ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2022-40

September 8, 2022

JUSTICE AND SOLICITOR GENERAL

Case File Number 005622

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Summary: The Applicant made a request for access to records in the custody or control of Justice and Solicitor General (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act). He requested his personal information contained in the inboxes of eight provincial prosecutors. He also requested his personal information contained in messenger services, pagers, or cell phones assigned to these provincial prosecutors.

The Public Body originally applied sections 17, 18, 20(1), 24(1), and 27(1)(a) of the FOIP Act to withhold information from the records. The Applicant requested review of the Public Body's severing decisions and the adequacy of its search.

The Public Body subsequently reconsidered its application of exceptions and relied on section 20(1)(g) (disclosure harmful to law enforcement), 24(1) (advice from officials), and 27(1)(b) (privileged information) to sever the information.

The Adjudicator found that some of the information to which the Public Body had applied sections 20(1)(g) and 27(1)(b) was subject to these provisions; however, the majority of the information to which the Public Body had applied these provisions was subject to section 24(1)(a) or (b).

The Adjudicator confirmed many of the Public Body's decisions to withhold information under section 24(1), but reminded the Public Body that this provision applies only to

information that reveals the substance of advice and not to information that reveals only the identities of decision makers, the subject of advice, or the date.

The Adjudicator confirmed most of the Public Body's decisions to withhold information from the Applicant, but ordered it to reconsider its exercise of discretion in cases where the information met the terms of an exception but it was not clear that the purpose of the exception was served by applying it.

In some cases where the Public Body was ordered to reconsider its exercise of discretion, the Adjudicator also ordered it to consider whether section 17(1) of the FOIP Act applied.

The Adjudicator confirmed that the Public Body had conducted a reasonable search for responsive records; however, she noted that the Public Body had not included an attachment to an email that would be responsive; she directed the Public Body to search for this record.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act* R.S.A. 2000, c. F-25, ss. 17, 18, 20, 24, 27, 72

Authorities Cited: AB: Orders 96-017, F2004-026, F2007-021. F2007-029. F2008-016, F2009-026, F2013-17, F2013-51, F2015-29, F2019-02, F2019-07, F2021-08, F2021-34

Cases Cited: *Krieger v. Law Society of Alberta*, 2002 SCC 65 (CanLII), [2002] 3 SCR 372; *Ontario (Public Safety and Security) v. Criminal Lawyers Association,* 2010 SCC 23

I. BACKGROUND

[para 1] The Applicant made a request for access to records in the custody or control of Justice and Solicitor General (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act). He requested his personal information contained in the inboxes of eight provincial prosecutors. He also requested his personal information contained in messenger services, pagers, or cell phones assigned to these provincial prosecutors.

[para 2] The Public Body conducted a search for responsive records. It provided records to the Applicant, but severed information under sections 17 (disclosure harmful to personal privacy), 18 (disclosure harmful to individual or public safety), 20 (disclosure harmful to law enforcement), 24 (advice from officials), and 27 (privileged information).

[para 3] The Applicant requested review by the Commissioner of the Public Body's response to his access request. In particular, he questioned the adequacy of the Public Body's search for responsive records and its decisions to sever information from the records it located.

[para 4] The Commissioner assigned a senior information and privacy manager to investigate and attempt to settle the matter. The Applicant subsequently requested an inquiry.

[para 5] The Commissioner agreed to hold an inquiry and delegated her authority to conduct it to me.

[para 6] In its initial submissions, the Public Body explained that it would no longer rely on section 18 (disclosure harmful to individual and public safety) to the information in the records. The Public Body also clarified that it was relying on section 27(1)(b) to withhold information from the records and not section 27(1)(a). Finally, it stated that it had reconsidered its decision to apply section 20(1)(g) and was now applying this provision to fewer records.

II. ISSUES

ISSUE A: Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act (duty to assist applicants)?

ISSUE B: Did the Public Body properly apply section 20(1)(g) (disclosure harmful to law enforcement) to information in the records?

ISSUE C: Did the Public Body properly apply section 24(1) of the Act (advice from officials) to information in the records?

ISSUE D: Did the Public Body properly apply section 27(1)(b) to information in the records?

III. DISCUSSION OF ISSUES

ISSUE A: Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act (duty to assist applicants)?

[para 7] Section 10(1) of the Act states:

> *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] In Order F2007-029, the Commissioner made the following statements about a public body's duty to assist under section 10(1):

> The Public Body has the onus to establish that it has made every reasonable effort to assist the Applicant, as it is in the best position to explain the steps it has taken to assist the applicant within the meaning of section 10(1).
>
> . . .

Previous orders of my office have established that the duty to assist includes the duty to conduct an adequate search for records. In Order 2001-016, I said:

> In Order 97-003, the Commissioner said that a public body must provide sufficient evidence that it has made a reasonable effort to identify and locate records responsive to the request to discharge its obligation under section 9(1) (now 10(1)) of the Act. In Order 97-006, the Commissioner said that the public body has the burden of proving that it has fulfilled its duty under section 9(1) (now 10(1)).
>
> Previous orders . . . say that the public body must show that it conducted an adequate search to fulfill its obligation under section 9(1) of the Act. An adequate search has two components: (1) every reasonable effort must be made to search for the actual record requested and (2) the applicant must be informed in a timely fashion what has been done.

. . .

In general, evidence as to the adequacy of 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

[para 9] The Public Body provided the following explanation of its search:

Based on the request wording and the time period noted in paragraph 1, all of the eight individuals are Provincial Prosecutors/employees of the Alberta Crown Prosecution Service (ACPS) and their email inboxes needed to be searched for this request.

On August 7, 2015, to facilitate the search, the Public Body provided the applicant's request scope verbatim to the ACPS FOIP Contact asking him to identify and locate all responsive records.

The seven ACPS employees conducted a search for responsive records in keeping with the scope of the FOIP request with the exception of one employee, […], who no longer worked for the Government of Alberta (GoA) at the time this request was processed. As per ACPS FOIP contact, the period between Mr. […] leaving the GoA and when the request was made was long enough that any records were deleted from the GoA servers, thus, inaccessible. These employees were responsible for conducting their own individual search including their Outlook email inboxes, Microsoft Lync conversation history folders, and any other electronic media based on their record keeping systems and the records that were requested. They were also responsible for obtaining whatever technical support they needed to be able to retrieve all responsive records.

The Public Body confirmed with the FOIP contact how the inbox search was completed. The ACPS FOIP contact defined "inbox" for the named individuals as to be read as including any sub-folders that have been created, or emails that are still extant in their deleted or trash folders. Every

> email, even including those “To” or “From” him, should be flagged. More important emails “about” him or that mention his name.
>
> On October 27, 2015, the Public Body acknowledged the receipt of all responsive records from seven of the eight ACPS employees identified. The responsive records were provided by the individuals in a hard copy format directly to either the FOIP Office or the ACPS FOIP Contact who in turn provided them to the FOIP Office.

[para 10] In his request for review, the Applicant questioned whether the Public Body had searched for all responsive records. In his reply submissions, he stated:

> Further to the public body's response and pursuant to my requirement that I provide a response as yourself and the public body requested of me, please kindly know, briefly, that I believe they, the public body, may have misapplied and misinterpreted certain definitions, including as it relates to the term 'inbox', and did not search other folders such as the sent, deleted or draft folders. The public body also does not properly articulate how the searches were performed in keeping with provincial privacy legislation and its requirements and under what privacy officer's or professional's supervision or safeguards.

[para 11] From my review of the records the Public Body located and the Public Body’s account of its search, I am satisfied that, for the most part, it conducted a reasonable search for responsive records and met its duty to assist the Applicant. However, I note that record 418 contains reference to a memo that is being forwarded to the email inbox of one of the prosecutors whose email inbox is the subject of the Applicant’s access request. Although an image of the memo appears on the record, the memo itself does not appear among the records. The Public Body has not addressed its search for the memo; however, record 418 constitutes some evidence supporting the idea that at one time, a responsive memo in the prosecutor’s inbox existed that has not yet been produced.

[para 12] With respect to records other than the memo referenced on record 418, the Public Body has explained how its search was conducted and the areas it searched. It has explained why it is unable to produce records from the email account of one of the provincial prosecutors whose records were requested – the provincial prosecutor left its service in the past and the email account was destroyed prior to the search. The records themselves indicate that they were retrieved from the sent items folder in addition to the inbox. The records, in some cases, indicate that their origin is a cell phone.

[para 13] With one exception, there is no reason to expect that any additional records exist beyond what the Public Body has located. The Applicant has not adduced any evidence to support his position that further records exist or that the search was not conducted in a reasonable manner.

[para 14] For the reasons above, I find that the Public Body has established that it conducted a reasonable search for responsive records. However, I must direct the Public Body to conduct a search for the memo referenced on record 418. If it locates the memo, it must decide whether to give the Applicant access to it. If it is unable to locate the memo, it should provide an account of the search it conducted for the memo in keeping with the requirements set out in Order F2007-029.

ISSUE: Did the Public Body properly sever information from the records?

[para 15] I have decided that I will review all the Public Body's severing decisions at once, rather than reviewing each instance of severing under sections 20(1)(g), 27(1)(b), 24(1)(a) and (b). This is because the Public Body often applied more than one provision to the same information, and this will enable me to address the same information once rather than multiple times.

[para 16] I have also added the issue of whether section 17(1) (disclosure harmful to personal privacy) applies to information in the records the Public Body has withheld from the Applicant as this provision is mandatory when it applies.

[para 17] I will begin by summarizing orders of this office interpreting the relevant provisions and then turn to the Public Body's severing decisions.

Section 20(1)(g)

[para 18] Section 20(1)(g) authorizes a public body to withhold information relating to the exercise of prosecutorial discretion from an applicant. It states:

> *20(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*
>
> > *(g) reveal any information relating to or used in the exercise of prosecutorial discretion […]*

[para 19] As the Public Body notes, in *Krieger v. Law Society of Alberta*, 2002 SCC 65 (CanLII), [2002] 3 SCR 372 the Supreme Court of Canada described the scope of prosecutorial discretion, when it said:

> As discussed above, these powers emanate from the office holder's role as legal advisor of and officer to the Crown. In our theory of government, it is the sovereign who holds the power to prosecute his or her subjects. A decision of the Attorney General, or of his or her agents, within the authority delegated to him or her by the sovereign is not subject to interference by other arms of government. An exercise of prosecutorial discretion will, therefore, be treated with deference by the courts and by other members of the executive, as well as statutory bodies like provincial law societies.
>
> Without being exhaustive, we believe the core elements of prosecutorial discretion encompass the following: (a) the discretion whether to bring the prosecution of a charge laid by police; (b) the discretion to enter a stay of proceedings in either a private or public prosecution, as codified in the *Criminal Code*, R.S.C. 1985, c. C-46, ss. 579 and 579.1; (c) the discretion to accept a guilty plea to a lesser charge; (d) the discretion to withdraw from criminal proceedings altogether: *R. v. Osborne* (1975), 1975 CanLII 1357 (NB CA), 25 C.C.C. (2d) 405 (N.B.C.A.); and (e) the discretion to take control of a private prosecution: *R. v. Osiowy* (1989), 1989 CanLII 4780 (SK CA), 50 C.C.C. (3d) 189 (Sask. C.A.). While there are other discretionary decisions, these are the core of the delegated sovereign authority peculiar to the office of the Attorney General.

> Significantly, what is common to the various elements of prosecutorial discretion is that they involve the ultimate decisions as to whether a prosecution should be brought, continued or ceased, and what the prosecution ought to be for. Put differently, prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it. Decisions that do not go to the nature and extent of the prosecution, i.e., the decisions that govern a Crown prosecutor's tactics or conduct before the court, do not fall within the scope of prosecutorial discretion. Rather, such decisions are governed by the inherent jurisdiction of the court to control its own processes once the Attorney General has elected to enter into that forum.

[para 20] In Order F2007-021, the Adjudicator determined that not all information in a prosecutor's file will relate to the exercise of prosecutorial discretion. He said:

> However, I do not accept the Public Body's statements that "any information in a Crown prosecutor's file may reasonably be expected to relate to the exercise of prosecutorial discretion and therefore may be protected from disclosure" and that "the simple presence of records in the file that may contain such information engages the provisions of this exception." To accept these assertions would be to judge information by its location rather than its substance. While it may be the case that most or all information in a Crown prosecutor's file usually falls under section 20(1)(g) of the Act, information must still be reviewed on a record-by-record basis.
>
> The present inquiry illustrates the need to review records individually. Some of the documents (pages 622-638) are not ones routinely found in a Crown prosecutor's file. They are a letter of complaint, internal memoranda about that letter, and a briefing note. On review of the records, I agree with the Public Body that the records fall within the scope of section 20(1)(g) – but this is due to their content and not the fact that they are on the file. I can envisage the possibility of records making their way onto a Crown prosecutor's file but having nothing to do with prosecutorial discretion.
>
> In deciding that pages 622-638 of the Crown prosecutor's file fall within section 20(1)(g) of the Act, I have borne in mind the breadth of the section, in that information needs only to "relate to" the exercise of prosecutorial discretion. I have also borne in mind the B.C. definition cited above, which indicates that, in the context of access legislation, the exercise of prosecutorial discretion extends to the duty or power to conduct a hearing or trial.

[para 21] Previous orders of this office have held that information need only be reasonably expected to *relate* to the exercise of prosecutorial discretion for section 20(1)(g) to apply. Order F2007-021 holds that if information was available to the Crown prosecutor when making the decision to exercise prosecutorial discretion, and is not extraneous, there is a relationship between the information and the exercise of prosecutorial discretion such that the information relates to the exercise of prosecutorial discretion.

[para 22] The Applicant argues that provincial prosecutors do not exercise prosecutorial discretion; rather, prosecutorial discretion is exercised only by Crown prosecutors. The Public Body disagrees with this position. In its rebuttal submissions, it stated:

> Section 20(1)(g) provision of the FOIP Act allows a public body to refuse to disclose information related to the exercise of discretion by prosecutor with regard to prosecuting an offence. Prosecutorial discretion means the exercise of a prosecutor's discretion related to his or her power to prosecute, negotiate a plea, withdraw charges, enter a stay of proceedings, and appeal a decision

> or verdict. The exercise of prosecutorial discretion may be with respect to offences under the Criminal Code (Canada) and any other enactment of Canada for which the Minister of Justice and Attorney General for Alberta may initiate and conduct a prosecution. Prosecutorial discretion may also be exercised with respect to offences under an enactment of Alberta, including prosecution of provincial regulatory offences. In addition, section 20(1)(g) of the FOIP act does not interpret that this section only applies to lawyers. Thus, the provincial prosecutors exercise prosecutorial discretion in the course of their responsibilities.

[para 23] The Public Body argues that it is the role of the Attorney General to bring and manage prosecutions. Decisions made to prosecute, negotiate a plea or accept a plea, to enter a stay or to appeal a verdict are all exercises of the Attorney General's prosecutorial discretion. The Attorney General delegates this role, and the discretion necessary to perform it, to prosecutors – both Crown prosecutors and provincial prosecutors. I agree with the Public Body that provincial prosecutors may exercise prosecutorial discretion. While a provincial prosecutor may not exercise discretion on behalf of the Attorney General to the same extent that a Crown prosecutor does, it is clear that provincial prosecutors apply discretion to withdraw or pursue charges and negotiate pleas to charges. These functions are within the authority of the Attorney General and are performed by provincial prosecutors as agents of the Attorney General and are exercises of prosecutorial discretion.

[para 24] The Public Body states that it reconsidered its decision to apply section 20(1)(g) to some of the records:

> Section 20(1)(g) was applied to the page numbers 62 to 63, 297 to 300, 365 to 372, 390, 407 to 410, 417 to 418, 437 to 442, 472 to 485, 488 to 493, 499 to 501, 519 to 524, 532 to 537 and 546.
>
> Upon consultation with ACPS, the Public Body claims that section 20(1)(g) was incorrectly applied to the page numbers 370, 390, 407, 408, 409, 441, 442 and 536. As such, the Public Body reconsiders its application and section 20(1)(g) no longer applies to these pages.

[para 25] The Public Body no longer relies on section 20(1)(g) to sever information from records 370, 390, 407, 408, 409, 441, 442, and 536. It continues to rely on this provision and section 27(1)(b) to withhold records 62, 63, 297, 298, 299, 300, 365, 366, 367, 368, 369, 371, 372, 410, 417 – 418, 437 – 442, 472 – 485, 488 – 493, 499 – 501, 519 – 524, 532, 533, 534, 535, 537, and 546 from the Applicant.

Section 27(1)(b)

[para 26] Section 27(1)(b) states:

> *27(1) The head of a public body may refuse to disclose to an applicant*
>
> *(b) information prepared by or for*
>
> *(i) the Minister of Justice and Solicitor General,*
>
> *(ii) an agent or lawyer of the Minister of Justice and Solicitor General, or*

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

in relation to a matter involving the provision of legal services […]

[para 27] Section 27(1)(b) applies to information that is prepared by or "on behalf of" a lawyer in relation to a matter involving the provision of legal services, as opposed to information that is sent or addressed to a lawyer.

[para 28] In Order F2013-51, the Director of Adjudication reviewed previous orders of this office and held that the information to which section 27(1)(b) applies is substantive information prepared by or on behalf of a lawyer so that the lawyer may provide legal services.

> Applying the reasoning in Orders 99-022, F2010-007, and F2008-028, information "prepared for an agent or lawyer of a public body" is substantive information prepared on behalf of an agent or lawyer so that the agent or lawyer may provide legal services. Information sent to an agent or lawyer of a public body in circumstances where the sender is seeking to obtain legal services, is not captured by section 27(1)(b), as the information is not prepared by or on behalf of the agent or lawyer. It also follows that section 27(1)(b) does not cover the situation where a person, even a person who is one of the persons listed in subclauses i – iii, creates information that is connected in some way with the provision of legal services but is not created for that purpose. For example, section 27(1)(b) does not apply to information that merely refers to or describes legal services without revealing their substance. The term "agent" does not refer to any employee of a public body, but to an individual who is acting as an agent of a public body under particular legislation, or in the course of a specific matter or proceeding.
>
> I am unable to identify information falling within the terms of section 27(1)(b) among the records to which the Public Body has applied section 27(1)(b). There is no information in the records that could be said to have been prepared by or on behalf of an agent or lawyer of a public body in order that the agent or lawyer may provide legal services.

[para 29] I agree with the foregoing interpretation.

Sections 24(1)(a) and (b)

[para 30] In Order F2015-29, the Director of Adjudication interpreted sections 24(1)(a) and (b) of the FOIP Act and described the kinds of information that fall within the terms of these provisions. She said:

> The intent of section 24(1)(a) is to ensure that internal advice and like information may be *developed* for the use of a decision maker without interference. So long as the information described in section 24(1)(a) is developed by a public body, or for the benefit or use of a public body or a member of the Executive Counsel, by someone whose responsibility it is to do so, then the information falls under section 24(1)(a).
>
> A consultation within the terms of section 24(1)(b) takes place when one of the persons enumerated in that provision solicits information of the kind subject to section 24(1)(a) regarding that decision or action. A deliberation for the purposes of section 24(1)(b) takes place when a decision maker (or decision makers) weighs the reasons for or against a particular decision or action. Section 24(1)(b) protects the decision maker's request for advice or views to assist him or her in making the decision, and any information that would otherwise reveal the considerations involved in making the decision. Moreover, like section 24(1)(a), section 24(1)(b) does not apply

> so as to protect the final decision, but rather, the process by which a decision maker makes a decision.

[para 31] I agree with the analysis of the Director of Adjudication as to the purpose and interpretation of sections 24(1)(a) and (b), and agree these provisions apply to information generated when a decision maker asks for advice regarding a decision, or evaluates a course of action or it is necessary to provide advice so that decisions to guide a public body's policy may be made. Section 24(1) is intended to protect the processes by which public bodies make decisions from interference.

[para 32] In Order F2004-026, former Commissioner Work determined that sections 24(1)(a) and (b) do not apply to peripheral information on a record, but only to the kinds of information specified in these provisions. He said:

> I acknowledge there may be circumstances where a public servant's participation in certain kinds of discussions may give rise to criticism. Despite this, I do not accept that the words of section 24(1) are intended to shield from exposure the very fact that consultations or deliberations between particular officers or employees took place, or took place about a particular topic, on the basis that this may dissuade public servants from participating in discussions of particular subjects. Where a person consults or is consulted on a given subject as a function of their office, and the application of section 24 is claimed on the basis that they are officers or employees of a public body, the very fact they participated in the consultation cannot, in my view, be withheld under section 24 unless this fact also reveals the substance of the consultation. If there is something in such a disclosure that could give rise to an unreasonable invasion of the personal privacy of such employees, that is a consideration to be addressed under section 17, not section 24. I reject the Public Body's argument that sections 24(1)(a) and 24(1)(b) permit withholding of a document or a portion of a document that would reveal only that an individual participated in a discussion. This reasoning applies as well to the parts of the correspondence that contain non-substantive content (for example, cover documents that convey the advice, or parts of the bodies of e-mail exchanges indicating only that comments are being sought or provided).
>
> The same point applies to subject matter or timing of the consultation. The exceptions in section 24(1)(a) and 24(1)(b) do not apply to the subject line or other indicator of the topic (or the date it took place), unless they would allow an accurate inference to be drawn about the substance of the advice or consultations. In Order 96-012, the former Commissioner held (at paragraph 31) that "... a summary statement of the topic of a consultation or deliberation, as opposed to a summary of the consultation or deliberation in itself, is also not exempt." I note as well that in the present case, given the nature of the request, it is clear that this inquiry is about information relating to a particular topic, so that disclosure of the subject line in much of the correspondence does not reveal information that cannot be derived from the very fact the documents are responsive. (However, this reasoning does not necessarily apply to headings of a more specific nature. A heading or sub-heading in a document can itself constitute advice – for example, where the need to address a particular matter or matters is part of the advice, or where part of the advice consists in developing categories. In such cases, headings may be withheld because they are substantive components of the advice.)
>
> In defining the scope of the exceptions in sections 24(1)(a) and 24(1)(b), I have in mind that these exceptions are broader than those in parallel provisions in some other jurisdictions. The legislation in Ontario and British Columbia, for example, excepts only "advice and recommendations". In Alberta, "advice, proposals, recommendations, analyses or policy options" are all excepted, as well as "consultations or deliberations". Thus, in my view, the exceptions in section 24(1)(b) embrace the substantive parts of communications that seek an opinion as to the appropriateness of particular proposals respecting a course of action to be decided, including any background materials that inform the advisors about the matters relative to which advice is being sought, and are thus inextricably interwoven with the questions being asked ("consultations"). This includes

> correspondence between government departments and third-party advisors, which was conveyed by a department to the Public Body for the purpose of providing background to enable the giving of advice. They also embrace the reasons behind advice - "the reasons for and against an action" - as well as the advice itself, and possibly also the presentation of available alternatives ("policy options"). In my view, "deliberations" also includes comments that indicate or reveal reliance on the knowledge or opinions of particular persons, including those of the person making the communication. However, these wider exceptions do not encompass non-substantive material which merely indicates that someone sought or gave advice or had a discussion about a course of action, without revealing substantive elements of the request or the advice, or the content of the discussion.
>
> I am strengthened in the view that sections 24(1)(a) and 24(1)(b) embrace only substantive information by reference to the remainder of the subsections of section 24(1). Each of these deals with substantive information. I note that some of them speak expressly of "contents of…", whereas subsections (a) and (b) do not. However, in each of the subsections that speak expressly of "contents of", a particular type of document – draft legislation or orders, agendas or minutes, and formal research or audit reports – is specified. In my view the inclusion of "contents of" is meant to ensure that not only the specified documents, but also information from other sources about what is in the specified documents, may be excluded. Where a particular type of document is not specified (as in subsections (a) and (b)), the added words are not necessary.

[para 33] In the foregoing order, former Commissioner Work determined that entire records cannot be withheld from an applicant under sections 24(1)(a) or (b) if only some of the information the record contains falls within the terms of these provisions. Information as to who gave advice, or the fact that advice was sought and the subject of it, cannot be withheld under section 24(1)(a) or (b) unless the information also reveals what was advised, or the questions a decision maker sought to have answered.

Section 17

[para 34] Section 17 sets out the circumstances in which a public body may or must not disclose the personal information of a third party in response to an access request. It states, in part:

> *17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.*
>
> *(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if*
>
> > *[…]*
> >
> > *(f) the disclosure reveals financial and other details of a contract to supply goods or services to a public body […]*
>
> *[…]*
>
> *(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*

[…]

> *(b) the personal information is an identifiable part of a law enforcement record, except to the extent that the disclosure is necessary to dispose of the law enforcement matter or to continue an investigation,*
>
> *[…]*
>
> *(g) the personal information consists of the third party's name when*
>
> > *(i) it appears with other personal information about the third party, or*
> >
> > *(ii) the disclosure of the name itself would reveal personal information about the third party[…]*

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

> *(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,*
>
> *(b) the disclosure is likely to promote public health and safety or the protection of the environment,*
>
> *(c) the personal information is relevant to a fair determination of the applicant's rights,*
>
> *(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,*
>
> *(e) the third party will be exposed unfairly to financial or other harm,*
>
> *(f) the personal information has been supplied in confidence,*
>
> *(g) the personal information is likely to be inaccurate or unreliable,*
>
> *(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and*
>
> *(i) the personal information was originally provided by the applicant.*

[para 35] Section 17 does not say that a public body is never allowed to disclose third party personal information. It is only when the disclosure of personal information

would be an unreasonable invasion of a third party's personal privacy that a public body must refuse to disclose the information to an applicant under section 17(1). Section 17(2) (not reproduced) establishes that disclosing certain kinds of personal information is not an unreasonable invasion of personal privacy.

[para 36] When the specific types of personal information set out in section 17(4) are involved, disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. To determine whether disclosure of personal information would be an unreasonable invasion of the personal privacy of a third party, a public body must consider and weigh all relevant circumstances under section 17(5), (unless section 17(3), which is restricted in its application, applies). Section 17(5) is not an exhaustive list and any other relevant circumstances must be considered.

[para 37] Section 17(1) requires a public body to withhold information once all relevant interests in disclosing and withholding information have been weighed under section 17(5) and the conclusion is reached that it would be an unreasonable invasion of the personal privacy of a third party to disclose his or her personal information.

[para 38] Once the decision is made that a presumption set out in section 17(4) applies to information, it is necessary to consider all relevant factors under section 17(5) to determine whether it would, or would not, be an unreasonable invasion of a third party's personal privacy to disclose the information.

Exercise of Discretion

[para 39] In *Ontario (Public Safety and Security) v. Criminal Lawyers Association,* 2010 SCC 23, the Supreme Court of Canada commented on the authority of Ontario's Information and Privacy Commissioner to review a head's exercise of discretion. The Court noted:

> The Commissioner's review, like the head's exercise of discretion, involves two steps. First, the Commissioner determines whether the exemption was properly claimed. If so, the Commissioner determines whether the head's exercise of discretion was reasonable.
>
> In IPC Order P-58/May 16, 1989, Information and Privacy Commissioner Linden explained the scope of his authority in reviewing this exercise of discretion:
>
> > In my view, the head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. It is my responsibility as Commissioner to ensure that the head has exercised the discretion he/she has under the *Act*. While it may be that I do not have the authority to substitute my discretion for that of the head, I can and, in the appropriate circumstances, I will order a head to reconsider the exercise of his/her discretion if I feel it has not been done properly. I believe that it is our responsibility as the reviewing agency and mine as the administrative decision-maker to ensure that the concepts of fairness and natural justice are followed. [Emphasis in original]
>
> Decisions of the Assistant Commissioner regarding the interpretation and application of the *FIPPA* are generally subject to review on a standard of reasonableness (see *Ontario (Minister of*

> *Finance) v. Higgins* (1999), 1999 CanLII 1104 (ON CA), 118 O.A.C. 108, at para. 3, leave to appeal refused, [2000] 1 S.C.R. xvi; *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 1999 CanLII 19925 (ON CA), 46 O.R. (3d) 395 (C.A.), at paras. 15-18; *Ontario (Attorney General) v. Ontario (Freedom of Information and Protection of Privacy Act Adjudicator)* (2002), 2002 CanLII 30891 (ON CA), 22 C.P.R. (4th) 447 (Ont. C.A.), at para. 3).
>
> The Commissioner may quash the decision not to disclose and return the matter for reconsideration where: the decision was made in bad faith or for an improper purpose; the decision took into account irrelevant considerations; or, the decision failed to take into account relevant considerations (see IPC Order PO-2369-F/February 22, 2005, at p. 17).
>
> In the case before us, the Commissioner concluded that since s. 23 was inapplicable to ss. 14 and 19, he was bound to uphold the Minister's decision under those sections. Had he interpreted ss. 14 and 19 as set out earlier in these reasons, he would have recognized that the Minister had a residual discretion under ss. 14 and 19 to consider all relevant matters and that it was open to him, as Commissioner, to review the Minister's exercise of his discretion.
>
> The Commissioner's interpretation of the statutory scheme led him not to review the Minister's exercise of discretion under s. 14, in accordance with the review principles discussed above.
>
> Without pronouncing on the propriety of the Minister's decision, we would remit the s. 14 claim under the law enforcement exemption to the Commissioner for reconsideration. The absence of reasons and the failure of the Minister to order disclosure of any part of the voluminous documents sought at the very least raise concerns that should have been investigated by the Commissioner. We are satisfied that had the Commissioner conducted an appropriate review of the Minister's decision, he might well have reached a different conclusion as to whether the Minister's discretion under s. 14 was properly exercised.

[para 40] The Supreme Court of Canada confirmed the authority of the Information and Privacy Commissioner of Ontario to quash a decision not to disclose information pursuant to a discretionary exception and to return the matter for reconsideration by the head of a public body. The Court also considered the following factors to relevant to the review of discretion:

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

[para 41] The fact that the Court remitted the issue of whether the Head of the Public Body had properly exercised discretion to withhold information indicates that a failure by the Commissioner to consider whether a head properly exercised discretion is a reviewable error.

[para 42] While this case was decided under Ontario's legislation, in my view, it has equal application to Alberta's legislation. Section 72(2)(b) of Alberta's FOIP Act establishes that the Commissioner may require the head to reconsider a decision to refuse access in situations when the head is authorized to refuse access. A head is authorized to

withhold information if a discretionary exception applies to information. Section 72(2)(b) provision states:

> *72(2) If the inquiry relates to a decision to give or to refuse to give access to all or part of a record, the Commissioner may, by order, do the following:*
>
> > *(b) either confirm the decision of the head or require the head to reconsider it, if the Commissioner determines that the head is authorized to refuse access […]*

[para 43] In Order 96-017, the former Commissioner reviewed the law regarding the Commissioner's authority to review the head of a public body's exercise of discretion and concluded that section 72(2)(b), (then section 68(2)(b)), was the source of that authority. He commented on appropriate applications of discretion and described the evidence necessary to establish that discretion has been applied appropriately.

> A discretionary decision must be exercised for a reason rationally connected to the purpose for which it's granted. The court in *Rubin* stated that "Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act..."
>
> The court rejected the notion that if a record falls squarely within an exception to access, the applicant's right to disclosure becomes solely subject to the public body's discretion to disclose it. The court stated that such a conclusion fails to have regard to the objects and purposes of the legislation: (i) that government information should be available to the public, and (ii) that exceptions to the right of access should be limited and specific.
>
> In the court's view, the discretion given by the legislation to a public body is not unfettered, but must be exercised in a manner that conforms with the principles mentioned above. The court concluded that a public body exercises its discretion properly when its decision promotes the policy and objects of the legislation.
>
> The Information and Privacy Commissioners in both British Columbia and Ontario have also considered the issue of a public body's proper exercise of discretion, both in the context of the solicitor-client exception and otherwise. In British Columbia, the Commissioner has stated that the fundamental goal of the information and privacy legislation, which is to promote the accountability of public bodies to the public by creating a more open society, should be supported whenever possible, especially if the head is applying a discretionary exception (see Order No. 5-1994, [1994] B.C.I.P.C.D. No. 5)…
>
> …
>
> In Ontario Order 58, [1989] O.I.P.C. No. 22, the Commissioner stated that a head's exercise of discretion must be made in full appreciation of the facts of the case and upon proper application of the applicable principles of law. In Ontario Order P-344, [1992] O.I.P.C. No. 109, the Assistant Commissioner has further stated that a "blanket" approach to the application of an exception in all cases involving a particular type of record would represent an improper exercise of discretion.
>
> I have considered all the foregoing cases which discuss the limits on how a public body may exercise its discretion. In this case, I accept that a public body must consider the objects and

> purposes of the Act when exercising its discretion to refuse disclosure of information. It follows that a public body must provide evidence about what it considered.

[para 44] In that case, the Commissioner found that the Public Body had not made any representations or provided any evidence in relation to its exercise of discretion. Further, he determined that the head must consider the purpose of the exception in the context of the public interest in disclosing information when exercising discretion. As the head of the Public Body had not provided any explanation for withholding information, the Commissioner ordered the head to reconsider its exercise of discretion to withhold information under a discretionary exception.

[para 45] Similarly, in Order F2004-026, the Commissioner said:

> In my view a Public Body exercising its discretion relative to a particular provision of the Act should do more than consider the Act's very broad and general purposes; it should consider the purpose of the particular provisions on which it is relying, and whether withholding the records would meet those purposes in the circumstances of the particular case. I find support for this position in orders of the British Columbia Information and Privacy Commissioner. Orders 325-1999 and 02-38 include a list of factors relevant to the exercise of discretion by a public body. In addition to "the general purposes of the legislation (of making information available to the public) the list includes "the wording of the discretionary exception and the interests which the section attempts to balance". It strikes me as a sound approach that the public body must have regard to why the exception was included, and whether withholding the information in a given case would meet that goal.

[para 46] Once it is determined that a discretionary exception to disclosure applies, a public body must determine whether it will withhold the information or release it to the applicant. In making this decision, the public body will weigh any applicable public and private interests, including the purpose of the provision, in withholding or disclosing the information. The Commissioner will review the public body's exercise of discretion. If the Commissioner determines that the public body failed to consider a relevant factor or took into consideration irrelevant factors, or there is no obvious purpose served by withholding information, the Commissioner will direct the public body to reconsider its exercise of discretion.

The circumstance when a public body relies on a discretionary exception that does not apply to withhold information, but the information itself and the public body's reasons for withholding the information support the application of another exception

[para 47] In the body of this order, below, I find in several instances that the Public Body applied sections 20(1)(g) and 27(1)(b) incorrectly to information to which section 24(1) applies, and for reasons that align with the purpose of that provision.

[para 48] In Order F2008-016, the Adjudicator addressed the situation where a public body applied an inapplicable exception, but its reasons and the evidence of the records supported the application of another exception. She said;

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

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

The same is true where background information was provided by legal counsel at the EPS to other legal counsel employed by the EPS. In those instances I find that section 27(1)(b) would apply. As the Commissioner stated in Order F2004-026:

> I have noted the Applicant's point that the Public Body cannot have been properly exercising its discretion under a particular provision when it did not even have that provision in mind. I agree that at the time of the initial response, there was a defect in the way the Public Body exercised its discretion, in that it did not have precisely the right provisions in mind for some of the documents. However, as I noted earlier, the principle behind the provisions…was the same for both the provisions initially referenced, and the later ones. This detracts significantly from the idea that the failure to name the right provisions at a particular point in time should preclude the ability to withhold documents in the final result. (Order F2004-026 at paragraph 52)

In Order F2004-026, the Commissioner was faced with a situation where the public body raised an exclusion late in the process and not at the time of the initial response to the Applicant. I understand that allowing the EPS to withhold information under section 27(1)(b) and 27(1)(c) of the Act takes this analysis a step further, but I feel it is appropriate to do so in these limited circumstances, for the same principles as those on which the Commissioner relied on in Order F2004-026.

As section 27(1) is a discretionary exception, even if section 27(1) applies to records, a public body may choose to apply the exception or not. After deciding that the discretionary exception applies, a public body must consider whether it should apply the exception nonetheless. In determining this, a public body must:

1. consider the object and purpose of the Act;
2. show that it took all relevant factors into consideration;
3. exercise its discretion in good faith, for a proper purpose and based only on relevant considerations.

(Order F2007-004 paragraphs 18-22)

In all cases where I have found that the EPS ought to have applied section 27(1)(b) and 27(1)(c) of the Act to the records, I find that it did so to protect necessary confidentiality relative to the provision of advice and legal services and I find that this is a proper use of the EPS' discretionary power under sections 27(1)(b) and 27(1)(c) of the Act. I make this finding even though the EPS ultimately named the wrong sections as the basis for its severing and withholding of the information.

[para 49] The Adjudicator in the foregoing case determined that if the nature of the information is subject to an exception other than the one the Public Body applied, and the Public Body's reasons for withholding the information are consistent with the purposes of the provision that is ultimately found to apply, then it is appropriate to confirm the Public Body's application of the provision that does apply. This order has been followed in orders of this office, including: F2013-17, F2019-07. F2021-08, and F2021-34. I agree with the Adjudicator's reasoning in Order F2008-016. I also note that the exceptions to

disclosure in the FOIP Act reflect public interests in withholding information. A public interest in withholding information that plainly applies should not be overlooked simply because a public body did not apply it.

[para 50] I turn now to the question of whether the Public Body properly applied exceptions to disclosure to the records at issue.

Records 62 – 63

[para 51] The Public Body withheld records 62 – 63 in their entirety. These records contain an email of proposed traffic ticket resolutions written by the Applicant as an agent for his then clients. These were forwarded in an email by a provincial prosecutor to a Crown prosecutor who was assigned to one of the matters listed by the Applicant.

[para 52] I find that the emails written by the two prosecutors do not relate to the exercise of prosecutorial discretion. The email written by the provincial prosecutor simply forwards the Applicant's list of proposed resolutions while the email from the Crown prosecutor indicates that he requires more information.

[para 53] The Applicant's proposed resolutions could be considered to relate to the exercise of prosecutorial discretion, assuming that the prosecutors assigned to these cases reviewed the proposals and determined whether they would accept pleas on the terms proposed by the Applicant on behalf of his clients, or not.

[para 54] I turn now to the exercise of discretion to apply section 20(1)(g) to the Applicant's proposed resolution. The Public Body states that it exercised its discretion in favor of withholding information it considered to relate to the exercise of prosecutorial discretion in all cases for the following reasons:

> In support of this argument, the Supreme Court states the following in Krieger v. Law Society of Alberta, [2002] 3 SCR 372, 2002 SCC 65 (CanLII) para 32
>
> *"The quasi-judicial function of the Attorney General cannot be subjected to interference from parties who are not as competent to consider the various factors involved in making a decision to prosecute. To subject such decisions to political interference, or to judicial supervision, could erode the integrity of our system of prosecution."*
>
> For these reasons, the Public Body submits that the above information establishes the following facts on the balance of probabilities: (1) prosecutorial discretions was exercised, (2) there is information that relates to or was used in this exercise of that discretion, and (3) disclosure or the information in the records withheld under section 20(1)(g) could reasonably be expected to reveal this information.

The Public Body's argument does not address the fact that the Applicant is the author of the letter to which it has applied section 20(1)(g).

[para 55] Not all records that may relate to, or have been used in, the exercise of discretion, by virtue of being available to a prosecutor when making a decision, will reveal anything about how the prosecutor exercised discretion. As a result, disclosure

may not result in interference with prosecutorial discretion. Parties expect prosecutors to review their plea proposals and potentially discuss them with the parties; that is, they expect the plea proposal to be used in the exercise of discretion. It is unclear what harm to prosecutorial independence could result from disclosure to the Applicant of the fact that he asked prosecutors to agree to proposals on behalf of clients. Moreover, I note that throughout the records, prosecutors responded to the Applicant's plea proposals and explained why they did not agree with them, as part of negotiations. In other words, the prosecutors explained why they exercised their discretion in a particular way. As a result, I am unable to conclude that any harm could come to prosecutorial discretion if the Applicant's proposals were to be disclosed.

[para 56] The Public Body appears to argue that if section 20(1)(g) applies, interference with, or harm to, prosecutorial discretion may be presumed. I am unable to accept this argument. I note that the FOIP Act creates exceptions to the application of section 20(1)(g). For example, section 20(2) establishes that section 20(1)(g) may not be applied to information that has been in existence for ten years or more. In other words, even if the information reveals the reasons for the exercise of discretion, it may not be withheld if the information is more than ten years old. Section 20(6) authorizes the head of a public body to disclose the reasons for not conducting a prosecution to a victim or the victim's family. While neither factor applies in this case, these provisions make it clear that the Legislature did not intend the application of section 20(1)(g) to be the sole factor to be considered in exercising discretion under this provision.

[para 57] I am unable to agree with the Public Body that it exercised its discretion in relation to section 20(1)(g) appropriately when it withheld the plea proposals originally submitted to the Applicant on behalf of clients from him. I must therefore direct the Public Body to reconsider its exercise of discretion.

[para 58] Even though I find that the Public Body must reconsider its application of section 20(1)(g), I believe that it must also consider whether section 17 (disclosure harmful to personal privacy) applies to information about the Applicant's clients where it appears in the records. Section 17(1) is a mandatory exception when it applies.

[para 59] The Applicant acted as agent for clients and submitted plea proposals on their behalf in that capacity; however, he made the access request on his own behalf. While it is true that the Applicant supplied information about his clients, which is a factor weighing in favor of disclosure under section 17(5)(i), it also appears to be the case that the information formed part of a "law enforcement record" within the terms of section 17(4)(b). This provision presumes harm to personal privacy when it applies. I leave it to the Public Body to consider whether any other factors apply and weigh for or against disclosure in making its decision.

[para 60] To conclude, I find that section 20(1)(g) does not apply to the emails sent by the Crown prosecutor and the provincial prosecutor that appear on records 62 – 63, as the information in these emails does not relate to the exercise of prosecutorial discretion in a matter and was not used for this purpose. I find that the Applicant's letter of

proposed resolutions was likely used by prosecutors in exercising prosecutorial discretion. However, I find that the Public Body has not demonstrated that it properly exercised its discretion when it withheld the Applicant's proposal under section 20(1)(g) and so I must direct it to make a new decision. In addition, the Public Body has not considered the application of section 17(1) to information in the records, and as this provision is mandatory, I direct it to do so.

Records 173 – 175

[para 61] The Public Body applied sections 24(1)(a) and (b) to records 173 – 175 in their entirety. Records 173 – 175 contain email exchanges between an assistant chief Crown prosecutor and prosecutors. The assistant chief Crown prosecutor wrote the prosecutors in order to gather information and confirm facts to make a decision. While records 173 – 175 do not refer to a decision, I infer from the entirety of the records at issue, that the assistant chief Crown prosecutor was making a policy decision regarding an issue that had arisen. I find that the bodies of the emails are subject to section 24(1)(b), as they reveal consultations and deliberations.

[para 62] While I find that the bodies of the emails are subject to section 24(1)(b), I find that the remaining information in the emails is not subject to sections 24(1)(a) or (b). I will direct the Public Body to disclose the remaining information in the emails, such as the subject lines, the dates, the identities of the senders and the identities of the recipients.

[para 63] I am satisfied that the Public Body properly exercised its discretion when it elected to withhold the information in the bodies of the emails from the Applicant. It is conceivable that disclosure of this information could result in interference with the processes by which the Public Body develops policy. Protecting the decision-making process from interference is one of the purposes of section 24(1).

Records 297 - 300

[para 64] Records 297 – 300 contain emails between prosecutors. I am unable to say that information of this kind relates to, or was used in the exercise of prosecutorial discretion, as the emails do not refer to a prosecutor's exercise of discretion in a matter, but discuss a general problem that had arisen affecting multiple prosecutions conducted by several prosecutors. I find that section 27(1)(b) does not apply to these records as they were not prepared for a prosecutor's use in a matter.

[para 65] The emails contain advice and analysis regarding a problem affecting prosecutions generally. While the Public Body did not apply section 24(1)(a) or (b) to the bodies of the emails in these records it is clear from the content of the records that these provisions apply. Moreover, it is conceivable that the ability of the prosecutors to discuss problems and develop solutions would be hampered if I were to direct disclosure of the advice and analysis. I find that discretion is properly exercised by withholding the bodies of the emails from the Applicant.

[para 66] I note that the dates of the emails, the names of the senders and recipients, and the subject and date lines of the emails are not subject to any exceptions to disclosure. As a result, I must direct the Public Body to give the Applicant access to this information.

Records 365 – 369

[para 67] Records 365 – 369 contain emails and attachments between prosecutors consulting about an issue that had arisen. These records also contain an email written by the Applicant proposing settlements on behalf of his then clients.

[para 68] The emails written by the prosecutors appear intended to establish the seriousness of the issue so that it could be addressed or resolved. I find that these emails do not relate to the exercise of prosecutorial discretion, as the issue under discussion does not relate to any one prosecution or a decision related to a prosecutor's power to prosecute, negotiate a plea, withdraw charges, enter a stay of proceedings, or appeal a decision or verdict.

[para 69] I find that the bodies of the emails written by prosecutors in these records consist of consultations and deliberations within the terms of section 24(1)(b), and not section 20(1)(g) or section 27(1)(b). It is conceivable that interference with the ability of the Public Body to provide internal advice or to receive it could be interfered with if the emails written by the prosecutors were disclosed. As a result, I conclude that the Public Body has appropriately exercised discretion by withholding the bodies of these emails.

[para 70] I find that information in the prosecutors' emails, other than the bodies of the emails, is not subject to section 24, as the subject lines, dates, and the identities of senders and recipients do not reveal anything substantive about advice or consultations and deliberations. I must therefore direct the Public Body to disclose information not contained in the bodies of these emails.

[para 71] I find that the email written by the Applicant was likely used in the exercise of prosecutorial discretion, given that the prosecutors assigned to the cases listed in it likely reviewed it and determined whether they agreed or not. For this reason, the Applicant's email could be said to have been used in the exercise of prosecutorial discretion. While I find that section 20(1)(g) applies to the Applicant's email (but not section 27(1)(b) as it was not prepared by a lawyer or agent for the Minister of Justice) I am unable to find that the Public Body properly exercised its discretion when it withheld the email from the Applicant. The Applicant is aware of what he wrote and expected prosecutors to review it. It is therefore unclear how disclosing it could interfere with prosecutorial discretion. That being said, the Applicant's email contains the personal information of his former clients. The Public Body has not yet considered whether section 17 applies to the information in the emails written by the Applicant for the purpose of bargaining with the prosecutors. I will therefore direct the Public Body to reconsider its exercise of discretion and also to consider whether section 17(1) applies to the email written by the Applicant.

Records 371 - 372

[para 72] Records 371 – 372 contain emails between prosecutors discussing a procedural issue that had arisen and how to address it. The email chain addresses the same topic as records 373 – 374, to which the Public Body applied sections 24(1)(a) and (b). The topic does not relate to the exercise of prosecutorial discretion, but the Public Body's protocols for addressing an issue that had arisen. I find that sections 24(1)(a) and (b) apply to the bodies of the emails, as they contain consultations and deliberations of employees, but that sections 20(1)(g) and 27(1)(b) do not apply. The emails do not relate to the exercise of prosecutorial discretion and it would be unlikely that they would be used in its exercise. In addition, the emails were not prepared for a prosecutor's use in a particular legal matter for the purposes of section 27(1)(b).

[para 73] I find that sections 24(1)(a) and (b) apply to the bodies of the emails, but not the other information in the emails, such as the dates, subject lines, senders, and recipients. I must therefore direct the Public Body to give the Applicant access to the information in the records other than the bodies of the emails.

[para 74] I find that disclosure of the bodies of the emails could conceivably interfere with the processes by which the Public Body makes decisions. As there do not appear to be any relevant factors that apply and weigh in favor of disclosure, I will confirm the Public Body's decision to sever the bodies of the emails.

Records 373 – 374

[para 75] Records 373 – 374 contain emails between prosecutors regarding the appropriate policy to follow in given situations. The Public Body severed the entirety of these emails on the basis of sections 24(1)(a) and (b).

[para 76] I find that sections 24(1)(a) and (b) apply to the bodies of the emails, but not the other information in the emails, such as the dates, subject lines, senders, and recipients. I must therefore direct the Public Body to give the Applicant access to the information in the records other than the bodies of the emails.

[para 77] I find that disclosure of the bodies of the emails could conceivably interfere with the processes by which the Public Body makes decisions. As there do not appear to be any relevant factors that apply and weigh in favor of disclosure, I will confirm the Public Body's decision to sever the bodies of the emails.

Records 383 - 384

[para 78] Records 383 and 384 contain emails between prosecutors. One email provides advice while another email contains a discussion of the advice. An email dated July 23, 2015 at 8:09 simply forwards the advice to a prosecutor without revealing the substance of the advice. Sections 24(1)(a) and (b) may be applied to information that

reveals the substance of advice. It cannot be applied to information such as dates, the subject of advice (if the subject does not reveal the substance of the advice), the recipients of advice or the author or sender of advice. I find that the bodies of the emails, with the exception of the email created at 8:09 for the purpose of forwarding advice, is subject to sections 24(1)(a) and (b); however, I find that the remaining information is not subject to an exception to disclosure and the Applicant must be given access to it.

[para 79] The information in the records supports finding that the means by which the Public Body develops or takes advice could be the subject of interference if the Applicant were given access to it. As protecting the processes by which a public body develops and receives is a purpose of section 24(1), I find that the Public Body exercised its discretion appropriately when it decided to withhold the bodies of the emails, other than the email created at 8:09.

[para 80] To summarize, I find that the bodies of the emails, other than the email created at 8:09, were properly withheld. However, the Public Body must disclose the remaining information in records 383 – 384 to the Applicant.

Record 391

[para 81] Record 391 contains a series of emails between prosecutors. The Public Body applied sections 24(1)(a) and (b) to withhold the emails in their entirety. I accept that the bodies of the emails contain information that can be characterized as advice within the terms of section 24(1)(a) or as a consultation within the terms of section 24(1)(b).

[para 82] I find that only the bodies of the emails contain information subject to section 24(1). The subject lines, date lines, recipients and senders do not reveal anything substantive about the discussions in the bodies of the emails. As a result, I must direct the Public Body to give the Applicant access to this information.

[para 83] As it is conceivable that the Public Body's processes by which it develops advice or takes it could be subjected to interference if the information in the bodies of the emails is disclosed, I find that the Public Body appropriately exercised its discretion when it decided to withhold the bodies of the emails from the Applicant.

Record 392

[para 84] The Public Body severed an email from record 392 under sections 24(1)(a) and (b). I find that the purpose of this email is simply to forward an email. The email does not contain any information subject to either section 24(1)(a) or (b) or any exception to disclosure.

[para 85] I find that record 392 is not subject to an exception to disclosure and the Public Body must give the Applicant access to it.

Records 395 – 396

[para 86] Records 395 – 396 contain emails between prosecutors. The content of the emails indicates the prosecutors were developing a strategy to address a problem that had arisen. The Public Body applied sections 24(1)(a) and (b) to withhold the records in their entirety.

[para 87] I find that the bodies of the emails contain information falling within the terms of sections 24(1)(a) and (b); however, I find that the dates, subject lines, names of senders, and names of recipients in these emails are not subject to section 24(1), or any exception in the FOIP Act.

[para 88] As it is likely that disclosing the information in the bodies of the emails could result in interference with the Public Body's decision making processes, I find that the Public Body properly exercised its discretion when it decided to withhold the information from the Applicant. While I will confirm the Public Body's decision in relation to the bodies of the emails, I will direct it to give the Applicant access to the remaining information in the emails.

Record 399

[para 89] Record 399 contains an email forwarding an email from the Applicant to a prosecutor. The Public Body severed this email under sections 24(1)(a) and (b).

[para 90] I find that the email severed from record 399 does not contain information subject to section 24(1). I am unable to say that the email does anything more than forward correspondence.

[para 91] I note that the response from the prosecutor to whom the email was forwarded replied to the Applicant and indicated that the email had been forwarded to him. As a result, it is unclear that any harm could be expected to result from the fact that the email was forwarded to the prosecutor for response.

[para 92] I am unable to find that sections 24(1)(a) or (b) applies and I will direct the Public Body to disclose the information it withheld from this record.

Record 401

[para 93] The Public Body withheld an email written by one prosecutor to another from record 401. The email provides factual information. I am unable to say that the email is intended to provide advice or to seek it.

[para 94] As I find that section 24(1) does not apply to the email severed from record 401, I will direct the Public Body to disclose it.

Record 410

[para 95] Record 410 contains two emails. One email sets out something that transpired, and then requests that something be done as a result. The other email agrees to the request. Neither email relates to the exercise of prosecutorial discretion or was used in such an exercise.

[para 96] I also find that section 27(1)(b), which was also applied by the Public Body, does not apply as the emails were not prepared by or for a prosecutor's use in providing legal services in relation to the matter that is the subject of the emails.

[para 97] As I am unable to find that an exception to disclosure under the FOIP Act applies to the information in this record, I will direct the Public Body to disclose it.

Record 411

[para 98] Record 411 contains 4 emails. The Public Body severed the first three emails from this record. The fourth email was provided to the Applicant.

[para 99] I find that the first two emails do not contain advice or request advice. I find that section 24(1) does not apply to them. I also find that they are not subject to an exception to disclosure.

[para 100] I find that the third email on record 411 contains advice regarding a matter that had arisen. I find that section 24(1)(a) applies to the third email on record 411. I also find that it is reasonably likely that disclosure of the email could result in interference with the means by which the Public Body obtains advice. I therefore find that the Public Body reasonably exercised its discretion when it withheld the third email; however, as discussed above, section 24(1) does not apply to such information as the date of the email, the identities of the sender and recipients, or the subject line as this information does not reveal anything substantive about the advice. I will direct the Public Body to disclose the subject line, the date, and the identities of the sender and recipients.

Record 416

[para 101] Record 416 contains an email from one Crown prosecutor to another. The email requests advice. I find that section 24(1)(b) applies to the body of the email. I find that the date, the subject line, and the identities of the sender and recipient are not subject to exceptions to disclosure and I will direct that information to be disclosed.

[para 102] I find that it is reasonably likely that disclosure of the body of the email could result in interference with the methods by which the Public Body obtains advice. I therefore find that the Public Body reasonably exercised its discretion when it withheld the body of the email.

Records 417 – 418

[para 103] Records 417 – 418 contain emails between a prosecutor and an employee of the Public Body. The purpose of the emails is to determine where a file should be sent. The Public Body applied both sections 20(1)(g) and 27(1)(b) to withhold these emails from the Applicant.

[para 104] I find that the emails on records 417 – 418 are not subject to either section 20(1)(g) or 27(1)(b).

[para 105] While one email refers to a prosecutor waiting for evidence before making a decision, it is unknown what the substance of the evidence is, how the evidence would affect the prosecutor's decision, or what the decision would be. As a result, I find that the information does not clearly relate to the exercise of prosecutorial discretion. I also find that the email was not used in the exercise of discretion. I further find that the emails were not prepared for the prosecutor's use in providing prosecutorial services within the terms of section 27(1)(b).

[para 106] I am unable to say that these emails are subject to an exception to disclosure. I will therefore direct the Public Body to disclose these records to the Applicant.

Record 419 and 423

[para 107] Record 419 contains two emails. Record 423 is a duplicate of record 419, with the exception that the first email forwards the second email to different people. The first email forwards the second email for information purposes. I find the first email is not subject to section 24(1) as its function is simply to forward the second email.

[para 108] The body of the second email may be viewed as a consultation within the terms of section 24(1)(b).

[para 109] I am unable to find that the Public Body properly exercised its discretion when it withheld the body of the second email. The content of the email, while a consultation, appears innocuous. The substantive content of the second email may be inferred from the prosecutor's correspondence with the Applicant. It may be that the Public Body has reasons for withholding the body of the second email on record 419, but these are not apparent from the record or its submissions.

[para 110] To conclude, I find that the body of the second email is subject to section 24(1)(b); however, I will direct the Public Body to reconsider its decision to withhold the body of the second email. In addition, I will direct the Public Body to disclose all information on record 419 (and record 423) other than the body of the second email.

Record 427

[para 111] Record 427 contains two emails, which the Public Body withheld in their entirety under sections 24(1)(a) and (b). The second email is the same as that appearing on records 419 and 423. My decision regarding the second email is therefore the same as with records 419 and 423.

[para 112] The first email may be construed as a consultation within the terms of section 24(1)(b). Like the second email, the information may be viewed as innocuous, revealing little that may not be inferred from the Public Body's correspondence with the Applicant. As it is unclear what benefit is served by severing the bodies of the emails from record 427, I will direct the Public Body to reconsider its decision to withhold this information.

[para 113] As the information in record 427 that does not form part of the bodies of the emails is not subject to an exception to disclosure, I must direct the Public Body to give the Applicant access to this information.

Record 432 – 433

[para 114] The Public Body applied sections 24(1)(a) and (b) to withhold a portion of an email. The email is written by a prosecutor and provides analyses of a situation. I find that the purpose of the analysis was to assist the Public Body to develop a strategy. I agree with the Public Body that the information it severed is subject to section 24(1)(a).

[para 115] I also agree with the Public Body that interference with its ability to take advice and develop policy could result if it discloses the information it severed to the Applicant.

Records 437 – 438

[para 116] Record 437 contains two email conversations between prosecutors. The Public Body applied sections 20(1)(g) and 27(1)(b) to sever these records in their entirety. I find that section 20(1)(g) does not apply as the information does not relate to the exercise of prosecutorial discretion and would not have been used to make such a decision. I do find that section 27(1)(b) applies as the emails indicate that a prosecutor wrote the email to ensure that things were done for a prosecution, and another prosecutor wrote back to inform her that those things were being taken care of. These emails can be said to have been written by or for a prosecutor so that the prosecutor could provide a legal service (prosecution).

[para 117] As it is unclear why the Public Body exercised its discretion to sever all the information from record 437 under section 27(1)(b), I must ask it to reconsider this decision.

[para 118] Record 438 contains an email written by a chief Crown prosecutor. It informs prosecutors of a decision that has been made. The Public Body withheld this record under sections 20(1)(g) and 27(1)(b). I find that neither of these provisions apply. The record does not relate to a decision to exercise prosecutorial discretion and would not be used to make one. In addition, the chief Crown prosecutor did not prepare this record in relation to a matter for which she was providing legal services. I am unable to identify an exception that would apply to the email on record 438. As a result, I must direct the Public Body to disclose it.

Record 439 - 440

[para 119] Records 439 - 440 contain three emails. The Public Body applied sections 20(1)(g) and 27(1)(b) to withhold these emails in their entirety.

[para 120] The first email contains a suggested course of action. I find that the body of the email is advice within the terms of section 24(1)(a). I find that this email is not subject to section 20(1)(g) as it does not relate to the exercise of prosecutorial discretion and is not likely to have been used in such an exercise. I also find that section 27(1)(b) does not apply as the prosecutor did not prepare the email for the purpose of providing legal services.

[para 121] While I find that section 24(1)(a) applies, it is unclear to my why the Public Body exercised its discretion in favor of withholding information. It is unclear that disclosure could have a negative impact on the Public Body's decision making processes.

[para 122] The second email simply refers the third email to a prosecutor. I am unable to identify an exception to disclosure that applies.

[para 123] The third email is the same email that appears on record 438, and which I decided should be disclosed. For the same reasons, I find that the Applicant should be given access to this email.

Records 445 – 447

[para 124] The Public Body applied sections 24(1)(a) and (b) to withhold emails between prosecutors appearing on records 445 – 447. I agree with the Public Body that the information in the bodies of the emails falls within the terms of sections 24(1)(a) and (b); however, I do not agree that all the content of the emails is subject to section 24(1). As discussed above, only information that reveals the substantive content of advice is subject to section 24(1). I must direct the Public Body to disclose information such as the dates, and subject lines and the identities of the senders and recipients.

[para 125] With regard to the Public Body's exercise of discretion, I accept that disclosure of the bodies of the emails could reasonably be expected to interfere with the processes by which the Public Body takes advice and makes decisions. I will therefore confirm the Public Body's exercise of discretion.

Record 450

[para 126] Record 450 contains two emails written by prosecutors to each other. The Public Body withheld these emails from the Applicant under section 24(1)(b). I find that the bodies of these emails contain analysis within the terms of section 24(1)(a) and consultations within the terms of section 24(1)(b). While the emails on their own do not obviously relate to the Public Body's decision making process, when reviewed in the context of the issues being addressed by the prosecutors in the records, resulting in the email written to the Applicant on April 17, 2015 that appears on records 540 – 541, I find that the emails form part of the Public Body's decision making process.

[para 127] I find that only the bodies of the emails are subject to sections 24(1)(a) and (b). Information such as the dates, identities of the senders and recipients, and the subject line are not subject to section 24(1) or an exception to disclosure and must be disclosed to the Applicant.

[para 128] As it is conceivable that interference with the Public Body's decision making processes could result from disclosure of the bodies of the emails on record 450, I will confirm the Public Body's decision to withhold this information from the Applicant.

Records 472 – 485

[para 129] Records 472 – 485 contain emails, some of which are written to, or by, the Applicant. The Applicant provided proposed resolutions for the clients he listed. The prosecutors provided their positions in responses in separate emails and in comments on the proposals themselves. There are also emails between Crown prosecutors.

[para 130] I agree with the Public Body that the Applicant's proposals (records 481, 482, 483 –485), would be used in the exercise of prosecutorial discretion and section 20(1)(g) applies. However, as discussed above, there is an expectation that a prosecutor will review a defendant's proposals and make a decision regarding them. Moreover, the proposal was drafted by the Applicant. As a result, while section 20(1)(g) may apply, it is difficult to understand the Public Body's reasons for withholding the proposals from the Applicant, given that he is aware of the emails he sent. That being said, this record contains the personal information of the Applicant's clients, and, as discussed above, the Public Body appears not to have considered whether section 17 applies to information regarding the Applicant's former clients.

[para 131] Despite the Public Body's submissions, it is difficult to imagine what interference to prosecutorial discretion could result from providing correspondence to the Applicant that the prosecutors emailed to the Applicant – correspondence that the prosecutors intended him to have as the representative of his clients.

[para 132] Records 472 – 485 also contain emails sent by prosecutors to colleagues (records 472, 474, 476, 477, 480 and 483). I find that these emails do not contain information relating to or used in the exercise of prosecutorial discretion. I also find that these emails were not prepared for the purpose of providing legal services in relation to a legal matter within the terms of section 27(1)(b). I do find that these emails were written for the purpose of consulting with colleagues regarding an issue that had arisen for which a consistent approach was being developed. In my view, the substantive content of these emails is subject to section 24(1)(b). I will discuss the application of section 24(1)(b) further, below.

[para 133] To summarize, I find the emails between the prosecutors as colleagues are subject to section 24(1)(b). I find that the correspondence sent to or by the Applicant is subject to section 20(1)(g); however, I find that the Public Body has not demonstrated that it properly applied its discretion to withhold the correspondence sent to and by the Applicant. Moreover, I find that the Public Body has not turned its mind to the application of section 17 to the personal information of the Applicant's former clients in the records. I will therefore direct the Public Body to reconsider its exercise of discretion in relation to the correspondence sent to and by the Applicant and to determine whether section 17(1) applies.

Records 488 – 489

[para 134] The Public Body applied sections 20(1)(g) and 27(1)(b) to sever records 488 and 489 in their entirety. These two records contain two emails. The first email is written by a prosecutor. The email indicates it is intended to forward the second email to colleagues. The second email is written by the Applicant.

[para 135] The email written by the Applicant asks to alter a resolution process. The email does not propose settlements of any specific cases in which the Applicant acted as an agent.

[para 136] I am unable to find that section 20(1)(g) applies to these emails. There is no decision made in the exercise of prosecutorial discretion that could have been made in relation to their content.

[para 137] I am also unable to find that section 27(1)(b) applies. As discussed above, section 27(1)(b) applies to information prepared by a lawyer or agent of the Minister of Justice in relation to a legal manner for which the lawyer or agent is responsible. The first email, while written by a prosecutor, was not prepared for any particular matter. The second email is written by the Applicant, and so it cannot be said to have been prepared by or for a lawyer or agent of the Minister of Justice.

[para 138] I am unable to identify an exception to disclosure that would apply to these records. As a result, I must direct the Public Body to disclose them.

Records 490 – 491

[para 139] The Public Body applied sections 20(1)(g) and 27(1)(b) to sever records 490 – 491 in their entirety. Records 490 – 491 contain an email chain.

[para 140] The emails do not relate to any particular matter in which prosecutorial discretion would be exercised, but a general issue of process that had arisen. For this reason, section 20(1)(g) does not apply to these records, as prosecutorial discretion relates to a prosecutor's decisions regarding a particular prosecution. In addition, I am unable to find that these records were prepared by or for a prosecutor in relation to a matter for which the prosecutor was providing legal services.

[para 141] I do find that section 24(1)(b) applies to some of the information in these records as the purpose of many of the emails is to engage in a consultation or deliberation within the terms of that provision. However, the first email -- which simply forwards the rest of the email chain – and the dates, senders, recipients, and subject lines in these records are not information to which section 24(1)(b), or any other exception in the FOIP Act, applies.

[para 142] As it is conceivable that disclosure of the substantive content of records 490 – 491 could result in interference with the processes by which the Public Body makes decisions, I will confirm the Public Body's decision to sever the substantive content from the bodies of the emails. However, I will direct it to disclose the email that simply forwards the other emails, and the identities of the senders, recipients, dates, and subject lines from these records.

Records 492 - 493

[para 143] Records 492 – 493 contain an email chain. The Public Body withheld these records under sections 20(1)(g) and 27(1)(b). The email chain is between a clerk and a prosecutor. The prosecutor asked the clerk for information regarding a file for which the prosecutor was responsible. I infer that the prosecutor asked the question in order to prepare. I find that section 27(1)(b) applies to these emails. I find section 27(1)(b) also applies to the clerk's emails, as these were prepared for the prosecutor's use.

[para 144] I am unable to say that these emails are subject to section 20(1)(g) as there is no indication that the content relates to the exercise of prosecutorial discretion or was used in such an exercise.

[para 145] While I find that section 27(1)(b) applies to the emails, it is unclear why the Public Body exercised its discretion to withhold them. The Public Body did not explain its exercise of discretion in relation to its application of section 27(1)(b), and the content of the records, which appears to be both dated and innocuous, does not provide a clear basis of support for the Public Body's decision. I must order the Public Body to make a new decision as to whether it will withhold or disclose this information.

Records 494 – 495

[para 146] The Public Body applied sections 24(1)(a) and (b) to withhold records 494 – 495 in their entirety. Record 494 contains an email from a prosecutor to another public body. The email asks a factual question. I infer that the question was asked in order to assist the Public Body to develop a strategy or policy. As a result, I find that the body of the email is a consultation or deliberation within the terms of section 24(1)(b). However, I find that the remainder of the email, which consists of the date, the sender, the recipient, and the subject line, is not subject to section 24(1), or any other exception to disclosure in the FOIP Act.

[para 147] I accept that the substantive content of the body of the email on record 494 could reasonably be expected to result in interference with the Public Body's ability to develop policy if it were disclosed. I will therefore confirm the Public Body's decision to withhold the body of the email.

[para 148] Record 495 contains an email from one prosecutor to another. The email appears intended to advise the prosecutor as to how to respond to a question and suggests a template for response. I find that the body of the email on record 495 contains advice within the terms of section 24(1)(a). I also find that the template email is advice. However, I find that information about the identities of the sender and recipient, the date, and the subject line of the email between prosecutors is not subject to section 24(1) or any other exception to disclosure and the Public Body must give the Applicant access to this information.

[para 149] As I find it is reasonably likely that disclosing the information could result in interference with the Public Body's ability to give and take advice, I will confirm the Public Body's decision to withhold the body of the email from the Applicant.

Records 499 - 500

[para 150] Records 499 – 500 contain two emails. The first is from a prosecutor to a Crown prosecutor. The second email is from a Crown prosecutor to several prosecutors. The Public Body applied sections 20(1)(g) and 27(1)(b) to withhold records 499 – 500 in their entirety.

[para 151] I find that neither section applied by the Public Body is engaged by the information in the records.

[para 152] The first email is intended to express thanks. It is not subject to an exception to disclosure under the FOIP Act.

[para 153] The body of the second email provides analysis of a situation and recommendations for the prosecutors going forward. The second email does not relate to the exercise of prosecutorial discretion and was not used in the exercise of prosecutorial

discretion for the purposes of section 20(1)(g). In addition, while the second email was written by a Crown prosecutor, it was not prepared for use in providing services in relation to a legal matter, within the terms of section 27(1)(b). Instead, the email is written to propose a policy for the future. That being said, I find that the body of the second email contains advice, analysis, and proposals that are the subject of section 24(1)(a).

[para 154] I also find that disclosing the information could reasonably be expected to interfere with the processes by which the Public Body develops advice and policies. I will therefore confirm the Public Body's decision to sever the body of the second email. As I find that the first email is not subject to an exception to disclosure, and as I find that information such as the dates of the emails, the identities of the senders and recipients, and subject lines, is not subject to an exception to disclosure, I will direct the Public Body to give the Applicant access to this information.

Record 501

[para 155] The Public Body applied sections 20(1)(g) and 27(1)(b) to record 501, which contains 3 emails. I am unable to find that any of these emails is subject to section 20(1)(g). While one email – that written at 9:33 AM -- suggests why exercise of prosecutorial discretion might have been exercised, the prosecutor who wrote this email was not the one who exercised prosecutorial discretion. Rather the email speculates as to why another prosecutor may have exercised discretion in a particular way. There is nothing to suggest that this email was used to make a decision in the exercise of prosecutorial discretion. The timing of the email makes it impossible that it could have been used in making the decision that is the subject of the email.

[para 156] I also find that section 27(1)(b) does not apply, as the emails were not prepared for use in providing legal services.

[para 157] While I am unable to find that an exception to disclosure applies to any of the emails, it appears possible that some of the content could be subject to another exception to disclosure under section 20, or was at one time. As I am unable to state positively that section 20(1)(a) does not apply, I will direct the Public Body to gather evidence as to whether it applies and to make a decision regarding its application.

Records 519 - 524

[para 158] The Public Body applied sections 20(1)(g) and 27(1)(b) to withhold records 519 – 524 in their entirety. These records consist of a complaint made by the Applicant that a prosecutor was rude to him and discussions regarding the complaint. None of these records fall within the terms of section 20(1)(g) or 27(1)(b). The complaint is not likely to form part of prosecution file or to be used to make decisions in the exercise of prosecutorial discretion. Clearly, the complaint written by the Applicant was not prepared by or for a lawyer or an agent of the Minister of Justice for the purpose of providing legal services. I also find that the discussions of the complaint were not

prepared for the purpose of providing legal services, as none of the prosecutors to whom it was forwarded was providing legal services on behalf of the Public Body in relation to the complaint.

[para 159] The first email on record 519 advises a course of action. I find that this email is advice within the terms of section 24(1)(a). I am unable to find that any other emails regarding the Applicant's complaint are subject to a discretionary exception.

[para 160] In reviewing records 519 -524, I note that they contain personal information – not only about the Applicant's former clients but of prosecutors. While information about employees acting in a representative capacity is not considered personal information subject to section 17, (see Orders F2009-026, F2013-51 and F2019-02) when information about employees has a personal dimension and may have consequences for them as individuals, section 17 may apply. Complaints about an employee's conduct are examples of complaints affecting employees as identifiable individuals.

[para 161] As the Public Body does not appear to have turned its mind to the potential application of section 17(1) to records 519 – 524 I must direct it to consider whether section 17(1) applies to the personally identifying information of an employee or the Applicant's former clients.

Record 531

[para 162] The Public Body applied sections 24(1)(a) and (b) to withhold record 531 in its entirety. Record 531 consists of three emails.

[para 163] The email that begins the chain, dated August 22, 2014 at 11:24 AM simply refers a matter to a prosecutor. However the email sent at 12:15 and the email sent at 12:16 may be viewed as deliberating a course of action.

[para 164] I find that sections 24(1)(a) and (b) apply to the substance of the emails sent at 12:15 and 12:16, but not the email sent at 11:24.

[para 165] I note, too, that the Public Body withheld the entire record; however, as discussed above, neither section 24(1)(a) nor (b) applies to information such as the subject of advice, or the author or recipients of advice, or the date and time of advice.

[para 166] The content of the email sent at 12:15 and the email sent at 12:16 make it clear that the purpose of withholding this content was to protect the ability of prosecutors to speak candidly in order to make good decisions. As a result, I confirm the Public Body's decision to sever this information. However, I must direct it to give the Applicant access to the content in these records other than the substantive portions of the email sent at 12:15 and that sent at 12:16.

Records 532 – 535

[para 167] The Public Body applied sections 20(1)(g) and 27(1)(b) to withhold records 532 – 535 from the Applicant in their entirety. The records consist of emails written by Crown prosecutors and prosecutors regarding a problem that had arisen and possible strategies to address it. I find that sections 20(1)(g) and 27(1)(b) do not apply. The emails do not relate to the exercise of prosecutorial discretion and were not used in the exercise of it. Moreover, the emails were not prepared in relation to a matter for which the prosecutors and Crown prosecutors were providing legal services or so that the prosecutors and Crown prosecutors could provide legal services.

[para 168] I do find that the bodies of the emails are subject to sections 24(1)(a) and (b), as the emails may be viewed as either providing advice, analyzing a problem, or seeking advice, depending on the email.

[para 169] I also note that the personal information of an individual is contained in these records that may be subject to section 17(1).

[para 170] While I find that the bodies of the emails are subject to sections 24(1)(a) and (b), I find that the subject lines, recipients, senders, and dates of the emails are not information to which section 24(1)(a) or (b) applies, as discussed in Order F2004-026, *supra*. I also find that withholding the bodies of the emails from the Applicant serves the purpose of sections 24(1)(a) and (b), as it permits the Public Body's employees to engage in frank discussions in order to develop effective policies.

[para 171] To summarize, I find that the bodies of the emails may be withheld under sections 24(1)(a) and (b), but not the remaining information. I also find that the Public Body must review records 532 – 535 to determine whether they contain information subject to section 17(1).

Record 537

[para 172] The Public Body withheld record 537 in its entirety on the basis of sections 20(1)(g) and 27(1)(b). Record 537 contains an email in which a prosecutor provides advice as to how a policy applies in a particular situation. I find that this email was not written in the exercise of prosecutorial discretion and was not used to make such decisions. I also find that this email was not prepared so that legal services could be provided. However, I do find that the body of the email contains advice within the terms of section 24(1)(a).

[para 173] The Public Body severed the email in its entirety; however, only the body of the email contains advice. I must therefore direct the Public Body to give the Applicant access to the information in the record other than the body of the email.

[para 174] Finally, from my review of the information severed by the Public Body, I accept that disclosure of the information could reasonably be expected to result in

interference with the process by which the Public Body's employees provide advice or receive it. I find that the Public Body properly exercised its discretion when it withheld the body of the email.

Record 538

[para 175] Record 538 contains an email. The Public Body severed the email in its entirety under section 24(1)(a) and (b). I find that the body of the email contains recommendations and deliberations of a Crown prosecutor regarding a policy matter. I agree with the Public Body that the body of the email is subject to sections 24(1)(a) and (b); however, I find that the identities of the author and the recipients, the subject line, and the date of the email are not subject to an exception to disclosure. As a result, I must direct the Public Body to give the Applicant access to the information in this record other than the body of the email.

[para 176] I find that the Public Body properly exercised its discretion to withhold the body of the email from the Applicant as disclosure could reasonably be expected to result in interference to the processes by which it develops advice and policies.

Record 546

[para 177] Record 546 consists of an email written by a prosecutor to colleagues. It does not refer to a specific prosecution, or decisions made by a prosecutor in relation to one, but provides advice as to how a procedure may be implemented in the future.

[para 178] The Public Body applied sections 20(1)(g) and 27(1)(b) to withhold this email in its entirety. However, as the information in the email does not relate to a specific exercise of prosecutorial discretion and was not used to make such an exercise, I find that section 20(1)(g) does not apply. In addition, the email was not prepared for the purposes of providing legal services in relation to a matter, but to provide general policy advice.

[para 179] While I find that sections 20(1)(g) and 27(1)(b) do not apply, I find that the body of the email consists of advice subject to section 24(1)(a).

[para 180] As noted above, section 24(1)(a) does not apply to information that does not convey anything about the substance of advice. I find that information about the sender, recipients, the subject, and the date, is not subject to section 24(1)(a) and I will direct the Public Body to give the Applicant access to this information.

[para 181] From my review of the content of the information, I am satisfied that disclosing it could conceivably harm the process by which the Public Body develops and takes advice. Withholding the information from the Applicant therefore serves the purpose of the provision and I will confirm the Public Body's decision to withhold the body of the email appearing on record 546.

Summary

[para 182] I have found that in most cases, the Public Body was authorized to sever information, although it often applied incorrect exceptions.

[para 183] The Public Body should note that both sections 20(1)(g) and 27(1)(b) may apply to particular decisions a prosecutor makes in a matter (20(1)(g)) or to records prepared by or on behalf of a lawyer or agent in order to provide legal services in relation to a particular matter (27(1)(b)). However, neither provision applies if a prosecutor is making decisions or preparing records that are unrelated to a particular legal matter for which the prosecutor is providing legal services.

[para 184] The Public Body should also note that section 17(1) may require severing personal information about an agent's clients if the agent has made an access request on his or her own behalf and not that of clients.

[para 185] Finally, the Public Body should note that sections 24(1)(a) and (b) apply only to information that reveals the substance of advice (24(1)(a)) or consultations and deliberations (24(1)(b)), but not to information that reveals only the subject matter of advice, the date, or the identities of senders and recipients.

[para 186] Finally, when exercising discretion to withhold information under an exception to disclosure, it is necessary to consider the purpose of the provision and to determine whether withholding information from a requestor serves this purpose. If the Public Body finds that the purposes served by withholding information fall within the terms of another provision, it may want to consider whether the information is more appropriately withheld under that provision. If severing information serves no purpose, then the Public Body should consider disclosing the information.

IV. ORDER

[para 187] I make this Order under section 72 of the Act.

[para 188] I confirm that the Public Body met its duty to assist by conducting an adequate search for responsive records with the exception of the memorandum to which record 418 refers.

[para 189] I require the Public Body to search for the memorandum to which record 418 refers.

[para 190] I require the Public Body to give the Applicant access to the information I found not to be subject to an exception to disclosure under the FOIP Act in the body of the order.

[para 191] I require the Public Body to determine whether section 17(1) applies to information in records 62 – 63, 365 – 369, 472 – 485, 519 – 524, and 532 – 535.

[para 192] I order the Public Body to reconsider its exercise of discretion to sever information as discussed in the body of the order.

[para 193] I direct the Public Body to determine whether section 20(1)(a) is applicable and should be applied to information on record 501.

[para 194] I order the Public Body to inform me within 50 days of receiving this order that it has complied with it.

_____
Teresa Cunningham
Adjudicator