

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2012-24

October 15, 2012

EDMONTON POLICE SERVICE

Case File Number F5041

Office URL: www.oipc.ab.ca

Summary: The Applicants made an access request for a police file concerning the investigation into the death of their daughter. The Public Body (EPS) responded by providing a report that summarized the investigation (17 pages), but withheld the greatest part of the file (229 pages and an audio recording), relying on section 17 (unreasonable invasion of privacy) and, for three pages of records, section 21(1)(b) (information supplied by a government).

The Adjudicator found that the Public Body had not taken some important factors into consideration in making its decision to withhold the records. The first was that the Applicants needed as much information as possible, on a compassionate basis, to enable them to deal with their daughter's death. The Adjudicator held that this factor needed to be considered relative to all the individual items and categories of personal information in the undisclosed parts of the file, to decide for each whether this consideration outweighed the presumptions that disclosure would be an unreasonable invasion of privacy. As well, she found that the Public Body had not adequately explained why, for each of these items that were withheld, disclosure would unreasonably invade privacy, when in the Public Body's view, this was not the case for the *same kind* of information it had disclosed in a more summary form.

The Adjudicator held that she would not substitute her own decision as to which items of information should be withheld or disclosed, since the Public Body had not yet met its duty to make the decision taking all relevant factors into account. Rather, she would ask

the Public Body to make a new decision having regard to these considerations. She chose this course for this case because of the significance of the factors, as well as because the Public Body is in a better position in the present circumstances to gather relevant facts from the Appellants and third parties that could assist it in its decision.

With regard to section 21(1)(b), the Adjudicator agreed with the Public Body that the Office of the Chief Medical Examiner had an interest in three of the records, which it had supplied. She therefore decided to reserve jurisdiction with respect to the withholding of these three pages on the basis of section 21(1)(b), to give the Chief Medical Examiner's Office an opportunity to provide input.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(n), 1(r), 6, 17, 17(1), 17(2) 17(2)(i), 17(3), 17(4), 17(4)(a), 17(4)(b), 17(4)(d), 17(4)(g)(i), 17(5), 17(5)(a), 17(5)(c), 17(5)(e), 17(5)(h), 21, 21(1), 21(1)(b), 21(3), 40, 40(1)(b), 40(1)(cc), 67, 71(2), 72; *Fatality Inquiries Act*, R.S.A 2000, c. F-9, s. 30, 30(2).

Authorities Cited: AB: Orders 99-035, F2004-018, F2007-022, F2008-027, F2009-026, F2010-025, F2010-031, F2011-001, F2011-014; **ONT:** Order MO-2404.

Cases Cited: *Mount Royal University v. Carter*, 2011 ABQB 28

I. BACKGROUND

[para 1] On June 23, 2009, the Applicants made a request for access to the Edmonton Police Service (the "Public Body") under the *Freedom of Information and Protection of Privacy Act* ("the Act", or "the FOIP Act". The Applicants requested investigation file #07-47688, which contains the details of the Public Body's investigation into the death of their daughter at the age of nineteen. The Public Body provided seventeen pages of the file with the names of third parties severed from them, but withheld the remaining information, consisting of 233 pages, and an audio recording, under section 17 (disclosure harmful to personal privacy) and, for three pages, section 21(1)(b) (information supplied by a government). An additional four pages, consisting of media reports, were subsequently provided.

[para 2] The Applicants requested review by the Commissioner of the Public Body's response to their access request. The Commissioner authorized mediation. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

[para 3] The submissions and the evidence of the parties revealed that a third party was affected by the Applicants' request for review within the terms of section 67 of the FOIP Act, as the third party's name and facts about him appear in the records at issue. The third party was provided notice of the inquiry and the opportunity to participate. However, the third party did not provide submissions.

II. RECORDS AT ISSUE

[para 4] Those portions of investigation file #07-47688 that have not been provided to the Applicants are at issue.

III. ISSUES

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

Issue B: Did the Public Body properly apply section 21 (disclosure harmful to intergovernmental relations) to the information in the records?

IV. DISCUSSION OF ISSUES

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

Do the records withheld by the Public Body contain the personal information of third parties?

[para 5] Personal information is defined by section 1(n) of the FOIP Act as information about an identifiable individual. Section 1(n) states;

I In this Act,

...

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

[para 6] The records contain information about the Applicants' daughter and the circumstances in which she died, which is her personal information.

[para 7] The records also contain information about a third party who shared an apartment with the Applicants' daughter ("the third party"). The third party was interviewed by the police regarding the Applicants' daughter's death. The information in the records about him is his personal information. As well, the records contain personal information about persons related to the third party.

[para 8] The names, addresses, and statements, of witnesses is also the personal information of these people.

[para 9] Some of the foregoing information is the personal information of more than one person at the same time, insofar as the people described above made statements about others.

[para 10] The records also contain information about the Applicants (and the Public Body has withheld some of this information under section 17). Section 17(1) requires a Public Body to withhold personal information if it would be an unreasonable invasion of *a third party's* personal privacy to disclose it. However, in the context of an access request, the persons making the request are not third parties. Section 1(r) of the Act provides the following definition of "third party:"

1 In this Act,

...

(r) *"third party" means a person, a group of persons or an organization other than an applicant or a public body;*

As section 1(r) provides that the information of an applicant is not the information of a third party within the terms of the FOIP Act, information about applicants cannot be withheld under section 17(1).

[para 11] Records 104, 105, 106, 107, and 170 are examples of records that contain information of the Applicants themselves, as identifiable individuals, although the instances of it are not limited to these records. I will ask the Public Body to review the records and to ensure that any information in them that is solely about the Applicants is disclosed to them.

[para 12] It appears the Public Body may have relied on section 17 to withhold information about police officers acting in the course of their duties. I note that the Disclosure Analyst said in his affidavit that the Public Body relied on section 17 only in relation to information about the employment history of a single officer. However, for example, the Public Body withheld records such as task logs (records 1- 3) on the basis of section 17, but the only information about individuals in these records that I can ascertain is that of the police officers who conducted the investigation that is the subject of the

records. As well, there is information throughout the records as to which police officers were involved in the investigation and the nature of their involvement (that does not directly reveal the personal information of anyone else), as well as signatures of these officers.

[para 13] In Order F2009-026, the Adjudicator said:

If information is about employees of a public body acting in a representative capacity the information is not personal information, as the employee is acting as an agent of a public body. As noted above, the definition of “third party” under the Act excludes a public body. In Order 99-032, the former Commissioner noted:

The Act applies to public bodies. However, public bodies are comprised of members, employees or officers, who act on behalf of public bodies. A public body can act only through those persons.

In other words, the actions of employees acting as employees are the actions of a public body. Consequently, information about an employee acting on behalf of a public body is not information to which section 17 applies, as it is not the personal information of a third party. If, however, there is information of a personal character about an employee of a public body, then the provisions of section 17 may apply to the information. I must therefore consider whether the information about employees in the records at issue is about them acting on behalf of the Public Body, or is information conveying something personal about the employees.

In that case, the Adjudicator found that information solely about an employee acting as a representative of a public body was information about the public body, and not information about the employee as an identifiable individual. In *Mount Royal University v. Carter*, 2011 ABQB 28 Wilson J. denied judicial review of Order F2009-026.

[para 14] In Order F2011-014, the Adjudicator concluded that the name and signature of a Commissioner for Oaths acting in that capacity was not personal information, as it was not information about the Commissioner for Oaths acting in her personal capacity. She said:

Personal information under the FOIP Act is information about an identifiable individual that is recorded in some form.

However, individuals do not always act on their own behalf. Sometimes individuals may act on behalf of others, as an employee does when carrying out work duties for an employer. In other cases, an individual may hold a statutory office, and the actions of the individual may fulfill the functions of that statutory office. In such circumstances, information generated in performance of these roles may not necessarily be about the individual who performs them, but about the public body for whom the individual acts, or about the fulfillment of a statutory function.

I find that the names and other information about police officers acting in the course of their duties, as representatives of the Public Body, cannot be withheld as personal information, unless the information is at the same time that of an individual in their

personal capacity. (I except from this conclusion the information adverted to in the Affidavit of the Public Body's Disclosure Analyst (at para 5 of the *In Camera* Affidavit) that relates to the employment history of the member.) I will therefore ask the Public Body to review the records to ensure that any information in them that is solely of police officers acting in the course of their duties is disclosed.

Section 17

[para 15] Section 17 states in part:

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

17(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

...

(i) the personal information is about an individual who has been dead for 25 years or more [...]

...

(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,*

...

(d) the personal information relates to employment or educational history,

...

- (g) the personal information consists of the third party's name when*
 - (i) it appears with other personal information about the third party,*
 - or*
 - (ii) the disclosure of the name itself would reveal personal information about the third party...*

...

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

- (a) *the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny*
- (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 16] When the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy, a public body must refuse to disclose the information to an applicant under section 17(1). Section 17(2) sets out the circumstances in which disclosing certain kinds of personal information is not an unreasonable invasion of personal privacy.

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

Section 17(2)

[para 18] The Public Body argues that none of the factors set out in section 17(2) of the FOIP Act apply to the information in the records. I agree with the Public Body that none of the provisions of section 17(2) apply to the personal information in the records.

Section 17(4)

[para 19] The Public Body takes the position that the information in the withheld records is subject to the presumptions created by sections 17(4)(a), (b), (d), and (g) of the FOIP Act.

[para 20] Section 17(4)(b) creates a presumption relative to personal information that is "an identifiable part of a law enforcement record". In this case, the records are clearly identifiable as part of a law enforcement record, as they are the product of a police investigation. I note that the Applicants argue that some of the information in the records

exists apart from the involvement of the police. While that is true, such pre-existing information was nevertheless, as it exists in the records at issue, all compiled in the course of the police investigation, and is thus part of a law enforcement record.

[para 21] I find that the presumption created by section 17(4)(b) applies to the personal information of the Applicants' daughter that is contained in the records.

[para 22] As noted, the records also contain information about a third party who shared an apartment with the Applicants' daughter, and was interviewed by the police regarding the circumstances surrounding the Applicants' daughter's death. The information in the records about this individual is also subject to the presumption created by section 17(4)(b). The same is true of information about persons related to this third party.

[para 23] With regard to the names of witnesses who provided statements to the police in the course of the investigation, I find that section 17(4)(b) applies to their names and other identifying personal information, as this information clearly forms part of a law enforcement record. As a result, the personal information of the witnesses appearing in the records is subject to the presumption created by this provision.

[para 24] As the personal information in the records consists of the names of the individuals described above associated with other information about them, the presumption set out in section 17(4)(g)(i) (names plus other personal information) also applies.

[para 25] The Public Body argues that sections 17(4)(a) and (d) also apply.

[para 26] With regard to the Public Body's reference to section 17(4)(a), I assume it is applying this provision to information about emergency medical treatment received by the Applicants' daughter that appears in the records, and other information about her medical condition. I accept that this information falls under section 17(4)(a) and is subject to a presumption that it would be an unreasonable invasion of the Applicants' daughter's personal privacy to disclose it.

[para 27] With regard to section 17(4)(d), I note that record 172 contains information about the third party's business, and that record 170 contains sentences that describe the Applicants' daughter's employment. I find that this information is subject to the presumption arising under section 17(4)(d).

Section 17(5)

With regard to section 17(5), the Public Body states (at paras 27 and 28):

Section 17(5) of FOIPPA lists a number of additional factors that should be considered in determining whether an applicant can displace the presumption that disclosure of personal information is an unreasonable invasion of a third party's privacy interests.

It is difficult to determine from the Applicants' Initial Submissions the basis on which they argue that they have met the burden of proof placed on them to show that the presumptive invasions of privacy in subsection 17(4) are met. These Initial Submissions state the facts and then, without more, state that "the Applicants submit that they have proven that the disclosure of the personal information would not be an unreasonable invasion of a third party's personal privacy". Given that the Applicants provide no reasoning for this argument, they cannot have proven any such thing.

[para 28] In a similar vein, the Public Body states in its rebuttal that:

The EPS disagrees that the factual circumstances in this Inquiry indicate that the Applicants have met the burden on them to show that the requested records should be disclosed. As detailed in the EPS' Initial Submissions, the tragic circumstances in this matter do not relieve the Applicants of the burden to show that records should be released in spite of ss. 17 and 21 [of FOIPPA]."

[para 29] In an inquiry, once a public body has demonstrated that the information it has withheld is personal information, and has explained how it discharged its duty under section 17(5) in relation to that information, then, by reference to section 71(2), the burden falls to the Applicant to show that it would not be an unreasonable invasion of personal privacy to disclose information about a third party. As noted, the Public Body says that "the Applicants submit that they have proven that the disclosure of the personal information would not be an unreasonable invasion of a third party's personal privacy", but that they cannot be said to have discharged their burden under section 71(2) when they have only stated the facts, without more.

[para 30] However, as stated in former orders of this office, given that applicants may not have knowledge of what is contained in the records, they may not be in a position to make arguments about the contents of the records, or to state anything other than what they know about the facts. In such circumstances, it is appropriate for the decision-maker, who does know what the records contain, to independently examine all the possible relevant factors, regardless whether the factors that favour disclosure were or were not raised by the applicant. As well, if the facts support the presence of a factor that is relevant to the decision to be made within the terms of section 17(5), it does not matter that the Applicant did not specifically frame it as such a factor.

[para 31] In this case, the Public Body has set out in considerable detail the factors it took into account in making its decisions as to whether to withhold or disclose the records. It has explained that certain presumptions arise, and it has discussed some of the factors potentially at play under section 17(5), including whether there is a need for public scrutiny, whether the information is relevant to a fair determination of the Applicants' rights, the likelihood of unfair damage to reputation of third parties, and the fact that some information has already been disclosed pursuant to section 40(1)(cc) of the Act (satisfying the consideration of compassion that is recognized by that provision).

[para 32] In my view there are certain factors that the Public Body ought to have considered that it did not consider. I will explain my conclusions about the relevant factors below.

[para 33] I note first, however, that although my views about the relevant factors and how they apply differ on some points from those of the Public Body, it is not my intention in this case to substitute my decision as to whether disclosure would be an unreasonable invasion of privacy for that of the Public Body.

[para 34] This is so despite the fact that in past orders in which adjudicators have found that a public body has failed to take into account what the adjudicator has regarded as a relevant factor in favour of disclosure, the adjudicator has refused to confirm the public body's decision and has ordered the records to be disclosed. (See, for example, Order F2010-031.)

[para 35] In this case I have decided that rather than performing the weighing exercise myself taking into account these additional factors and points as to how they are to be applied, I will ask the Public Body to do so, and to make a new decision as to which portions of the personal information should be disclosed and which withheld. I have chosen this approach for the following reasons.

[para 36] By the terms of the Act, my task is to review the decisions of public bodies rather than to make decisions in the first instance. Though the Act gives me the ability to substitute my own decision for that of a public body, section 17(5) also places a positive duty on public bodies to make the decision initially, taking into account all relevant factors, including information from the Applicant and from third parties. My review is to be done with the benefit of the reasoning of the public body as to why particular items of information were withheld, and as well on the basis that the public body has gathered relevant factual information before making its decision. In this case I do not find it either practical or possible to conduct a "review" of the Public Body's decision at this time.

[para 37] The primary reason for this is that all the factors that the Public Body says in its submission that it applied in this case by reference to section 17(5) were factors that weighed against disclosure, whereas I believe that there are two significant factors, which I will discuss below, that apply in favour of disclosure of the information that has not yet been disclosed.¹ In my view, a decision that applies factors with this relative degree of significance should be made at first instance by the body that has the primary duty under the Act to make it. In effect, the Public Body has not yet met its duty to make a decision on the basis of all relevant considerations. As well, in this particular case, the first of these factors (which might be referred to as the "compassion" consideration) would best

¹ In saying this I recognize that the Public Body did decide to disclose some information, which it says it did under section 40(1)(cc). However, for the purposes of its submissions in this inquiry, it argues that the fact it disclosed information already under section 40(1)(cc), which in its view was sufficient to meet the Applicants' need for information to deal with their grieving, was to be considered in performing the weighing under section 17(5) as a factor *against* disclosure of the balance of the information.

be applied in light of information the Public Body might be able to obtain from the Applicants as to the nature of the information they are seeking, and, possibly, from the third party as to his views on disclosure of the information about him.²

[para 38] As well, I note that the Public Body in this case selected out 17 pages that summarized the police investigation, but withheld all the personal information in the balance of the records without differentiation. However, I believe that the primary factor that I regard as weighing in favour of disclosure ought to be applied to each discrete item or category of personal information in the records, rather than by treating all the remaining personal information in a global way. For example, personal information in the records that describes matters or events having nothing to do with the daughter's death would not have the same value to the Applicants' need for the information on a compassionate basis as details about some of her activities in the time prior to her death. Similarly, information provided by third parties who had no direct involvement in the circumstances surrounding the death of the daughter, especially if it can be anonymized, is less sensitive and would be less invasive of privacy than the information provided by those who were present in those circumstances. Information consisting of the observations of investigating police officers about some of the circumstances and events (though arguably it is personal information of the daughter in the sense it is part of the investigation file relating to her death) may help to explain the unfolding of events without being invasive of personal privacy, because it is not particularly sensitive or has no strongly personal element.

[para 39] An additional reason for remitting the decision to the Public Body in this case is that a number of the pages in the records do not appear to contain the personal information of anyone (for example, pages 1-3, 23), while some are blank. Although some of these pages contain information about police officers performing their duties, as noted above, this kind of information has been held in former orders not to be personal information, I cannot tell whether the records are being withheld because the Public Body regarded the latter information as personal, or whether it regarded the information as meaningless. If the former is true, I do not know why the Public Body would regard the information as personal. If the latter is true, I do not know why the pages would be regarded as meaningless given the scope of the request. Any review by me of the decisions about these records would benefit from explanations on these points.

[para 40] For the reasons given above, I prefer to remit the decision under section 17 to the Public Body in this case. However, I do not mean to suggest by this that that is the

² I am not in the best position to ascertain from the Applicants whether and why they would regard particular information as meaningful, since I cannot discuss the information with them. Nor can I find out from the third parties (the "third party" as well as the witnesses), what their views would be on possible disclosure of their personal information. I tried to do the latter by requesting the third party's participation in this Inquiry, but was unsuccessful. The Public Body was apparently not successful when it tried to notify the third party, but as this office was able to do so, presumably the Public Body would also be able to do so. Assuming this to be the case, the Public Body is in a better position to obtain this information, as, again, it is in a position to discuss the nature of the information with third parties. The same is true for the information of any witnesses whose identity could not be anonymized.

preferred course of action relative to section 17 generally. In other circumstances, substituting a decision under section 17 for that of a public body may continue to be the appropriate course.

The factors considered by the Public Body under section 17(5)

[para 41] The first factor the Public Body says it considered was the need for public scrutiny (under section 17(5)(a)). In explaining why it thinks public scrutiny is not called for in this case, the Public Body stated that if there were a need for public scrutiny, the information already released, or information that would be disclosed during the proceedings of the Law Enforcement Review Board that were underway at the time (relative to a complaint by the Applicants as to how the police investigation had been conducted) would satisfy any such need.

[para 42] I agree with the Public Body that the Applicants have not established that public scrutiny is called for in this case. While the facts as stated in their submission mention the complaint about the quality of the investigation and the Law Enforcement Review Board proceeding, and the attachments to their submissions discuss in considerable detail whether the investigations were conducted appropriately, the Applicants do not suggest in their submissions that they seek the information in order to establish that this was so. Therefore, I cannot conclude that section 17(5)(a) is a factor weighing in favour of disclosure in this case.

[para 43] As for the factor under section 17(5)(c) (fair determination of rights), the Public Body stated that it considered that the personal information in the records not to be relevant to a fair determination of the Applicants' rights. It said that if the Applicants have concerns regarding the daughter's rights or those of her estate, because there is no evidence that the Applicants are acting as personal representatives of the daughter's estate, any such rights do not amount to the Applicants' rights under FOIPPA. I agree that there is no basis on which to regard section 17(5)(c) as a relevant consideration on the basis that the Applicants are the personal representatives of their daughter's estate (since there appears to be no evidence that they are). While saying this I note that there may be circumstances in which legal steps might be taken by parents in the case of a deceased family member even though they are not legal representatives within the terms of the Act, or even as citizens regardless of a familial relationship. I also note again the information before me that a Law Enforcement Review Board complaint process was underway at the time the submissions were being made. However, again, the Applicants have not told me that they are seeking the personal information for the purpose of such a proceeding, so I cannot conclude that they are.

[para 44] The Public Body also stated it view that disclosure of the information would result in third parties possibly being exposed unfairly to harm (by reference to section 17(5)(e)), or that it could result in unfair damage to reputation, (by reference to section 17(5)(h)). It said that "[r]eferences to the living conditions, lifestyle choices, and criminal history of the Deceased and the Specific Third Party may result in harm or damage to reputation." The Public Body did not point to any information in the records

that it believes could reasonably be expected to have these consequences. I note that in Order F2010-025, the Adjudicator determined that prior to finding that section 17(5)(h) applies, “a determination must be made, based on evidence, including the evidence of the information in the record itself and evidence regarding the individual’s reputation, that disclosure would result in unfair damage to an individual’s reputation”.

[para 45] I have reviewed the records with both these factors in mind, and I am unable to identify any information in the records that would expose third parties to harm or damage their reputations unfairly. I find that without more, the Public Body’s idea that these possibilities justify withholding the records is unsubstantiated.

‘Meaninglessness’ of the information

[para 46] The Public Body also says that that personal information in the Responsive Records would be difficult or impossible to sever or that severance of some information would render the remaining information meaningless. I have no way to know to which parts of the information the Public Body applied these principles – that is, I do not know which parts it would be “impossible to sever” and which parts would be rendered meaningless by the severing of personal information. As I have already said, some of the pages of what have been identified as responsive records do not contain any “personal information” within the terms of the Act (as interpreted by previous orders). It is true that much of the information would be “impossible to sever” if the goal of the severing was to try to anonymize the information of the third party in this case, but that is equally true of the information that was disclosed, so presumably that is not the information to which the Public Body refers as “impossible to sever”. If the Public Body is referring to the pages that contain the information of police officers and other officials, again, this is not, in my view, personal information in the present circumstances. Thus I do not understand the points the Public Body has made about the impossibility of severing, and the meaninglessness of information. If the Public Body is to rely on them, a clearer explanation as to what information would be meaningless is called for.

Additional relevant considerations

[para 47] I turn to the factors which I regard as important that the Public Body did not consider. The first of these relates to the particular circumstances of this access request – that it involves parents of a young adult daughter, with whom they were in regular contact, who died in circumstances such that they have not been able to be satisfied as to the cause of her death. It is entirely understandable, from the standpoint of compassion, that any information that could give them insight into her death would help them to deal with it. Again, the Applicants do not make this point expressly. However, the attachments to their submission make it clear that the information they already have has not provided them with a satisfactory explanation, and that they seek the entire police file in the hope that this will enlighten them about how and why she died beyond the information they have already been given.

[para 48] I acknowledge the principle that an access requestor’s motives are not relevant in the sense that they do not generally have to explain or justify their reasons for

seeking information. However, that is not to say that motives cannot be relied on to support a request. For example, section 17 permits the consideration of whether a requestor needs the information to determine their rights. In my view, the reasons why the Applicants are seeking information in this case – to try to understand what happened to their daughter when they have been unable to find any clear explanation – is a relevant circumstance in this case. In saying this, I am not saying that the records contain that explanation; nevertheless, whether they do or do not is information that would also be of significant use to them in these circumstances.

[para 49] I have not overlooked that the Public Body did provide some information (the summary of the investigation report) to the Applicants. It said that it did so under section 40(1)(cc). Section 40(1)(cc) is a subsection of section 40, which sets out situations in which a public body may of its own volition disclose personal information under the FOIP Act (that is, outside the terms of an access request). It states:

40(1) A public body may disclose personal information only

...

(cc) to the surviving spouse or adult interdependent partner or a relative of a deceased individual if, in the opinion of the head of the public body, the disclosure is not an unreasonable invasion of the deceased's personal privacy...

[para 50] In its recitation of the facts, the Public Body says that after receiving the Applicants' access request, it decided that despite the fact that section 17(2)(i) of the FOIP Act indicates that a deceased's expectation of privacy lasts for 25 years after the date of death, it would disclose some information to the Applicants (the final report of the investigation into the death by an EPS member, severed to some degree) pursuant to section 40(1)(cc). However, it said it was withholding the remainder of responsive records in the file, including an audio recording, pursuant to sections 17 and 21(1)(b).

[para 51] It is not clear to me why the EPS says that the records it disclosed were disclosed pursuant to section 40(1)(cc) rather than pursuant to the rights to obtain access on a request under section 6. Since section 40(1)(cc) contains the requirement that the disclosure not be an unreasonable invasion of the privacy of the deceased person, then assuming no other exceptions apply (and none are claimed in this case except for pages 47 to 49), the conditions for disclosure of the deceased daughter's information are the same for each route for disclosure – that is, the Public Body must ask whether disclosure would be an unreasonable invasion of her personal privacy, taking into account in either case what may implicitly be derived from the presence in section 17 of section 17(2)(i).

[para 52] Furthermore, section 40(1)(cc) does not speak to third party information – it relates only to the personal information of a deceased person. Despite this, personal information of the third party was disclosed in this initial 'section 40(1)(cc)' disclosure. (I note that the Public Body severed this person's name from the record, and says in its submission that it did not disclose third party information, but since his identity was

clearly known to the Applicants, this did not achieve the result of making some of the information that was released in the initial disclosure unidentifiable and hence not his personal information.³ Furthermore, if such severing were effective to anonymize this person, it would be equally effective for the remaining the records.)

[para 53] Possibly, the Public Body applied section 40(1)(cc) rather than Part 1 to disclose the information because it regarded the former as the only provision in the Act which would permit it to provide a response on compassionate grounds. In any event, the Public Body chose section 40(1)(cc) as the mechanism by which it was able to provide some information to the Applicants about the investigation, to satisfy the element of compassion that is recognized by the Act in that section.⁴

[para 54] In relying on this provision to disclose the summary information, the Public Body cited Order 99-035 as informing its interpretation of the policy behind it. It stated (at para 41):

[section 40(1)(cc)] ... is a compassionate mechanism to overcome the obvious problem that deceased persons cannot express consent as third parties.

The Public Body also referred (in para 8 of the Disclosure Analyst's affidavit) to the fact that: "... it was likely that the Applicants would be in need of certain limited information regarding the Investigation because they would likely be grieving the death of the Deceased".

[para 55] At the same time, however, the Public Body treated the fact that it had disclosed this limited information under section 40(1)(cc) as a consideration *against* disclosure of any additional information when it undertook the weighing of factors under section 17. It stated (at para 39):

Information released to the applicants pursuant to s. 40(1)(cc) is relevant to the need to release further information pursuant to the Request. The discretion of the public body in choosing certain limited personal information to disclose pursuant to s. 40(1)(cc) must also be relevant the application of s.17 to a particular set of records.

[para 56] However, the Public Body did not regard this "compassionate mechanism" as calling for the disclosure of the more detailed information in the withheld records. It said (at para 47):

Unlike the situation in Order 98-004 [in which records were disclosed to a long-standing guardian and trustee that would have been disclosed during that relationship] there are no

³ I do not mean to say that the Public Body was wrong to disclose the personal information of the third party that it has effectively disclosed so far; it does not appear that doing so would have invaded his personal privacy in the circumstances, given the Applicants' knowledge of his relationship with their daughter.

⁴ I believe the appropriate response by the Public Body for this access request would have been to respond under Part 1 of the Act rather than under Part 2. However, as the information the Public Body says it disclosed under section 40(1)(cc) is not in issue, I am not reviewing that part of its response directly.

other circumstances weighing in favour of disclosure of the deceased's personal information beyond the information already disclosed to the Applicants.

...

In contrast, in the case at bar, the Deceased was a 19-year-old adult person living independently from her parents, the Applicants. There is no indication that the Applicants were involved in her legal or financial affairs or otherwise received any further information about the Deceased than would be the case with any other adult child living independently. According to the provisions of FOIPPA, deceased adult children have a right to privacy, just as do other deceased persons.

[para 57] With reference to its exercise of discretion, the Public Body also relied on the affidavit of its disclosure analyst, wherein he stated (with reference to the application of section 40(1)(cc)):

In particular, the EPS considered that the Applicants were the parents of the Deceased, that the Deceased was an adult living independently from her parents, and that it was likely that the Applicants would be in need of certain limited information regarding the Investigation because they would likely be grieving the death of the Deceased. The EPS provided as much information as it could to the Applicants, while still respecting the privacy rights of the Deceased and other third parties.

[para 58] Leaving aside whether the Public Body was right to apply section 40(1)(cc) in response to an access request, I do not accept the interpretation expressed in Order 99-035 as capturing the *entire* purpose behind section 40(1)(cc). In my view, in appropriate circumstances, section 40(1)(cc) permits public bodies to disclose personal information to family members, even though there is nothing to suggest that the deceased would themselves have disclosed it; in other words, the purpose is also to meet the needs of the family members to deal, whether emotionally or practically, with the death and its consequences (as long as there is no unreasonable invasion of the deceased's privacy). In such circumstances, presumably the fact and nature of the relationship to the deceased is a factor that may be taken into account in determining whether the disclosure would invade the deceased's privacy.

[para 59] I find support for this view in Ontario Order MO-2404. Section 14(4)(c) of Ontario's *Municipal Freedom of Information and Protection of Privacy Act* states that it is not an unjustified invasion of personal privacy to disclose "personal information about a deceased individual to the spouse or a close relative of the deceased individual, [when] the head is satisfied that, in the circumstances, the disclosure is desirable for compassionate reasons." In Order MO-2404, the Adjudicator described the kinds of information that may be disclosed for compassionate reasons under section 14(4)(c) (at para 48 and 49), as follows:

... The family of the deceased has experienced the tragic loss of a loved one and I am satisfied that obtaining as much information as possible regarding the circumstances surrounding the deceased's death can be a vital part of the family's grieving process. Clearly, the deceased's family is in the best position to determine the therapeutic value of any personal information received. In my view, this was the intent of the Legislature in

adding section 14(4)(c) to the *Act*. Accordingly, I am satisfied that disclosure of the personal information of the deceased is desirable for compassionate reasons.

However, disclosing the deceased's personal information could present a challenge in places where it is intertwined with the personal information of a number of other identifiable individuals who were interviewed by the Police as witnesses to the accident. The question is whether the intrusion on the personal privacy of these affected parties is necessary and justified in order to provide the appellant with access to the deceased's personal information. In my view, it is not. However, I am satisfied that for the most part the deceased's personal information can be disclosed without compromising the personal privacy of the affected parties by simply removing all personal identifiers associated with the affected parties in the records. In my view, this strikes a fair balance, allowing the deceased's family access to the deceased's personal information and the insight and understanding it seeks into the circumstances surrounding his death, while preserving the affected parties' personal privacy.

[para 60] While the Alberta legislation does not specifically speak of compassion, in my view, this is necessarily one of the considerations the Legislature had in mind in allowing a Public Body to disclose information to relatives in preference to others. I agree that this kind of “compassionate” consideration can be, and in many cases likely would be, a relevant consideration for disclosure to family members under section 40(1)(cc). I also agree that as much information that could achieve these purposes should be disclosed as possible (that is, without unreasonably invading the deceased’s personal privacy).

[para 61] Thus, in my view, even if the Public Body was permitted to rely on section 40(1)(cc), if the Public Body regarded this section as permitting the Public Body to disclose only what it considers the individuals might themselves have disclosed to their family members had they had the ability to do so, it took too restrictive a view of the provision. That it took this view is possibly demonstrated by its reference to the fact that the deceased daughter was an adult living independently from her parents, and that there “... is no indication that the Applicants were involved in her legal or financial affairs or otherwise received any further information about the Deceased than would be the case with any other adult child living independently”. This suggests the Public Body may have regarded these points as a factor indicating the daughter might not have disclosed some of the personal information in the records to them. (I note that the latter appears to be factually inaccurate in terms of the degree of financial independence between the deceased daughter and her parents, as the Applicants indicated in the attachments to their submission that the daughter was working for her father.)

[para 62] Furthermore, in my view, the Public Body was not required, in taking into account a compassionate consideration, to restrict itself to reliance on section 40(1)(cc) (and indeed should not have done so). As noted earlier, section 40(1)(cc) applies to disclosure by a public body on its own motion, rather than on an access request, and Part 1 sets out the applicable procedures on an access request. As well, section 40(1)(cc) does

not deal with the disclosure to relatives of information of other third parties that is related to the information of a deceased person.⁵

[para 63] I believe that the same compassionate element can be considered as a relevant factor under section 17(5) on an access request, despite the fact that it is not expressly enumerated therein. (The enumeration in section 40 can be understood as a reminder to public bodies that they have the ability to make such a disclosure regardless of an access request. I am reinforced in this view by the fact the provision is redundant in any event since public bodies may make such a disclosure regardless of familial relationships under section 40(1)(b) regardless of the familial status of the applicant.) Further, as a relevant factor under section 17(5), the consideration of compassion is not meant merely to serve in substitution for what the deceased person may themselves have disclosed; rather, it weighs in favour of giving as much information as possible to help meet the needs of families in the manner described in the Ontario decision. As well, it can be a consideration not only relative to the information of a deceased person, but also relative to the personal information of other third parties that in some way relates to the deceased.

[para 64] I note that the Public Body says it considered as a factor in its exercise of discretion under section 17(5) that the Applicants did not appear to have any “pressing need for any third party personal information”, but I do not know how it reached this conclusion. If the personal information of a third party can help inform the next of kin of the circumstances surrounding the death of a family member, and can help to make that death understandable, the family quite possibly does have a “pressing need” for it. Further, as discussed in Order MO-2404, a deceased’s family is likely in a better position to decide what information will be helpful to it than is a public body, even if the information is or includes that of a third party.

[para 65] Before leaving this factor I will comment on the significance to the issue in this case of section 17(2)(i), since the Public Body has cited this provision with reference to the application of section 17 (at paras 3 and 23). Section 17(2)(i), provides that it is not an unreasonable invasion of privacy to disclose the personal information of someone who has been dead for 25 years or more. It is not the case, however, that the expectation of privacy of an individual does not change once the individual has died.

[para 66] In Order F2011-001 the Adjudicator said:

The Public Body notes that the Complainant’s mother died in 1996. As she has not been dead for twenty-five years, the Public Body correctly points out that section 17(2)(i) does not apply to personal information about her. If section 17(2)(i) applied, it would not be an unreasonable invasion of personal privacy to disclose the personal information and it would be unnecessary to weigh competing interests under section 17(5). However, the

⁵ In the Ontario decision cited above, the wording was such that the information of third parties could be interpreted as encompassed by “information about the deceased”. That is not as readily the case with section 40(1)(cc); however, in my view the same principle can be imported into the considerations under section 17(5), which does permit the disclosure of the personal information of other third parties.

converse is not true: it does not follow from the fact that section 17(2)(i) does not apply that disclosure is an unreasonable invasion of personal privacy.

[para 67] In other words, section 17(2)(i) does not operate ‘in reverse’, and the fact that an individual has not been dead for twenty-five years does not mean that it would necessarily be an unreasonable invasion of the individual’s personal privacy to disclose information about the individual.

[para 68] The Adjudicator also found in Order F2011-001 that the privacy interests of deceased individuals diminish over time and that this may be a consideration under section 17(5). She said:

The former Information and Privacy Commissioner of Ontario considered that the fact that an individual is deceased is a factor to be weighed when deciding whether it would be an unreasonable or unjustifiable invasion of personal privacy to disclose personal information. In his view, that an individual is deceased, while only one of several factors he considered in that case, was nevertheless a factor weighing in favor of disclosure. I agree with this analysis and share the view that individual privacy interests diminish after death. If privacy interests do not diminish following death and over time, it would be entirely arbitrary for the legislature to determine that privacy rights end after twenty-five years when they do not after twenty-four years and eleven months, for example.

[para 69] I agree that the privacy interests of a deceased person may diminish over time. In the case before me, the Applicants’ daughter has been dead for over five years. Disclosing her personal information now would not necessarily be an invasion of her personal privacy to the same extent that it would have been in her lifetime. That is another consideration that is relevant to the application of section 17(5) in this case.

[para 70] I have reviewed the withheld records, and see there is information in them that has not been provided to the Applicants that would allow them to know more about the circumstances and events surrounding their daughter’s death than they presently know. At the same time, not all the information about the daughter and others in the records would serve this purpose. A considerable amount of the information is extraneous to the central issue that concerns them. However any information in the records about events and activities that may shed light on what happened to her, including the theories the police developed and investigated regarding her death, and whether and why they were discounted, would enable the Applicants to understand more about the circumstances. Records 26 – 28, 33 – 37, 38 – 43, 44, paragraph 4 and part of paragraph 6 on record 85, 91, and records 168 – 170 are some examples of records containing information that would serve this purpose.

[para 71] The second major factor which I believe requires consideration in this case is that some of the information that the Public Body has chosen to disclose is very similar in nature, though often less detailed, than the information that has been withheld. A summary of the information (in a form of a final report by the investigator) was provided whereas the detailed information in the remainder of the file, on which the report was based, was withheld. Thus, for example, the Public Body disclosed the “will say”

statements of investigators in summary form, but withheld their fully detailed statements on which the summary is based.

[para 72] The Public Body has said that it has disclosed as much information as possible, but it has not explained why it thought that the more summary information was not an unreasonable invasion of the privacy of the third parties whose information was included in the summary, but the more detailed information was such an invasion. It would be of great assistance for me in any review of the decision of the Public Body to have the benefit of its views about this question.

[para 73] This factor is of heightened importance in this case because the information the Public Body disclosed in its abbreviated form may have led the Applicants to draw inaccurate conclusions regarding their daughter's death which the more detailed and extensive information might permit them to better assess. That information in the records may serve to clarify possible misapprehensions resulting from the Public Body's earlier disclosure is also relevant to the decision to be made under section 17(5) regarding the Applicant's daughter's personal information.

[para 74] To conclude, I will ask the Public Body to review each piece of third-party personal information in the records (of the deceased daughter, of other third parties, or of both intertwined) and to consider whether the presumptions that apply to the information (that disclosure would be an unreasonable invasion of privacy) are outweighed in this case by the compassionate consideration that the parents desire to have the information to learn more than they already know about pertinent circumstances surrounding the death of their daughter. In doing this, I ask it to take into account the significance of the fact that some of the information has already been provided in summary form, and to consider whether the disclosure of the more detailed, pertinent, information on which the summary was based is indeed different in kind such that disclosure of the latter would involve an invasion of privacy whereas the former does not. As well, I would ask the Public Body to determine whether information can be provided if effectively anonymized, or if consent to disclosure could be obtained. Finally, I ask it to provide a better explanation for the pages that appear to contain no personal information, or for any information it considers to be "meaningless".

[para 75] I understand this is a difficult task. I feel the Public Body is in a better position than I am to do it, not only by virtue of its familiarity with the records, but also because it is in a better position than I am to obtain additional information from the parties that may help it. As well, as I have said, my role of reviewing the decisions of Public Body can be performed more effectively if I have the benefit of its reasoning with respect to the discrete items of personal information in the records.

[para 76] I note again that much of the information is extraneous to the central concerns of the Applicants, and for any such extraneous or irrelevant information, the presumptions created by section 17(4) are not likely outweighed. At the same time, some of it that is not of a particularly personal or sensitive nature could be provided to make the story fuller and more complete without unduly invading privacy. As well, it would

appear that there is no purpose that would be served by disclosing the names and contact information of the third party witnesses, so that information can be severed and the remainder disclosed if the Public Body is satisfied that no other information in the records would serve to identify these persons.

Issue B: Did the Public Body properly apply section 21 (disclosure harmful to intergovernmental relations) to the information in the records?

[para 77] The Public Body withheld records 47 to 49 under section 21(1)(b) on the basis that they were provided by the Office of the Chief Medical Officer. Section 21 of the FOIP Act authorizes the head of a public body to withhold information in circumstances where the disclosure of information could reasonably be expected to harm intergovernmental relations. Section 21 states, in part:

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 78] The Public Body argues:

This information was supplied in confidence by the Office of the Chief Medical Examiner, an agency of Alberta Justice, and was treated confidentially by the EPS in conjunction with the use of the reports in the Investigation.

A public body does not need to demonstrate that harm would result from the release of the confidential information at issue in s. 21(1)(b). Adding a harm requirement to section 21(1)(b) would be to fundamentally change the requirements of that section.

Order F2004-018: Edmonton Police Service (May 26, 2005) at paras. 38, 40...

However merely because the public body need not prove harm as a prerequisite to the application of s. 21(1)(b) does not mean that no harm can come from the release of information provided in confidence. Even if harm were a prerequisite to the application of s. 21(1)(b), the EPS submits that harm would come from the release of the information severed pursuant to s. 21(1)(b).

The legislative purpose underlying a provision such as s. 21(1)(b) is the promotion and protection of the free flow of information between governments and their agencies for the purpose of discharging their duties and functions. It also relates to the preservation of trust.

BC Order 331-99: Vancouver Police Board (December 21, 1999)
Ontario Order PO-1927-1, Ontario Hydro (July 24, 2001) rev'd other grounds (1998)
107 O.A.C. 341 (Div. Ct.) rev'd other grounds (1999) 118 O.A.C. 108 (C.A.)

If the confidentiality of this type of information is not maintained, harm to the relationship between the parties providing and receiving the information may be presumed to occur. A lack of trust between these parties can be seen as such a harm. However, s. 21(1)(b) does not require that such harm be specifically proven as a general form of harm can be presumed to occur where expectations of confidence are not preserved.

...

The EPS and Alberta Justice (and its agencies) have a common interest in the administration of justice. This requires that the two public bodies be permitted to share information relating to the administration of justice. Where the Chief Medical Examiner creates a report regarding a suspicious death being investigated by the EPS, clearly provision of the report falls within the common interest.

Alberta Justice and the Office of the Chief Medical Examiner are "a department, branch or office of the Government of Alberta" pursuant to s. 1(p)(i) of FOIPPA and thus a public body. Alberta Justice is also a "government" and the Office of the Chief Medical Examiner one of its agencies as these terms are used in s. 21 of FOIPPA. They are therefore "government" for the purposes of s. 21.

Order F2007-022, Conseil Scolaire Catholique et Francophone du sud de l'Alberta (September 25, 2007)

Therefore, records supplied by the Office of the Chief Medical Examiner to the EPS comes from a "government" to a public body as required by section 21(1)(b).

[para 79] In Order F2004-018, the Commissioner stated that four criteria must be met before section 21(1)(b) applies:

There are four criteria under section 21(1)(b) (see Order 2001-037):

- a) the information must be supplied by a government, local government body or an organization listed in clause (a) or its agencies;
- b) the information must be supplied explicitly or implicitly in confidence;
- c) the disclosure of the information must reasonably be expected to reveal the information; and
- d) the information must have been in existence in a record for less than 15 years.

In Order F2008-027, the Adjudicator noted that this test does not address whether the supplier of the information can be the Government of Alberta, or to whom the information is to be supplied. The Adjudicator determined that section 21(1)(b) does not apply to information supplied *by* the Government of Alberta or a representative of the Government of Alberta or to information supplied to an entity that is not a representative of the Government of Alberta. She concluded:

Section 21 addresses harm to the intergovernmental relations of the Government of Alberta. It therefore follows that the information supplied in clause (b) must be supplied to a public body representing the Government of Alberta, before this provision applies. If information is supplied to any entity other than a representative of the Government of Alberta, it would be illogical to presume that harm would result to the intergovernmental relations of the Government of Alberta from disclosure of that information. Similarly, it would be absurd to presume that harm would result to the intergovernmental relations of the Government of Alberta through the disclosure of information it supplies to itself.

The Adjudicator found that information supplied by Alberta Justice to the Edmonton Police Service did not meet the requirements of section 21(1)(b) as the information had been supplied by the Government of Alberta, rather than one of the entities listed in clause a of section 21(1). I note that the Adjudicator in Order F2008-027 concluded that Order F2007-022, on which the Public Body relies, was in error to the extent that it suggests section 21(1)(b) may be applied to information supplied to a local public body by a representative of the Government of Alberta.

[para 80] In the case before me, the Public Body argues the Office of the Medical Examiner is a representative of the Government of Alberta. It reasons, on that basis, that when the Office of the Medical Examiner shares information with the Edmonton Police Service, that it does so within the terms of section 21(1)(b).

[para 81] I will assume for the moment, without deciding the question, that the Public Body is right that section 21(1)(b) applies in the present circumstance. Section 21(3) prohibits disclosure if the body providing the information does not consent, but before deciding whether it must observe this prohibition, the Public Body must first exercise its discretion to decide whether it is itself minded, in the circumstances, to disclose or to withhold the information (and if the former, it must ask the provider for consent). In this case the Public Body has said that it exercised its discretion to withhold the records because the information was supplied in explicit and implicit confidence, and there would be harm to the relations between the Medical Examiner's Office and itself, and jeopardy to continued receipt of such information, if confidentiality were violated.

[para 82] However, section 21(3) is directed at circumstances in which information is given in confidence, yet the organization supplying the information gives consent in a particular case. The Public Body relies on its Disclosure Analyst's affidavit, in which he states:

I do not have any information to suggest that the Office of the Chief Medical Examiner has consented to the release of their records that relate to the Investigation, nor do I believe that they would have done so.

However, the Disclosure Analyst does not indicate the basis for his belief, and it seems highly likely, given the absence of a statement that the Medical Examiner's Office was asked by the EPS whether it would give consent in the case of this specific access request, that it was not asked. Since it does not appear that the Medical Examiner's Office was consulted with respect to this particular case and indicated that it would not give consent, there is nothing to indicate that the harm to relations posited by the Public Body would arise. Clearly, this harm would not arise in a given case if the Medical Examiner were inclined, in that particular case, to disclose the information, as might happen for compassionate reasons, or in some cases, because the Medical Examiner's Office had already provided the report pursuant to a direct request.⁶

[para 83] In other words, before a public body can exercise its discretion to withhold records *on the ground of harm to relations from violation of confidentiality* in a given case, it must ask the body that supplied the information whether it does or does not consent. It is only if the provider denies permission that the disclosure could harm the relationship, and constitute a reason for withholding. If this has not happened in the present case, the conclusion that there would be harm would, in my view, be an irrelevant consideration to the Public Body's exercise of discretion.

[para 84] I note that in its rebuttal submission, the Public Body stated its view that if I were to reject its reliance on section 21(1)(b) to withhold pages 47 to 49, I should name the Office of the Medical Examiner as an affected party in this inquiry. I agree that in this

⁶ I note that the *Fatality Inquiries Act* provides as follows:

30(1) Except for reports, certificates and other records made in the course of a public fatality inquiry, all reports, certificates and other records made by any person under this Act are the property of the Government and shall not be released without the permission of the Chief Medical Examiner.

- (2) On the completion of*
- (a) the investigation, and*
 - (b) the public fatality inquiry, if one is held,*

and on the receipt of a request from any of the adult next of kin or the personal representative of the deceased, the Chief Medical Examiner shall complete and send a report to the person making the request.

case, as the records in question emanated from the Chief Medical Examiner's Office, it has an interest in whether they are disclosed on this access request.

[para 85] I have decided, therefore, that I will reserve jurisdiction over the issue of the proper application of section 21 until the Office of the Chief Medical Examiner has had an opportunity to indicate its position on whether records 47 to 49 should be released. As well, the Medical Examiner's Office may take this opportunity, should it wish to do so, to comment on whether section 21(1)(b) applies to these records. I will refer it, in the event it chooses to do so, to the cases on the application of this section that are discussed above. As well, I will invite it to comment on the intent of section 30(2) of the *Fatality Inquiries Act*, and whether this section would permit persons such as the Applicants in this case to receive copies of a report such as the one contained in records 47 – 49, should they request it. I extend the time for completion of this aspect of the inquiry until December 21, 2012.

V. ORDER

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

[para 87] I order the head of the Public Body to comply with the duty under section 17(5) to consider all relevant circumstances in making the decision to disclose or withhold personal information under section 17, including the relevant circumstances I have described above under the heading "*Additional Relevant Considerations*", as summarized at para 74.

[para 88] I further order the Public Body to notify me, in writing, within 50 days of receiving a copy of this Order that it has complied with the Order.

Christina Gauk, Ph.D.
Director of Adjudication