ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2022-46

September 27, 2022

JUSTICE AND SOLICITOR GENERAL

Case File Number 017232

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Summary: An individual made an access request to Justice and Solicitor General (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for records relating to training given to new registered nurses employed by Alberta Health Services working at two remand centres in Alberta. The request also asked for records that discuss or reference security clearances.

The Public Body located 141 pages of responsive records. It provided responsive records to the Applicant, with information withheld under sections 17(1), 20(1) and 24(1).

The Applicant requested an inquiry into the Public Body's response, specifically regarding the Public Body's application of sections 20(1) and 24(1) of the Act.

The Adjudicator accepted the Public Body's application of section 20(1) to some information to which that exception was applied. However, the Adjudicator found that the Public Body did not consider all relevant factors in exercising its discretion to apply those provisions. The Adjudicator ordered the Public Body to re-exercise its discretion.

The Adjudicator found that the Public Body properly applied section 24(1) to the information in the records. However, the Adjudicator found that the Public Body did not consider all relevant factors in exercising its discretion to apply those provisions. The Adjudicator ordered the Public Body to re-exercise its discretion.

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

Authorities Cited: AB: Decision F2014-D-01, Orders 96-012, 96-006, 99-013, F2002-024, F2004-026, F2006-032, F2007-005, F2007-013, F2007-021, F2009-009, F2010-008, F2010-036, F2013-13, F2016-10, F2017-55, F2020-22 **Ont**: PO-2332, PO-2911

Cases Cited: *Canada (Information Commissioner) v. Canada (Prime Minister)*, 1992 CanLII 2414 (FC), [1992] F.C.J. No. 1054, *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (CanLII), *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII), *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23 (CanLII)

I. BACKGROUND

[para 1] An individual made an access request to Justice and Solicitor General (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for the following:

- "…all records relating to the training given to new Registered Nurses employed by Alberta Health Services at the Edmonton Remand Centre (ERC) and the Fort Saskatchewan Correctional Centre (FSCC). This request includes hand-outs; policies and procedures; Powerpoint and similar slides; books and manuals; and records of any other kind that are given to or referred to when Registered Nurses are trained at the ERC and FSCC. This request is limited to documents used in such training at any time on or after January 1, 2018".

- "…all policies, documents, emails, or other records in all formats that discuss or reference: a) The granting, maintaining, and loss of security clearances and/or security approvals to employees at the ERC and the FSCC; b) Appeals or reviews of security clearance and/or security approval losses by employees at the ERC and FSCC; and c) Emails or documents of any other kind discussing concerns, questions, or problems related to security clearances and/or security approvals at the ERC and the FSCC. This request is limited in time to records created or referred to on or after January 1, 2018."

[para 2] The Public Body located 141 pages of records. Some of the information on those pages was withheld, including some pages that were fully withheld, under section 17(1), subsections 20(1)(j), (k), (l) and (m), and section 24(1)(a). The total number of pages disclosed in whole or in part was 120.

[para 3] The Applicant requested a review of the Public Body's decision, stating:

> The core goal of my access request was to access the policy or policies that JSG applies when deciding how to grant, suspend, and revoke security clearances for contracted workers providing services in provincial correctional facilities. That information would not disclose third-party personal information, does not affect law enforcement, and does not constitute advice to officials. It is essential that government imposed policies be

available for public review. To keep those policies secret is anathema to the spirit and word of the *Act.*

[para 4] Subsequent to the review, the Applicant requested an inquiry into the Public Body's application of sections 20(1) and 24(1).

II. RECORDS AT ISSUE

[para 5] The records at issue consist of the portions of the information in the records withheld under sections 20 and 24.

III. ISSUES

[para 6] The issues as set out in the Notice of Inquiry, dated April 20, 2022, are as follows:

1. Did the Public Body properly apply section 20(1) of the Act (disclosure harmful to law enforcement) to the information in the records?

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

IV. DISCUSSION OF ISSUES

1. Did the Public Body properly apply section 20(1) of the Act (disclosure harmful to law enforcement) to the information in the records?

[para 7] The Public Body applied sections 20(1)(j), (k), (l) and (m) to information in the records. These provisions state:

> *20(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*
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> *...*
>
> *(j) facilitate the escape from custody of an individual who is being lawfully detained,*
>
> *(k) facilitate the commission of an unlawful act or hamper the control of crime,*
>
> *(l) reveal technical information relating to weapons or potential weapons,*
>
> *(m) harm the security of any property or system, including a building, a vehicle, a computer system or a communications system,*
>
> *...*

[para 8] Section 71(1) of the Act states:

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

[para 9] The Public Body has the burden of showing in each case, that disclosure of the information could reasonably be expected to lead to one of the outcomes set out in sections 20(1)(j), (k), (l) or (m).

[para 10] In *Canada (Information Commissioner) v. Canada (Prime Minister)*, 1992 CanLII 2414 (FC), [1992] F.C.J. No. 1054, Rothstein J., as he then was, made the following observations in relation to the evidence a party must introduce in order to establish that harm will result from disclosure of information. He said (emphasis added):

> While no general rules as to the sufficiency of evidence in a section 14 case can be laid down, what the Court is looking for is support for the honestly held but perhaps subjective opinions of the Government witnesses based on general references to the record. Descriptions of possible harm, even in substantial detail, are insufficient in themselves. At the least, there must be a clear and direct linkage between the disclosure of specific information and the harm alleged. The Court must be given an explanation of how or why the harm alleged would result from disclosure of specific information. If it is self-evident as to how and why harm would result from disclosure, little explanation need be given. Where inferences must be drawn, or it is not clear, more explanation would be required. The more specific and substantiated the evidence, the stronger the case for confidentiality. The more general the evidence, the more difficult it would be for a court to be satisfied as to the linkage between disclosure of particular documents and the harm alleged.

[para 11] The "harm test" must be applied on a record-by-record basis (Orders F2002-024, at para. 36, F2009-009, at para. 91).

[para 12] The Supreme Court of Canada has clearly enunciated the test to be used in access-to-information legislation wherever the phrase "could reasonably be expected to" is found (such as in section 18(1)(a)). In *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII), the Court stated:

> Given that the statutory tests are expressed in identical language in provincial and federal access to information statutes, it is preferable to have only one further elaboration of that language; *Merck Frosst*, at para. 195:
>
> > I am not persuaded that we should change the way this test has been expressed by the Federal Courts for such an extended period of time. Such a change would also affect other provisions because similar language to that in s. 20(1)(c) is employed in several other exemptions under the Act, including those relating to federal-provincial affairs (s. 14), international affairs and defence (s. 15), law enforcement and investigations (s. 16), safety of individuals (s. 17), and economic interests of Canada (s. 18). In addition, as the respondent points out, the "reasonable expectation of probable harm" test has been followed with respect to a number of similarly worded provincial access to information statutes. Accordingly, the legislative interpretation of this expression is of importance both to the application of many exemptions in the federal Act and to similarly worded provisions in various provincial statutes. [Emphasis added.]
>
> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst*

> emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences": *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41, at para. 40.

[para 13] The Supreme Court of Canada has made it clear that there is one evidentiary standard to be used wherever the phrase "could reasonably be expected to" appears in access-to-information legislation. There must be a reasonable expectation of the relevant outcome, and the Public Body must provide sufficient evidence to show that the likelihood of any of the above scenarios is "considerably above" a mere possibility.

[para 14] Section 20(1)(j) permits the Public Body to withhold information if the disclosure of that information could reasonably be expected to facilitate an individual's escape from custody.

[para 15] Section 20(1)(k) permits the Public Body to withhold information if the disclosure of that information could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime.

[para 16] Section 20(1)(l) permits the Public Body to withhold information if the disclosure of that information could reasonably be expected to reveal technical information relating to weapons or potential weapons.

[para 17] Section 20(1)(m) permits the Public Body to withhold information if the disclosure of that information could reasonably be expected to harm the security of any property or system.

[para 18] The Public Body has applied more than one of these provisions in every case, except for pages 28 and 29. The Public Body withheld information on page 28 under section 20(1)(k) only, and information on page 29 under section 20(1)(m) only.

[para 19] In Order F2016-10, section 20(1)(m) was found to apply to video footage taken at the Calgary Remand Centre during particular incidents that had occurred there. In that case, the applicant had argued that standard operating procedures of correctional guards was publicly available information, as was the layout of the Centre. The applicant also argued (see para. 19):

> There is no security risk at all, the jail is not a top secret area, all one needs to do to view it is either get hired as a guard or get charged with a crime to become an inmate. There have been countless inmates who are intimately familiar with the jail areas who have been released into the public, so there's no point claiming [secrecy] is important. (Initial submission)

[para 20] I found: (at paras. 20-21):

> Regarding the Applicant's argument that anything the video would disclose is already known to inmates, I disagree. There were no inmates present (or visible) in the unit shown by the video recording; only guards and their movements were visible. The video suggests that the inmates were behind the closed, opaque doors in the unit, visible on the video. Further, Applicant appears to have been disciplined for standing in in a doorway with the door open, suggesting that inmates were not allowed to be moving around in the unit at that time. Therefore, the movements of the guards at that time would not have been observed by the inmates. The guards' response to the incident involving the Applicant was also not observed by inmates, as none were visible on the video recording. The guards' responses, including movement of guards from elsewhere, could reasonably reveal if other areas of the prison were without guards for the duration of the incident.
>
> For this reason, I accept the Public Body's arguments that disclosing the video recording could reasonably be expected to harm the security of the CRC. As in the circumstances in Ontario Order PO-2911, the video recording reveals a maximum security unit in the CRC; the adjudicator in that Order found that "the video could suggest potential security vulnerabilities by revealing the manner in which the day space is recorded by the video camera, thereby jeopardizing the security of the Correction Centre" (cited above). Further, in this case, the video could suggest potential security vulnerabilities by revealing the guard movements during an incident with an inmate; movements that were not otherwise observable by inmates.

[para 21] The Ontario decision cited above, Order PO-2911, found that section 14(1)(k) of the Ontario *Freedom of Information and Protection of Privacy Act* applied to a surveillance video taken of an incident occurring in a correctional facility. Section 14(1)(k) of the Ontario Act states:

> *14(1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,*
>
> *(k) jeopardize the security of a centre for lawful detention;*

[para 22] In Order PO-2911, the adjudicator stated:

> In determining whether section 14(1)(k) applies, I have considered the findings in Order PO-2332, where Adjudicator John Swaigen considered the application of section 14(1)(k) to a security audit undertaken of a maximum security detention centre. This audit contained detailed information about the operational security and procedures required in the day-to-day operation of a maximum security correctional facility. In Order PO-2332, Adjudicator Swaigen stated:
>
> > In my view, much of the information in the security audit would be obvious to most people. It is a matter of common sense and common knowledge that certain kinds of security measures, such as locks, fences and cameras would be present in certain locations and would be checked periodically in certain ways and that other practices and procedures described in the OSAW would be routine. However, the Ministry points out that "to a knowledgeable individual, the absence of a particular topic, identified deficiencies, or the unavailability of certain security-enhancing measures at a given correctional facility could suggest a potential security vulnerability".

> I accept that even information that appears innocuous could reasonably be expected to be subject to use by some people in a manner that would jeopardize security. Knowledge of the matters dealt with in the security audit could permit a person to draw accurate inferences about the possible absence of other security precautions. Such inferences could reasonably be expected to jeopardize the security of the institution by aiding in the planning or execution of an escape attempt, a hostage-taking incident, or a disturbance within the detention centre. As the Ministry states, disclosure of the contents of the security audit to a requester can result in its dissemination to other members of the public as well.
>
> I agree with and adopt this reasoning of Adjudicator Swaigen. The video at issue in this appeal shows how the interior space is configured in a day room in a specific correctional centre. The configuration of the day room and surrounding cells is also present in other correction centres in the province.
>
> This video could be used to jeopardize the security of the correction centre where it was taken, as well as other correctional institutions that are designed the same way. The correction centre where the video was shot is a maximum security institution which houses individuals who have committed serious offences, including high-risk inmates. These inmates present a risk to staff, other inmates, and the community.
>
> The video reveals the exact layout of the day space area. If the information was released to the general public, it could pose a security risk to the staff and the inmates of correction centres with the same layout. I find that the video could suggest potential security vulnerabilities by revealing the manner in which the day space is recorded by the video camera, thereby jeopardizing the security of the Correction Centre, as well as other centres for lawful detention which have the same or a similar layout. Taking into consideration that the law enforcement exemption must be approached in a sensitive manner (*Ontario (Attorney General) v. Fineberg*, cited above), I find that section 14(1)(k) applies to the record in this appeal, the video.

[para 23] In Order F2017-55, the adjudicator accepted that section 20(1)(m) applied to CCTV video footage from the Calgary Remand Centre, insofar as the video "could potentially reveal the manner in which the unit is recorded, thereby jeopardizing the security of the Correction Centre" (at para. 43).

[para 24] In Order F2010-008, the adjudicator found that sections 20(1)(j) and (k) applied to portions of the Edmonton Police Service training manual relating to officer safety. The records in that case revealed techniques, strategies and procedures used by police in their interactions with suspects and other members of the public. The information dealt with matters such as stopping vehicles, searching buildings, arresting suspects, using handcuffs, and officer positioning. In that case, the public body had made submissions *in camera* that could not be discussed in the Order; the adjudicator stated that these submissions

> … provide[d] examples of how disclosure of specific information in the records at issue would enable an individual, in specific situations, to discern vulnerabilities in the techniques, strategies and procedures used by police members, thereby permitting the individual to evade police, lie in wait, flee or escape custody, take countermeasures, use a

> weapon, commit unlawful acts, hamper the control of crime, or cause harm to police members. (At para. 16)

[para 25] The adjudicator acknowledged that some police training information was publicly available, but found that the information in the records at issue was far more detailed, such that it was more likely the cited outcome could result from disclosure. He said (at para. 23):

> The Applicant's submissions regarding prior release of information about the Public Body's policies and training procedures does not alter my finding that disclosure of the records at issue would result in the harms contemplated by sections 20(1)(j) and 20(1)(k). The information severed in the Training Manual is far more detailed than the information that the Applicant has pointed out in the court decisions that it has cited. Harm on disclosure of the records at issue is therefore more likely. The use of force review submitted by the Applicant contains detailed information, but the information is not the same as the information that was withheld in the Training Manual. The use of force review explains some of the principles, objectives, considerations and options when police interact with a suspect, whereas the Training Manual reveals the actual techniques and strategies to be used. The use of force review explains the force that was used by particular police officers against a particular suspect in a particular situation, whereas the Training Manual sets out the range of responses to be used, ideally, in a variety of contexts.

[para 26] In Order F2007-005, the adjudicator rejected the argument that sections 20(1)(j) applied to an Edmonton Police Service Canine Unit training video, as the public body failed to show how disclosing the video could facilitate the escape of individuals being lawfully detained (at paras. 20-21).

[para 27] However, the adjudicator accepted the public body's argument that disclosure of the video could allow individuals to implement countermeasures to facilitate the commission of unlawful acts. The adjudicator found that if this information in the video was disclosed, the EPS Canine Unit could become less effective in apprehending suspects, such that section 20(1)(k) applied to that information (at paras. 23-25).

[para 28] The Public Body states that the records at issue are comprised of Standing Operating Procedures that provide directives to correctional centre employees regarding protocol and safety. The records also include PowerPoint slides that reveal the "centres' technology, keys and access card information, the centres' types of housing units, emergency evacuation information, contraband, hostage and riot situation information, emergency codes information, surveillance tools…" (at para. 13).

[para 29] The Public Body argues that this information is for employee training and is not known by the general public and inmates. It states (at para. 13):

> Disclosure of the records at issue would pose security risk to staff, inmates and visitors. It is the Public Body's position that it is reasonable to expect disclosure would facilitate the escape by inmates, increase risk of unauthorized contraband and increase the amount of violent altercations within correctional centres.

[para 30] The Public Body has applied section 20(1)(j) to what it describes as "detailed information related to protocol and security, centres' technology and surveillance tools, access to centres and types of housing units" (at para. 15).

[para 31] The Public Body further argues (at para. 17):

> While escapes are rare, they do occur and the risk is serious. Disclosure of the protected information would cause the tactics and strategies used by the centres to become publicly available and potentially exploited. An inmate who is lawfully detained could utilize knowledge of the tactics and strategies to execute countermeasures and facilitate an escape from custody. Knowledge of vulnerabilities such as correctional centres' blind spots, configuration, layout, where to exit the building during an emergency, the function of the access card, biometric readers, the use of keys and the number of cameras in correctional centres are not known by the general public and inmates. The purpose of the redacted information is to maintain the security of correctional centres and to ensure the safety of inmates, staff and general public. Additionally, if an inmate knows this information it could provide him/her advance knowledge of how to exploit any centres' weakness or evade security measures in place and/or elaborate an escape plan which will undermine the security and safety of other inmates, staff and general public.

[para 32] The Public Body applied section 20(1)(k) to information it describes as "specific plans and processes which show, among other things, the criteria for security clearance and where and/or to whom the information is communicated to in correctional centres" (at para. 20). It argues (at paras. 20-21):

> An inmate nor a member of the general public would not be privy where a clearance would take place. Providing the location where security clearance take place in correctional centres would allow a member of the general public to have the knowledge where to submit false documents for entry in the centre.
>
> In addition, correctional centres rarely hire individuals as contractors. Usually correctional centres hire a company, which won a bid to fix or provide equipment and/or a service. The company, who won the tender, will send in contractors or subcontractors once or several times to fix, install and/or provide a service. The redacted information is not provided upon hiring or in the tender process nor is it commonly known as in the past there were people who wanted to access correctional centres for nefarious reasons (and had successfully unfortunately). In order to keep correctional centres safe the Public Body do not publish the criteria so that these nefarious group cannot have the exact checklist to make sure they find an individual that meets centres standards which could lead those individuals to get contrabands, drugs and weapons into the centres.

[para 33] The Public Body further argues that disclosure of information in the records that details how employees are to handle certain types of incidents (e.g. a hostage situation or riot) could facilitate the commission of a crime insofar as the information could be used by an inmate to defeat or exploit the centres' security and any vulnerabilities in that security.

[para 34] The Public Body noted that some similar information may be found online; however:

> …the information found online was not published by any Alberta correctional centres or Alberta Corrections. The information that people can find online is not necessarily factual or accurate. The fact that there is specific training in relation to the information contain on pages 42-46 and 118-122 could be enough for an individual to use this information in a harmful way. (At para. 22)

[para 35] The Public Body applied section 20(1)(l) to information on pages 1, 9-10, 12, 16, 27 and 127-128. Its submission addresses only the information on pages 27 and 127, which it says relates to contraband and weapons. It cites the FOIP Guidelines and Practices Manual from Service Alberta, which states (at pages 154-155):

> This provision enables a public body to refuse to disclose information that could reasonably be expected to make the applicant or others aware of technical information relating to weapons or to materials that have the potential to become weapons. For example, this exception would cover information on how to make a bomb.

[para 36] The Public Body argues (at para. 26):

> The protected information if in the hand of an ill-intentioned individual would provide an inmate technical knowledge of how to make a weapons and how centres deal with contrabands which could facilitate the commission of a crime and undermine the security and safety of other inmates, staff and general public.

[para 37] The Public Body withheld information under section 20(1)(m) that it states reveals "where a clearance should happen and which law enforcement database is [used]" such that disclosure "could damage a property or system that is currently used by correctional centres, police services and other law enforcement agencies" (at para. 29).

[para 38] The Public Body further states (at paras. 31, 33):

> Identifying where a security clearance should be conducted, for example, is not known of the general public or by inmates. If this information is disclosed it would be a point where a member of the general public would have access to submit false documents for entry in the centres. Additionally, the information related to a database system would reveal the systems used by law enforcement officials. Revealing this information would have adverse effects, including not limited to allowing the public or criminals to cause damage to the database system.
>
> …
> Identifying the surveillance tools, emergency codes, access systems and type of housing units would reveal the properties or systems used by the centres. Revealing this information would have adverse effects, including but not limited to allowing the public and/or criminals to infringe the security and safety of inmates and staff… Also, the protected information could among other things, alert an inmate as to what is happening allowing him/her to take advantage of a situation and to exploit any weakness of correctional centres' security. Therefore, for the reasons above the harm is conceivable.

Analysis

[para 39] I have reviewed the records in light of the past precedent discussed above. In my view, much of the information withheld under the various subsections of section 20(1) does not meet the criteria to apply those provisions.

[para 40] For the most part, I accept the Public Body's argument that the information in the records at issue has not been made public and/or is not routinely disclosed. The exception is the photos of prison weapons. It is not clear that the photos were taken at a correctional facility run by the Public Body; at least one of those photos was copied from (or posted to) the internet. It seems possible that the other photos are also from an internet search. In any event, nothing in the photos reveals any sort of weaponry that cannot be readily located via an internet search. Further, the photos are of crude weapons made from everyday materials (for example, a sharpened stick or beverage container). I do not accept that a photo of a sharp object can be characterized as revealing "technical information relating to weapons or potential weapons" simply for the reason that the sharp object could be used as a weapon. Regarding the application of section 20(1)(k) to these pages, I assume the Public Body means to argue that an inmate could use the photos as a guide to create weapons. Some of the images are also difficult to decipher, such that it is not possible to determine how the implements were created. In my view, none of the photos shows anything that is not otherwise available to the public such that disclosing the photos could reasonably be expected to facilitate a crime. Given the ease with which such pictures of prison weapons can be located online, I do not accept that disclosing *these* photos could facilitate the commission of an unlawful act or hamper the control of crime. I make the same finding regarding the description of how prison weapons have been made in the past on page 127, as it is also general rather than specific, and also common knowledge.

[para 41] In the Orders discussed above, section 20(1) (or equivalent sections in other jurisdictions) was found to apply where disclosure would reveal vulnerabilities in techniques, strategies and procedures used by law enforcement. The respective adjudicators accepted that disclosure of such information could permit countermeasures to be taken, that would undermine the efficacy of such techniques etc.

[para 42] In Ontario Order PO-2332, the adjudicator noted that while some of the security measures discussed in the records were common sense, a knowledgeable person could identify absences of certain measures, or other deficiencies. In that case, the records at issue consisted of a security audit of a maximum security centre. It is reasonable to assume that a security audit would contain a detailed and comprehensive account of the centre's security arrangements.

[para 43] The Public Body similarly states that the records reveal detailed information, such as information about protocol, surveillance tools and other technology.

[para 44] However, in my view, much of the information in the records is not sufficiently detailed to meet the necessary standard; in other words, in many cases, the likelihood of one of the outcomes in section 20(1) cited by the Public Body resulting from disclosure is not considerably above a mere possibility.

[para 45] I agree with the finding in the Ontario Orders that "the law enforcement exemption must be approached in a sensitive manner"; however, the standard set by the Supreme Court must still be met. It is insufficient to merely state that outcomes are possible or likely without explaining how the likelihood is considerable above a mere possibility.

[para 46] Some of the information in the records reveals rules for employees working at the centres; many of these rules are common sense and general. Pages 2-48 of the records consists of a 'security orientation' presentation for new employees of the centres. Based on the content and the scope of the Applicant's request (the Applicant requested training given to new registered nurses working at remand centres in Alberta), it appears to be aimed at 'civilian' employees, rather than law enforcement employees. I say this because the presentation does not include specific law enforcement techniques or strategies for maintaining security in the centres. Rather, the information is general and fairly superficial. A reasonable if absurd parallel to some of the rules in the records would be a rule about not running in the hallway. Disclosing such a rule does not seem to endanger the efficacy of the rule. And unlike the situation in Order PO-2332, the records in this case do not consist of a comprehensive review of the centres' security arrangements such that the absence of a stated rule could reveal a vulnerability in the arrangements.

[para 47] While the records do discuss surveillance cameras or other technology used in the centres, in many cases the reference is merely to the existence of the technology or an approximate number of cameras. Revealing the fact that the centres have cameras, or even the general location of some cameras (e.g. that some are located in spaces that are publicly accessible) does not seem to meet the standard for applying the cited subsections of section 20(1). The Public Body has referenced revealing "blind spots"; however, it is not clear what information in the records could reveal any blind spots or security gaps. The Public Body similarly refers to disclosing information about the function of access cards or biometric readers; however, it is not clear from my review of the records where that information is discussed, or how disclosure of the very general information about that technology could lead to one of the outcomes argued by the Public Body.

[para 48] The Public Body has also withheld information about dealing with hostage situations (page 28). The information on this page does not reveal techniques or strategies of law enforcement when dealing with hostage situations. Rather, the information is aimed at employees who would not be expected to control or resolve such situations, but may find themselves affected. The information is of a "keep calm and carry on" nature. I understand that these pages reveal advice provided to centre employees; however, it is unclear how disclosing such general advice could reasonably be expected to lead to one of the outcomes identified by the Public Body.

[para 49] Similar instructions appear on pages 129-136. Some of these instruction can be characterized in a similar manner as the information on page 28. However, some information reveals how law enforcement in the centres will deal with the situation (on

pages 131, 134). I accept that this information is properly withheld under sections 20(1)(j) or (k).

[para 50] The presentation for new employees also includes information about various approaches that may be used by inmates to manipulate employees of the centre. The information addresses primarily the behaviour of inmates. It does not reveal any special techniques for employees to use, such that disclosing the information could allow an inmate to employ countermeasures. It is not clear how disclosing a general direction not to let oneself be manipulated in a particular way could reasonably be expected to facilitate an escape or commission of a crime.

[para 51] I make the same finding regarding information that reveals what security clearances are done. The fact that a security clearance is conducted is disclosed in the records provided to the Applicant. It is difficult to imagine that knowing what type of clearance is conducted could reasonably be expected to facilitate an inmate's escape, facilitate the commission of a crime, or harm the security of a system. Similarly, information that reveals which result of a security check will disqualify an individual from working on site does not seem to be able to lead to one of the outcomes argued by the Public Body if disclosed. If an individual were able to provide a fraudulent security clearance, it is likely they would provide a clean record, rather than a record that merely avoids the items listed on this page. It is unclear how disclosing which offences prevent employment would allow countermeasures to be taken.

[para 52] That said, on page 1 of the records, some of the information specifies exactly what is to be done with security clearance information. I accept that this information, if disclosed, could enable countermeasures to be taken. Similarly, page 106 details specific measures taken to secure keys in the facility; I accept that this information, if disclosed, could enable countermeasures to be taken.

[para 53] Other information that if disclosed could reasonably be expected to result in one of the section 20(1) outcomes claimed by the Public Body is:

- detailed layouts of the centres where it appears in the records;
- evacuation plans where they appear in the records;
- emergency codes where they appear in the records;
- information that reveals the specific types of biometric scanners used and how they work, where it appears in the records; and
- information about which security cards can access which units (page 81).

[para 54] I will order the Public Body to disclose the information in the records that I have not identified as meeting the standard for applying sections 20(1)(j), (k), (l) or (m).

Exercise of discretion

[para 55] Section 20(1) is a discretionary exception. In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23 (CanLII), the Supreme Court

of Canada commented on the authority of Ontario's Information and Privacy Commissioner to review a head's exercise of discretion.

[para 56] 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 57] In Order F2010-036 the adjudicator considered the application of the above decision of the Court to Alberta's FOIP Act, as well as considered how a public body's exercise of discretion had been treated in past orders of this Office. She concluded (at para. 104):

> In my view, these approaches to review of the exercise of discretion are similar to that approved by the Supreme Court of Canada in relation to information not subject to solicitor-client privilege in *Ontario (Public Safety and Security)*.

[para 58] In *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (CanLII) (*EPS*), the Court provided detailed instructions for public bodies exercising discretion to withhold information under the Act. This decision was issued after the Public Body provided its submissions to this inquiry. However, it might be helpful for the Public Body to review the discussion.

[para 59] The Court said (at para. 416)

> What *Ontario Public Safety and Security* requires is the weighing of considerations "for and against disclosure, including the public interest in disclosure:" at para 46. The relevant interests supported by non-disclosure and disclosure must be identified, and the effects of the particular proposed disclosure must be assessed. Disclosure or non-disclosure may support, enhance, or promote some interests but not support, enhance, or promote other interests. Not only the "quantitative" effects of disclosure or non-disclosure need be assessed (how much good or ill would be caused) but the relative importance of interests should be assessed (significant promotion of a lesser interest may be outweighed by moderate promotion of a more important interest). There may be no issue of "harm" in the sense of damage caused by disclosure or non-disclosure, although disclosure or non-disclosure may have greater or lesser benefits. A reason for not disclosing, for example, would be that the benefit for an important interest would exceed any benefit for other interests. That is, discretion may turn on a balancing of benefits, as opposed to a harm assessment.

[para 60] It further explained the weighing of factors at paragraph 419:

> …If disclosure would enhance or improve the public body's interests, there would be no reason not to disclose. If non-disclosure would benefit the public body's interests beyond any benefits of disclosure, the public body should not disclose. If disclosure would neither enhance nor degrade the public body's interests, given the "encouragement" of disclosure, disclosure should occur. Information should not be disclosed only if it would run counter to, or degrade, or impair, that is, if it would "harm" identified interests of the public body.

[para 61] Lastly, the Court described burden of showing that discretion was properly exercised (at para. 421):

> I accept that a public body is "in the best position" to identify its interests at stake, and to identify how disclosure would "potentially affect the operations of the public body" or third parties that work with the public body: EPS Brief at para 199. But that does not mean that its decision is necessarily reasonable, only that it has access to the best evidence (there's a difference between having all the evidence and making an appropriate decision on the evidence). The Adjudicator was right that the burden of showing the appropriate exercise of discretion lies on the public body. It is obligated to show that it has properly refrained from disclosure. Its reasons are subject to review by the IPC. The public body's exercise of discretion must be established; the exercise of discretion is not presumptively valid. The public body must establish proper non-disclosure. The IPC does not have the burden of showing improper non-disclosure.

[para 62] The Public Body's submission states (at paras. 34-36):

> 34. Order F2006-032, the OIPC lists criteria to decide whether or not a record or topic is a matter of public interest:
>
> "[para 43] The first set of criteria (numbers 1 to 3) is relevant to decide if a record 'relates to a matter of public interest':
>
> 1. Will the records contribute to the public understanding of, or to debate on or resolution of, a matter or issue that is of concern to the public or a sector of the public, or that would be, if the public knew about it? The following may be relevant:
> - Have others besides the applicant sought or expressed an interest in the records?
> - Are there other indicators that the public has or would have an interest in the records?
>
> 2. Is the applicant motivated by commercial or other private interests or purposes, or by a concern on behalf of the public, or a sector of the public? The following may be relevant:
> - Do the records relate to a conflict between the applicant and government?
> - What is the likelihood the applicant will disseminate the contents of the records?
>
> 3. If the records are about the process or functioning of government, will they contribute to open, transparent and accountable government? The following may be relevant:
> - Do the records contain information that will show how the Government of Alberta or a public body reached or will reach a decision?
> - Are the records desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to scrutiny?

- Will the records shed light on an activity of the Government of Alberta or a public body that have been called into question?"

> 35. There have not been other requests for these records by any other individual other than the applicant, nor has there been any media attention or inquiries about these records. The interest lies with the applicant only and if the applicant were to disseminate the contents of the records into the public domain, the security plans and mechanisms would damage the Public Body's ability to ensure safe detainment of lawfully detained persons and to ensure the safety of staff, inmates and visitors.
>
> 36. The Public Body submits that the Edmonton Remand Centre (ERC) and the Correctional Services Division objected to the release of the information. The disclosure of the redacted information in the public domain would have negative consequences for law enforcement, including but not limited to individuals outsmarting law enforcement. In addition, while the Public Body disclosed part of the Standing Operating Procedures, centres' technology, keys and access card information, types of housing units, emergency evacuation information and contraband to the applicant, security and safety of correctional centres and its inhabitants must prevail the applicant's right to access the information withheld from disclosure. The information contained in but not limited to the SOP provide guidance to staff in relation to the process of security clearance at the provincial correctional centres to ensure inmates, staff, visitors and public's safety in situations which may be dangerous.

[para 63] The factors set out in Order F2006-032 regarding public interest in disclosure relate to whether it is appropriate to waive fees for the reason that the records relate to a matter of public interest. While a consideration of the public interest is a relevant factor in exercising discretion, it is not the only reason to consider disclosing information. As discussed in *EPS*, it may be that the Applicant's interest in disclosure outweighs the factors against disclosure. The Applicant's interest needn't meet the standard for 'public interest'; the Applicant may have their own private interest in disclosure and that interest ought to be considered to the extent that it is known.

[para 64] In this case, the Applicant set out their reason for the access request in their request for review. They said:

> The core goal of my access request was to access the policy or policies that JSG applies when deciding how to grant, suspend, and revoke security clearances for contracted workers providing services in provincial correctional facilities.

[para 65] It is not clear whether the Public Body considered this interest, or whether any of the information withheld under section 20(1) would address this interest if disclosed. The Applicant appears to be making the request on behalf of a group that provides services to correctional centres; the Public Body may therefore also consider whether disclosure of any information could aid that group in understanding how their security clearances may be affected by behaviours discussed in the training materials.

[para 66] The Public Body considered appropriate factors in exercising discretion; however, in my view it did not consider *all* relevant factors. The Court in *EPS* discussed the importance of weighing the risks and benefits of disclosure against withholding the

information. The Public Body's explanation of its exercise of discretion does not include any such discussion. I will order the Public Body to re-exercise its discretion to withhold information under section 20(1), taking into account the factors discussed above.

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

[para 67] The Public Body applied section 24(1)(a) and (b) to information in the pages 51, 53-54 and 55-56 of the records at issue.

[para 68] Section 17 was applied to the same information as section 24(1) on pages 51, 55 and 56. As the Applicant specifically stated that they were not seeking an inquiry into the Public Body's application of section 17, it is not at issue in this inquiry. Therefore, whether or not the Public Body properly applied section 24(1) to withhold information on pages 51, 54 and 55 is irrelevant as the Public Body continues to withhold that information under section 17. The Applicant's submission includes arguments relating to pages 53 and 54 but not pages 51, 56 or 56, indicating that they are interested only in the former pages.

[para 69] Given this, I will consider the Public Body's application of section 24(1) to the information withheld on pages 53 and 54 only.

[para 70] Sections 24(1)(a) and (b) state:

> *24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*
>
> *(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,*
>
> *(b) consultations or deliberations involving*
>
> *(i) officers or employees of a public body*
>
> *(ii) a member of the Executive Council, or*
>
> *(iii) the staff of a member of the Executive Council,*
>
> ...

[para 71] A "consultation" occurs when the views of one or more officers or employees are sought as to the appropriateness of particular proposals or suggested actions; a "deliberation" is a discussion or consideration, by persons described in section 24(1)(b), of the reasons for and/or against an action (Orders 96-006 at p. 10; Order 99-013 at para. 48, F2007-021, at para. 66).

[para 72] The test for sections 24(1)(a) and (b), as stated in past Orders, is that the advice, recommendations etc. (section 24(1)(a)) and/or the consultations and deliberations (section 24(1)(b)) should:

1. be sought or expected, or be part of the responsibility of a person by virtue of that person's position,
2. be directed toward taking an action,
3. be made to someone who can take or implement the action. (See Order 96-006, at p. 9)

[para 73] In Order F2013-13, the adjudicator stated that the third arm of the above test was overly restrictive with respect to section 24(1)(a). She restated that part of the test as "created for the benefit of someone who can take or implement the action" (at paragraph 123).

[para 74] In addition to the requirements in those tests, sections 24(1)(a) and (b) apply only to the records (or parts thereof) that reveal substantive information about which advice was sought or consultations or deliberations were being held. Information such as the names of individuals involved in the advice or consultations, or dates, and information that reveals only the fact that advice is being sought or consultations held on a particular topic (and not the *substance* of the advice or consultations) cannot generally be withheld under section 24(1) (see Order F2004-026, at para. 71).

[para 75] Bare recitation of facts or summaries of information also cannot be withheld under sections 24(1)(a) or (b) unless the facts are interwoven with the advice, proposals, recommendations etc. such that they cannot be separated (Order F2007-013 at para. 108, Decision F2014-D-01 at para. 48). As well, neither section 24(1)(a) nor (b) apply to a decision itself (Order 96-012, at para. 31).

[para 76] The first step in determining whether section 24(1)(a) and/or (b) were properly applied is to consider whether a record would reveal advice, proposals, recommendations, analyses, or policy options (which I will refer to as "advice etc.", section 24(1)(a)); and consultations or deliberations between specified individuals (section 24(1)(b)).

[para 77] The Applicant argues that the withheld information, which consists of portions of emails, "appear to plan a get-together to discuss issues, rather than contain advice to/from officials or deliberations of a potential course of action."

[para 78] The Public Body states (at paras. 41, 44):

> The email threads contain consultations, deliberations and recommendation between an AHS manager, a JSG Deputy Director and a JSG Director related to security clearance and security protocols in correctional centres. This information will allow AHS and the centres to take action and make decision to rectify the situation. For this reason it was recommended the application of section 24(1)(a) and (b) [Advise from officials] of the Act, to portions of pages 51 and 53-56. Disclosing the information would reveal the consultation details, which is intended to be confidential.
>
> …
> The Public Body applied section 24(1)(a) and (b) to the information contained on pages 51 and 53-56 of the records as these email records would reveal consultations,

> deliberations and recommendations not intended for public disclosure. The email records on page 51 and 53-56, provides information related to security clearance and security protocols in correctional centres. As a result, the records were created to provide an analysis of a situation that may require action and presentation of options for future action. The protected information falls under the jurisdiction of the Correctional Centres' Deputy Director and Director following an AHS investigation. The process will inform the decisions to be made. These records were made for the consideration of the Directors of the correctional centres who have the authority to make the final decision regarding the outcome of the process.

[para 79] I agree with the Applicant that pages 53 and 54 consist of emails setting up a meeting between Public Body employees and employees of AHS. It is clear from the emails that the meeting will include employees who are tasked with making decisions.

[para 80] The withheld portions of the emails are not comprised of scheduling or other non-substantive information. Rather, the withheld portions raise questions and concerns that the authors believe need to be addressed at the upcoming meeting, in order to make the relevant decisions. These discussions can be characterized as preliminary consultations and deliberations undertaken to prepare for the meeting. I accept that section 24(1)(b) applies to the withheld information on pages 53 and 54.

Exercise of discretion

[para 81] Section 24(1) is a discretionary exception. The discussion regarding the exercise of discretion to apply section 20(1) also applies here.

[para 82] The Public Body states (at paras. 45-49):

> The Public Body confirms that it considered all matters at hand and it exercised its discretion of withholding the records to the applicant based on the following factors:
>
> Whether the individual's request could be satisfied by severing the record and by providing the applicant with as much information as is reasonably practicable;
>
> The historical practice of the Public Body with respect to release of the similar types of information; and
>
> The nature of the records and the extent to which the document is significant and/or sensitive to the Public Body.
>
> The Public Body submits that the disclosure of the records in whole and in part, would mostly certainly make advice and recommendations less candid, comprehensive, and frank and would impair the ability of the management team to ensure excellent and independent decision making processes, within the JSG Correctional Services Division

[para 83] I do not understand what the Public Body means when it states that it considered the historical practice of the Public Body with respect to the release of the similar information. Decisions to withhold information must be made on a case-by-case basis. In Order F2020-22 I said (at para. 114):

> This explanation suggests that the Public Body applies section 24(1) in a 'blanket' manner, rather than on a case-by-case basis. Specifically, this is indicated by the Public Body's reference to exercising its discretion to withhold "these types of consultations." Section 24(1)(b) can apply to a broad range of consultations and deliberations; some consultations or deliberations might be quite innocuous. Not all information to which this exception can apply will have a 'chilling effect' if disclosed. I understand the Public Body's above explanation to mean that it exercises its discretion to withhold information under section 24(1)(b) in all cases, to avoid any chilling effect. That is not a proper exercise of discretion.

[para 84] It may be that by 'historical practice', the Public Body means that it considered whether similar information has already been disclosed, such that it wouldn't make sense to withhold it from the Applicant now. This would be a relevant factor to consider. However, it may also be that the Public Body decided that since it has not disclosed similar information in the past, it will withhold the information here as well. That is not an appropriate exercise of discretion.

[para 85] The Public Body also hasn't indicated whether it considered the Applicant's interest in disclosure. As stated above, the Court in *EPS* discussed the importance of weighing the risks and benefits of disclosure against withholding the information. The Public Body's explanation of its exercise of discretion does not include any such discussion. I will order the Public Body to re-exercise its discretion to withhold information under section 24(1), taking into account the factors discussed above.

V. ORDER

[para 86] I make this Order under section 72 of the Act.

[para 87] I find that the Public Body properly applied section 20(1) to some information in the records, as described at paragraphs 49, 52 and 53. However, I order the Public Body to re-exercise its discretion in relation to those records. I order the Public Body to disclose the information in the records that I have not identified as meeting the standard for applying sections 20(1)(j), (k), (l) or (m).

[para 88] I find that section 24(1) applies to the information in the records at issue; however I order the Public Body to re-exercise its discretion in relation to those records.

[para 89] I further order the Public Body to notify me and the Applicant in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

_____

Amanda Swanek
Adjudicator