ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2020-35

November 30, 2020

CHILDREN'S SERVICES

Case File Number 004641

Office URL: www.oipc.ab.ca

Summary: An individual made an access request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act), dated September 8, 2016, to Children's Services (the Public Body). The Applicant's children were in the care of foster parents at the time; the Applicant requested records containing references made by her to foster parents, including any comments about their parenting.

The Public Body initially did not conduct search for responsive records, stating that any responsive records would be withheld. The Applicant requested a review of the Public Body's decision by this Office. Following that review, the Public Body searched for responsive records and located 32 pages. The Public Body provided some information in the records to the Applicant and withheld information under sections 17(1) and as non-responsive to the request.

The Applicant requested an inquiry into the Public Body's decision to withhold information, as well as the adequacy of the Public Body's search.

The Adjudicator determined that the search conducted by the Public Body was adequate.

The Adjudicator found that the Public Body improperly characterized information in the responsive records as 'non-responsive'. The Adjudicator also found that the Public Body improperly assessed the factors in section 17(5) to the information in the records. The Adjudicator ordered the Public Body to process the records again, following the guidance

for determining what is and is not responsive. The Public Body was also ordered to reconsider the application of all factors under section 17 of the Act, and consult with third parties in doing so.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 6, 10, 17, 30, 31, 72.

Authorities Cited: AB Orders 97-002, 97-006, 2000-019, F2004-015, F2007-029, F2008-012, F2008-028, F2008-031, F2010-028, F2014-16, F2017-28, F2018-75, F2020-13, F2020-16

Cases Cited: *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3

I. BACKGROUND

[para 1] An individual made an access request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act), dated September 8, 2016 to Children's Services (the Public Body). The Applicant's children were in the care of foster parents at the time; the Applicant requested records containing references made by her to foster parents, including any comments about their parenting.

[para 2] The Public Body initially did not conduct search for responsive records, stating that any responsive records would be withheld under section 17 of the Act. The Applicant requested a review of the Public Body's decision by this Office. Following that review, the Public Body searched for responsive records and located 32 pages. The Public Body provided some information to the Applicant and withheld information under sections 17(1) and as non-responsive to the request.

[para 3] The Applicant requested an inquiry into the Public Body's decision to withhold information, as well as the adequacy of the Public Body's search.

II. RECORDS AT ISSUE

[para 4] The records at issue consist of the portion of the records at issue withheld under sections 17, and as non-responsive.

III. ISSUES

[para 5] The issues set out in the Notice of Inquiry dated August 28, 2020, are as follows:

1. **Is the information in the records responsive to the Applicant's access request?**

2. **Did the Public Body meet its obligations as required by section 10(1) of the Act (duty to assist applicants)?**

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

[para 6] I will consider these issues in the following order:

1. Did the Public Body meet its obligations as required by section 10(1) of the Act (duty to assist applicants)?

2. Is the information in the records responsive to the Applicant's access request?

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

IV. DISCUSSION OF ISSUES

1. Did the Public Body meet its obligations as required by section 10(1) of the Act (duty to assist applicants)?

[para 7] A public body's obligation to respond to an applicant's access request is set out in section 10, which states in part:

> *10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.*

[para 8] The duty to assist includes responding openly, accurately and completely, as well as conducting an adequate search. The Public Body bears the burden of proof with respect to its obligations under section 10(1), as it is in the best position to describe the steps taken to assist the applicant (see Order 97-006, at para. 7).

[para 9] In Order F2007-029, the former Commissioner described the kind of evidence that assists a decision-maker to determine whether a public body has made reasonable efforts to search for records:

> In general, evidence as to the adequacy of a search should cover the following points:
>
> - The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
> - The scope of the search conducted - for example: physical sites, program areas, specific databases, off-site storage areas, etc.
> - The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
> - Who did the search

- Why the Public Body believes no more responsive records exist than what has been found or produced (at para. 66)

[para 10] In the Notice of Inquiry, I asked the Applicant to provide reasons for her belief that more records exist than were located and/or to describe the records she believes should have been located.

[para 11] The Applicant states (submission, at pates 1-2):

> Children's Services staff alluded to information, particularly in court, that I criticized the foster parents and made statements against them and their safety. They cited no one person or particular conversation which gives me no information to provide for the Inquiry. I have no details which I can provide to reduce the scope of a search by knowing who created the records.
>
> In terms of where the records are, the people interacting with me were Caseworkers, service providers through Alta Care and the Family Centre who provided supervised visits and family support, and lawyers through the legal team assigned to Children's Services. The assigned Play Therapist who supported the litigation, [TC], referenced statements. I approached service providers directly for information as they were the point of contact interacting with me. They stated that FOIP requests were required through Children's Services and that they had no records to provide. My primary point of contact were service providers who submitted notes. Notes were almost never taken in front of me but were provided to Children's Services with no chance to see them or review them. There was a rotation of different people. The practice was referenced as case building. In terms of what I already have been provided - I don't think I was advised who was asked which would allow me to identify gaps of who should be checked for records. Some individuals were never identified to me by name. When I asked for any information about this content I was **regularly and repeatedly told to make a FOIP request.**
>
> In terms of record keeping by staff, I would describe what I saw as chaotic and haphazard. From disclosure I observed handwritten notes found on other documents, no templates for recording information, notes likely turned in much later than the time actually spent with me, individuals were with me that never submitted notes, and records were all likely submitted at one time to meet a deadline. Witnesses turned up for court with hundreds of pages that was never known ahead of their appearance.

[para 12] With respect to its search, the Public Body states that the FOIP Office determined that all responsive records would be held by a particular Children's Services Office. That office provided 15 volumes of records, totaling approximately 7200 pages of records. A FOIP advisor reviewed each record to locate responsive records, which took approximately 33 hours. The advisor located 32 pages containing responsive information.

[para 13] The Applicant did not provide a rebuttal submission for the inquiry, so I do not know whether this information about the Public Body's search has identified any gaps to her.

[para 14] Given the context of the access request, it seems reasonable that all relevant records would be located at the Children's Services office that dealt with the Applicant's

case. The Public Body states that "all records" were provided to the FOIP office. Most of the records provided to me for the inquiry are copies of emails, which satisfies me that electronic records were printed and provided to the FOIP office. The Public Body's decision to review each page indicates a reasonable likelihood that all responsive records were located.

[para 15] The Applicant has referred to notes of caseworkers she is seeking; some responsive records appear to be notes of caseworkers. The name of the one Public Body employee specifically identified in the Applicant's submission appears in the responsive records as well.

[para 16] Given the context of the request and the manner the Public Body conducted the search for responsive records, I am satisfied that it conducted an adequate search for records.

[para 17] The Applicant raised the point that the Public Body initially refused to conduct a search for records, stating that any responsive records would be withheld under section 17(1). In its submission, the Public Body states (submission at page 4):

> The OIPC reviewed the matter and clarified that the Respondent should perform a search for responsive records and upon reviewing those records, determine whether any relevant exceptions to disclosure apply. The OIPC clarified that if information can be reasonably severed from a record, the Complainant has a right of access to the remainder of the record.

[para 18] The Public Body erred in its initial decision not to search for responsive records. Section 6(2) clearly states that an applicant has a right of access to the remainder of a record where some information was severed under an exception to access. I understand that the Public Body believed that the responsive information would be withheld under section 17(1); however, the discussion of the application of section 17(1) to the records at issue in this Order should serve to illustrate why it is important for a public body to search for responsive records and make a determination based on a review of the responsive records. It is not sufficient for a public body to assume it would withhold any responsive information when the public body hasn't reviewed that information.

[para 19] I also note that Order F2010-028, resulting from an inquiry involving the same Public Body, found that section 17(1) cannot apply to information about foster parents in certain circumstances (as I will discuss in the relevant section of this Order). That Order had been issued years prior to the Applicant's access request, and should have alerted the Public Body to the possibility that section 17(1) might not apply to some or all of the requested information (or might not require withholding that information, once all the circumstances were considered).

[para 20] The Applicant also raised an additional point on this matter that I want to highlight. In her submission, she states that "I believe it was important to identify and secure records. The decision to not search, and the lengthy delays in communicating the

request, prevented the ability to locate responsive records". If the Public Body's FOIP office did not notify the Children's Services office that dealt with the Applicant of the access request, the employees at the Children's Services office would not know that an access request has been made. An access request triggers an obligation to keep all responsive records; however, employees must be aware of the request in order to know to keep records.

[para 21] The Applicant made her access request on September 8, 2016. The Public Body initially responded on September 23, 2016. Its second response, after it conducted a search, is dated August 31, 2017. Therefore, not quite a year passed between the date of the access request and when the Public Body finally conducted a search for records. In this time, it is possible that employees might have thrown away notes or other such records they considered to be transitory, not knowing they might be responsive to an access request. At this point, I do not know whether or not this may have happened; if it did, it is too late to rectify the situation.

[para 22] Given the above, I cannot conclude that the Public Body met its duty to respond to the Applicant openly accurately and completely. To be clear, this finding is not based on whether the Public Body erred in determining that section 17(1) would apply to any responsive records. It is because the Public Body made its assessment on the basis of what it *assumed* would be in the responsive records and how it *assumed* the factors in sections 17(2)-(5) would apply. The Public Body was obliged to apply section 17(1) to the information actually in the responsive records, not to information it imagined or assumed was in the records. This is especially the case where the context of the information is relevant, as it is when applying section 17(1).

[para 23] I find that the Public Body did not meet its duty to respond to the Applicant openly, accurately and completely. The Public Body ultimately rectified this error; however, given the possible consequences of the delay in the search for records, it seems appropriate in this case to order the Public Body to provide a reminder to its staff regarding the necessary steps in responding to an access request.

2. Is the information in the records responsive to the Applicant's access request?

[para 24] The Public Body withheld a significant amounts of information in each of the 32 pages of records as non-responsive.

[para 25] The Applicant's request was for references she (the Applicant) made about foster parents, including any comments she made about their parenting. Responsive records include any records that include or refer to anything the Applicant might have said about foster parents. Most of these records consist of emails sent by the Applicant to the Public Body. In a few cases, the records contain a Public Body employee's notes, which include comments made by the Applicant during a visit, meeting or conversation.

[para 26] In my view, the Public Body characterized too much information in the responsive records as non-responsive. In many cases, the Public Body characterized portions of sentences as non-responsive when other portions of the same sentence are responsive.

[para 27] In Order F2018-75 I discussed how public bodies should properly characterize information as non-responsive. I said (at paras. 55-65):

> Separate items of information in a record cannot be viewed out of context of the record as a whole when determining if they are separate and distinct from the remaining record. For example, there may be an email written about the Applicant, but the signature line of the author, or the date of the email, or the address line, are not the applicant's personal information if separated from the context of the email. However, it would be unreasonable to characterize those items of information as not responsive to a personal information request from the Applicant for emails written about him. As stated in Order F2009-025, 'non-responsive' is not an exception from the Act to separate sentences or other items of information from the context of the record as a whole in order to withhold them.
>
> Information must be considered in the context of the record as a whole, in determining whether it is separate and distinct from the remainder of the record. In the case of a personal information request like the Applicant's, in order to withhold portions of a record as non-responsive, the Public Body must consider whether that portion contains the Applicant's personal information *or* whether that portion provides context to the remainder of the record that *is* the Applicant's personal information.
>
> An example of 'separate and distinct' might be distinct emails in an email chain. Another example relates to police officers' notebooks, which often contain notes on unrelated incidents on a single page. In response to an access request for police records relating to one incident, the part of the notebook page that relates to a different incident might be non-responsive. Another example is where a personal note is added to a work email, such as a note referencing a medical absence, holiday or so on. Where that personal note does not have any relation to the remainder of the email or to the access request, it might be non-responsive.
>
> An example of where the Public Body has properly characterized a part of a responsive record as non-responsive is on page 690 of file #F8329 (the version provided on August 22, 2016). It appears that a Public Body employee used this record to jot down a note, which is not related to the record itself. The note is not related to the Applicant's request. The Public Body drew a box around the note and withheld it as non-responsive. In this case, the note was unrelated to the request and was unrelated to the rest of the record such that it was 'clearly separate and distinct' from the remainder of the record.
>
> Pages 517-18, 521, 523-5 of file #F8329 are administrative records that relate to queries or complaints made to or about the Public Body and the response. The Public Body has withheld portions of these records as non-responsive, stating that they are about the Public Body's administrative processes and are not the Applicant's personal information.
>
> For the most part, I agree with the Public Body, except for information withheld as non-responsive in the first and third paragraphs under "Response Action Taken". The Public

> Body states that this information relates to individuals other than the Applicant. These paragraphs do reference another (unidentifiable) individual (on page 523), but in a manner that clearly relates the Applicant's personal information in that record. In my view, the Public Body has to have taken this sentence out of the context of the record in its entirety, to find it to be non-responsive. As I have said, information must be considered in the context of the records as a whole. In my view, this information is responsive.
>
> I also note that on page 524, the second-last full sentence on the page is withheld as 24(1)(b) and the last full sentence is withheld as non-responsive. The last full sentence clearly relates to the preceding sentence (the second-last); it is difficult to determine why one sentence would be responsive and the other not. Following the analysis above, neither sentence appears to be responsive.
>
> The Public Body withheld some portions of emails on pages 741-743 as non-responsive, stating that they relate only to administrative processes. I agree; the information is not about the Applicant.
>
> The Public Body withheld employer account numbers and medical billing numbers from customer service payment screens. I have reviewed that information on pages 1-104 of file #F8329 and agree that it is non-responsive.
>
> The Public Body has withheld portions of pages 105-114 as containing personal information of other individuals. I confirm that these portions do not relate to the Applicant.
>
> I have not made a finding in every instance where the Public Body claimed a record, or portion of a record, is non-responsive. The pages I have referred to above are examples to be used by the Public Body in reviewing the remainder of the records at issue to determine what information was properly withheld as non-responsive. In most cases that I reviewed, the Public Body has properly characterized information as non-responsive, with the exception of the information described at paragraph 60. If the Public Body finds other instances in which it was not applied appropriately, the Public Body may have to decide whether the information must nevertheless be withheld under an exception in the Act.

[para 28] In this case, the Public Body often characterized portions of a sentence as non-responsive while disclosing other portions of the sentence (presumably as responsive) and withholding other portions under section 17(1), when the entire sentence relates to the same subject. This type of error occurred on almost every page of the records; for me to correct every error would require me to essentially reprocess the request. That is not my role. Therefore, I will order the Public Body to review the records at issue and make new decisions regarding what information is responsive, taking into account the guidance in Order F2018-75. For the reasons discussed below, the Public Body will also be directed to reconsider its application of section 17(1) to withhold information in the records.

[para 29] In reviewing and reprocessing the request, the Public Body must be mindful that a sentence need not specifically include the words 'foster parent' to be responsive.

Surrounding information that relates to the reference to the foster parents and provides context to the reference can also be responsive.

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

[para 30] The Public Body has withheld personal information of several third parties under section 17(1). This provision 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.*
>
> …

[para 31] Section 17 is a mandatory exception: if the information falls within the scope of the exception, it must be withheld.

[para 32] Under section 17, if a record contains personal information of a third party, section 71(2) states that it is then up to the applicant to prove that the disclosure would not be an unreasonable invasion of a third party's personal privacy.

[para 33] Section 1(n) defines personal information under the Act:

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

[para 34] The responsive records contain personal information about the foster parents, including comments made by the Applicant about them. The records also contain personal information about two children, and other third parties.

[para 35] I note that references to or comments in the records about the foster parents usually do not mention their names. Nevertheless, the names of the foster parents do occur in the records, and their names are discoverable from the other information in the records (for example, the city of residence, the names of the foster children, etc.).Therefore, the foster parents are identifiable from the information in the records, even if not named in every instance.

[para 36] Some of the third parties are Public Body employees or employees of other bodies in relation to their work duties. Previous orders from this Office have found that section 17 does not apply to personal information that reveals only that the individual was acting in a formal, representative, professional, official, public or employment capacity, unless that information also has a personal dimension (Order F2008-028, para. 54). Nothing in the responsive records (or portions of records) indicates that the information about the public body employees performing work duties has a personal dimension such that section 17(1) could apply. Most of this information was withheld as non-responsive; however, as I will order the Public Body to make new decisions about what information in the records is responsive, some information about individuals acting in their work capacities may be responsive. The Public Body will have to keep this distinction in mind in making new decisions regarding the application of section 17(1) to that information.

[para 37] In Order F2010-028, which was raised by the Applicant in her request for inquiry, the adjudicator found that some of the information relating to foster parents is not personal information that can be withheld under section 17(1) (see para. 23). She found that information about the foster parents is akin to information about an individual's performance of their work duties. The adjudicator found (at paras. 50-53):

> It is my understanding from reviewing the records and submissions of the parties that the Applicant's foster parents were compensated or reimbursed (though to what extent is not clear to me), and regulated by the Public Body. The responsive records reveal that when the Applicant was in foster care, the foster parents were regularly contacted by the Public Body or they themselves contacted the Public Body to report on the progress and any problems they were encountering with the Applicant. I believe that there is a parallel between the foster parents' performing their duties as foster parents, and an employee or agency relationship. While there may also be some information in the records that record their performance of their duties that has a personal dimension for the foster parents, I find that this parallel to employment or agency is a factor that weighs in favour of disclosing the foster parents' work product (that is, the content of their comments to and conversations with the Public Body) during the time when they were acting in their role fostering the Applicant.
>
> As well, several orders of this office have held that the disclosure of personal information relating to individuals acting in a formal representative capacity, such as names, titles and business contact information, is not an unreasonable invasion of personal privacy (see

> Order F2009-038 at para 46). This information is distinct from "work product" mentioned above because it is personal information as defined in section 1(n) of the Act. However, due the nature of the information, the fact that it is personal information of a third party acting in his or her formal, representative capacity, pursuant to section 17(5) of the Act, it may not be an unreasonable invasion of a third party's personal privacy to disclose it.
>
> Although undoubtedly many foster parents take on the responsibility of being a foster parent for personal reasons rather than for the compensation, nevertheless, I find that when acting as foster parents, these individuals are acting in their formal, representative capacity. Thus, this factor weighs in favour of disclosing the names and contact information of the Applicant's foster parents, during the time when they were acting in their capacity as her foster parents. However, this factor does not weigh in favour of disclosing the personal information of other members of the foster families (such as other children in the home) who were not acting as foster parents to the Applicant.
>
> Weighing all the factors I have discussed, I find that the Public Body ought to have disclosed the names, contact information, and work product (which would include the content of the conversations the foster parents had with the Public Body about the Applicant) to the Applicant during the time that these third parties were acting as the Applicant's foster parents. I do not find that the factors mentioned above weigh in favour of disclosing the personal information of members of the foster families who were not acting as foster parents. This includes the personal information of other children in the foster families. Therefore, I find that the Public Body was correct in severing these other third parties' personal information.

[para 38] The context of the records and request is different in Order F2010-028 than in this case; however, the analysis remains relevant. Whether or not information has a personal dimension does not change based on who the applicant is or why they have requested the records.

[para 39] In this case, it might be the case that some or all of the references/comments made by the Applicant about the foster parents relates to their role such that it is more akin to describing how they perform their work duties rather than having a 'personal dimension'. If so, section 17(1) cannot be applied to withhold that information. On the other hand, comments made about the way someone performs their work duties can sometimes have a personal dimension. It might be that some references/comments about the foster parents have a personal dimension while others do not. If information is to be withheld on the basis that there is a personal dimension, the nature of the personal dimension must be clear.

[para 40] I am already ordering the Public Body to reprocess the records in light of my determination regarding what information is responsive to the request. I will also order the Public Body to make a new decision regarding the application of section 17(1). The Public Body is to take into account the guidance provided in this Order.

[para 41] If the Public Body determines that some information about the foster parents is not personal information that can be withheld under section 17(1), then the remaining

discussion in this Order it not applicable to that information. The remaining discussion is relevant only to personal information to which section 17(1) can apply.

Application of sections 17(2) – 17(5)

[para 42] Section 17(2) lists circumstances in which disclosure of personal information is not an unreasonable invasion of privacy. The Public Body states that none of the circumstances apply in this case and I agree. None of the provisions in section 17(3) seem to apply.

[para 43] Section 17(4) lists circumstances in which disclosure is presumed to be an unreasonable invasion of privacy. The Public Body has argued that several subsections of section 17(4) apply. The most obvious subsection is section 17(4)(g), which states:

> *17(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*
>
> …
>
> *(g) the personal information consists of the their 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*

[para 44] This provision applies to all of the personal information to which section 17(1) can be applied (as discussed earlier).

Section 17(5)

[para 45] Section 17(5) is a non-exhaustive list of factors to consider in determining whether disclosing personal information would be an unreasonable invasion of privacy. The Public Body states that it considered whether section 17(5)(c) weighs in favour of disclosure, but that nothing indicates it applies. The Public Body also considered the application of section 17(5)(i). I will also discuss sections 17(5)(a) and (h). These provisions state:

> *(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether*
>
> *(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,*
>
> …
>
> *(c) the personal information is relevant to a fair determination of the applicant's rights,*
>
> …

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

Section 17(5)(a)

[para 46] Section 17(5)(a) weighs in favour of disclosure where the disclosure is desirable to subject the Public Body's activities to public scrutiny. In order for the desirability of public scrutiny to be a relevant factor, there must be evidence that the activities of the public body have been called into question, which necessitates the disclosure of personal information in order to subject the activities of the public body to public scrutiny. (See Order 97-002, at para. 94; Order F2004-015, at para. 88; Order F2014-16, at para. 34.)

[para 47] The Applicant states (initial submission at pages 1-2):

> Children's Services staff alluded to information, particularly in court, that I criticized the foster parents and made statements against them and their safety. They cited no one person or particular conversation which gives me no information to provide for the Inquiry. I have no details which I can provide to reduce the scope of a search by knowing who created the records.
> …
>
> The information I am seeking are statements that call into question my honesty and my character. I don't have transcripts of court proceedings to provide a specific reference. This Inquiry's findings are important because individuals were told to fear their safety by just being around me. These statements were repeated by others and I need to determine the source.

[para 48] I understand that the Applicant is seeking the requested information because she has heard or been told that she made negative comments about the foster parents. She states that when she asked what comments she had made, she was told to make a FOIP request.

[para 49] While the Applicant is clearly frustrated with the responses she has received from the Public Body, she has not argued or provided support to find that activities of the public body have been called into question, which necessitates the disclosure of personal information in order to subject the activities of the public body to public scrutiny. Therefore, section 17(5)(a) does not apply.

Section 17(5)(c)

[para 50] Section 17(5)(c) weighs in favour of disclosure where the personal information is relevant to a fair determination of the Applicant's rights. Four criteria must be fulfilled for this section to apply:

> (a) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds;
>
> (b) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed;
>
> (c) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
>
> (d) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing. (Order F2008-012 at para. 55, Order F2008-031 at para. 112)

[para 51] The excerpt cited above (at para. 47) from the Applicant's submission is also relevant to this factor.

[para 52] The Public Body states that it is unclear whether there are ongoing legal proceedings to which the personal information in the records would be relevant. It further states (initial submission at page 6):

> Further, proceedings under the *Child, Youth and Family Enhancement Act* (CYFEA) provide for the disclosure of records for litigation purposes and most, if not all, of the 7200 original records were disclosed to the Applicant or the Applicant's legal counsel under CYFEA. The Respondent submits that any information required to adjudicate legal rights under CYFEA would have been disclosed under this separate process.

[para 53] The Public Body stated that 7200 pages of records relating to the Applicant were located at the Children's Services Office that deals with the Applicant. Presumably these are the records the Public Body states may have been provided to the Applicant in a different proceeding. I will address this point in greater detail later in this section of the Order.

[para 54] I agree that the Applicant did not provide any indication of an upcoming or ongoing legal proceeding for which she has requested the information. The Applicant has referred only to past proceedings. I find that section 17(5)(c) does not apply.

Section 17(5)(h)

[para 55] Section 17(5)(h) weighs against disclosing personal information if doing so would unfairly damage the third party's reputation.It seems possible that section 17(5)(h) might be a factor with respect to some of the responsive information at issue.

[para 56] In Order F2017-28, I considered the application of section 17(5)(h) to personal information of coworkers provided to the public body by the applicant. In that case, I found that while section 17(5)(h) may apply to the information, little weight was given to that factor as the information was provided by the Applicant. Whether section 17(5)(h) applies and to what information, and what weight is should be given are decisions the Public Body will have to consider in reprocessing the records at issue.

Section 17(5)(i)

[para 57] The Public Body cites Order 2000-019, in which former Commissioner Clark discussed the application of section 17(5)(i). In that Order, former Commissioner Clark said (at paras. 105-106):

> In Order 98-004, I also said that where the circumstances between the applicant and the third party had changed from the time of supplying the personal information, such that there were now adverse interests between the applicant and the third party, that relevant circumstance weighed in favour of not disclosing the third party's personal information to the applicant.
>
> I see no reason to depart from my interpretation set out in Order 98-004. I intend to consider a change of circumstances under section 16(5)(i) in deciding whether that change weighs in favour of not disclosing a third party's personal information.

[para 58] Commissioner Clark did not specify what the relationship between the applicant and third party was in in that case. The access request was for records relating to a workplace investigation of the applicant's alleged unprofessional conduct in providing services to clients in a mental health clinic.

[para 59] The Public Body states (initial submission, at page 6):

> … the Applicant's submission confirms that an adverse relationship and interests exist between the Applicant and the foster parent(s) which would weigh against providing third party personal information to the Applicant.

[para 60] In Order 2000-019, Commissioner Clark stated that the applicant in that case had provided personal information about a third party to the Public Body, but that the relationship between the applicant and the third party had changed since that time. In this case, there is no indication that the Applicant's relationship with the foster parents has changed, whether or not it can be characterized as adverse.

[para 61] A change in relationship might be where an applicant was a guardian or caregiver of a third party when they provided information about the third party to a public body, but was no longer in that role when the access request was made.
The same would apply where an applicant was in a spousal relationship with a third party when the information was provided to a public body, but that relationship had dissolved by the time of the access request. A 'change' in relationship may or may not be relevant to the information being requested; whether it is relevant must be determined on a case-by-case basis.

[para 62] Another situation in which section 17(5)(i) might not weigh in favour of disclosing information to an applicant, is where an applicant provided 'pre-existing' records about a third party to a public body. By 'pre-existing' I mean records the applicant did not create themselves but that originated from another source. An example

would be an individual providing medical records of a spouse to a public body for a particular purpose, then later requesting copies of those medical records from the public body. This is especially so if the if the relationship between the applicant and spouse has changed between the time the medical records were provided to the public body and the time of the access request. In other words, an applicant may provide medical records of their spouse to a public body for the benefit of the spouse, then later request a copy of those same medical records to be used in a manner hostile to the spouse. This is a situation in which a change in relationship might be relevant to whether section 17(5)(i) weighs in favour of disclosure.

[para 63] None of these situations arise in this case. Here, the Applicant made references or comments about foster parents in correspondence with the Public Body. She is the source of the information (i.e. she 'created' the responsive information), and is requesting copies of the records in which she made those references or comments.

[para 64] With respect to the information provided by the Applicant, the Public Body applied the comments made by former Commissioner Clark in Order 2000-019 without consideration of the context. In my view, the discussion in that Order about when section 17(5)(i) would not weigh in favour of disclosing personal information that was supplied to the public body by the applicant does not appear to be relevant here.

[para 65] In my view, there are no circumstances in this case that vitiate the usual application of section 17(5)(i), which weighs in favour of disclosing personal information that was provided to the public body by the applicant. Therefore, section 17(5)(i) is a significant factor that weighs in favour of disclosing the personal information of the foster parents in the statements the Applicant's requested.

[para 66] Not all of the responsive information is contained in correspondence sent to the Public Body by the Applicant. Some of the records are notes of Public Body employees, who recorded conversations with the Applicant and other things said/done by the Applicant during those meetings or visits. While the Public Body employee was recording what the Applicant said, the notes represent the author's interpretation of what was said, as well as the surrounding circumstances and context. This is not information that was provided by the Applicant; therefore, section 17(5)(i) is not applicable to that information.

Other factors

[para 67] The Public Body stated in its initial submission that information was already provided to the Applicant through another process; this may include the information at issue here. The fact that records were provided as part of another process does not necessarily mean that they must also be provided in response to a FOIP request, nor in contrast, that they need not be.

[para 68] In some cases, this factor might mean that the public body has already discharged its burden to provide the responsive records. In Order F2020-13, the Director

of Adjudication found that a public body does not have a duty to provide records to an applicant that were provided in response to a previous access request. She cited decisions from several other jurisdictions on this point, which found that in the cases before them, a public body has discharged its duty if the requested records has previously been provided and the public body indicated which records those were (see paras. 66-70).

[para 69] On the other hand, if the Public Body has already provided most or all of the information at issue to the Applicant in another process, this is a factor that can weigh in favour of disclosure here. In other words, if the Applicant has already been provided with the information, it may not be an unreasonable invasion of privacy to provide another copy in response to an access request. This factor will depend upon the circumstances.

[para 70] I am distinguishing this case from the facts in Order F2020-13 because the Public Body does not seem to be clear what information was already provided to the Applicant. Its submission states (at page 6):

> The Respondent submits that any information required to adjudicate legal rights under CYFEA would have been disclosed under this separate process.

[para 71] It is not clear if any of the 32 pages at issue here were, in fact, provided to the Applicant, or whether the Public Body's FOIP office knows if they were. If these pages were provided previously, the Public Body has not provided direction to the Applicant about when they were provided such that she can locate the responsive records herself.

[para 72] I note also that unlike the situation in Order F2020-13, the Applicant has not made an access request that encompasses records previously requested under the FOIP Act. If the Applicant has her own copies of the records at issue, she does not appear to be aware of this fact.

Balancing factors under section 17

[para 73] I agree with the Public Body that section 17(4) weighs against disclosure of third party personal information in the responsive records (that can be withheld under section 17(1)). I also found that different factors weigh in favour of disclosure.

[para 74] Whether the Public Body ultimately decides to withhold some or all of the responsive third party personal information, the decision is not an obvious one. As such, this is a situation in which it is important for the Public Body to notify the third parties affected by the request and seek their input. Section 30(1)(b) of the Act requires a public body to notify a third party of the access request if the public body is considering granting access.

[para 75] In *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (Merck Frosst), the Supreme Court of Canada considered when affected parties must be notified under a section of the federal *Access to Information Act* (ATIA) similar to section 30 of the FOIP Act. The Court found found (at paras. 60, 77-78 and 84):

As noted earlier, s. 27(1) of the Act specifies when the head of the government institution must make reasonable efforts to give notice to a third party. (I will simply refer to this as the notice requirement.) For convenience, the text of the provision as it read at the time of the applications is as follows:

> 27. (1) Where the head of a government institution intends to disclose any record requested under this Act, or any part thereof, that contains or that the head of the institution has reason to believe might contain
>
> (*a*) trade secrets of a third party,
>
> (*b*) information described in paragraph 20(1)(*b*) that was supplied by a third party [financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party], or
>
> (*c*) information the disclosure of which the head of the institution could reasonably foresee might effect a result described in paragraph 20(1)(*c*) or (*d*) in respect of a third party [information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party],
>
> the head of the institution shall, subject to subsection (2) [waiver of the requirement by the third party], if the third party can reasonably be located, within thirty days after the request is received, give written notice to the third party of the request and of the fact that the head of the institution intends to disclose the record or part thereof.

[…]

As discussed earlier, in order to disclose third party information without giving notice, the head must have no reason to believe that the information might fall within the exemptions under s. 20(1). Conversely, in order to refuse disclosure without notice, the head must have no reason to believe that the record could be subject to disclosure. If the information does not fall within one of these clear categories, notice must be given. I would therefore interpret the phrase "intends to disclose" as referring to situations which fall between those in which the head concludes that neither disclosure nor refusal of disclosure without notice is required. In other words, the head "intends to disclose" a record "that the head … has reason to believe might contain" exempted information unless the head concludes either (a) that there is no reason to believe that it might contain exempted information (in which case disclosure without notice is required) or (b) that he or she has no reason to believe that disclosure could be required by the Act (in which case refusal of disclosure without notice is required). To the extent that the reasons of the Court of Appeal, at para. 34, suggest the head must have actually formed an opinion on the matter as opposed to simply having no "reason to believe", I respectfully disagree.

The approach I propose sets quite a low threshold for the requirement of giving notice. This is not only consistent with the text of the Act, but properly reflects the balance the Act strikes between disclosure and protection of third parties.

> […]
>
> To sum up my conclusions on s. 27(1):
>
> > (i) With respect to third party information, the institutional head has equally important duties to disclose and not to disclose and must take both duties equally seriously.
> >
> > (ii) The institutional head:
> >
> > > - should *disclose* third party information *without notice* only where the information is clearly subject to disclosure, that is, there is *no reason to believe that it is exempt*;
> > >
> > > - should *refuse to disclose* third party information *without notice* where the information is clearly exempt, that is, where there is no reason to believe that the information is subject to disclosure.
> > >
> > > (iii) The institutional head must give notice if he or she:
> > >
> > > - is in doubt about whether the information is exempt, in other words if the case does not fall under the situations set out in point (ii);
> > >
> > > - intends to disclose exempted material to serve the public interest pursuant to s. 20(6); or
> > >
> > > - intends to disclose severed material pursuant to s. 25.

[para 76] I interpret the Court's direction to be that third parties need not be notified of an access request in the following circumstances: where the exception to access clearly applies to information in the records at issue, such that the information will not be disclosed to the applicant under the FOIP Act, or where it is clear that the exception to access does not apply to the information in the records at issue such that it must be disclosed. Where it is unclear whether section 17(1)-(5) ultimately weighs in favour of, or against disclosure and where evidence from the third party could provide insight into the application of the exception, the third party ought to be consulted by the Public Body. This is the case for all personal information to which section 17(1) can apply.

[para 77] In this case, I understand that the Public Body decided it was clear that the third party personal information would not be disclosed to the Applicant. As such, it did not consult with the third parties under section 30(1)(b). While I find that the Public Body's assessment of the factors in section 17 was incorrect, I also accept that its decision was made in good faith and for that reason the Public Body did not fail in its duty to notify the third parties under section 30(1).

[para 78] Having reviewed the records and the submissions of the parties, I find that it is neither clear that the information to which section 17(1) can be applied must be disclosed to the Applicant, nor that it must be withheld. As I will order the Public Body to reprocess the responsive records and reconsider its application of section 17(1), it follows from the direction given by the Supreme Court of Canada in *Merck Frosst* that the Public Body's duty to notify the third parties is now engaged.

V. ORDER

[para 79] I make this Order under section 72 of the Act.

[para 80] I find that the Public Body did not fulfill its duty to assist the applicant under section 10 when it initially refused to search for responsive records. The Public Body ultimately responded to the Applicant and so I needn't order this to be done. However, I order the Public Body to provide a written reminder to its FOIP staff of the steps required to respond to an access request openly, accurately and completely.

[para 81] I find that the Public Body ultimately conducted an adequate search for responsive records.

[para 82] I find that the Public Body did not properly assess what information in the records is responsive to the Applicant's request. I order the Public Body to reprocess the records at issue.

[para 83] I find that the Public Body did not properly consider all relevant factors in its decision to apply section 17(1). I order the Public Body to reconsider its application of section 17(1), taking into account the guidance provided in this Order.

[para 84] I order the Public Body to provide a new response to the Applicant, explaining why information in the records at issue is non-responsive (if any), and why it decided to withhold information under section 17(1) (if any). This response should specifically reference the factors raised in this Order, and explain how they were considered.

[para 85] I further order the Public Body to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order. If the timelines set out in sections 30 and 31 of the Act prevent the Public Body from providing a final decision to the Applicant regarding section 17(1), the Public Body may comply by notifying me and the Applicant of the current status of the notification process. The Public Body must, at minimum, have taken steps to locate and contact third parties, and have provided notice under section 30. If the Public Body could not locate some or all of the third parties, this should also be noted. This does not affect the Public Body's decisions with respect to responsiveness.

_____

Amanda Swanek
Adjudicator