

ALBERTA
OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER

ORDER F2004-022

November 28, 2005

CALGARY POLICE SERVICE

Review Number 2888

Office URL: <http://www.oipc.ab.ca>

Summary: The Applicant made a request under the *Freedom of Information and Protection of Privacy Act* (the “Act”) for access to all recruiting files and documentation pertaining to his application for employment with the Calgary Police Service (the “Public Body”).

In response to the access request, the Public Body provided access to 425 pages of responsive records. It withheld 115 pages in their entirety, while partially severing a further 42 pages. The Public Body cited sections 17, (unreasonable invasion of privacy), 19 (confidential evaluations), 20 (law enforcement), 21(intergovernmental relations), 26 (testing and auditing procedures) and 27 (privileged information) of the Act as its authority to withhold the records.

The Adjudicator held that the Public Body did not properly withhold some of the records at issue and ordered it to disclose those records to the Applicant.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c.F-25, ss. 1(n), 1(h)(ii), 4(1)(g),17, 17(4)(d), 17(4)(f), 19, 21, 21(1)(b), 27, 27(1)(a), 71(2), 72. *Police Act*, R.S.A. 2000, c.P-17, ss. 36, *Police Service Regulation*, Alta. Reg. 356/90.

Authorities Cited: *Blacks’ Law Dictionary*, 7thed. (St. Paul: West Corp.1999) at p.1153 and p.1341.

Cases Cited: *Nova, An Alberta Corporation v. Guelph Engineering Company* (1984), 30 Alta. L.R. (2nd), 183 C.A., *Solosky v. The Queen* [1980] 1 S.C.R. 821, *Waugh v. British Railway Board*, [1979] 2 All E.R. 1169 (H.L.).

Orders Cited: AB: 96-015, 96-017, 97-018, 98-021, 99-021, 99-028, F2004-015, F2004-024.

I. BACKGROUND

[para 1] On July 8, 2003, the Calgary Police Service (the “Public Body”) received an access request under the *Freedom of Information and Protection of Privacy Act* (the “Act”). The request was for “all recruiting files, letters and documentation pertaining to the [Applicant’s] recruiting process conducted by the Calgary Police Service.” The Applicant’s request was for the time period from July 2002 to the date of request.

[para 2] On November 6, 2003, the Public Body wrote to the Applicant stating it had identified 425 pages of responsive records. The Public Body decided to withhold 115 pages in their entirety, while partially severing a further 42 pages. The Public Body denied access citing sections 17 (unreasonable invasion of privacy), 19 (confidential evaluations), 20 (law enforcement), 21 (intergovernmental relations), 26 (testing and auditing procedures) and 27 (privileged information) of the Act as its authority to withhold the records. The Applicant asked this office to review the Public Body’s decision. Mediation didn’t resolve the issues, which proceeded to inquiry.

II. RECORDS AT ISSUE

[para 3] The records at issue consist of letters, recruitment testing material, a legal opinion, file and investigative notes. There are 157 pages of records at issue in this inquiry. Of these, 115 are withheld in their entirety, while 42 pages are partially withheld, as follows:

Pages withheld in their entirety: 32, 34, 35-37, 39-48, 50-59, 68-72, 81, 268, 268A, 269, 269A, 293, 294, 306, 307, 319, 320, 323-350, 350A, 351, 351A, 352, 352A, 353, 353A, 354, 354 A, 355, 355 A, 356, 356A, 357, 357A, 358-359, 360-364, 372, 397-401, 403-407, 413-425.

Partially severed: 2, 3, 31, 38, 49, 60, 64, 66, 76, 77, 78, 80, 82, 85, 90, 180, 281, 285-291, 298-304, 311-317, 384-385, 392, 412.

III. ISSUES

[para 4] There are six issues in this inquiry:

- A. Does section 17 of the Act (personal information) apply to the records/information?

- B. Did the Public Body properly apply section 19 of the Act (confidential evaluations) to the records/information?
- C. Did the Public Body properly apply section 20 of the Act (law enforcement) to the records/information?
- D. Did the Public Body properly apply section 21 of the Act (intergovernmental relations) to the records/information?
- E. Did the Public Body properly apply section 26 of the Act (testing and auditing procedures and techniques) to the records/information?
- F. Did the Public Body properly apply section 27(1) of the Act (privileged information) to the records/information?

IV. DISCUSSION OF ISSUES

ISSUE A: Does section 17 of the Act (personal information) apply to the records/information?

[para 5] The relevant portions of Section 17 are:

17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

- (a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,*
- (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,*
- (c) the personal information relates to eligibility for income assistance or social service benefits or to the determination of benefit levels,*
- (d) the personal information relates to employment or educational history,*
- (e) the personal information was collected on a tax return or gathered for the purpose of collecting a tax,*
- (e.1) the personal information consists of an individual's bank account information or credit card information,*
- (f) the personal information consists of personal*

recommendations or evaluations, character references or personnel evaluations,

(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,

or

(h) the personal information indicates the third party's racial or ethnic origin or religious or political beliefs or associations.

(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 6]

The Public Body withheld under this section in its entirety:

Pages 34, 35-37, 81 (File notes, letter)

39-48, 68-72 (Legal opinion, Memoranda)

50-59, 268, 269, 323-357, 372, 413-425 (File notes, investigative notes)

[para 7] The Public Body partially severed:

Pages 2, 3, 38, 49, 60, 66, 76, 77, 78, 80, 82, 85, 384, 385, 392, 412.

[para 8] In accordance with section 71(2) of the Act and as has been stated by Order 97-018, the burden of proof will be on the Applicant to prove that disclosure would not be an unreasonable invasion of a third party's personal privacy. Nevertheless, I will still review the Public Body's decision that section 17 applies.

[para 9] Section 17 is a mandatory section of the Act. Therefore if section 17 applies, a public body must refuse to disclose the information. Order 99-028 stated that there are two criteria that must be fulfilled for section 17 to apply:

- (a) the information must be "personal information" of a third party; and
- (b) the disclosure of the personal information must be an unreasonable invasion of a third party's personal privacy.

[para 10] The Public Body states that the severed and undisclosed records contain the names, addresses and telephone numbers of third parties, as well as the personal beliefs of those third parties. The Applicant has not addressed the issue of the burden of proof in his submission.

[para 11] Page 34 is a Note to File. The two names identified on it are individuals acting in their representative capacities. As such, disclosure would not be an unreasonable invasion of privacy under section 17. However, the Public Body has also claimed that sections 19 (confidential information) and 27 (privileged information) apply to the record and therefore, I shall discuss this record further under those issues.

[para 12] Pages 35-37 are statements which include third party personal information such as employment history. Accordingly, disclosure would be presumed to be an unreasonable invasion of a third party's privacy in accordance with section 17(4)(d). In addition, the statements were supplied in confidence, a relevant circumstance which the Public Body took into consideration under section 17(5)(f) of the Act. Although the statements additionally include personal information of the Applicant, it is so inextricably intertwined with the third party personal information that any attempt to sever such information would render the records meaningless. On this basis the Public Body was correct to withhold the information under section 17.

[para 13] Pages 39-48 are a legal opinion and a note to file which the Public Body refuses to disclose not only under section 17 but also section 27 (privileged information). I intend to consider those pages under section 27 rather than section 17.

[para 14] Pages 50-59 are a summary of findings based on conversations between an employee of the Public Body and the Applicant's references. The record contains third party personal information such as employment history and the personal views of the

third parties regarding the Applicant, which would constitute the Applicant's personal information under section 1(n) (viii) of the Act. Disclosure of the employment history of the third parties would be an unreasonable invasion of the third parties' privacy in accordance with section 17(4)(d). In addition, the record states that the references were told by the Public Body's employee that any views expressed by them would be held in confidence, a relevant circumstance which the Public Body took into consideration under section 17(5)(f) of the Act. With regard to the Applicant's own personal information, I find that it is so inextricably intertwined with the third party personal information that any attempt to sever this information, with a view to disclosing the remainder, would render the record meaningless. I therefore find that the Public Body was correct to withhold the personal information under section 17.

[para 15] Pages 68-72 consist of memoranda. There are personal opinions relating to the Applicant intertwined with third party personal information dealing with employment history. The information was given in confidence. Opinion evidence regarding the Applicant would meet the definition of "personal information" found at section 1(n) (viii) of the Act and therefore could be released to the Applicant. However, I find that the information about the Applicant contained in the memoranda is so inextricably intertwined with the third party personal information that any attempt to sever this information, with a view to disclosing the remainder, would render the records meaningless. Given that the third party personal information was given in confidence and dealt with employment history, it would be an unreasonable invasion of a third person's privacy to release the record. I therefore find that the Public Body was correct to withhold the personal information under section 17.

[para 16] Page 81 is a file tracking sheet which consists entirely of third party personal information. The nature of that information, which describes the personal background of one of the Applicant's references and which was given in confidence is such that it would be an unreasonable invasion of a third person's personal privacy if it was disclosed. The Public Body was therefore correct in withholding the information under section 17.

[para 17] Pages 268-268 A are excerpts from confidential evaluations. There is no third party personal information contained in the records and accordingly section 17 would not apply. The Public Body, however, has further claimed that the records are subject to the application of section 19 (confidential evaluations), and I will discuss the records further under that issue.

[para 18] Pages 269-269 A contain further excerpts from confidential evaluations. Page 269 contains no third party personal information. The information contained therein is an opinion about the Applicant and this would constitute his own personal information under section 1(n)(viii). Page 269 A is a blank page and contains no personal information. Accordingly, section 17 would not be applicable to either record. However, the Public Body has also argued the applicability of section 19 (confidential evaluations) to these records and I will discuss the records further under that issue.

[para 19] Pages 323-357 are excerpts from confidential evaluations. Twelve of those pages cannot be claimed under section 17 as they are blank questionnaires containing no personal information (Pages: 333, 334, 336, 337, 338, 339, 346, 348, 351A, 353, 353A and 356A). The Public Body has further argued the applicability of section 19 (confidential evaluations) to those records, and I will discuss the records further under that issue.

[para 20] Twenty-four of the pages include opinions about the Applicant rather than third party personal information. As has been discussed previously, such information would come within the definition of “personal information” of the Applicant under section 1(n)(viii). However, I note that the Public Body has exercised its discretion to withhold those pages under section 19 (confidential evaluations) of the Act. I will therefore discuss the exercise of that discretion under that section in due course. In any event, section 17 will be inapplicable to the twenty-four pages in question (Pages: 323, 324, 325, 326, 327, 328, 331, 332, 335, 341, 342, 343, 344, 345, 347, 349, 350A, 351, 352, 354, 354A, 356, 357, and 357A).

[para 21] The four remaining pages are cover sheets to the questionnaires (Pages 330, 340, 350 and 355). These sheets display third party personal information such as the names of personal references and contact details. While it is not an unreasonable invasion of privacy to disclose the names of the references which the Applicant himself tendered, the contact details of those individuals which were given in confidence should be severed under section 17. The cover sheet with the name of the Applicant and Reference can, however, be disclosed.

[para 22] Page 372 is a report that consists entirely of third party personal information. Given the nature of that information, which was used by the Public Body as part of a security clearance, the information, if disclosed, would be an unreasonable invasion of a third person’s privacy. Section 17 therefore applies in this instance.

[para 23] Pages 413-425 are personal reference questionnaires. The cover sheet of both questionnaires (pages 413 and 423) and my previous reasoning for pages 330, 340, 350 and 355 pertaining to such records, will apply here with equal force. Accordingly, the cover sheet with the name of the Applicant and personal references can be disclosed, with the contact details being severed.

[para 24] Pages 415, 416, 417 and 419 do not contain third party personal information and therefore section 17 is not applicable. The Public Body has also applied section 19 (confidential evaluations) in withholding these pages, and I will discuss the applicability of that section later.

[para 25] The remaining records (pages 414, 418, 420, 421, 422, 424 and 425) contain personal information of the Applicant in the form of personal opinions regarding him. There is no third party personal information contained in these records. The information would therefore constitute the Applicant’s “personal information” as defined

under the Act and section 17 would not be applicable. However, the Public Body has further relied on section 19 (confidential evaluations) as a further basis for denying access. I will therefore discuss these records under that issue.

[para 26] With regard to the severed records, pages 2, 3, 38, 60, 66, 76, 77, 80, 90, 180, 384, 385 and 412 have names deleted from the record. I find that the names and signatures were provided by individuals acting in their representative capacities and as such, the disclosure of this information would not be an unreasonable invasion of privacy under section 17.

[para 27] There are three remaining severed records: pages 82, 85 and 392. On Page 82, the name of a third party has been severed; however, the Public Body has not made out any argument as to why disclosure would be an unreasonable invasion of privacy. There is also no indication on the face of the record itself why release would be an unreasonable invasion of privacy. The name therefore can be disclosed. On page 85, the Applicant's own telephone number has been severed. As this is not third party information, it can be released. Finally, at page 392 the Public Body has properly severed a name, which from the face of the record is clearly not of an individual acting in a representative capacity.

[para 28] In conclusion, I find that section 17 applies to pages 35-37, 50-59, 68-72, 81, 372 and the severed portion of page 392. In addition, I find that section 17 is inapplicable to the following pages: 34, 39-48, 268-268A, 269-269A, 323-357, 415, 416, 417, 419 and the partially severed portions of pages 2, 3, 38, 60, 66, 76, 77, 80, 82, 85, 90, 180, 384, 385 and 412.

[para 29] The Public Body, however, has further applied section 19 (confidential evaluations) to pages 34, 268, 268A, 269, 269A, 323-357, 413-425 and section 27 (privileged information) to pages 34, 39-48, I shall therefore address the applicability of those sections to the records in due course.

[para 30] However, given that the Public Body has not claimed the applicability of any other sections of the Act to the partially severed records, the following records can be released to the Applicant: pages 2, 3, 38, 60, 66, 76, 77, 80, 82, 85, 90, 180, 384, 385 and 412.

ISSUE B: Did the Public Body properly apply section 19 of the Act (confidential evaluations) to the records/information?

[para 31] Section 19 reads:

19(1) The head of a public body may refuse to disclose to an applicant personal information that is evaluative or opinion material compiled for the purpose of determining the applicant's suitability, eligibility or qualifications for employment or for the

awarding of contracts or other benefits by a public body when the information is provided, explicitly or implicitly, in confidence.

(2) The head of a public body may refuse to disclose to an applicant personal information that identifies or could reasonably identify a participant in a formal employee evaluation process concerning the applicant when the information is provided, explicitly or implicitly, in confidence.

(3) For the purpose of subsection (2), "participant" includes a peer, subordinate or client of an applicant, but does not include the applicant's supervisor or superior.

[para 32] The Public Body withheld, under this section, in their entirety:

Records 34, 50-59, 268, 269, 323-357, 372, 413-425 File notes,
investigative notes
293, 294, 306, 307, 319, 320 Interviewer's notes
358-364 Investigative notes
397-401, 403-407 Testing materials

Pages partially severed: 298-304, 311-317.

[para 33] In Order 98-021, the Commissioner stated that for section 19(1) to apply, all three parts of the following test must be met:

1. The information must be personal information that is evaluative or opinion material;
2. The personal information must be compiled solely in order to determine the applicant's suitability, eligibility or qualifications for employment, to award a government contract, or to award other benefits; and
3. The personal information must have been provided, explicitly or implicitly, in confidence.

[para 34] In Order 99-021, the Commissioner defined the term "evaluative" as the adjective for "evaluate", which means "to assist, appraise, to find or state the number of". The Commissioner also defined "opinion" as a "belief or assessment based on grounds short of proof: a view held probable." The Commissioner stated that an example of an opinion would be a belief that a person would be a suitable employee, based on that person's employment history. An "opinion" is subjective in nature, and may or may not be based on facts.

[para 35] As previously stated, page 34 is a note to file that contains no personal information, other than the names of two individuals acting in their representative capacities. The information contained on the record is not evaluative and will not fall within section 19. The Public Body has, however, also claimed the application of section 27 to this record and this will be discussed under that issue.

[para 36] Pages 268, 268 A, 269 and 269 A are excerpts from personal reference questionnaires. Page 268 contains no personal information and therefore section 19 is inapplicable. Pages 268 A, 269 and 269 A contain evaluative personal information used to determine employment eligibility, thus meeting the criteria for section 19.

[para 37] Pages 293, 294, 306, 307, 319 and 320 are standard form interview evaluation sheets. The handwriting and scoring set out on the records meet the three-part criteria required for the application of section 19 and therefore fall within that section. The Public Body further submits that the interview evaluation sheet template, itself, falls within section 26 (testing procedures) and this will be addressed under that issue.

[para 38] Pages 323-357 are excerpts from confidential evaluations. Twelve of those pages cannot be claimed under section 19 as they are blank questionnaires containing no personal information (Pages: 333, 334, 336, 337, 338, 339, 346, 348, 351 A, 353, 353 A, 356A). Additionally, four pages are cover sheets to the evaluations, containing the Applicant's name and references' name and address (Pages: 330, 340, 350 and 355). These pages while containing personal information do not have an evaluative or opinion element and accordingly section 19 would be inapplicable. As the Public Body has not claimed any further exceptions, the 16 pages which make up these records can be released to the Applicant (Pages 330, 333, 334, 336, 337, 338, 339, 340, 346, 348, 350, 351 A, 353, 353 A, 355, 356 A).

[para 39] The remaining pages contain handwritten information by the interviewer, which meets the criteria set down in Order 98-021 and therefore falls within the exception to disclosure under section 19 (Pages 320, 324, 325, 326, 327, 328, 329, 331, 332, 335, 341-345, 347, 349, 350A, 351, 352, 352A, 354, 354 A, 355 A, 356, 357, 357 A).

[para 40] Pages 358-364 and 372 are investigative notes. I have already dealt with page 372 by determining that the Public Body properly applied section 17 to the record. Pages 358-364 contain a recital of basic facts regarding the Applicant and third parties; consequently, there is no analysis that would fall within the definitions of "evaluative" or "opinion". Section 19, therefore, is inapplicable. I note, however, that the Public Body has further cited the application of section 21 (intergovernmental relations) to pages 358-364 and this will be discussed under that issue.

[para 41] Pages 397-401 form part of a written communication test. The handwritten scores on pages 397-399 are confidential evaluations that meet the criteria of section 19. Pages 400 and 401 do not contain any evaluative materials and therefore do not fall

within section 19. However, the applicability of section 26 (testing and auditing) to the questions set out on pages 397-399 and pages 400-401 will be discussed under that issue.

[para 42] Pages 403-407 are an essay written in the Applicant's own handwriting. There is no evaluative notation or scoring on the essay. Section 19 therefore will not apply. However, section 26 (testing and auditing) has also been claimed by the Public Body and this matter will be discussed under that issue.

[para 43] Pages 413-425 are a personal reference questionnaire. Page 413 and 423 contain the names of the Applicant and a personal reference. Pages 415-419 have been left blank. All of these pages contain no evaluative information and therefore section 19 is inapplicable. As no other sections of the Act have been claimed by the Public Body, these records can be released to the Applicant. However, pages 413 and 423 shall be severed in accordance with my finding relating to the application of section 17 to pages 330, 340, 350 and 355.

[para 44] With regard to pages 414, 418, 420, 421, 422, 424 and 425, I find that they contain evaluative information, relating to the Applicant's suitability for employment given in a confidential context and therefore fall within the scope of section 19.

[para 45] With regard to the partially severed records, Pages 298-304 and 311-317 list "key actions" to be considered in an employment evaluation. However, the key actions do not contain any personal information in an evaluative context and therefore do not come within section 19. The Public Body has also cited the applicability of section 26 (testing and auditing) to these records and they will be further dealt with under that issue.

[para 46] I have examined the Public Body's factual decision of the applicability of section 19 to the records in question. I now turn to the second step of the decision-making process, namely, whether the head of the Public Body or its delegate properly determined, considering the objects and purposes of the Act, whether the information should be released in those cases where the exception applies.

[para 47] Order 96-017 considered the decision-making process a public body must undertake in applying a discretionary exception of the Act such as section 19. There is a two-step process consisting of a factual decision: namely, the determination as to whether the information falls within the exception which allows the information to be withheld from disclosure, and a discretionary decision, which determines whether the information should nevertheless be disclosed, even if the exception applies.

[para 48] The Public Body in this instance has not provided direct evidence from the head of the public body or its delegate. It has, however, demonstrated by way of argument that it considered the competing purposes of the Act, weighing the right of access to records against the disclosure by a public body of personal information. Since the personal information was given in confidence, the Public Body decided to withhold the personal information. In reviewing the Public Body's submission, no improper or irrelevant considerations were made. It therefore exercised its discretion properly.

[para 49] In conclusion, I find that the Public Body properly withheld under section 19 pages 268 A, 269-269 A, 320, 324- 329, 331, 332, 335, 341-345, 347, 349, 350A, 351, 352, 352 A, 354, 354A, 355 A, 356, 357, 357 A, 397-399, 414, 418, 420-422, 424, 425. The Public Body also properly withheld under section 19 the handwriting and scores found in pages 293, 294, 306, 307, 319 and 320.

[para 50] I conclude that section 19 does not apply to the following pages: 34, 268, 330, 333, 334, 336-339, 340, 346, 348, 350, 351A, 353, 353A, 355, 356A, 358-364, 400, 401, 403-407, 413, 415-419, 423. Section 19 is also inapplicable to the severed records, pages 298-304, 311-317.

[para 51] Since I have found that sections 17 and 19 are inapplicable and since no other sections of the Act have been claimed by the Public Body, the following records can be released to the Applicant: pages 268, 330, 333, 334, 336, 337, 338, 339, 340, 346, 348, 350, 351 A, 353, 353A, 355, 356A, 413, 415, 416, 417, 419, 423. The Public Body has further claimed the applicability of section 21 (intergovernmental relations) to pages 358-364, section 26 (testing and audit procedures) to pages 293, 294, 306, 307, 319, 320, 397-399, 400-401, 403-407, the partially severed pages 298-304, 311-317 and section 27 (privileged information) to page 34. I shall discuss these records further under those issues.

ISSUE C: Did the Public Body properly apply section 20 of the Act (law enforcement) to the records/information?

[para 52] Section 20(1) reads:

20(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

- (a) harm a law enforcement matter,*
- (b) prejudice the defence of Canada or of any foreign state allied to or associated with Canada,*
 - (b.1) disclose activities suspected of constituting threats to the security of Canada within the meaning of the Canadian Security Intelligence Service Act (Canada),*
- (c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement,*
- (d) reveal the identity of a confidential source of law enforcement information,*
- (e) reveal criminal intelligence that has a reasonable connection with the detection, prevention or suppression of organized criminal activities or of serious and repetitive criminal activities,*

- (f) *interfere with or harm an ongoing or unsolved law enforcement investigation, including a police investigation,*
- (g) *reveal any information relating to or used in the exercise of prosecutorial discretion,*
- (h) *deprive a person of the right to a fair trial or impartial adjudication,*
- (i) *reveal a record that has been confiscated from a person by a peace officer in accordance with a law,*
- (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, or*
- (n) *reveal information in a correctional record supplied, explicitly or implicitly, in confidence.*

[para 53] In its initial submission, the Public Body declined to make representations with regard the application of this section. Subsequently, in rebuttal the Public Body submitted argument, although it did not state what records it withheld under this section.

[para 54] The Public Body has argued that section 20 is applicable as the recruitment process itself is a law enforcement investigation. To meet the requirement of “law enforcement” in section 1(h)(ii), the Public Body must demonstrate that its investigation leads or could lead to a penalty or sanction. The Public Body argued that there is a potential for a penalty or sanction being imposed in that the Applicant may face dismissal from employment or withdrawal of an offer of employment by the Public Body.

[para 55] In Order 96-015, the Commissioner stated the authority of a police service to investigate is not confined to a single statute, as is the case with many public bodies. That being the case, however, the Public Body has failed to cite any specific legislative or regulatory authority which would give such an investigation the potential to result in a penalty or sanction. Both the *Police Act* and the *Police Service Regulation* refer to levels of competency and possible sanction to police officers appointed under section 36 of that Act, but they do not extend to prospective police officers. Therefore, I cannot conclude that the definition of penalty or sanction can be extended to a situation where the Applicant is unable to meet the conditions of an offer of employment set by the Public Body, a matter which is governed by the common law. This is further demonstrated when one examines the definitions of penalty and sanction found in *Black’s Law Dictionary* (St. Paul, Minnesota, West Corp.,1999) at pages 1153 and 1341 respectively:

Penalty. 1. Punishment imposed on a wrongdoer, esp. in the form of imprisonment or fine. Though usu. [sic].for crimes, penalties are also sometimes imposed for civil wrongs.

Sanction. 1. Official approval or authorization. 2. A penalty or coercive measure that results from failure to comply with a law, rule or order.

[para 56] Additionally, for section 20 to apply, it must be demonstrated by the Public Body that disclosure could reasonably be expected to result in the harm contemplated under that section. In Order F2004-024, I stated:

The following test for a reasonable expectation of harm must be applied on a record by record basis:

- The Public Body must show a clear cause and effect relationship between the disclosure and the harm alleged;
- The harm that would be caused by the disclosure constitutes “damage” or “detriment” to the matter and not simply hindrance or minimal interference; and
- The likelihood of harm must be genuine and conceivable.

[para 57] In this instance, the Public Body has not considered these issues on a record by record basis. It has not indicated what records it claims under section 20. It has only tendered general assertions as to the harm that may occur and has failed to submit specific evidence linking the harm described to any specific record. Accordingly, the Public Body has not proven the applicability of section 20.

ISSUE D: Did the Public Body properly apply section 21 of the Act (intergovernmental relations) to the records/information?

[para 58] Section 21(1) and (3) read:

21(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

- (a) *harm relations between the Government of Alberta or its agencies and any of the following or their agencies:*
 - (i) *the Government of Canada or a province or territory of Canada,*
 - (ii) *a local government body,*
 - (iii) *an aboriginal organization that exercises government functions, including*
 - (A) *the council of a band as defined in the Indian Act (Canada), and*
 - (B) *an organization established to negotiate or implement, on behalf of aboriginal people, a treaty or land claim agreement with the Government of Canada,*
 - (iv) *the government of a foreign state, or*

- (v) *an international organization of states, or*
(b) *reveal information supplied, explicitly or implicitly, in confidence by a government, local government body or an organization listed in clause (a) or its agencies.*

(3) The head of a public body may disclose information referred to in subsection (1)(b) only with the consent of the government, local government body or organization that supplies the information, or its agency.

[para 59] The Public Body withheld under section 21(1)(b) in its entirety:

Pages: 358-364 Investigative notes

[para 60] The Public Body states that the records include information that was provided under agreement between local government and the Government of Canada, which was entered into with the expectation that those documents would be exchanged and retained as confidential records.

[para 61] From an examination of the records, it can be inferred from the type of information exchanged that it is information supplied in confidence from a federal agency to the Public Body. Moreover, in accordance with section 21(3), no consent has been forthcoming from that federal agency. Accordingly, the records will come within the exception of section 21 of the Act.

ISSUE E: Did the Public Body properly apply section 26 of the Act (testing and auditing procedures and techniques) to the records/information?

[para 62] Section 26 reads:

26 The head of a public body may refuse to disclose to an applicant information relating to

- (a) *testing or auditing procedures or techniques,*
(b) *details of specific tests to be given or audits to be conducted, or*
(c) *standardized tests used by a public body, including intelligence tests,*
if disclosure could reasonably be expected to prejudice the use or results of particular tests or audits.

[para 63] The Public Body withheld under this section in its entirety:

Pages 293, 294, 306, 307, 319, 320 Interviewer's notes
397-401, 403-407 Testing materials

Partially severed: Pages 298-304, 311-317

[para 64] The records in question consist of interview evaluation sheets set out in a standard form and scoring keys by which an applicant's reply to standardized interview questions can be assessed. One record consists of an essay answer written by the Applicant. The severed records contain "Key Factors" which the Public Body states are used to assess a candidate's answers to interview questions. The Public Body maintains that disclosure of such records would invalidate the future utility of the current interview process, as it would allow future candidates, aware of the evaluation sheets and scoring keys, to frame appropriate replies to the interview questions.

[para 65] At the outset, the records do not contain questions for use in an examination or test. Rather, they are evaluative tools and where any questions in the records are posed, they are directed to members of the interview panel itself, rather than the Applicant. The records therefore fall outside section 4(1)(g) of the Act, and as such I have jurisdiction to determine whether the records come within the scope of section 26.

[para 66] Pages 293, 294, 306, 307, 319 and 320 are interview evaluation sheets set out in a standard form and containing scoring keys by which an applicant's reply to standardized interview questions can be assessed. If these records were disclosed, it could reasonably be expected to prejudice the use of the standardized interview questions currently in place. As such section 26(1) (a) will be applicable to the pages in question. With regard to the handwriting that is also found on the records, it will be recalled that I decided previously in this order that such writing has been properly withheld by the Public Body under section 19.

[para 67] Pages 397-401 and 403-407 form part of a written communication test. I determined previously in this order that the handwriting found on pages 397-399 was properly excluded by the Public Body under section 19. With regard to pages 397-401 which additionally include standard questions posed to an interview panel and an evaluative key, these are part of the testing procedures used by the Public Body which could reasonably be expected to prejudice the written communication test if disclosed. Accordingly, section 26(1)(a) will apply to these pages.

[para 68] Pages 403-407 consist of an answer book containing a handwritten essay by the Applicant. The Public Body has submitted that if this record is released, it can be used to reconstruct the essay question and could reasonably be expected to invalidate the future use of the test if the Applicant shared the information with other recruits. I have examined the record and agree that given the nature of the essay, which is a recital of the facts found in the original question, the test question can be reconstructed and, if shared with recruits, could reasonably be expected to prejudice the use of the test. The Commissioner reached a similar conclusion with regard to test answers in Order F 2004-015. Therefore, the records meet the criteria for section 26(1)(c).

[para 69] I now turn to the partially severed records, pages 298-304 and 311-317. From an examination of the records, it is evident that the key actions form a guide for the

evaluation of prospective employees which could reasonably be expected to prejudice the use or results of the test in question. In this instance, therefore, the partially severed portion of these records will fall within the exclusion of section 26(1)(a).

[para 70] Having determined that the Public Body was correct in its factual determination that the information falls within section 26, I now must examine whether the head of the Public Body properly exercised its discretion to withhold the information considering the objects and purposes of the Act, even though the exception applies.

[para 71] I accept the Public Body's submission that the records were withheld to preserve their future utility. This was a proper exercise of the Public Body's discretion.

[para 72] In conclusion, the Public Body properly applied section 26 to the records in question.

ISSUE F: Did the Public Body apply section 27(1) of the Act (privileged information) to the records/information?

[para 73] Section 27(1) reads:

27(1) The head of a public body may refuse to disclose to an Applicant

- (a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,*
- (b) information prepared by or for
 - (i) the Minister of Justice and Attorney General,*
 - (ii) an agent or lawyer of the Minister of Justice and Attorney General, or*
 - (iii) an agent or lawyer of a public body,*in relation to a matter involving the provision of legal services, or*
- (c) information in correspondence between
 - (i) the Minister of Justice and Attorney General,*
 - (ii) an agent or lawyer of the Minister of Justice and Attorney General, or*
 - (iii) an agent or lawyer of a public body,*and any other person in relation to a matter involving the provision of advice or other services by the Minister of Justice and Attorney General or by the agent or lawyer.*

(2) The head of a public body must refuse to disclose information described in subsection (1)(a) that relates to a person other than a public body.

[para 74] The Public Body withheld under this section in its entirety:

Pages 32, 34 Letter, File notes
39-48, 68-72 Legal opinion, memoranda

[para 75] Pages 68-72 have already been discussed earlier where I determined that the entirety of the records were properly excluded under section 17. I therefore find it unnecessary to further examine the applicability of section 27(1)(a) to these records.

[para 76] The Public Body submits that the records fall within the exception of section 27(1)(a) in that the documents are subject to legal privilege.

[para 77] In Order 96-017, the Commissioner stated that the then section 26(1)(a)(solicitor-client privilege) is intended to encompass both aspects of solicitor-client privilege: (i) solicitor-client communications and (ii) third party communications, also referred to as “litigation privilege”.

[para 78] Litigation privilege applies to papers and materials created for or obtained by the client for its lawyer’s use in existing or contemplated litigation: *Waugh v. British Railway Board*, [1979] 2 All E.R. 1169 (H.L.). To correctly apply litigation privilege, the Public Body must demonstrate that the “dominant purpose” for which the documents were prepared was to submit them to a legal advisor for advice and use in the litigation, whether existing or contemplated: *Nova, An Alberta Corporation v. Guelph Engineering Company* (1984), 30 Alta. L.R.(2d) 183(C.A.)

[para 79] Page 32 is a letter between the Public Body and a third party. Pages 34 and 48 are both notes to the Public Body’s pre-employment file dealing with the Applicant. The Public Body has not provided any evidence as to the dominant purpose for the creation of the records. On an examination of the records, they do not appear to have been created or obtained for use in existing or contemplated litigation. There is no third party personal information contained in them. Accordingly, section 27 does not apply to the records in question and they can be released to the Applicant.

[para 80] Pages 39-47 consist of a letter from the Public Body’s solicitor to the Public Body. *Solosky v. The Queen* [1980] 1 S.C.R. 821 set out the criteria necessary for solicitor-client privilege to apply with regard to solicitor-client communications. For the privilege to apply, the records must be communications between solicitor and client, which entail the giving of legal advice that is intended to be confidential. In this instance, the record meets the criteria for section 27(1)(a).

[para 81] Having determined that the Public Body was correct in its factual determination that the information falls within section 27, I must now examine whether the head of the Public Body properly exercised its discretion to withhold the information, considering the objects and purposes of the Act, even though the exception applies.

[para 82] Throughout the Public Body's entire submission it has given greater weight to the principle of protection of privacy over the right of access to information. Given the nature of the information contained in the pages 39-47, I accept that this was a proper exercise of the Public Body's discretion.

V. ORDER

[para 82] I make the following Order under section 72 of the Act.

ISSUE A: Does section 17 of the Act (personal information) apply to the records/information?

[para 83] I find that section 17 of the Act applies to the following records/information: pages 35-37, 50-59, 68-72, 81, 372 and the severed portion of page 392.

[para 84] As such, I order the Public Body not to disclose these records in their entirety to the Applicant.

[para 85] I find that section 17 does not apply to the following: pages 34, 39-48, 268-268 A, 269-269A, 323-357, 415-417 and 419. These records are further dealt with under the issues pertaining to sections 19 and 27 of the Act.

[para 86] I find that section 17 does not apply to the following severed records: pages: 2, 3, 38, 60, 66, 76, 77, 80, 82, 85, 90, 180, 384, 385 and 412. I order the Public Body to disclose the information severed on these records to the Applicant.

ISSUE B: Did the Public Body properly apply section 19 of the Act (confidential evaluations) to the records/information?

[para 87] I find that the Public Body properly applied section 19 of the Act to the following records/information: pages 268 A, 269-269 A, 320, 324-329, 331, 332, 335, 341-345, 347, 349, 350A, 351, 352, 352A, 354, 354A, 355A, 356, 357, 357A, 397-399, 414, 418, 420-422, 424, 425 and pages 293, 294, 306, 307, 319 and 320.

[para 88] As such, I confirm the Public Body's decision to withhold these records from the Applicant.

[para 89] I find that the Public Body did not properly apply section 19 to the following records/information: pages 34, 358-364, 400, 401, 403-407 and the severed portions of pages: 298-304 and 311-317. These records are further dealt with under the issues pertaining to sections 26 and 27 of the Act.

[para 90] I find that the Public Body did not properly apply section 19 to the following records/information: pages 268, 333, 334, 336-339, 346, 348, 351A, 353, 353A, 356A, 415, 416, 417 and 419. I therefore order their disclosure to the Applicant. I further order the Public Body to disclose pages 330, 340, 350, 355, 372, 413 and 423, to be severed in accordance with my finding in this Order. I shall forward a copy of these records to the Public Body indicating the severance that must be completed so as to comply with this Order.

ISSUE C: Did the Public Body properly apply section 20 of the Act (law enforcement) to the records/information?

[para 91] I find that the Public Body did not properly apply section 20 to the records/information.

ISSUE D: Did the Public Body properly apply section 21 of the Act (intergovernmental relations) to the records/information?

[para 92] I find that the Public Body properly applied section 21 to the records/information found at pages 358-364. As such, I confirm the Public Body's decision to withhold these records.

ISSUE E: Did the Public Body properly apply section 26 of the Act (testing and auditing procedures and techniques) to the records/information?

[para 93] I find that the Public Body properly applied section 26 to the records/information found at pages 293, 294, 306, 307, 319, 320, 403-407, the standard form at pages 397-401 and the partially severed records at pages 298-304 and 311-317. I confirm the Public Body's decision to withhold these records and this information from the Applicant.

ISSUE F: Did the Public Body properly apply section 27(1) of the Act (privileged information) to the records/information?

[para 94] I find that the Public Body properly applied section 27(1) of the Act to the records and information found at pages 39-47. I confirm the Public Body's decision to withhold these records from the Applicant.

[para 95] I find that the Public Body did not properly apply section 27(1)(a) to pages 32, 34 and 48. I order the Public Body to disclose pages 32, 34 and 48 to the Applicant.

[para 96] I further order that the Public Body notify me, in writing, within 50 days of being given a copy of this Order that the Public Body has complied with this Order.

Dave Bell
Adjudicator