ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2022-R-01
(RECONSIDERATION OF ORDER F2017-58)

April 20, 2022

EDMONTON POLICE SERVICE

Case File Number F7354

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Summary: This Order is a reconsideration of Order F2017-58, which concerned the Edmonton Police Service's (Public Body) response to an access request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act). On judicial review of that Order, the Court of Queen's Bench quashed the Order in part. The Court directed a reconsideration of exceptions applied by the Public Body, by a different Adjudicator.

In this reconsideration, the Public Body claimed solicitor-client privilege over six pages of records over which privilege had not been claimed in the initial inquiry or judicial review proceeding. The Adjudicator noted that section 17(1) applied to three pages of those records in their entirety, such that the claim of privilege needn't be decided. With respect to the remaining three pages of records, the Adjudicator concluded that the Court limited the reconsideration to the Public Body's application of section 17(1). Therefore, the only issue for the reconsideration was the Public Body's application of section 17(1).

The Adjudicator found that section 17(1) applies to some of the information in the records at issue but not all. The Public Body was ordered to review the records in accordance with the instructions in the Order, and provide the Applicant with a copy of the information to which section 17(1) does not apply.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 17, 71, 72

Authorities Cited: AB: Decision F2017-D-01, Orders 97-002, F2004-015, F2008-028, F2014-16, F2015-30, F2017-58, F2017-84, P2008-010

Cases Cited: *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10, *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, *University of Calgary v. Alberta (Information and Privacy Commissioner)*, 2021 ABQB 795,

I. BACKGROUND

[para 1] On May 2, 2013, the Applicant made an access request to the Edmonton Police Service (Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for "all records as defined by s. 1(q) relating to the investigation into the findings of misconduct by Judge Wenden against [a named individual] in the matter of *R v Kubusch*, (2003) ABPC 156, copy enclosed." The Public Body provided some records and withheld information under sections 4(1)(a), 17(1), 20(1), 21(1), 24(1) and 27(1) of the FOIP Act. The Applicant requested an inquiry on March 27, 2015. An inquiry was conducted, concluding with Order F2017-58 issued on July 7, 2017. The Public Body applied for a judicial review of that order.

[para 2] In *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (*EPS*), the Court of Queen's Bench quashed Order F2017-58 in part. The Court remitted to the Commissioner the decision of whether the Public Body had properly withheld some of the information in the records. Specifically, the Court ordered (at paras. 659(14) and (15)):

> I order the following records considered in F2017-58 (Inquiry F7384) to be returned to the IPC for reconsideration by a different adjudicator respecting the application of s. 17 of *FOIPPA* to these records, in light of these reasons: records 1, 2 (in part), 3-8, 21, 23-40, 42, 44-45, 47-50, 56-90, 92, 96-100, 107-121, 131-132, 463-479, 486-516. In the reconsideration proceedings, no new materials will be filed with the IPC, except with leave and as directed by the IPC or the adjudicator.
>
> I order records 52-54 and 91, considered in F2017-58 (Inquiry F7384), to be returned to the IPC for reconsideration by a different adjudicator, on the terms set by the IPC or the adjudicator.

[para 3] The Public Body confirmed that it is applying only section 17(1) to pages 52-54 and 91 of the records at issue.

[para 4] The Affected Party who participated in the first inquiry into file F7384, as well as in the judicial review of Order F2017-58, agreed to participate in the reconsideration as a disclosed party.

[para 5] In the *EPS* decision, the Court directed that "no new materials will be filed with the IPC, except with leave and as directed by the IPC or the adjudicator" (at para. 659(14)). Given the complexity of submissions made to the original inquiry and the number of issues addressed in those submissions that are not at issue in this reconsideration, I decided to ask the parties to

make new submissions to this reconsideration, addressing only the issues for the reconsideration. The parties were not precluded from repeating arguments made in the original inquiry or providing copies of relevant portions of original submissions.

II. RECORDS AT ISSUE

[para 6] The records at issue consist of pages 1, 2 (in part), 3-8, 21, 23-40, 42, 44-45, 47-50, 52-54, 56-90, 91, 92, 96-100, 107-121, 131-132, 463-479, 486-516.

III. ISSUES

[para 7] The Notice of Reconsideration, issued on October 4, 2021, sets out the issue for the reconsideration as follows:

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

IV. DISCUSSION OF ISSUES

Preliminary issue – Scope of the inquiry

[para 8] In its initial submission to this reconsideration, the Public Body argues that section 27(1)(a) applies to pages 4, 6-7, and 36 of the records remaining at issue, claiming the information is subject to solicitor-client privilege. The Public Body did not claim privilege over these records in the first inquiry. Nor is there any indication it made arguments to this effect in the judicial review proceeding.

[para 9] The Public Body states that page 4 refers to an EPS legal memorandum; pages 6-7 refer to portions of analysis and conclusions in a legal opinion, and page 36 includes discussion about advice sought from internal counsel. The Public Body's index of records also shows that it is also claiming privilege over pages 34 and 37, although it hasn't made any specific arguments about those pages. The Public Body did not mention why it did not claim privilege over these pages before now.

[para 10] It is not clear to me that I can consider the Public Body's claim of privilege in this reconsideration. In *EPS*, the Court clearly set out the scope of this reconsideration in its decision at paragraph 659 (14) and (15), reproduced at paragraph 2 above. Pages 4, 6, 7, 34, 36 and 37 are included in the records to be reconsidered with respect to the application of section 17.

[para 11] At paragraph 661, the Court states:

> With respect to orders (14) and (15), I confirm that I did consider whether I should exercise my discretion *not* to remit the records to the IPC for reconsideration. See ***Vavilov*** at para 142. The parties did not make submissions on the manner in which I should exercise my remedial discretion. I acknowledge that I must consider (*inter alia*) the efficient use of public resources and costs to the parties: ***Vavilov*** at para 142. I have declined to exercise my discretion not to remit for the following reasons:

> (a) I do not find that the outcomes of reconsideration respecting orders (14) or (15) are inevitable: ***Mobil Oil Canada Ltd v Canada- Newfoundland Offshore Petroleum Board***, [1994] 1 SCR 202, Iacobucci J at 228-229; ***Vavilov*** at para 142.
> …
> (h) Order (15)[1] is focused on the application of s. 17 only, not on other *FOIPPA* provisions, and no further materials are to be filed except as directed by the IPC or her delegate. These limitations shall ensure the proportionality of additional institutional resource investment and expense for the parties.

[para 12] Given this, it appears that the Court ordered a reconsideration of the pages listed at paragraph 659(14) – including pages 4, 6, 7, 34, 36 and 37, with respect to section 17 alone.

[para 13] It might be argued that the Court did not consider whether solicitor-client privilege applied to pages 4, 6-7, 34, 36 and 37 because it was not initially claimed by the Public Body, and therefore did not make a decision in this regard, either implicitly or explicitly.

[para 14] The Court conducted a thorough analysis of the application of section 17(1) to the information to which the Public Body applied section 17(1) in the initial inquiry, except those pages to which other exceptions had been found to apply (at paras. 572-658). In the initial inquiry, the Public Body applied section 17(1) to all of the pages at issue in this reconsideration, including pages 4, 6-7, 34, 36 and 37; these pages were included in the Court's review of section 17(1).

[para 15] The Court clearly states that it reviewed the relevant records (at para. 600). At paragraph 601, the Court set out different headings for the information to which section 17(1) applies. The Court also set out headings for "records potentially subject to solicitor-client privilege and records potentially falling under s. 4(1)(a)". The Court listed which pages contain personal information falling under each heading (at para. 603):

> My review disclosed the following:
>
> *third party opinions about the Officer*
>
> records 2-3, 4, 6-7 (solicitor-client privilege may also apply), 8, 22, 23, 26-29, 34, 35, 36, 37, 463, 486
>
> *EPS's reasons for not embarking on further proceedings*
>
> records 2-3, 4, 6-7, 8
>
> *identifying information other than name (ss. 1(n)(i), (iv) (might potentially be addressed by minor severance)*
>
> records 2, 5, 22, 39-40, 45, 47, 48, 60, 65-67, 104-105
>
> *information about employment history not connected with the **Kubusch** matter (s.1(n)(vii))*
>
> record 2
>
> *the Officer's personal views or opinions (s. 1(n)(ix))*

[1] Given the context, the Court presumably meant to refer to Order (14), which focusses on the application of section 17, and mirrors the language of this paragraph, with respect to the filing of further materials.

records 27, 30

additional personal information not disclosed in public sources

records 1, 2, 4, 5, 8, 22, 24, 25, 29, 31, 466-467, 486, 498, 500-506, 508-509, 512, 515

solicitor-client privilege

record 44

s. 4(1)(a)

records 106, 108-120

[para 16] The record under the "solicitor-client privilege" heading (record 44) is not at issue in this reconsideration.

[para 17] The Court notes under the first heading ("third party opinions about the Officer") that "solicitor-client privilege may also apply" to records 4, 6 and 7. The Court does not make any further comment about the application of that privilege to those pages (or page 44) in the remainder of the decision. Nor is it referenced in the order at paragraph 659(14), ordering a reconsideration of the application of section 17(1) to those pages.

[para 18] It therefore remains unclear whether I am also to consider whether any information in pages 4, 6, and 7 are subject to solicitor-client privilege. However, for the reasons discussed in the next section of this Order, I find that section 17(1) applies to pages 4, 6 and 7 in their entirety. Therefore, I needn't consider whether solicitor-client privilege also applies.

[para 19] With respect to pages 34, 36 and 37, the Court also lists those pages under the heading "third party opinions about the Officer" but does not include the comment that they may also be subject to solicitor-client privilege. Had the Court regarded pages 34, 36 and 37 to be potentially privileged, it likely would have made the same notation as it did for pages 4, 6 and 7. This leads me to conclude that the Court did not believe these records were subject to privilege, and therefore limited this reconsideration to the application of only section 17(1) with respect to those pages.

[para 20] I note as well that the Court suggested that pages 52-54 and 91 of the records might be subject to informer privilege, although this had not been claimed by the Public Body in the initial inquiry or judicial review proceeding. For this reason, the Court did not specify the grounds for reconsideration of pages 52-54 and 91, but rather left that decision to the adjudicator (at para. 659(15)). This further supports my conclusion that the Court considered the application of various privileges to the records before it, including all of the records at issue in this reconsideration. Had the Court regarded pages 34, 36 and 37 as possibly privileged, it could have directed the reconsideration to consider this ground as well, but it did not do so.

[para 21] In making this decision, I am cognizant of the direction in *University of Calgary v. Alberta (Information and Privacy Commissioner)*, 2021 ABQB 795 (*University of Calgary*), which resulted from a judicial review of Order F2017-84. In that Order, the Director of Adjudication considered the claim of privilege made by the University of Calgary following *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (*U of*

C). The Director concluded that Supreme Court did not make a final decision regarding the University's claim of privilege over all of the relevant records, as the decision in *U of C* related to a preliminary decision of this Office to order the University to produce the records over which privilege was claimed (see Decision F2017-D-01). The Director further concluded that the Office was therefore required to make a final decision regarding the University's claim of privilege.

[para 22] In the subsequent *University of Calgary* decision, the Court of Queen's Bench found that the Supreme Court had made a final decision regarding the University's claim of privilege over all of the relevant records. It found that the doctrine of estoppel applied, stating (at para. 62, my emphasis):

> The Supreme Court could have decided the question of the Commissioner's authority to order production under section 56 and then made no further comment about the privilege claim in this case. But it did not do so. In three sets of reasons the Supreme Court commented on the validity of the privilege claim and concluded that there was no reason for the delegate to require production for review purposes in this case. Issue estoppel and its sister doctrine of *res judicata* apply "not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time": ***L'Hirondelle v Patenaude***, 2019 ABQB 39 at para 52, citing *Henderson v Henderson* [1843-1860] All ER Rep 378 at 381-382.

[para 23] Given this, and the Court's thorough review of the records at issue in this inquiry in *EPS*, I conclude that the decision regarding whether pages 34, 36 and 37 are privileged has been made. I am therefore precluded from considering the Public Body's claim of privilege over records that the Court could have found to be privileged (or surmised might be privileged) but did not.

[para 24] With respect to pages 52-54 and 91, I previously noted that the Court left the grounds for reconsideration open (at para. 659(15)). Prior to issuing the Notice of Inquiry, I asked the Public Body to tell me and the Applicant whether it would continue to withhold these pages from the Applicant and if so, under what exceptions (letter dated September 17, 2021). The Public Body responded by letter dated September 30, 2021, confirming that it was not claiming informer privilege (or any other privilege) over these pages. The Public Body further stated that it continued to apply section 17(1) to these pages, as set out in its submissions to the initial inquiry.

[para 25] Lastly, the Court's direction at paragraph 659(14) to reconsider the application of section 17(1) to the pages listed in that paragraph includes paged 486-516. However, the Court also ordered the Public Body to disclose pages 510 and 513 to the Applicant (at para. 659(17)):

> (17) I order records 55, 510, and 513 (without redaction), considered in F2017-58 (Inquiry F7384), to be disclosed by EPS to the CTLA.

[para 26] Given this direction from the Court, neither pages 510 nor 513 are properly at issue in this inquiry. However, the copy of the records at issue provided by the Public Body for this

reconsideration still show information redacted on pages 510 and 513. Possibly this is an oversight.

Conclusions regarding the scope of the reconsideration

[para 27] This reconsideration will consider only the Public Body's application of section 17(1) to the records. I acknowledge that the *EPS* decision alluded to a possible claim of solicitor-client privilege over pages 4, 6 and 7 of the records, at paragraph 603 of that decision. However, given my finding that section 17(1) applies to those pages in their entirety, I do not need to decide whether the Court's reference to privilege at paragraph 603 overrides its direction at paragraph 659(14) to reconsider only the Public Body's application of section 17(1) to those pages).

[para 28] As the Court did not make similar comments regarding the possibility of pages 34, 36 or 37 being privileged, and because it directed that the reconsideration of those pages encompass section 17(1) alone, I conclude that section 17(1) is the only section open to me to consider here.

[para 29] With respect to pages 52-54 and 91, the Court left the scope of the reconsideration open, but the Public Body confirmed it is applying only section 17(1) to those pages.

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

[para 30] 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 31] The information in the records relating to the Affected Party consists of his name, address, date of birth, age, as well as employment and professional history. The records also contain opinions about him. This is the Affected Party's personal information. Some of the withheld records do not appear to contain the Affected Party's personal information or are not comprised entirely of his personal information. I will address these records in the next section.

[para 32] The records also contain personal information of third parties who had interacted with the Affected Party, such as name, address, date of birth, physical description. None of the arguments of the parties relate to any third party other than the Affected Party.

Does section 17(1) require the Public Body to withhold the Affected Party's personal information?

[para 33] Section 17 states in part:

> *17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.*
>
> *...*
>
> *(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*
>
> *...*
>
> *(b) the personal information is an identifiable part of a law enforcement record, except to the extent that the disclosure is necessary to dispose of the law enforcement matter or to continue an investigation,*
>
> *...*
>
> *(d) the personal information relates to employment or educational history,*
>
> *...*
>
> *(g) the personal information consists of the third party's name when*
>
> *(i) it appears with other personal information about the third party, or*
>
> *(ii) the disclosure of the name itself would reveal personal information about the third party,*
>
> *...*
>
> *(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether*
>
> *(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,*
>
> *...*

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

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

[para 34] Section 17 is a mandatory exception: if the information falls within the scope of the exception, it must be withheld.

[para 35] 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 36] 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).

[para 37] Some information in the records at issue relate to actions taken by the Affected Party as part of his work duties. Generally that is not information to which section 17 applies. In Order P2008-010, the Director of Adjudication considered whether information relating to officers performing their job duties had a personal dimension when it was collected in a database that was created for the purpose of collecting and disseminating information about members of the EPS who had allegedly used force against individuals. She concluded (at paras. 30-31):

> The very fact of what the officer did is not their personal information – it is their discharge of their work and of their duties to the public as a member of a public institution. This could be said of any records that reveal nothing other than what was done – for example, a video recording of an incident, or a factual account from an observer.
>
> However, if the information that is entered is a record or report of a disciplinary process, it does not come in pure form – it comes associated with personal information as well. Information in the database that reveals what was done by the officer *but that at the same time* reveals something that is personal to the officer – for example, the fact that a disciplinary proceeding was conducted and that particular conclusions were drawn, or that a penalty was imposed (which might speak to the conduct itself insofar as it shows how egregious the person who heard direct evidence saw it to be), has both non-personal and personal aspects which are inextricably interwoven. Since the personal information revealing what was done cannot be separated from the pure fact of what was done, such information must be regarded in totality as having a dual – non-personal as well as personal – character. A similar duality might exist in relation to an entry that both records what was done or allegedly done by an officer, and that has a personal aspect for some other reason, for example, that it was highly publicized.

[para 38] While this analysis relates to the *Personal Information Protection Act* (PIPA), I find it is also applicable under the FOIP Act. Records created by the Affected Party in the course of his job duties and information relating to the performance of his job duties appearing in the records at issue have a personal dimension in this context. They are included in the records at issue precisely because they relate to an investigation into his alleged misconduct. This gives the information a personal dimension such that section 17(1) can apply.

[para 39] Other Public Body employees/officers were named in the records as they were involved in the investigation of the Affected Party. In each case, it appears that the Public Body employees/officers were acting in their professional capacities, such that their information in the records is not information to which section 17(1) can apply. The Public Body did not argue that any information of these other employees/officers can be or should be withheld under section 17(1). I find that section 17(1) does not apply to any information of other Public Body employees/officers relating to the performance of their duties. The remainder of this discussion does not apply to that information.

[para 40] The Public Body withheld all but a few pages in their entirety. In *EPS*, the Court considered whether the personal information in pages 480-485 could be severed, with the remaining information provided to the Applicant. The Court found that "it would be unreasonable to conclude that any portion of these records should be disclosed" (at para. 518). While these pages are not at issue in this reconsideration, I have a copy of the records from the original inquiry. I have reviewed these pages in order to make a consistent finding regarding the pages at issue in this inquiry. Following the Court's guidance, there are several pages in the records at issue for which the Affected Party's personal information cannot be severed from any non-personal information; for example, pages 4, 6-7, 26-30, 36, 52-54, 57, 58, 463, 466, 467, 486-489.

[para 41] In other cases, it seems that the Affected Party's information could reasonably be severed from the remaining record. The Public Body's submission did not address why these pages were not provided to the Applicant with personal information severed. It is possible that what appears to me to be non-personal information reveals personal information about the Affected Party. However, this is not apparent from the records themselves so I cannot conclude this to be the case. As noted by the Court in *EPS*, privacy concerns may be addressed by severing information rather than withholding pages in their entirety (at para. 602). I will order the Public Body to review the records and conduct a line-by-line review to determine what information can be provided to the Applicant after the personal information has been severed (this excludes the records identified above, which cannot be severed).

[para 42] For example, many pages of the records consist of Public Body forms that have been filled out. Some forms include personal information of the Affected Party that reveal only the same information as has been recently discussed in Order F2017-58 and the *EPS* decision. Some forms include additional personal information of the Affected Party, or other third parties (whose information is not at issue in this reconsideration). Several pages relate to the investigation undertaken by the Affected Party, which led to the *Kubusch* decision; the information in these records only tangentially relates to the Affected Party such that it is unclear how the entire page could be withheld under section 17. Many records can be characterized as administrative: setting up meeting times, arranging for documents to be sent or obtained. While these records may relate to the investigation of the Affected Party, that does not make the information his personal information. Several pages of the records appear to be a printout of a policy and procedure manual; this is not the Affected Party's personal information.

[para 43] The Public Body did not discuss what information was withheld as it relates to the Affected Party, and what information was withheld as it relates to other third parties. It may be that section 17(1) requires the Public Body to withhold information of other third parties in the records before disclosing any additional information to the Applicant. As stated, the application of section 17(1) to personal information of third parties other than the Affected Party is not at issue in this reconsideration.

Sections 17(2) – (5)

[para 44] Before turning to the application of sections 17(2)-(5), I will review the directions provided by the Court in *EPS*, with respect to the application of this exception.

[para 45] In the first inquiry, the adjudicator found that the Public Body's reasons for not pursuing criminal charges or disciplinary proceedings against the Affected Party was information about the Public Body and not personal information about the Affected Party. The Court found this conclusion unreasonable, stating that this information was part of the Affected Party's employment history and was his personal information for the purposes of section 17 (see paras. 582-588).

[para 46] In the first inquiry, the adjudicator found that the personal information in the records was already publicly available in the *Kubusch* decision and transcripts of the proceeding, as well as via media stories about the matter.

[para 47] The Court made several comments about the public availability of information relating to the Affected Party and the records at issue. The Court raised doubts that the public availability of some information amounts to that information being 'extensively' disclosed to the public. The Court noted that the Public Body informed the Applicant that it conducted an investigation into allegations of misconduct by the Affected Party, and that no proceedings resulted. The Court found that this cannot be considered extensive disclosure to the public of the investigation results. The Court noted that the adjudicator referred only to one news article on the matter, which it found also didn't amount to extensive public disclosure. The Court agreed that the *Kubusch* decision is publicly available, but the transcripts of the proceeding – while available to the public – must be ordered.

[para 48] The Court concluded that the records contained more personal information of the Affected Party than what had already been disclosed by way of the *Kubusch* decision, transcript, news article, and previous communications from the Public Body to the Applicant (at para. 621).

[para 49] The Court discussed the public availability of the *Kubusch* decision at greater length. It noted that the decision is available on CanLII, which is accessible to any person with an internet connection, for free. However, the Court noted (at para. 619):

> It is one thing to conclude that a person lacks a reasonable expectation of privacy respecting certain information because the information is well-known to many. It is another thing to conclude that a person lacks a reasonable expectation of privacy in that information because that information is well-known to one organization or some members of that organization. It is yet another thing to conclude that a person lacks a reasonable expectation of privacy because it is

possible that individuals could, sometime, had they the motivation, do a computer search and find the information.

[para 50] The Court also noted that the age of the information is a relevant factor, stating (at para. 636):

> Generally, the greater the period of non-disclosure of governmental information, the lesser the interest in non-disclosure. But in the case of personal information, the greater the period of non-disclosure, the greater the interest in non-disclosure. As Director of Adjudication Dr. Christina Gauk wrote in Order F2014-16 at para 59,
>
> > [para 59] There is no present public interest and no present need for public scrutiny that makes disclosure of personal information in the Report necessary now. Put another way, the date of the event leads now to a greater expectation of personal privacy. Unless there is convincing evidence to wake this proverbial sleeping dog, and I have been shown none, this is surely a situation in which to let it lie.
>
> (This, another CTLA application, did concern a much older incident, occurring nearly 30 years before the information request.)
>
> The ***Kubusch*** decision was released in 2003. The investigation concluded that year. The CTLA applied for records relating to the ***Kubusch*** decision in 2013. The Adjudicator's decision was released in 2017.

[para 51] The Court discussed how the age of the information is relevant to the effect of disclosure on reputation. The Court states (at para. 642):

> Some have erred and their reputation has never recovered. Others have erred and have remade their lives, no longer defined by their flaw but on what they have built since their flaw was exposed: ***R v Handy***, 2002 SCC 56, Binnie J at para 38. This was the point of the Officer's reputation arguments. An act and publication of that act do not mean that reputation cannot be recovered. The effect of disclosure must be set against reputation regained – whatever reputation has been regained.

[para 52] The Court also acknowledged that other factors may override any factors in the discussion above.

[para 53] As noted, the Court found that the outcome of this reconsideration is not inevitable. Therefore, while the Court provided comprehensive direction regarding the relevance of certain factors to the application of section 17, I must make a decision anew.

Section 17(2)

[para 54] Section 17(2) prescribes a number of circumstances in which it is not an unreasonable invasion of privacy to disclose personal information. None of the parties have argued that any provisions of section 17(2) are relevant and, from the face of the records, none appear to apply.

Section 17(3)

[para 55] None of the parties has argued that section 17(3) applies to any of the withheld information, and from the face of the records, this provision does not apply.

Section 17(4)

[para 56] The Public Body and Affected Party argued that sections 17(4)(b), (d) and (g) are relevant. The Applicant acknowledges that these provisions apply.

[para 57] Section 17(4)(b) applies to personal information that is an identifiable part of a law enforcement record, except to the extent that the disclosure is necessary to dispose of the law enforcement matter or continue an investigation.

[para 58] Law enforcement is defined in section 1(h) of the Act, to include:

> *1 In this Act,*
> *...*
>
> *(h) "law enforcement" means*
>
> *(i) policing, including criminal intelligence operations,*
>
> *(ii) a police, security or administrative investigation, including the complaint giving rise to the investigation, that leads or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the investigation or by another body to which the results of the investigation are referred, or*
>
> *(iii) proceedings that lead or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the proceedings or by another body to which the results of the proceeding are referred;*

[para 59] The records at issue are all comprised of internal investigation records; most of the records are identifiable as being part of a police file, as required by this provision. Therefore, section 17(4)(b) applies to much of the third party personal information in those records.

[para 60] Section 17(4)(d) creates a presumption against disclosure of personal information that relates to employment or educational history. I agree that this presumption applies to third party personal information in the records.

[para 61] Section 17(4)(g) creates a presumption against disclosure of personal information consisting of a third party's name when it appears with other personal information about that third party, or where the name alone would reveal personal information about the third party. This provision applies to all of the third party personal information in the records.

Section 17(5)

[para 62] The Applicant argued that section 17(5)(a) applies to the information. The Public Body and Affected Party argued that sections 17(5)(e) and (h) apply. I will also consider section 17(5)(i).

[para 63] 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 64] In Order F2014-16, the Director of Adjudication discussed appropriate factors to consider in determining whether public scrutiny is desirable. She said (at paras. 35-36):

> In determining whether public scrutiny is desirable, I may consider factors such as:
>
> 1. whether more than one person has suggested public scrutiny is necessary;
> 2. whether the applicant's concerns are about the actions of more than one person within the public body; and
> 3. whether the public body has not previously disclosed sufficient information or investigated the matter in question.
>
> (Order 97-002, paras 94 and 95; Order F2004-015, para 88).
>
> It is not necessary to meet all three of the foregoing criteria in order to establish there is a need for public scrutiny. (See *University of Alberta v. Pylypiuk* (cited above) at para 49.) For example, in Order F2006-030, former Commissioner Work said (at para 23) that the first of these factor "is less significant where the activity that has been called into question, though arising from a specific event and known only to those immediately involved, is such that it would be of concern to a broader community had its attention been brought to the matter", commenting that "[i]f an allegation of impropriety that has a credible basis were to be made in this case, this reasoning would apply".

[para 65] Past Orders of this Office have made the distinction between allegations of wrongdoing by a public body employee, and allegations of a more systemic nature against a public body. For example, in Order F2015-30, I discussed the application of section 17(5)(a) to allegations made against a police officer in a disciplinary decision. I said (at para. 43, emphasis added):

> I find that the Applicant has not provided credible evidence to suggest that activities of the Public Body require scrutiny. <u>The unredacted portions of the Decision reveal that the actions of the Detective were called into question; however, there is no indication that the activities of the Public Body more broadly are being called into question, beyond this particular case</u> in which the Detective may have provided deficient advice to a colleague. I may have found otherwise had the Applicant provided some evidence that the Detective routinely advised colleagues to lie or use misleading language on warrant applications or similar documents. However, the Applicant's arguments merely speculate that this is the case, and the records themselves do not support such a finding.

[para 66] The Applicant argued in the initial inquiry that section 17(5)(a) applied to the information in the records. The adjudicator concluded that this provision did not apply. In *EPS*, the Court noted that this finding was not challenged in the judicial review proceedings, and also

that this finding "precludes the engagement of s. 2(b) [of the *Charter*] on the evidence" (at paras. 654).

[para 67] In its rebuttal submission to this reconsideration, the Applicant again raises the application of section 17(5)(a) and section 2(b) of the *Charter*. The Public Body argues the application of section 17(5)(a) was not challenged in the judicial review proceeding, and therefore the adjudicator's finding in Order F2017-58 stands. It states that *res judicata* applies, such that the application of section 17(5)(a) cannot be reheard in this reconsideration.

[para 68] I do not need to consider this point; for the reasons below, I also find that the Applicant failed to show that section 17(5)(a) applies.

[para 69] The Applicant argues that the public is "keenly interested in police misconduct and in the failure of policing institutions and the legal system to adequately investigate and sanction police misconduct" (rebuttal submission, at para. 9). The Applicant refers to two proceedings of the Alberta Law Enforcement Review Boards (LERB) that address issues with the internal police discipline process. Neither decision relates to the Affected Party.

[para 70] The Applicant states that the Affected Party was investigated for serious allegations, and was cleared. The Applicant argues that the public interest in this matter is whether the Public Body "engaged in a fair and impartial investigation of the [Affected Party's] conduct" (rebuttal submission, at para. 12). The Applicant argues that there is a need for transparency of the Public Body's finding.

[para 71] The Affected Party states that the Applicant's argument seems to be that there is a general public interest in the police discipline process, but this is not a sufficient reason to disclose the records at issue. He argues (rebuttal submission at para. 7):

> Ordering disclosure here would essentially mean that any party would be entitled to access specific internal police investigation records, simply because there exists some general public interest in police discipline.

[para 72] The Applicant has provided a copy of a December 2014 CBC news story about the Affected Party's promotion. The story included details relating to the Affected Party's criminal record and disciplinary suspension for excessive force. The story does not reference the *Kubusch* decision or the allegations against the Affected Party relating to that decision. The Applicant also provided copies of more recent news stories about use of force by police officers and the process for investigating complaints of excessive force. None of these articles appear to reference the Affected Party or the allegations arising from the *Kubusch* decision. To be clear, the records at issue relate to the manner with which the Affected Party obtained a search warrant in a criminal investigation. The records do not relate to allegations of excessive force.

[para 73] I understand that the Applicant is raising issues with the Public Body's internal disciplinary process generally. The Applicant has provided decisions of the LERB that raise concerns with this internal process in particular circumstances; those cases do not relate to the Affected Party. There may be legitimate concerns with the internal disciplinary process used by

police services; however, the Applicant has not provided sufficient reason to find that the records of the internal disciplinary process relating to the Affected Party require public scrutiny.

[para 74] The Applicant further argues that section 2(b) of the *Charter* is engaged, as "denial of access to the responsive records in this case effectively bars meaningful commentary on the disciplinary procedure to which the Public Body Respondent subjected [the Affected Party]" (rebuttal submission, at para. 17). Section 2(b) of the *Charter* states:

> 2. Everyone has the following fundamental freedoms:
> ...
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

[para 75] In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, the Supreme Court of Canada stated (at para. 37):

> In sum, there is a prima facie case that s. 2(b) may require disclosure of documents in government hands where it is shown that, without the desired access, meaningful public discussion and criticism on matters of public interest would be substantially impeded. As Louis D. Brandeis famously wrote in his 1913 article in Harper's Weekly entitled " What Publicity Can Do": "Sunlight is said to be the best of disinfectants ... ." Open government requires that the citizenry be granted access to government records when it is necessary to meaningful public debate on the conduct of government institutions.

[para 76] However, as stated by the Court in *EPS*, section 2(b) of the *Charter* is not engaged if there is no substantiated need for public scrutiny (at para. 654). As I do not see that public scrutiny is called for, it is not engaged here.

[para 77] The Applicant has not provided sufficient support to find that section 17(5)(a) applies to the information in the records at issue.

[para 78] The Applicant has not argued that any other provision in section 17 weighs in favour of disclosing the Affected Party's personal information in the records. The only other possible factors that may apply, based on the information before me, are section 17(5)(i) (information originally provided by the applicant), and whether the information in the records is publicly available and/or was already provided to the Applicant by the Public Body, such that it is not an unreasonable invasion of privacy to disclose it to the Applicant in the records at issue.

[para 79] Order F2017-58 and *EPS* refer to news articles, as well as the *Kubusch* decision and transcripts from that proceeding, as publicly available documents that may contain the same or similar information as that which appears in the records at issue. The Applicant provided me with the news article that seems to have been provided in the initial inquiry, and the *Kubusch* decision is available on CanLII. I have reviewed both. The news article is from December 2014, and is primarily about the Affected Party's promotion in light of his criminal convictions. The *Kubusch* decision was issued in 2003. It relates to an application by an accused to quash a search warrant issued in 2002. The Affected Party drafted and swore the Information to Obtain the Warrant (ITO). The decision outlines the steps taken by the Affected Party in obtaining the

warrant. The Court in *Kubusch* was critical of the evidence provided by the Affected Party in the ITO, and the manner with which he obtained the warrant.

[para 80] As discussed above, the Public Body has withheld pages in their entirety where the entire page is not comprised of the Affected Party's personal information, rather than severing the personal information and providing the remaining information to the Applicant. In my view, it is not reasonable to sever the Affected Party's personal information from those pages where that information reveals only that the Affected Party was investigated for alleged misconduct in relation to the *Kubusch* decision. That information is clearly publicly available by way of the decision. It was also discussed more recently in Order F2017-58, as well as the *EPS* decision in which the Affected Party was named as a party. This weighs in favour of disclosing this information.

[para 81] I understand the point made by the Court in *EPS*, that the information may be sufficiently dated such that its disclosure again in this context could unfairly damage the Affected Party's reputation by bringing up past issues that may have since been forgotten. Section 17(5)(h) weighs against disclosure where it could result in unfair damage to the individual's reputation. In this case, these past issues to which the records relate clearly have not been forgotten by the Applicant. The Applicant is not restricted in what it can do with the information obtained from its access request, including disclosing it to the public. However, if the same information is already available to the Applicant, nothing stops it from discussing the same information publicly regardless of the access request. In Order F2014-16, cited by the Court in *EPS* with respect to the age of information as a factor against disclosure (excerpted at paragraph 50 of this Order), the Director of Adjudication concluded that the age of the requested information weighed against disclosure, even though some of the information had been made public in the past. In that case, the information at issue in Order F2014-16 was 23 years old by the time the access request was made, and over 30 years old by the time the Order was issued. There was no indication that the information had been made public more recently than 1983.

[para 82] The Court in *EPS* disagreed with the *extent* to which the adjudicator relied on the public availability of some information in Order F2017-58 to order much of the Affected Party's personal information to be disclosed to the Applicant; the Court did not conclude that this factor was not applicable at all. Further, the Court was not satisfied that all of the personal information in the records was the same as what was already publicly available (at para 621).

[para 83] My finding regarding the public availability of information weighing in favour of disclosure relates to information about the Affected Party being investigated by the Public Body in relation to the *Kubusch* decision. As noted, this information was disclosed reasonably recently by way of the *EPS* decision, which named the Affected Party, and discussed the fact that the Public Body considered criminal charges and disciplinary proceedings against the Affected Party. Given this, there is no purpose for the Public Body to continue to withhold personal information that reveals only the same information that has been disclosed in these decisions.

[para 84] I also find that the newspaper article in the records cannot be withheld under section 17(1). The Public Body's submissions did not address why it believes it would be an unreasonable invasion of privacy to disclose an article from a well-known and well-circulated

newspaper. The copy of the article in the records indicates it was printed from the internet. I acknowledge that the article was published years ago; however, the article does not contain any information not already available to the public by way of the *Kubusch* decision.

[para 85] Lastly, the Public Body continues to withhold the Affected Party's personal information appearing in correspondence between the Public Body and Applicant. The Public Body withheld a letter from the Applicant to the Public Body in its entirety at page 494 of the records. As this letter was clearly provided to the Public Body by the Applicant, it is unclear how it could be an unreasonable invasion of the Affected Party's privacy to provide that same letter back to the Applicant. This page has some handwritten notes that were presumably not part of the original letter sent by the Applicant; however, the notes do not appear to relate to the Affected Party, or otherwise contain third party personal information. The Public Body has not provided any explanation as to how section 17(1) would apply to the handwritten notes; I find that it does not.

[para 86] With respect to the Affected Party's information in this correspondence, the Public Body has not specifically addressed why it continues to withhold the Affected Party's name in correspondence originally provided by the Applicant. Given the context, section 17(5)(i) weighs heavily in favour of disclosing the Applicant's own correspondence to it, without severing the Affected Party's name.

Conclusions regarding section 17

[para 87] The Applicant's arguments with respect to the application of section 17 are limited to the application of section 17(5)(a); I find that factor does not apply. However, I find that the public availability of certain personal information weighs in favour of disclosing personal information that reveals the same information about the Affected Party that was disclosed in the *Kubusch* decision, Order F2017-58, and the subsequent *EPS* decision.

[para 88] Further, section 17(5)(i) weighs in favour of disclosing the Affected Party's name in correspondence originally provided to the Public Body by the Applicant. This factor outweighs those weighing against disclosure.

[para 89] No factor weighs in favour of disclosing any other personal information of the Affected Party in the responsive records.

[para 90] No factor weighs in favour of disclosing personal information of other third parties in the records, where I have found that section 17(1) can apply to that information.

[para 91] I have found that section 17(1) cannot be applied to all of the records in their entirety. The Public Body is to review the records and apply section 17(1) on a line-by-line basis, in accordance with the instructions in this Order.

[para 92] As noted in the discussion of the scope of this reconsideration, the Court ordered the Public Body to disclose pages 510 and 513 to the Applicant (at para. 659(17)). Page 510 is comprised of a letter to the Applicant from the Public Body, with a third party name withheld.

Page 513 is comprised of a letter from the Applicant to the Public Body with the Affected Party's name withheld, and another third party's name withheld. My finding above would apply to the Affected Party's name withheld on page 513; however, as the Court has already ordered the Public Body to disclose that information, I do not need to.

V. ORDER

[para 93] I make this Order under section 72 of the Act.

[para 94] I find that section 17(1) applies to some of the information in the records at issue, but not all. I order the Public Body to review the records in accordance with the instructions in this Order, especially paragraphs 39-43 and 80-92. The Public Body is to provide the Applicant with a new copy of those records containing information to which section 17(1) does not apply.

[para 95] I further order the Public Body to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

_____
Amanda Swanek
Adjudicator