v. Doe*, (1999), 180 D.L.R. (4th) 657, 47 O.R. (3d) 201, [1999] O.J. No. 4072 (C.A.), *Public Service Alliance of Canada v. Canada*, [2004] F.C.J. No. 13, *Quebec (Attorney General) v. Canada (Attorney General)*, [1979] 1 S.C.R. 218, *Scowby v. Glendenning*, [1986] 2 S.C.R. 226 , *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada*, 2008 SCC 15.

Orders Cited: AB: Orders F2006-024, F2009-030, F2010-22, F2010-027, P2010-020, **BC**: Orders 02-19, F06-01, **Ont**: Order PO-2917.

Authorities Cited: **AB**: Service Alberta, *FOIP Guidelines and Practices Manual* (2009), **BC**: *Privacy and the USA Patriot Act: Implications for British Columbia Public Sector Outsourcing*, 2004.

I. BACKGROUND

[para 1] This inquiry arises from a complaint made by an individual against the Royal Canadian Mounted Police (RCMP) regarding a Vulnerable Sector Check (VS Check) conducted by the City of Red Deer RCMP detachment. The individual complained that this check contained information about mental health apprehensions. The Complainant alleges that the inclusion of information about these mental health apprehensions in the VS Check was not authorized (i.e. that the use and/or disclosure of this element of her personal information was not authorized under the FOIP Act).

[para 2] The Complainant requested a review of the RCMP detachment's actions. The Commissioner decided that this matter should proceed directly to inquiry to determine the preliminary issue as to whether the Commissioner has jurisdiction to review the use and/or disclosure of the Complainant's personal information by the Red Deer detachment of the RCMP.

[para 3] After reviewing the complaint and the RCMP submissions, I determined that Alberta Justice and Solicitor General (AJSG) may be directly affected by the outcome of the inquiry. As such, I invited AJSG to provide me with submissions. I also asked it to provide me with a copy of the agreement between the Alberta Government and the Government of Canada (Canada) for the provision of police services under the *Police Act.*

[para 4] AJSG agreed to participate in the inquiry, and provided submissions. It also noted that under the *Police Act*, AJSG is not a signatory to the agreement between the City of Red Deer and Canada (although the template for municipal agreements has been approved by Canada and the province). As such, I also invited the City of Red Deer (City) to participate in the inquiry. The City agreed to participate and provided submissions.

II. ISSUE

[para 5] The Notice of Inquiry, dated February 8, 2016, stated the issue for the inquiry as follows:

> Does the Commissioner have jurisdiction to review the use and/or disclosure of the Complainant's personal information by the [Red Deer detachment of the] RCMP?

III. DISCUSSION OF ISSUE

[para 6] The RCMP stated in its initial submission that it is a federal institution and therefore complaints made about the use or disclosure of personal information must be made to the Federal Privacy Commissioner; the Alberta Commissioner does not have jurisdiction to consider the Complainant's complaint. It cited Service Alberta's *FOIP Guidelines and Practices,* (2009), which states that the RCMP is a federal institution subject to federal laws, even when acting as a municipal police service. It also cited former Commissioner Work as stating to the committee undertaking the 2002 legislative review of the FOIP Act, that this Office could have jurisdiction over the RCMP only by contract. However, as the Commissioner has delegated this inquiry to me, I must make my own determination as to jurisdiction in this case.

[para 7] In this discussion, I will first lay out the arguments of the RCMP, AJSG and the City (The Complainant was permitted to rely on her Request for Inquiry and attachments, and she chose to do so).

[para 8] I will then discuss the federal legislation and the "local nature" of a VS Check conducted by a detachment; the definition of "police service" and "public body" under the FOIP Act and *Police Act*; the case law regarding provincial jurisdiction over the RCMP; and the parties' arguments regarding the doctrine of federal paramountcy.

[para 9] I will move on to discuss the principle that a public body cannot "contract out" of its obligations under the FOIP Act.

Arguments of the parties

[para 10] Two of the submissions for the RCMP were submitted by the Attorney General of Canada on behalf of the RCMP. For simplicity, I will refer to all submissions made by or on behalf of the RCMP as submissions of the RCMP as it is the party to this inquiry.

[para 11] The RCMP stated in its rebuttal submission (dated October 14, 2016) that conducting a VS Check is a federal service. It stated (at para. 19):

> The Alberta Court of Queen's Bench [in *L'Heureux v. Unum Life Insurance Company of America*, 1998 ABQB 549] has held that when the RCMP is acting as a provincial police service, section 17 of the federal *Interpretation Act* does not apply unless the RCMP is acting pursuant to a federal statute. When the RCMP is releasing personal information either from a criminal records check or vulnerable sector check they are acting pursuant to a federal statute. The Court stated:

> In so far as the RCMP Act explicitly provides for the RCMP to take on the role of a provincial police service, it serves to exclude the RCMP from s. 17 of the Interpretation Act whenever such an agreement is in place and when the RCMP are not acting pursuant to a federal statute. (At para 19, emphasis added)

[para 12] In its submissions, AJSG provided copies of the templates for provincial and municipal Policing Service Agreements (PSA) with the RCMP. It explained the agreements in general terms at page 4 of its initial submission:

> The terms of the Provincial PSA provide that Canada and any eligible municipality may enter into a Municipal PSA. Article 10.0 of the Provincial PSA provides that a municipality may do so with the approval of the Governor in Council of Canada and the Lieutenant Governor in Council of Alberta. Canada and Alberta have agreed to the template for any Municipal PSA. If a municipality wishes to have the RCMP provide police services in that jurisdiction, Canada and the municipality must sign an agreement based on that template.

[para 13] AJSG argued that the PSAs recognize federal jurisdiction over "internal management and administration" of the RCMP. It also stated that he PSAs do not reference compliance by the RCMP with the FOIP Act; it said (at page 6 of its initial submission):

> If Canada and Alberta viewed FOIP as governing the collection, use and disclosure of personal information by the RCMP, it is unthinkable that such provisions would not be included in the Provincial PSA and the Municipal PSA template.

[para 14] AJSG cited several provisions of the PSAs as support for its arguments. It stated (at pages 4-6 of its initial submission, emphasis mine):

> First, there are a number of provisions that set out the concurrent versus exclusive jurisdiction for Canada and Alberta. These include the following:
>
> • In the section entitled "Introduction", at page 4 of the Provincial PSA, Canada and Alberta have specifically agreed to respect the constitutional jurisdiction of the other party:
>
> D. The Parties recognize that:
>
> (i) Alberta has the constitutional jurisdiction of the administration of justice which includes the responsibility for policing
>
> (ii) the RCMP is a federal entity and matters relating to the control, management, and administration of the RCMP are within exclusive federal jurisdiction, and
>
> (iii) the Commissioner of the Royal Canadian Mounted Police, under the direction of the Federal Minister has the control and management of the RCMP and all matters connected therewith
>
> H. Canada and Alberta recognize that through this Agreement a relationship with respect to provincial policing is established in the Province, built on consultation between Canada and Alberta, characterized by respecting each other's constitutional responsibilities and by responding to each other's needs, all in a manner that recognizes the evolving nature of law enforcement.

• In the section entitled "Article 6.0 Management of the Provincial Police Service", at page 17 of the Provincial PSA, Canada and Alberta have agreed:

> 6.1 The Provincial Minister will set the objective, priorities and goals of the Provincial Police Service.
>
> 6.2 The internal management of the Provincial Police Services, including its administration and the determination and application of professional police standards and procedures, will remain under the control of Canada.
>
> 6.4 Nothing in this Agreement will be interpreted as limiting in any way the jurisdiction of Alberta in respect of the administration of justice and law enforcement in the Province.

…

• Similarly, in the section of the Municipal PSA template entitled "Article 6.0 Management of the Municipal Police Service", at page 11, Canada and a municipality must agree:

> 6.1 The CEO may set the objectives, priorities and goals of the Municipal Police Service which are not inconsistent with those of the Provincial Minister and document those objectives, priorities and goals no more frequently than annually and in concert with the annual RCMP planning cycle.
>
> 6.2 The internal management of the Municipal Police Services, including its administration and the determination and application of professional police standards and procedures, will remain under the control of Canada.
>
> 6.4 Nothing in this Agreement will be interpreted as limiting in any way the jurisdiction of the Province in respect of the administration of justice and law enforcement in the Province.

Importantly, the recognition of provincial jurisdiction in Article 6.4 is specifically limited to laws related to the "administration of justice and law enforcement in the province", and does not suggest that the RCMP is subject to laws of general application.

…

Article 21.8(f), in the section entitled "Contract Management Committee" requires the RCMP to disclose information to any Independent Reviewer, but specifically provides that this disclosure is subject to the RCMP's requirements for the protection of information. This provision is as follows:

> 21.8 (f) The Independent Reviewer will be provided with access to information relevant to the agreed-upon subject matter and scope subject to:
>
> > (i) compliance with all applicable laws, federal policies or other requirements for the protection of information to which the RCMP is subject to, and

The only reasonable interpretation of this provision is that the parties have agree that the RCMP is subject only to federal protection of information laws and policies.

…

Importantly, the Municipal PSA template includes fewer "disclosure of information" provisions.

> The disclosure obligations in the Municipal PSA template are, essentially, requirements for the RCMP to disclose "contract management" or budgeting information to the municipality. See, for example, Articles 8.1, 8.3, 17.1, 17.7 and 20.7 of the Municipal PSA template. Similar to the Provincial PSA, the Municipal PSA templates does not include any requirement for the RCMP to provide to the municipality any information about compliance with FOIP, or to provide to the municipality copies of records that are responsive to a FOIP request.

[para 15] AJSG also pointed out provisions in the agreements that address the disclosure of information by an RCMP detachment to the province. It notes that these provisions do not expressly reference the FOIP Act. It stated:

> At Article 7.0, entitled "The Commanding Officer and the Operation of the Division", on page 19, Canada and Alberta have agreed:
>
> > 7.3 subject to applicable laws, the Provincial Police service will, upon specific or general request from Alberta, make best efforts to provide Alberta with information, including personal information that may be needed for the administration of justice in the Province or to carry into effect the laws in force therein.
>
> • Article 18.0 of the Provincial PSA requires the RCMP to provide to Alberta certain financial information necessary for budgeting and accountability.
>
> • Article 21.8(f), in the section entitled "Contract Management Committee" requires [the] RCMP to disclose information to any Independent Reviewer, but specifically provides that this disclosure is subject to the RCMP's requirements for the protection of information. This provision is as follows:
>
> > 21.8 (f) The Independent Reviewer will be provided with access to information relevant to the agreed-upon subject matter and scope subject to:
> >
> > > (i) compliance with all applicable laws, federal policies or other requirements for the protection of information to which the RCMP is subject to, and…
>
> The only reasonable interpretation of this provision is that the parties have [agreed] that the RCMP is subject only to federal protection of information laws and policies.

[para 16] It further stated:

> These provisions set out extremely limited requirements for the RCMP to provide information to Alberta, and notably do not include any requirement to provide to JSG any information about compliance with FOIP, or to provide to JSG copies of records that are responsive to a FOIP request. If Canada and Alberta viewed FOIP as governing the collection, use and disclosure of personal information by the RCMP, it is unthinkable that such provisions would not be included in the Provincial PSA and the Municipal PSA template. (Initial submission, page 6)

[para 17] AJSG also argued that the RCMP detachment is not an agent of the City in providing policing services. It cites the Supreme Court of Canada in *Société des Acadiens et Acadiennes du Nouveau-Brunswick Inc. v. Canada*, 2008 SCC 15 (*Société*), in which the Court stated that an RCMP detachment acting as a provincial police service remains a federal institution. It also cited

the Court in *Scowby v. Glendenning*, [1986] 2 S.C.R. 226 (*Scowby*) as stating that internal management and administration of RCMP detachments remains within the federal jurisdiction, even where the detachment is acting as a provincial police service.

[para 18] The City agreed with the submissions of the RCMP and AJSG, that the RCMP detachment remains a federal institution, subject to the federal *Privacy Act*. It refers to the Municipal PSA between Canada and the City, stating:

> … the Municipal Police Service Agreement creates a contractual service relationship between the City and the Respondent where the Respondent acts independently from the City and is responsible for its own administration and management. That is, although the Respondent provides municipal police services to the city "*in aiding the administration of justice in the municipality and in carrying into effect the laws in force in the Province and municipality*" [Municipal PSA, Article 7.1], the Agreement clearly indicates that the internal management and administration of the RCMP remains under the control of [the] federal Crown. (Initial submission, at para. 10)

[para 19] The City also referred to Article 6.2 of the Municipal PSA, cited above, which states that the administration and the determination and application of professional police standards and procedures remains under federal control.

[para 20] In the alternative, the City argues that if this Office does have jurisdiction to review the actions of the RCMP detachment, the detachment is a separate public body under the FOIP Act and not acting on behalf of the City.

Federal legislation

[para 21] The RCMP argued that conducting a VS Check is a federal service, acting pursuant to a federal statute. In my view, while a VS Check has some federal aspect, insofar as the federal RCMP maintain control over some of the records searched in conducting a VS Check, the VS Check appears to also have a provincial aspect.

[para 22] Section 6.3(3) of the federal *Criminal Records Act* requires a vulnerable sector search to be conducted in certain circumstances:

> *6.3(3) At the request of any person or organization responsible for the well-being of a child or vulnerable person and to whom or to which an application is made for a paid or volunteer position, a member of a police force or other authorized body shall verify whether the applicant is the subject of a notation made in accordance with subsection (2) if*
>
> *(a) the position is one of trust or authority towards that child or vulnerable person; and*
>
> *(b) the applicant has consented in writing to the verification.*

[para 23] There is little doubt that the search conducted for a VS Check includes federal records and the disclosure of those records is regulated by federal legislation. However, according to the RCMP's website the full VS Check includes more than federal databases; it also includes local databases. In this case, the Complainant's search results indicate a negative search result from the RCMP National Repository of Criminal Records (no records found); however,

the search indicates that there is "adverse information located on police records management systems." Specifically, the search discloses an arrest made pursuant to "mental health complaint", and another mental health complaint where no arrest is mentioned. In both cases, the search states that no criminal charges were laid. Therefore, it appears that the part of the VS Check the Complainant is concerned with is the part that relates to local records, and not records that are federally regulated.

[para 24] In other words, the complaint isn't about what information is included in a VS Check from the federal database; rather, it is about mental health information that was included in the VS Check.

[para 25] The BC and Ontario provincial governments have both enacted legislation that restricts the type of mental health information that can be included on a VS Check. The Ontario act, *Police Record Checks Reform Act, 2015* (S.O. 2015, Chapter 30) (not yet in force) limits the type of non-conviction information that can be disclosed on a vulnerable sector check (section 10). That legislation also explicitly binds the Crown (section 3). The BC Ministry of Justice created guidelines that detail the type of information that police should (or should not) release in a criminal records check; it specifically states that checks not include information about apprehensions under the BC *Mental Health Act*. Further, the BC *Criminal Records Review Act* (RSBC 1996, C. 86) regulates the use of criminal records checks for individuals working with children and vulnerable adults.

[para 26] While there appears to be overlap in the federal and provincial jurisdictions regarding vulnerable sector searches, the Complainant's complaint relates to the inclusion of mental health information that appears to be in provincial control (rather than being obtained from a federal database). As such, the inclusion of that information on a VS Check appears to be a provincial matter.

FOIP Act and *Police Act* provisions

[para 27] In a 2002 BC Order, former BC Commissioner Loukidelis determined that an RCMP detachment acting as a municipal police service did not fall within the definition of "public body" under the BC *Freedom of Information and Protection of Privacy Act*. In Order 02-19, He stated (at paras. 19 and 20):

> This inquiry does not raise, I should say at once, the issue of whether the Coquitlam Detachment, or the RCMP generally, is a "public body" under the Act. The RCMP says the Canadian constitution precludes "a direct application" of the Act "and other provincial access to information and privacy legislation to records in the custody of the RCMP" or under its control. It also refers to various statements by my predecessor in speeches, position papers and so on that appear to acknowledge the RCMP is not subject to the Act or the jurisdiction of the Information and Privacy Commissioner for British Columbia. It says these statements amount to a finding by my predecessor that the Act does not apply to the RCMP.
>
> Apart from the issue of what weight should be given, in an inquiry, to such comments, I have no doubt the Act is not intended to apply to the RCMP as if it were a public body. The Act's definition of public body does not purport to encompass the RCMP. Nor does the fact that some RCMP-originated records and information are in the City's hands, or that the Coquitlam

> Detachment is the (contract) municipal police force for the City, somehow make the RCMP a public body under the Act, directly or through the City. Among other things, the fact that the Act's definition of "employee" says that a public body "employee" includes "a person retained under a contract to perform services for the public body" does not, constitutional issues aside, indirectly make the RCMP a public body in its own right.

[para 28] The case here is somewhat different in its analysis, as the Alberta FOIP Act does appear to include some RCMP detachments in the definition of "public body". Specifically, RCMP detachments acting as provincial police services under the *Police Act* appear to fall within that definition. However, RCMP detachments providing municipal policing services may not. I set out the relevant provisions below.

[para 29] The Alberta FOIP Act regulates the collection, use and disclosure of personal information by public bodies, including police services. The relevant definitions from the FOIP Act are as follows:

> *1(p) "public body" means*
>
> *...*
>
> *(vii) a local public body,*
>
> *1(j) "local public body" means*
>
> *...*
>
> *(iii) a local government body;*
>
> *1(i) "local government body" means*
>
> *...*
>
> *(x) any*
>
> *(A) commission,*
>
> *(B) police service, or*
>
> *(C) policing committee,*
>
> *as defined in the Police Act,*

[para 30] Under the FOIP Act, a police service under the *Police Act* is a "local government body."In turn, a local government body is a "local public body", which is a "public body" under the FOIP Act (sections 1(i), (j) and (p), respectively).

[para 31] The Alberta *Police Act* defines "police service" as follows:

> *1(l) "police service" means*
>
> *(i) a regional police service;*
>
> *(ii) a municipal police service;*
>
> *(iii) the provincial police service;*
>
> *(iv) a police service established under an agreement made pursuant to section 5;*

[para 32] Section 1(n) states that "provincial police service means the Royal Canadian Mounted Police where an agreement is entered into under section 21(1)".

[para 33] In the present case, the City is a municipality with a population over 5000; its obligation to provide policing services for the municipality is set out in section 4(5) of the *Police Act*, which states:

> *4(5) A city, town, village or summer village that has a population that is greater than 5000 shall, for the purpose of providing policing services specifically for the municipality, do one of the following:*
>
> *(a) enter into an agreement for the provision of municipal policing services under section 22(2) or (3);*
>
> *(b) establish a regional police service under section 24;*
>
> *(c) establish a municipal police service under section 27.*

[para 34] The City has not established its own municipal police service; rather, it has entered into an agreement under section 22. Subsection 22(2) authorizes an agreement between Alberta and the municipality for the provision of policing services by the provincial police service, while subsection 22(3) authorizes an agreement between Canada and the municipality for the provision of policing services by the RCMP:

> *22(2) Notwithstanding subsection (1), where the Minister considers it necessary, the Minister may authorize a municipality that has a population that is greater than 5000 to enter into an agreement with the Government of Alberta for the provision of policing services specifically for the municipality by the provincial police service subject to the sharing of costs as determined by the Minister.*
>
> *(3) Subject to the prior approval of the Minister, the council of a municipality may enter into an agreement with*
>
> *(a) the Government of Canada for the employment of the Royal Canadian Mounted Police, or*
>
> *(b) the council of another municipality,*
>
> *for the provision of policing services to the municipality.*

In this case, the agreement is between Canada and the City, under section 22(3).

[para 35] Of note is the difference in terminology between section 22(2) and (3) of the *Police Act*, and section 21, below. Specifically, agreements under sections 22(2) and (3) speak to the provision of policing services, while section 21 authorizes Alberta to enter into an agreement with Canada for the RCMP to provide a provincial police service:

> *21(1) The Lieutenant Governor in Council may, from time to time, authorize the Minister on behalf of the Government of Alberta to enter into an agreement with the Government of Canada for the Royal Canadian Mounted Police to provide a provincial police service.*

(2) When an agreement referred to in subsection (1) is in force, the Royal Canadian Mounted Police are responsible for the policing of all or any part of Alberta as provided for in the agreement.

(3) The Royal Canadian Mounted Police with respect to their duties as the provincial police service shall, subject to the terms of the agreement referred to in subsection (1), be under the general direction of the Minister in matters respecting the operations, policies and functions of the provincial police service other than those matters referred to in section 2(2).

[para 36] The Alberta *Police Act* defines "police service" as including a provincial police service established under an agreement between the Government of Alberta and Canada under section 21 of the Police Act. However, the *Police Act* does not expressly include in the definition of "police service" the RCMP providing policing services for a municipality under an agreement made pursuant to section 22(3) of the Police Act, although those agreements must be made with the approval of the Government of Alberta. Further, section 21 contemplates the RCMP as a police service, whereas section 22(3) does not; the latter section refers only to the provision of policing services.

[para 37] Because the FOIP Act includes police services within the definition of "public body", it would seem that the RCMP acting as a provincial police service under an agreement between Canada and Alberta falls within the definition of "public body". In contrast, the RCMP providing policing services to a municipality under an agreement between Canada and that municipality does not create a police service per se, and therefore the FOIP Act is not engaged.

[para 38] In the present case, the City has entered into an agreement with Canada under section 22(3). If my above analysis of the *Police Act* is correct, the RCMP detachment does not fall within the definition of "police service" under the *Police Act*; therefore it is not a public body under the FOIP Act. If this is correct, the only issue remaining for consideration is whether the City is responsible for the detachment's compliance with the FOIP Act by virtue of this agreement. That issue will be discussed later in this Order.

[para 39] Reviewing the *Police Act* as a whole does not obviously reveal an inconsistency with finding that the RCMP detachment providing policing services in the City of Red Deer is not a "police service" under that Act; the provisions containing that phrase include provisions relating to complaints and discipline, the establishment of police commissions, and appointments of officers and chief. The relevant legislation, case law (discussed below) and PSAs all indicate that these matters are all otherwise regulated with respect to the RCMP detachment, such that it is not clearly absurd for these provisions in the *Police Act* not to apply to that detachment. That said, the *Police Act* is not my home statute and I do not have expertise in its interpretation. While I referred AJSG to the definitions of "police service" and "public body" in the *Police Act* and FOIP Act, AJSG did not provide arguments specifically on this point.

[para 40] To summarize, it is my view that the agreement between Canada and the City for the provision of policing services by the RCMP does not bring that RCMP detachment within the definition of "public body" in the FOIP Act.

[para 41] If I am wrong in my analysis of the *Police Act*, and an agreement under section 22(3) of that Act *does* create a "police service" as defined in that Act, then the RCMP detachment does fall within the definition of "public body" in the FOIP Act. For the reasons discussed in the next

section of this Order, I have determined that even if the RCMP detachment is "police service" under the *Police Act*, the FOIP Act nevertheless does not apply to the RCMP detachment as a public body.

Status of RCMP in case law

[para 42] As argued by AJSG, the Supreme Court of Canada in *Société* clearly stated that an RCMP detachment acting as law enforcement in a provincial or municipal jurisdiction remains a federal institution (albeit subject to provincial law). It stated (at paras. 13-14 and 18-19, emphasis added):

> The Agreement between New Brunswick and Canada is authorized by a provincial statute (s. 2 of the *Police Act*) and a federal statute (s. 20 of the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10 ("*RCMPA*")). The *RCMPA* authorizes the RCMP to enter into contracts to perform provincial policing duties. The counterpart of that federal statute in New Brunswick is the *Police Act*, s. 2(1) of which provides that the New Brunswick government may enter into such agreements with the RCMP. Section 2(2) of the *Police Act* gives an RCMP member all the attributes of a New Brunswick peace officer.
>
> The RCMP, which is constituted under s. 3 of the *RCMPA*, is responsible for enforcing federal laws throughout Canada. There is no doubt that the RCMP remains a federal institution at all times. This principle was confirmed in *R. v. Doucet* (2003), 222 N.S.R. (2d) 1, 2003 NSSCF 256, and in *Doucet v. Canada*, in which it was held that the RCMP retains its status as a federal institution when it acts under a contract with a province. This means that the RCMP cannot avoid the language responsibilities flowing from s. 20(1) of the *Charter* when it acts as a provincial police force. The Federal Court and the Federal Court of Appeal recognized this in the instant case. But s. 20 of the RCMP's enabling statute provides that it may *also* be given responsibility for the administration of justice and law enforcement in provincial or municipal jurisdictions. As a result, the fact that, in light of its nature and by virtue of its constitution, the RCMP is and remains a federal institution does not answer the question before this Court.
>
> …
>
> In the instant case, there is no transfer of responsibility for the administration of justice in the province. Under the Agreement between the RCMP and New Brunswick, the New Brunswick Minister of Justice is responsible for setting "the objectives, priorities and goals of the Provincial Police Service" (art. 3.3). The Minister determines the level of service to be provided. The respondent acknowledges, at para. 62 of her factum, that — as the Federal Court observed (para. 39) — New Brunswick retains control over the RCMP's policing activities. The RCMP remains responsible for internal management only (art. 3.1(a)). What must be concluded from this situation is that the institution in question is an institution of the New Brunswick government, that is, its Minister of Justice, and that the Minister discharges his or her constitutional obligations through the RCMP members designated as New Brunswick peace officers by the provincial legislation. The provision of services by the RCMP must therefore be consistent with the obligations arising under s. 20(2) of the *Charter*.
>
> The RCMP does not act as a separate federal institution in administering justice in New Brunswick; it assumes, by way of contract, obligations related to the policing function. The content of this function is set out in provincial legislation. Thus, in New Brunswick, the RCMP exercises a statutory power — which flows not only from federal legislation but also from New

> Brunswick legislation — through its members, who work under the authority of the New Brunswick government.

[para 43] An RCMP detachment remains a federal institution at all times, as stated by the Court; it is unclear whether it can also be a provincial public body under the FOIP Act.

[para 44] AJSG cited *Scowby*, a case in which the Supreme Court found that internal management and administration of RCMP detachments remains within the federal jurisdiction, even where the detachment is acting as a provincial police service.

[para 45] That case followed *Alberta (Attorney General) v. Putnam*, [1981] 2 S.C.R. 267 (*Putnam*), and *Quebec (Attorney General) v. Canada (Attorney General)*, [1979] 1 S.C.R. 218 (generally referred to as *Keable*).

[para 46] More recently, in *Public Service Alliance of Canada v. Canada*, [2004] F.C.J. No. 13, the Federal Court considered the case law on RCMP detachments acting as municipal or provincial police forces in determining whether the *Royal Canadian Mounted Police Act* (RCMP Act) requires all civilian support staff of RCMP detachments to be federal public servants. The Court summarized the principles from *Putnam* and *Keable* (at paras. 61-68):

> In his book, Peter Hogg refers to a number of Supreme Court of Canada cases on the limits of provincial legislative authority on the RCMP and I propose to review some of them. The first case mentioned is Quebec (Attorney General) v. Canada (Attorney General), [1979] 1 S.C.R. 218 (the "Keable decision"). That case concerned the constitutional validity of a provincial commission of inquiry related to criminal activities involving members of the RCMP. The Keable decision held, amongst other matters, that a provincially established commission of inquiry could investigate into the specific criminal activities of members of the RCMP, a matter being within the proper scope of the administration of justice. Justice Pigeon, writing on behalf of the majority, cautioned, because the members of the RCMP were operating under the authority of a federal statute and drew the following consequence:
>
> > Parliament's authority for the establishment of this Force and its management as part of the Government of Canada is unquestioned. It is therefore clear that no provincial authority may intrude into its management. While members of the Force enjoy no immunity from criminal law and the jurisdiction of the proper provincial authorities to investigate and prosecute criminal acts committed by any of them as by any other person, these authorities cannot, under the guise of carrying on such investigations, pursue the inquiry into the administration and management of the Force.
>
> As a result, the Supreme Court of Canada struck down that aspect of the Commission of Inquiry's mandate which authorized investigation into the methods used by the federal force as being essential aspects of their administration.
>
> The second case referred to in Peter Hogg, supra, is that of Alberta (Attorney General) v. Putnam, [1981] 2 S.C.R. 267.
>
> That case concerned a complaint of harassment during a drug bust made by a citizen against two RCMP officers who were assigned to police duties in the town of Wetaskiwin, Alberta, pursuant to a municipal police services agreement. The commanding officer of the RCMP in Alberta

investigated the complaint and found it unjustified. The complainant appealed to the Law Enforcement Appeal Board established under section 33 of the Provincial Police Act.

The issue before the Court was whether the province could apply the provisions of its Police Act dealing with inquiries to look into the conduct and performance on duty of RCMP officers performing police duties within the province.

The majority reasons written by Chief Justice Laskin held the constitutional question should be answered in the negative because the mandate of the Law Enforcement Appeal Board included the imposition of a punishment -- a matter dealing with the internal management of the Force and hence contrary to what was held in Keable decision.

Specifically, the Chief Justice at page 277 said it mattered not that the complaint of harassment was connected with an investigation under the federal Narcotic Control Act, being an activity excluded from the definition of "municipal police services". He held the answer would be no different if the RCMP detachment were concerned with the enforcement of criminal law or of provincial or municipal by-laws. He wrote:

> It does not appear to me to be possible or practical to separate the law enforcement duties of the R.C.M.P. detachment for the purpose of determining whether in some respects they are subject to the procedures of The Police Act, 1973 and in others not. The R.C.M.P. code of discipline is applicable to officers of that force, whatever be their duties, and the fact that policing contracts are authorized with a province or a municipality does not, as article 2 of the contract in this case expressly specifies, remove them from federal disciplinary control.

At page 278 of the reported case, the Chief Justice stated:

> I should like to say, before disposing of this appeal, that I recognize that there is a provincial interest in policing arrangements under this or any other contract between the Province and the R.C.M.P. The Province, by this contract, has simply made an en bloc arrangement for the provision of policing services by the engagement of the federal force rather than establishing its own force directly or through a municipal institution. The performance of the parties under the agreement of their respective roles is, of course, a matter of continuing interest to the parties if for no other reason than the constant contemplation of renewal negotiations. The Province of Alberta, for example, must have a valid concern in the efficacy of the arrangement, not only from an economic or efficiency viewpoint, but also from the point of view of the relationship between the Government of Alberta through its policing arrangements and the community which is the beneficiary of those police service arrangements. This, however, is a far cry from the right of one contracting party to invade the organization adopted by the other contracting party in the delivery of the services contracted for under the arrangement. This is so apart altogether from any constitutional impediment so clearly raised here as it was in Keable, supra. I say this not so as to narrow the impact of the observations on the issue directly raised in this appeal, but to contrast the position of the R.C.M.P. as a federal institution with the provincial interest in the provision of policing services throughout the Province. Here there can be no suggestion of finding a root in that provincial interest for the various subsections of s. 33 to which I have already adverted.

[para 47] Further to the above summary by the Federal Court of *Keable*, the Supreme Court also found in that case that the provincial commissioner might inquire into particular incidents involving RCMP officers; however, inquiries into methods and practices of the RCMP were outside of the commissioner's powers. It said:

> While acknowledging the power of the Commissioner to inquire into the methods used during searches or other incidents mentioned in the mandate, the parts of paragraphs (a) and (c) [of Order in Council 2986-77, amended by Order in Council 3719-77] dealing not with the methods used during the incidents in question but with "the frequency of their use" must be considered ultra vires with respect to the R.C.M.P. The inquiry then no longer contemplates criminal acts but the methods used by the police forces. For similar reasons and to the same extent, paragraph (d) is ultra vires, as it gives the Commissioner the power to make recommendations on steps to be taken to avoid the repetition of illegal acts, since such recommendations would contemplate changes in the regulations and practices of an agency of the federal government. (Emphasis mine)

[para 48] Based on the case law above, internal management, administration and discipline of the RCMP is within federal jurisdiction, even when an RCMP detachment is acting as a provincial or municipal police service. It remains less clear what falls within the scope of internal management, administration and discipline. The Provincial and Municipal PSAs mention that internal management of the police services *include* its administration and the determination and application of professional police standards and procedures.

[para 49] The distinction made in *Keable* between inquiries into a particular incident and inquiries that could lead to changes in the practices of the RCMP adds some clarity. So does the observation that the Province's interest in police service arrangements does not give it the ability to "invade the organization of [the RCMP] in the delivery of" those police services.

[para 50] The question now becomes whether making the RCMP detachment a public body under the FOIP Act would "invade the organization" or encroach on its internal management or administration.

[para 51] The FOIP Act regulates *public bodies*, not the conduct of individual employees of a public body. It requires a public body to respond to access requests, to make reasonable security arrangements to protect personal information and to keep records for a prescribed period in some circumstances. More specific to the case at hand, the FOIP Act prescribes the manner in which public bodies – not individual employees – can collect, use and disclose personal information.

[para 52] Some aspects of the FOIP Act would invade the internal management and administration of an RCMP detachment, for example:

- regulating the collection, use and disclosure of personal information of RCMP officers for human resources purposes (e.g. administration of sick leave);
- regulating RCMP practices such as requiring notes to be taken or body-worn cameras to be worn during policing work;
- regulating security systems used to protect personal information; and
- regulating the retention of personal information for a specified period of time.

[para 53] Given the above, it is clear that the FOIP Act would, in some circumstances, "contemplate changes in the regulations and practices of an agency of the federal government" (*Keable*) or "invade the organization adopted by" the RCMP (*Putnam*), which remains a federal institution (*Société*). Therefore, the case law cited above indicates that applying the FOIP Act to the RCMP as a public body would impermissibly creep into the realm of internal management and administration of the detachment.

[para 54] Arguably some aspects of the FOIP Act would not creep into the realm of internal management and administration of the detachment. Even if that is the case, it seems highly impractical to suggest that the FOIP Act applies to the detachment so long as any resulting order would not directly impact its internal management and administration. A case-by-case analysis would be required to determine if the subject matter of a complaint would touch on internal administration or management of the RCMP detachment. Because at least some aspects of the RCMP detachment would fall within the purview of the federal Privacy Commissioner (aspects relating to internal management and administration), and because the RCMP is subject to an access and privacy regime with independent oversight, it seems impractical (and possibly impracticable) for this Office to have jurisdiction over some, discrete actions performed by an RCMP detachment. As a practical matter, it is far more feasible for the federal regime to maintain jurisdiction over the RCMP in its entirety.

Paramountcy of federal legislation

[para 55] Another alternative argument raised by the RCMP is based on the doctrine of federal paramountcy. The Supreme Court of Canada described this doctrine in *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327 as follows (at paras. 16, 18, 19 and 25):

> This doctrine "recognizes that where laws of the federal and provincial levels come into conflict, there must be a rule to resolve the impasse": *Western Bank*, at para. 32. When there is a genuine "inconsistency" between federal and provincial legislation, that is, when "the operational effects of provincial legislation are incompatible with federal legislation", the federal law prevails: *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44, [2013] 3 S.C.R. 53, at para. 65, quoting *Western Bank*, at para. 69; see also *Marine Services*, at paras. 66-68; *Multiple Access*, at p. 168. The question thus becomes how to determine whether such a conflict exists.
>
> …
>
> A conflict is said to arise in one of two situations, which form the two branches of the paramountcy test: (1) there is an operational conflict because it is impossible to comply with both laws, or (2) although it is possible to comply with both laws, the operation of the provincial law frustrates the purpose of the federal enactment.
>
> What is considered to be the first branch of the test was described as follows in *Multiple Access*, the seminal decision of the Court on this issue:
>
> > In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other. [Emphasis added; p. 191.]

…

> If there is no conflict under the first branch of the test, one may still be found under the second branch. In *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, the Court formulated what is now considered to be the second branch of the test. It framed the question as being "whether operation of the provincial Act is compatible with the federal legislative purpose" (p. 155). In other words, the effect of the provincial law may frustrate the purpose of the federal law, even though it does "not entail a direct violation of the federal law's provisions": *Western Bank*, at para. 73.

[para 56] Were there to be a conflict such that the doctrine of federal paramountcy applies, the federal *Privacy Act* would be paramount and render the FOIP Act inoperative. The parties' submissions discuss the theoretical possibility of a conflict between the FOIP Act and *Privacy Act*.

[para 57] The RCMP argued in its submissions that permitting this Office to review the actions of the RCMP (a federal institution) would frustrate the purpose of the *Privacy Act* with regards to the investigation of a complaint. It stated (at paras. 33-34, submission dated October 14, 2016):

> By allowing a complainant to bypass the federal Privacy Commissioner when investigating a matter squarely within federal jurisdiction diminishes the Privacy Commissioner's important role in protecting personal information held by a federal government institution and improving compliance with the *Privacy Act* involving the institutions it governs.
>
> In addition, having two separate reviewing boards could lead to inappropriate forum shopping, or a determined complainant filing multiple complaints in order to seek different results, with the undesired effect of potentially subjecting the RCMP to conflicting decisions. This is clearly inconsistent with the purpose of the *Privacy Act*.

[para 58] Both the RCMP and AJSG also argued that the inconsistencies between the two sets of provisions could lead to conflicting decisions by the two regulatory regimes (for instance, that the RCMP could be required to both disclose and not disclose a document or to conduct criminal record checks differently). The RCMP argued that the Court held in *Scowby* that this type of conflict should be avoided. However, my review of the passage cited by the RCMP (para. 28 of *Scowby*) indicates that this is merely a discussion in the dissenting opinion of what the lower courts had found in that case; nothing in that dissent indicates agreement with that position.

[para 59] That said, it seems possible that a conflict could arise if the same set of facts would give rise to contradictory rulings from this Office and the federal Privacy Commissioner that cannot both be complied with. For example, one decision maker might find that a given disclosure of personal information was authorized, and therefore that it was a proper and necessary exercise of a police officer's duty, whereas another said it was unauthorized and must cease.

[para 60] It is also possible that the purpose of *Privacy Act* – to provide a uniform code for the RCMP's dealings with personal information, both in terms of access to personal information and protection of privacy wherever the RCMP is acting in Canada – could be frustrated where a

finding issued by the federal Privacy Commissioner regarding how the RCMP collected, used or disclosed personal information could not be complied with because a provincial ruling ran contrary to that finding.

[para 61] I find the parties' arguments plausible on this point but not sufficiently detailed so as to be determinative. If the doctrine of paramountcy applies, the FOIP Act is inoperative vis à vis the RCMP detachment, which is consistent with my finding based on the Supreme Court decisions, above. In contrast, a finding that the federal *Privacy Act* is not paramount over the FOIP Act is not a finding that the FOIP Act applies to the RCMP detachment; it merely means that the doctrine does not preclude it from applying.

Conclusion regarding the RCMP detachment as a "public body" under the FOIP Act

[para 62] In *Putnam*, the Supreme Court answered the constitutional question – whether Alberta could apply provisions of the provincial *Police Act* respecting conduct and performance to members of the RCMP providing policing services in the province – in the negative. For the reasons above, all of the applicable law leads me to the same conclusion in this case. I find that the RCMP detachment is not a public body subject to oversight by this Office under the FOIP Act.

[para 63] Earlier in this Order, I noted a possibility that the City is responsible for the RCMP detachment's compliance with the FOIP Act by virtue of the agreement between the City and Canada. In other words, that the RCMP detachment is not a public body under the FOIP Act does not provide a full answer to the jurisdictional question. The remaining question is whether the City is responsible for the detachment's collection, use and/or disclosure of personal information due to the contractual relationship between it and the RCMP.

[para 64] The next section of this Order considers that question. If the answer is yes, a complaint would have to be made against the City.

Contracting with a public body

[para 65] It is a well-established principle that a public body cannot contract out of its obligations under the FOIP Act. This means that generally when a public body enters into a contract with another body to provide services on behalf of the public body, the public body remains responsible for ensuring the services are provided in a manner consistent with the FOIP Act.

[para 66] This principle has been discussed primarily in situations in which an individual seeks access to records relating to the service provided by third party under contract to a public body; the question is often whether the public body retains control over records such that they can be requested under the FOIP Act. A test has been created to determine whether the contracting public body has control of the records (see Order F2006-024 at paras. 21-45, F2009-030 at paras. 9-58); this test includes whether the public body has a right to possess the records or regulate the use of the records, and whether the records relate to the public body's mandate and functions. Although this case does not involve an access request and the custody and/or control of records

is not an issue, these orders may nevertheless be helpful in determining whether the City's agreement with the detachment means that the City has responsibility for the detachment's compliance with the FOIP Act.

[para 67] Two similar cases in which the public body has been found not to have control over records created by a third party under a contract for services both involve services for managing Long Term Disability Income plans (LTDI plans), and for employee health services provided by a third party clinic. In Order F2009-030, the adjudicator stated (at para. 66, emphasis added):

> In most, if not almost all, cases where a public body contracts with a third party service provider, the public body retains control over the records relating to the services, the FOIP Act therefore applies, and the public body cannot contract out of its obligation regarding access requests under the Act. However, the present matter is an exception where, for legitimate reasons, the Public Body does not retain control over the records held by Great-West Life. It is not a matter of the Public Body contracting out of custody and control; it does not have custody or control in the first place. While the *Guide* cited by the Applicant makes it clear that a public body normally retains control over records relating to services provided by a third party, and that the public body should therefore ensure that its control is reflected in the contract, the *Guide* does not purport to say that this is universally true. In the context of contracting for service delivery, it notes (at page 13) that "the outsourcing agreement should state *whether* the public body maintains control over the records".

[para 68] Similarly, in F2010-022, the adjudicator stated (at paras. 27-30):

> In this case, the organization that provides services through the Wellness Centre is Shepell-fgi, a division of HRCP Inc. In turn, the doctor is apparently a sub-contractor, as the Applicant indicates that he was contracted by the Wellness Centre to solicit information from another care provider with respect to her medical situation. The "Independent Contractor Agreement", signed September 2008 between The Governors of the University of Calgary and Shepell-fgi, indicates (at pages 21) that Shepell-fgi administers the Employee Assistance Program, which provides eligible users with professional counseling and information services. The mandate of the Wellness Centre is, among other things, to provide assessment, counseling, claims management, referral, rehabilitation and re-integration services for staff members experiencing personal difficulties, illness or injury (page 22 of the Agreement). The Agreement emphasizes that Shepell-fgi is independent of the Public Body (article 2.7) and that all counseling records and case notes related to employees are its property and are confidential (article 5.3(g), as well as article C.9 of "Appendix C" to the Agreement).
>
> As in Order F2009-030, I find that there is a legitimate arm's length arrangement between the Public Body and Shepell-fgi, due to the nature of the services provided by Shepell-fgi and the reasonable requirement that information held by the Wellness Centre operated by Shepell-fgi be kept confidential and private, including vis-à-vis the Public Body, which is the employer of the individuals who use the services of the Wellness Centre.
>
> The Applicant argues in favour of a finding of custody and control because the third party service provider is deemed to be an employee of the Public Body under section 1(e) of the Act, which reads as follows:

> *1(e) "employee", in relation to a public body, includes a person who performs a service for the public body as an appointee, volunteer or student or under a contract or agency relationship with the public body;*
>
> I note that previous orders of this Office have found that, where a service provider is deemed to be an employee of a public body under section 1(e), the first of the ten criteria for determining custody and control, which I reproduced above, is fulfilled (Order F2002-006 at paras. 30 to 34; Order F2006-028 at paras. 22 to 24). In my view, however, it is more correct to say that it is the fact itself that the third party provides services for the public body -- rather than the application of section 1(e) -- that weighs in favour of a finding that the public body has custody or control of records held by that service provider. The definition of "employee" in section 1(e) is for the purpose of interpreting other provisions of the Act, in that it applies wherever the term "employee" appears, but there is no provision in the Act that speaks of information "in the custody and control of an employee".

[para 69] The discussion in the excerpt above, regarding the definition of "employee" in the FOIP Act, is significant. In the previous Order, F2009-030, the adjudicator had found that Great West Life was an employee of the contracting public body for the purposes of the contract. I agree with the later discussion in Order F2010-22; whether a contractor falls within the definition of "employee" in the FOIP Act is not determinative of whether the public body is responsible for ensuring the contractor follows the rules set out in the FOIP Act for all aspects relating to the contract. The definition of "employee" is relevant only to those provisions in the FOIP Act that use the word (for example, provisions permitting the disclosure of personal information as necessary to perform an employee's job duties (section 40(1)(h)).

[para 70] In Order F2010-027 and P2010-020, the adjudicator noted that the principle regarding "contracting out" of the FOIP Act applies equally in the context of a complaint. She said (at para. 61):

> The Complainant contends that the CDLA or CDLC prohibits British Columbia and Alberta from exchanging information. However, collection of information by a public body is governed by the Act, and not by an agreement which it may have entered into with some other entity or entities. Public Bodies cannot contract out of their obligations under the Act (Order F06-01 [2006] B.C.I.P.C.D. No. 2, cited with approval in *Business Watch International v. Alberta (Information and Privacy Commissioner)*, 2009 ABQB 10). Whether the Public Body properly collected information from British Columbia under the Act is determined by whether it complied with the Act's provisions.

[para 71] In the BC Order cited in the excerpt above, F06-01, the adjudicator also found that a public body cannot contract out of its obligation to provide access to records created for that public body. She referred to the former BC Commissioner's report on the implications of the USA Patriot Act (*Privacy and the USA Patriot Act: Implications for British Columbia Public Sector Outsourcing*, 2004). The report states in part:

> The fact that outsourcing is contemplated by FOIPPA does not, however, authorize a public body to do so in circumstances that would reduce security arrangements for personal information below those required of the public body directly. A public body cannot contract out of FOIPPA either directly or by outsourcing its functions. The decision to outsource does

> not change the public body's responsibilities under FOIPPA. Nor does it change public and individual rights in FOIPPA, which are not balanced against any 'right' to outsource.

[para 72] The BC adjudicator also referred to a decision of the Ontario Court of Appeal (*Ontario (Criminal Code Review Board) v. Doe*, (1999), 180 D.L.R. (4th) 657, 47 O.R. (3d) 201, [1999] O.J. No. 4072 (C.A.). Regarding that decision, she said (at para. 83, citations omitted):

> In Ontario (Criminal Code Review Board) v. Doe, the Ontario Criminal Code Review Board had a statutory obligation to keep a record of its proceedings, but the court reporter who created and physically possessed the backup tapes of those proceedings was an independent contractor and the contract for services did not address control of backup tapes. Referring to Neilson v. British Columbia (Information and Privacy Commissioner), and acknowledging that Neilson was about records kept by an employee and not an independent contractor, the Ontario Court of Appeal ruled that the Board's obligation to keep a record of its proceedings related to all forms of records and transcripts, including backup tapes that might have to be referred to in the event of a dispute over the accuracy of a record or transcript. The Board's duty to maintain a record of its proceedings and provide access to records under its control was not, and could not be, avoided by contracting out court reporting services, however silent or deficient the contractual terms as to control of backup tapes might be. The Court clearly considered that labelling the court reporter as "independent" was meaningless when the function that the court reporter fulfilled was part of the public body's functions.

[para 73] The BC adjudicator concluded (at paras. 84-85, citations omitted):

> I conclude that a public body cannot contract out of its obligations under the Act, or immunize records from its control under the Act, by contracting out a function and labelling it "independent" or failing to enter into adequate contractual arrangements to ensure compliance with the Act.
>
> In this case, the Panel's assignment to provide advice to the Minister on whether offshore oil and gas activity can be undertaken in a scientifically sound and environmentally responsible manner was clearly related to the functions and mandate of the Ministry. The Panel's work consisted of tasks and work phases that the Ministry stipulated in the Panel's terms of reference, and these were not limited to the report that the Panel was required to submit by January 15, 2002.

[para 74] I note that this principle of not "contracting out" of responsibilities under FOIP legislation has also been stated in Ontario (see Order PO-2917 at para. 42, stating that public bodies cannot enter into agreements that allow it to "contract out" of Ontario's FIPPA).

Analysis regarding the contractual relationship between the City and Canada

[para 75] A further analysis of the *Police Act* provides some clarity with respect to the contractual relationship between these parties.

[para 76] Section 4(5) of the *Police Act* sets out the City's duty to provide policing services; it says:

4(5) A city, town, village or summer village that has a population that is greater than 5000 shall, for the purpose of providing policing services specifically for the municipality, do one of the following:

(a) enter into an agreement for the provision of municipal policing services under section 22(2) or (3);

(b) establish a regional police service under section 24;

(c) establish a municipal police service under section 27.

[para 77] Sections 22(2), 22(3), 24 and 27 state:

22(2) Notwithstanding subsection (1), where the Minister considers it necessary, the Minister may authorize a municipality that has a population that is greater than 5000 to enter into an agreement with the Government of Alberta for the provision of policing services specifically for the municipality by the provincial police service subject to the sharing of costs as determined by the Minister.

(3) Subject to the prior approval of the Minister, the council of a municipality may enter into an agreement with

(a) the Government of Canada for the employment of the Royal Canadian Mounted Police, or

(b) the council of another municipality,

for the provision of policing services to the municipality.

…

24(1) Subject to the prior approval of the Minister, the councils of 2 or more municipalities may enter into an agreement to be policed by one regional police service.

(2) The Government of Alberta may be a party to an agreement referred to in subsection (1) if the region to be policed under the agreement includes an area not contained within the limits of a municipality that is subject to the agreement.

(3) If the council of a municipality has entered into an agreement under this section, it shall not withdraw from the agreement without the prior approval of the Minister.

…

27(1) A municipality that has assumed responsibility for establishing a municipal police service under section 4(2)(d) or (5)(c) shall establish and maintain an adequate and effective municipal police service under the general supervision of a municipal police commission.

(2) A municipality maintaining a municipal police service shall not withdraw from providing that service except with the prior approval of the Minister.

[para 78] As a city with a population greater than 5000, the City's duty regarding the provision of police services is to enter into an agreement for policing services, or establish a regional or municipal police service. The City opted to enter into an agreement. It has therefore fulfilled its duty under section 4(5) of the *Police Act*.

[para 79] Municipalities that enter into agreements to establish a regional police service under section 24 of the *Police Act* must also establish a regional police commission (section 25). A similar requirement for a municipal police commission is included in section 27(1). There is no such requirement for police services provided by a provincial police service, an existing police service of another municipality, or by the RCMP under an agreement, pursuant to sections 22(2) and (3). Presumably this is because these police services are pre-existing and have their own commissions.

[para 80] Where a municipality is required to establish a police commission, the municipality prescribes the rules governing the commission and appoints the members (section 28).

[para 81] The municipality is responsible for establishing the total budget; the commission is responsible for allocating the funds under the budget, including paying officers, and paying for equipment and operating costs (section 29).

[para 82] Commissions are also responsible for establishing policing policies and issuing instructions to the chief of the police service (section 31). If the Minister responsible for the *Police Act* is of the opinion that police services are not adequate and effective, the Minister can require a municipality to rectify the situation, and appoint police officers or arrange for alternate policing, where necessary (section 30).

[para 83] There is no option for the City to run its own policing, with officers reporting to the City administration; the City must *create* a police service (on its own or with another municipality), or enter into an agreement with an existing police service, whether municipal, provincial, or the RCMP. As already discussed, police services under the *Police Act* are set up as public bodies under the FOIP Act. Police commissions are also public bodies under the FOIP Act.

[para 84] Therefore, a policing service cannot be an operating program of the City itself, although the City remains responsible for ensuring adequate and efficient policing services, and for the funding of the policing service. The City has fulfilled its duty under section 4 of the *Police Act* by entering into an agreement with the RCMP for the provision of policing services.

[para 85] In Order F2009-030, cited above, the adjudicator found that the public body contracting with Great West Life for managing LTDI claims did not "contract out" of custody or control of records related to that service, because the public body did not have custody or control to begin with. He also stated (at para. 64):

> In this inquiry, my findings that the Public Body does not possess the records, they are not integrated with other records of the Public Body, Great-West Life uses the records for its own independent purposes, they relate to its separate mandate and functions, and the Public Body has no authority to possess, use or dispose of the records, outweigh my findings that Great-West Life is deemed to be an employee of the Public Body, holds the records for the purpose of its duties, as an employee, to manage and adjudicate LTDI claims, and the Public Body indirectly relies on the records.

[para 86] Similarly, in this case the Public Body did not contract out an operating program to the RCMP because the City did not have the ability to run a police service as part of the City itself. Rather, the City is obliged to create a police service separate from itself and have a separate "operating board" (a police commission), *or* contract with a pre-existing police service. A newly created police service would itself be a public body under the FOIP Act, as would a pre-existing police service – with the exception of an RCMP detachment.

[para 87] All of this is to say that by entering into an agreement with the RCMP, the City has not "contracted out" one of its own operating programs to the RCMP. The *Police Act* sets out a scheme by which police services are funded by municipalities but are separate entities. The FOIP Act complements this scheme by defining those police services as public bodies. An agreement with the RCMP to provide municipal policing services (under section 22(3)(a) of the *Police Act*) is not different in substance from an agreement with a neighbouring municipality to provide policing services (under section 22(3)(b) of the *Police Act*). The only difference relevant to this inquiry is that another municipal police service would be itself a public body under the FOIP Act regardless of whether it also polices a neighbouring municipality under an agreement. In contrast, the RCMP detachment is not a public body under the Alberta FOIP Act, but is a government institution under the federal *Privacy Act*, with the federal Privacy Commissioner as the oversight body with respect to the collection, use and disclosure of personal information.

[para 88] I note that this decision may appear inconsistent with a 1998 decision of the Alberta Court of Queen's Bench, *L'Heureux v. Unum Life Insurance Co. of America* (cited above). In that decision, the Court found that when RCMP officers act under the authority of provincial legislation, they act as agents of the provincial government. He said (at paras. 28-31 and 33):

> In this case the R.C.M.P. was conducting an investigation into a fatality pursuant to the *Fatality Inquiries Act,* R.S.A. 1980, c. F-6. The *Fatality Inquiries Act* establishes the "Fatality Review Board" which includes the Chief Medical Examiner and three other members appointed by the Lieutenant Governor in Council. The Board is charged with reviewing investigations under the *Fatality Inquiries Act* in order to determine if a public inquiry is required. It also reviews and investigates complaints into the misconduct of medical examiners.
>
> Section 6(5) of the *Fatality Inquiries Act* provides for the appointment of medical examiners' investigators, who can be full or part-time employees. Medical examiners are individual physicians appointed by the Minister of Justice and Attorney-General. According to the *Fatality Inquiries Act*, medical examiners' investigators work directly under the authority of the Chief Medical Examiner. The duties of medical examiners' investigators include assisting the medical examiner when requested. Other powers conferred upon medical examiners' investigators by the *Fatality Inquiries Act* include general search and seizure powers for the purposes of investigation if authorised by a medical examiner.
>
> Members of the R.C.M.P., members of municipal police services and peace officers responsible for policing within Alberta pursuant to the *Police Act* are deemed to have the powers and duties of medical examiners' investigators pursuant to s. 9(1) of the *Fatality Inquiries Act.* The documents that are the subject of the present application were created by members of the Tofield R.C.M.P. acting as a medical examiners' investigator pursuant to the *Fatality Inquiries Act.* Thus at the relevant time there was no Federal Crown agency involvement. The Tofield R.C.M.P.

members were conducting an investigation as directed by the Chief Medical Examiner and as such were agents of the Chief Medical Examiner.

6. The Effect of the Freedom of Information and Protection of Privacy Act

According to the *Freedom of Information and Protection of Privacy Regulation* (Alta. Reg. 200/95) Schedule 1, the "Fatality Review Board" is a "public body." The *Freedom of Information and Protection of Privacy Act*, S.A. 1994, c. F-18.5 (*Freedom of Information Act*), s. 6(1) allows an applicant access to any record in the "custody or under the control" of a public body. Although the R.C.M.P. are claiming custody of the documents in question, the *Fatality Inquiries Act* expressly provides:

> **31(1)** Except for reports, certificates and other records made in the course of a public inquiry, all reports, certificates and other records made by any person under this Act are the property of the Government and shall not be released without the permission of the Chief Medical Examiner.

…

The documents fall within the ambit of the *Freedom of Information Act*. The Respondent has not shown that the documents produced in the investigation fall into one of the exceptions stipulated in Division 2 of that Act. As such, the documents are producible under the *Freedom of Information Act*.

[para 89] In my view, this case is distinguishable from *L'Heureux*. In *L'Heureux* the RCMP detachment officer was acting as a medical examiner investigator pursuant to the *Fatality Inquiries Act*, acting as an employee of that public body. In performing those functions, the officer could act only as authorized under the *Fatality Inquiries Act*; the officer was not *also* acting as an RCMP officer (federally or as part of a municipal detachment). Therefore, the powers and responsibilities of the medical examiner investigator under the *Fatalities Inquiries Act* applied. In this case, officers of the RCMP detachment are "police officers" under the *Police Act* and are subject to that Act in performing municipal policing services. In performing policing services under an agreement with the City, RCMP detachment officers are not performing functions as employees of the City; rather, the RCMP detachment is a separate body. As stated above, in most cases the separate policing body will be a public body under the FOIP Act. However, where that separate policing body is the RCMP, the Supreme Court has said that it remains a federal institution; and, as I have found above, it is not a provincial public body under the FOIP Act.

Conclusion

[para 90] As noted by former Commissioner Work, it might be that an agreement between Canada and a municipality (or the Province) can be created or revised to require an RCMP detachment acting provincially or municipally to be subject to the FOIP Act, and subject to the oversight of this Office. However, no such agreement currently exists; neither the existing agreement between Canada and the City nor the agreement templates for provincial and municipal PSAs contemplate the application of the FOIP Act to RCMP detachments.

[para 91] I find that this Office does not have jurisdiction to review the Complainant's complaint about the detachment's collection, use and/or disclosure of her personal information. However, the Complainant can make her complaint to the federal Privacy Commissioner.

IV. ORDER

[para 92] I make this Order under section 72 of the Act.

[para 93] I find that the Red Deer RCMP detachment is not subject to the FOIP Act with respect to personal information collected, used and disclosed in the course of conducting a Vulnerable Sector Check. Therefore I do not have jurisdiction to review the Complainant's complaint about the detachment's collection, use and/or disclosure of her personal information.

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Amanda Swanek
Adjudicator