ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2013-05

February 12, 2013

EDMONTON POLICE SERVICE

Case File Number F5974

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Summary: Pursuant to the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) the Applicant requested from the Edmonton Police Service (EPS) all records relating to her deceased son for the period of July 2011 to August 2011. The Public Body located two responsive files: one file related to an investigation into the son's death (file 11-0099332), and one file related to a prior investigation into alleged criminal activity (file 11-087380) (the criminal file).

The Public Body disclosed most of the file relating to the son's death, with some information severed, and withheld some of the criminal file pursuant to section 17. The Applicant requested a review of the Public Body's decision to withhold information in the criminal file.

The Adjudicator found that section 4(1)(a) applied to five pages of the records at issue and therefore she did not have jurisdiction to review the Public Body's response with respect to these records.

The Adjudicator also found that the Public Body did not properly apply section 17 to some parts of the withheld information and ordered the Public Body to disclose more information in the records.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 3, 4, 17, 40, 72, *Police Act*, R.S.A. 2000, c. P-17, ss. 42.1, 45, 48, **CAN:** *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), c. 11, **ON:** *Freedom of Information and Protection of Privacy Act*, R.S.O 1990, c. F.31.

Authorities Cited: AB: Orders 96-010, 97-002, 99-028, 2000-032, F2002-024, F2004-015, F2006-007, F2008-012, F2008-028, F2008-031, F2009-015, F2009-026, F2009-033, F2011-001, F2012-18, F2012-24, **ON**: MO-2252

Cases Cited: *Newton v. Criminal Trial Lawyers' Association*, 2010 ABCA 399 (CanLII), *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23 (CanLII), 2010 SCC 23.

I. BACKGROUND

[para 1] The Applicant is the mother of an individual who had been accused of criminal activities, and who has since passed away. By letter dated September 20, 2011, the Applicant made a request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to the Edmonton Police Service (the Public Body) for all records relating to her son for the period of July 2011 to August 2011. The Public Body located two responsive files: one file related to an investigation into the son's death (file 11-099332), and one file related to a prior investigation into alleged criminal activity (file 11-087380) (the criminal file).

[para 2] The Public Body disclosed most of the file relating to the son's death, with some information severed, but withheld the criminal file in its entirety pursuant to section 17. The Applicant requested a review of the Public Body's decision to withhold the criminal file in its entirety. The Commissioner authorized a portfolio officer to investigate and try to settle the matter. This was not successful and the Applicant requested an inquiry into the matter.

II. RECORDS AT ISSUE

[para 3] The records at issue are the 36 pages of records in the criminal file, which were initially withheld in their entirety. The Public Body subsequently disclosed some information from some of the pages, and 3 of the pages were disclosed in their entirety and are no longer at issue (pages 2, 5, and 12). (All references to page numbers in this order refer to the numbering on the bottom of the pages of the initial set of records withheld in their entirety – the "EPS FOIPP" numbers. The second set of records does not have page numbers in the bottom footer; the page numbers at the top of the page are off by one number as the first page was not numbered).

III. ISSUES

[para 4] The original Notice of Inquiry states the sole issue at inquiry as follows:

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

[para 5] My review of the records at issue raised the question of whether section 4(1)(a) may apply to some of those records. By letter dated October 25, 2012, I asked the Public Body to address the applicability, if any, of section 4(1)(a). I therefore added the following issue to the inquiry:

> Are any of the records excluded from the application of the Act by section 4?

If section 4(1)(a) applies to the records at issue, I do not have jurisdiction to review the Public Body's decision to withhold them; therefore, I will consider that issue before considering the application of section 17 to the records.

[para 6] By letter dated October 25, 2012, I referred both parties to a recent order of this office, Order F2012-24, which relates to a request for a police file concerning the investigation into the death of the applicants' daughter. Although the requested information in that case is somewhat different from the present case, some of the discussion in that Order is relevant to the issues here. As such, I asked the parties to comment on specific aspects of that order. Both parties provided comments, which I will reference where relevant.

[para 7] On one page of the newly redacted records, the Public Body appears to have applied section 20(1)(m) to a single piece of information which occurred three times on one page. Previous orders of this office have held that the late raising of a discretionary exception by a public body would not be permitted if it resulted in delays or worked to the prejudice of a party (see Order 96-010). In this case, the Public Body merely noted the section number on the redacted set of records. The Public Body had not previously applied this section, nor did it mention the application of this section in its response to my questions, which accompanied these redacted records. Although the Applicant had an opportunity to respond to the Public Body's response to my questions, she did not address the new application of this exception; it seems likely that the Applicant did not notice the small-print notation on that single page. In my view, the Applicant did not have adequate notice and therefore opportunity to respond to the Public Body's new application of section 20(1)(m). Further, as the Public Body did not even refer to section 20(1)(m) in its response, it clearly did not meet its burden of proof with respect to whether that section properly applies. I find that the possible application of section 20(1)(m) is not properly at issue in this inquiry and even were it acceptable to raise this issue so late in the inquiry and in such a manner, the Public Body has failed to meet its burden of proof that the section applies.

[para 8] Section 17 was also applied to the information for which section 20(1)(m) was claimed, and I will consider the application of that provision to that information.

IV. DISCUSSION OF ISSUES

1. Are any of the records excluded from the application of the Act by section 4(1)(a)?

[para 9] My review of the records at issue raised the question of whether pages 26-30 are records over which I do not have jurisdiction pursuant to section 4(1)(a) of the Act. At the time of the Applicant's request, this provision stated the following[1]:

> *4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:*
>
> > *(a) information in a court file, a record of a judge of the Court of Appeal of Alberta, the Court of Queen's Bench of Alberta or The Provincial Court of Alberta, a record of a master of the Court of Queen's Bench of Alberta, a record of a sitting justice of the peace or a presiding justice of the peace under the Justice of the Peace Act, a judicial administration record or a record relating to support services provided to the judges of any of the courts referred to in this clause;*

[para 10] In my October 25, 2012 letter, I asked the Public Body to address whether any of those records contain information in a court file or are otherwise records as described in section 4(1)(a) of the Act such that they would be outside the scope of the FOIP Act and if so, to explain how.

[para 11] The Public Body confirmed in an affidavit sworn by the Disclosure Analyst that these pages "consist of information that is contained in a court file," and that "[s]ince File 380 was withheld, in its entirety, pursuant to s. 17, the fact that these records are also contained in a court file was not previously noted." Although the Public Body did not provide the requested explanation specifically as to how section 4(1)(a) applies to these pages, I conclude that the provision applies based on my review of the records. Two records (consisting of four pages in total) are records that emanated from the court, include the court seal, and are signed by a justice of the peace as an exercise of his duties under the *Criminal Code*; they are also the kinds of records that would be included in a court file. The remaining page is related to these two records but it is not clear to me that this page is the type of record that would be included in the court file. However, it seems to me that this page was completed by a justice of the peace in the course of exercising his duties under the *Criminal Code*. Therefore, whether or not this page is filed with the court, I find that it is a record of a justice of the peace under section 4(1)(a). I conclude that pages 26-30 are all outside the scope of the Act pursuant to section 4(1)(a) and therefore I cannot review the Public Body's response with respect to these records.

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[1] A minor amendment was made to this provision, effective July 1, 2012.

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

Is the information personal information?

[para 12] Section 1(n) defines personal information under the Act:

> *1 In this Act,*
>
> *...*
>
> *(n) "personal information" means recorded information about an identifiable individual, including*
>
> *(i) the individual's name, home or business address or home or business telephone number,*
>
> *(ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,*
>
> *(iii) the individual's age, sex, marital status or family status,*
>
> *(iv) an identifying number, symbol or other particular assigned to the individual,*
>
> *(v) the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,*
>
> *(vi) information about the individual's health and health care history, including information about a physical or mental disability,*
>
> *(vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,*
>
> *(viii) anyone else's opinions about the individual, and*
>
> *(ix) the individual's personal views or opinions, except if they are about someone else;*

[para 13] The criminal file includes a summary of the alleged criminal activity involving the son and another individual (the complainant), witness statements of the complainant, contact information for the son and another individual, charges against the son, a detention log for the son, medical information of the son, employment status of the son, information about the son's release from detention, the son's criminal history, court documents, a towing invoice for the son's vehicle (including information about the vehicle), a notice of seizure of the son's vehicle, a detainee screening form, and a prisoner property report. All of the above is personal information of either the Applicant's son, the complainant, or the other third party. It also includes the name and identifiers of police officers involved in the incident and the son's detention; most of the information relating to the officers was disclosed by the Public Body (I will discuss the one exception below).

[para 14] The Public Body indicated in its submissions that information in the records at issue, other than personal information withheld under section 17, would be impossible to sever without rendering that remaining information meaningless. The Public Body states in its initial submission that

> [t]o the extent that there are minimal additional portions of File 380 that do not consist of the personal information of the Deceased or the Complainant or other third parties, these portions consist only of headings, and reference the names of police officers.

[para 15] I asked the Public Body to clarify to what information in the records at issue section 17 properly applies, what information could remain unsevered and why that remaining information would be meaningless to provide to the Applicant. With respect to this issue, I referred to the discussion in paragraphs 39 and 46 of Order F2012-24.

[para 16] The Public Body responded by stating

> [i]n light of the Adjudicator's comments in Order F2012-24, the EPS is prepared to release additional information contained in File 380, consisting of investigating officer's names and contact information, as well as headings at the top pages of the report, and the dates on which the reports were filed. The EPS is prepared to release this information on the basis that disclosure of this information would not be an unreasonable invasion of a third party's privacy… The EPS submits that the remaining information that has been withheld is the personal information of third parties. This includes "sub-headings" in the report which in many instances are very detailed and would convey a significant amount of content included in the report. Where such information is not the personal information of third parties, it is being withheld on the basis that disclosure of the additional information would be meaningless.

[para 17] The Public Body prepared and provided a new copy of the records, reflecting its decision to provide some additional information.

[para 18] In Order F2012-24, the Director of Adjudication noted that past orders of this office have stated that the names and other information about public body employees acting in the course of their duties, as representatives of the public body, cannot be withheld as an unreasonable invasion of privacy (see, for example, Orders F2008-028, F2009-026). Presumably, based on the above-cited response from the Public Body, it accepts the application of this principle to the names and contact information of the officers. However, although the badge numbers of some officers were disclosed, the badge number of one officer on page 19 was severed under section 17 (the officer's name was disclosed)[2]. The Public Body has not provided any reasons for this apparent inconsistency in the application of section 17 to information in the records about the officers.

[2] The Public Body also applied section 20(1)(m) to this information; however for the reasons given earlier in this order, I do not accept the Public Body's late application of that discretionary exception.

[para 19] The Ontario Information and Privacy Commissioner's office has issued orders regarding whether an officer's badge number is personal information under Ontario's *Freedom of Information and Protection of Privacy Act*. In Order MO-2252, the adjudicator made the following comments:

> It is well known that police officers are required to produce their badge number as a matter of course at the outset of any search, raid, interview or similar activity. It should be noted that previous orders of this office have described the badge numbers of police officers as basic professional information (see Order MO-2050). In fact, as is noted by the Police in their representations, police badge numbers are routinely disclosed in the context of other police records such as tickets, occurrence reports and police officers' notes. In my opinion, a police officer's badge number is a tool of accountability. It assists members of the public in identifying a police officer as an individual with special powers and authority. It is also an essential tool in the public complaints process particularly in those cases where the names of the police officers are not available to the members of the public with whom the police interact.

[para 20] I agree that where information about an officer, such as name and/or badge number, appears in the context of that officer performing his or her duties that section 17 does not apply. As the badge number of an officer on page 19 appears in the context of that officer's job duties, section 17 cannot be applied to withhold it.

[para 21] In Order F2008-028, the adjudicator noted that the principle that the disclosure of names, job titles and/or signatures of individuals acting in their professional capacities is not an unreasonable invasion of personal privacy has also been applied to information about employees of public bodies as well as other organizations, agents, sole proprietors, etc. The name and signature of an employee of a towing company appear on pages 31 and 32, from which most of the information was withheld. I agree with the adjudicator in Order F2008-028 and find that it is not an unreasonable invasion of privacy to disclose the name and signature of the towing company employee.

[para 22] In my letter to the parties, I specifically pointed the parties to paragraph 46 of Order F2012-24, in which the Director of Adjudication stated:

> 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.

[para 23] Although I requested that the Public Body specify which information in the records is personal information of third parties that must be severed under section 17 and what of the remaining information would be meaningless, the Public Body has not done so, other than to state that subheadings in the records would reveal a significant amount of content in the records (and presumably therefore personal information of third parties). Several of the pages contain reports that have headings, subheadings and sub-subheadings. These pages appear to be standard forms that are filled out by officers involved in the investigation and/or other employees of the Public Body. It is apparent from the content of the records that some of the subheadings are not relevant to the investigation of the Applicant's son (for example, the space under some subheadings is left blank). Based on my review of the records, and as the Public Body has not provided sufficient arguments for me to find otherwise, I conclude that in most cases the subheadings and sub-subheadings are not personal information of third parties and would not reveal such personal information; therefore they cannot be withheld under section 17. In a few cases, which I will specify below, I agree with the Public Body that the sub-subheadings may reveal details about the criminal activity and are therefore personal information that may be withheld under section 17.

[para 24] I find the subheadings and sub-subheadings on the following pages are not personal information that can be withheld under section 17 (this does not apply to the content or "input" after the headings, which is personal information and will be discussed later in the order): pages 7, 8 (except all sub-subheadings after the third bolded subheading, as this may reveal some information related to the criminal activity), 10, 11, 18, 19, 20-23 (the bolded subheadings only), 31 (the form itself, as well as the information about the towing company and employee), 32 (the form itself, as well as the information about the towing company and employee), 35 (the form itself). In all of the above-listed pages, information about Public Body officers must also be disclosed where it has not already been disclosed.

[para 25] I do not find the above-listed information to be meaningless. It may be that this information is not particularly helpful to the Applicant, but that, by itself, does not make the information meaningless. Further, it may in fact be helpful to the Applicant insofar as it reveals the *type* of information contained (or not contained) in the records.

[para 26] The information described above that relates to the son, the complainant, and the other third party is the personal information of those individuals.

Would disclosure be an unreasonable invasion of a third party's personal privacy?

[para 27] 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,*
>
> *…*
>
> *(e) the third party will be exposed unfairly to financial or other harm,*
>
> *…*
>
> *(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant,*
>
> *…*

[para 28] Section 17 is a mandatory exception: if the information falls within the scope of the exception, it must be withheld.

[para 29] Under section 17, a public body must first prove that section 17 applies to the personal information withheld from the records. It is then up to the applicant to prove that the disclosure would not be an unreasonable invasion of a third party's personal privacy (Orders 99-028 at para. 12, 2000-032 at para. 25, F2002-024 at para. 17).

Section 17(2)

[para 30] The Public Body and Applicant have both raised the application of section 17(2)(i) to the personal information of the son. This provision states that it is not an unreasonable invasion of privacy to disclose personal information of a deceased individual who has been dead for 25 years or more. The Applicant's son passed away in July 2011; therefore the disclosure of his personal information may still be an unreasonable invasion of privacy. The Applicant cites Order F2011-001, in which the adjudicator stated the following:

> 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.

(at para. 30).

[para 31] I agree that the fact that a third party is deceased may diminish the privacy interests of that individual. This factor must be considered in the determination of whether personal information is to be withheld or disclosed under section 17. Specifically, the fact that the individual whom the information is about is deceased may affect the sensitivity of the information. Sensitivity of information is a factor that may be considered under section 17(5) (Order F2009-033, at para. 27); I will discuss this factor further below.

Section 17(4)

[para 32] EPS argues that sections 17(4)(b), 17(4)(d), 17(4)(g)(i) and 17(4)(g)(ii) apply to the personal information, creating a presumption that disclosing the information would be an unreasonable invasion of personal privacy. In my view, section 17(4)(a) is applicable to a small amount of information in the records.

[para 33] Section 17(4)(a) creates a presumption against disclosure of information that relates to medical treatment, history etc. Some information in the records relates to medical information of the Applicant's son; this provision weighs against the disclosure of that information.

[para 34] Section 17(4)(b) creates a presumption against disclosure of information contained in an identifiable part of a law enforcement record. Law enforcement is defined in section 1(h) of the Act, to include:

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

[para 35] As the records at issue consist of a police investigation file, section 17(4)(b) clearly applies to all of the personal information in the records.

[para 36] Section 17(4)(d) creates a presumption against disclosure of information that relates to employment or educational history. Some information in the records relates to employment information of the Applicant's son. I agree that this provision weighs against the disclosure of that information.

[para 37] Section 17(4)(g) (third party's name with other information) also applies to all of the described personal information, weighing against disclosure.

Section 17(5)

[para 38] The factors giving rise to a presumption that disclosing the personal information is an unreasonable invasion of personal privacy must be weighed against any factors listed in section 17(5), or other relevant factors, that weigh in favour of disclosure.

[para 39] The Applicants argued that section 17(5)(a) (disclosure desirable for public scrutiny) applies. The Public Body argued that section 17(5)(e) (unfair financial or other harm) and (h) (unfair damage to reputation) weigh against disclosure.

[para 40] Several orders from this office have emphasized the requirement for a public component in order to meet the public scrutiny test in section 17(5)(a):

> In *Pylypiuk (supra)* Gallant J. stated that the reference to public scrutiny of government or public body activities under what is now section 17(5)(a) requires

> some public component, such as public accountability, public interest and public fairness.
>
> > In my opinion, the reference to public scrutiny of government or public body activities in s. 16(5)(a) speaks to the requirement of public accountability, public interest, and public fairness.
>
> (Order F2006-007, at para. 27)

[para 41] For section 17(5)(a) to apply, there must be evidence that the activities of the public body have been called into question, which necessitates the disclosure of personal information to subject the activities of the public body to public scrutiny (Order 97-002 at para. 94 and Order F2004-015 at para. 88).

[para 42] The Applicant states that she has made a complaint against officers with the Public Body, and her complaint letter calls the actions of these officers into question. The Applicant also states that her allegations are based partly on notes from the son that "alleged mistreatment at the hands of the EPS", specifically mistreatment during his detention following his arrest, and for this reason the Applicant argues that her complaints against the officers have a credible basis.

[para 43] The Public Body argues that "the mere existence of an allegation of mistreatment brought by the parent of the Deceased does nothing to indicate a broader need for public scrutiny…" and that "any need for public scrutiny regarding the actions of police members in conducting the investigation is achieved by virtue of the complaint process under the *Police Act*." It further argues that the notes of the Applicant's son that form the basis of her complaint do not indicate that the son specifically complained of mistreatment by Public Body employees.

[para 44] I agree with the Public Body's point regarding the son's notes. I find that multiple interpretations may be given for the relevant portion of the notes. It is only a possible interpretation that the son was physically mistreated; another possible interpretation is that he was prevented from taking a particular action. The Applicant's complaints regarding the actions of officers with the Public Body are based partly on these notes and partly on the Applicant's own interactions with certain officers. In my view, the Applicant's allegations in her complaint, and the son's notes, do not provide sufficient evidence of the need for public scrutiny in this case.

[para 45] The Public Body states that it considered whether the disclosure of the records would unfairly expose a third party to financial or other harm (section 17(5)(e) or unfairly damage the reputation of third persons (section 17(5)(h)). The Public Body found that both factors applied to the information in the records at issue but failed to provide any reasons or explanation at all as to how these factors apply, to what specific information they apply, or which third parties would be affected.

[para 46] With respect to unfair damage to reputation, much of the information in the records relates to allegations against the Applicant's son to which he did not have the opportunity to respond. Although the son is now deceased, this factor is not limited to the

reputation of only living individuals and the information regarding the allegations against the son may unfairly damage his reputation. I agree with the adjudicator's finding in Order F2012-18, cited by the Public Body. That order similarly addressed a request for a criminal file relating to the applicant's deceased son. With respect to the application of section 17(5)(h), the adjudicator stated

> The bulk of information in the criminal file is information about unproven accusations against the Applicant's son. Given that the Applicant's son died shortly after the Public Body began its investigation of these accusations, the Applicant's son was not able to reply to the accusations. Therefore, the information in the file was not tested in any way. The allegations against the Applicant's son were also contained in the file relating to his death. As there is no way to prove the allegations against the Applicant's son were true or false and as the Applicant's son did not have the opportunity to respond to the accusations, I find that the disclosure of the information relating to the accusations may unfairly harm the reputation of the Applicant's son, a third party. Therefore, section 17(5)(h) of the Act applies and weighs in favour of withholding the information from the Applicant.

(at para. 27)

[para 47] I find that section 17(5)(h) weighs against disclosure of the details of the incident that reveal the son's personal information. However, it is not clear to me how this factor could apply to the personal information of the complainant or the other third party related to the investigation; the records contain information that these individuals provided about themselves. While some of that information may not be flattering, I find that the disclosure would not *unfairly* damage reputations. Similarly, I find that this factor does not apply to the information about the son's arrest and detention, or information related to his vehicle and drivers' licence; this is factual or similar information to which the point that the son cannot now address it is irrelevant.

[para 48] I will address, at this point, the Public Body's argument that the circumstances in Order F2012-18 are substantially similar to the circumstances of the current case and therefore that order supports the Public Body's decision with respect to the records at issue. With respect to the information in the records at issue that related to the allegations against the Applicant's son, I believe my conclusions are largely the same as those of the adjudicator in Order F2012-18. However, as I will discuss below, the information related to the arrest and detention of the Applicant's son is significant to the Applicant for reasons that do not appear to have been relevant to the case in Order F2012-18 (in fact, it is not clear that similar information was at issue in that order in any event).

[para 49] With respect to unfair financial or other harm, it is not clear to me what harm the Public Body envisioned or to whom; as I have no arguments on this point and no argument is apparent from the records themselves, I find that this factor does not apply to the information.

Compassionate grounds under section 17(5)

[para 50] In my October 25, 2012 letter, I asked the parties to address the discussion of section 40(1)(cc) in Order F2012-24, as well as whether there is a compassion consideration under section 17(5) with respect to the records at issue in this case.

[para 51] The Public Body stated that in responding to my questions, it considered whether additional information should be provided to the Applicant based on compassionate grounds. It determined that additional disclosure was not warranted in this case. It stated that the file related to the death of the Applicant's son (which was provided in response to the same access request) was already provided to her (in severed form) in order "to provide the Applicant with as much information about her son's death as possible, and as such [the file] was provided for compassionate reasons (under s. 40(1)(cc) instead of s. 17)."

[para 52] The Director of Adjudication considered the application of section 40(1)(cc) in a response to an access request, as well as the scope of a compassionate grounds factor under section 17(5):

> 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.
>
> 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 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.

> 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).

(Order F2012-24, at paras. 58-60)

[para 53] In this case, the Applicant already knows how her son died. Her concern is whether the events around her son's arrest contributed to his death. The police file dealing only with the son's death likely does not address this concern. Though recognizing the Public Body disclosed some of the file relating to the son's death to the Applicant, I asked the Public Body to consider whether there are also compassionate grounds for disclosing some or all of the criminal file to the Applicant. In my view, compassionate grounds can address more than only the immediate circumstances surrounding the death of a family member.

[para 54] The Public Body's Disclosure Analyst lists the following factors she considered in determining that further disclosure of the records at issue was not warranted:

- It is understandable that the Applicant wishes to obtain as much information as possible in regard to her son's death.
- The EPS previously provided a redacted copy of File 332 to the Applicant. File 332 is the EPS' investigation into the Deceased's death on July 31, 2011.
- The only record at issue in this Inquiry is File 380. File 380 is an investigation file relating to allegations by a third party [relating to the Deceased].
- File 380 contains a significant amount of personal information with respect to the Deceased and a third party.
- File 380 does not disclose that the Deceased was mistreated by the police, as alleged by the Applicant.

[para 55] The Disclosure Analyst concludes that "[g]iven the nature of the records at issue, and after weighing and balancing the other factors in s. 17, I have determined that disclosure of File 380 (with the exception of the information referenced at paragraphs 13-15 below [names and contact information of officers as well as headings]) is not appropriate in this case."

[para 56] The Applicant argues, in response to my questions, that

> [s]imilarly to Order F2012-24, the Applicant in this case seeks any information that the EPS can provide to her to give her insight into her son's death. As set out in Order F2012-24, the fact that the Applicant's motivation for seeking the records in order to obtain an explanation for the death of her son is a relevant circumstance in this case. This is true regardless of whether or not the records actually contain the answer that the applicant is seeking… In this case, the Applicant is concerned that there may be occurrences documented in File 380 [the criminal file] that contributed to her son's deteriorating emotional state and eventual death.

[para 57] She cites paragraph 48 of Order F2012-24 as support for this argument. That paragraph states:

> 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 58] I note that the Applicant stated in her initial submission that the reason for seeking access to the records at issue is to determine whether to or enable her to pursue a complaint against the officers involved in the son's arrest (and presumably his detention).

[para 59] In my view, these are not mutually exclusive or conflicting motives for seeking the records at issue. It may be that the Applicant is pursuing (or contemplating pursuing) action against the officers because she believes the circumstances around her son's arrest and detention may have contributed to his death.

[para 60] The Applicant has made several allegations in her complaint made to the Public Body, specifically that

> [t]hey [the Applicant and her spouse] believe that [the son's] initial arrest was handled improperly and that he should not have been arrested and incarcerated.

> They believe that [the son] was physically mistreated while incarcerated and that he was assaulted by officers.
>
> [They] also complain about the police failing to take [the son] for medical treatment or to take other steps to help him when he was clearly suicidal while in their custody.

[para 61] Based on the arguments provided, the Public Body seems to take the position that since the records at issue consist of a file relating to an investigation into alleged criminal activity by the son, rather than the file specifically related to the son's death, that there are no compassionate reasons for disclosing any of the information to the Applicant.

[para 62] The Public Body argues that the records "[do] not disclose that the Deceased was mistreated by the police, as alleged by the Applicant." The Director of Adjudication, in Order F2012-24, determined that the existence (or not) of information sought by the applicants was by itself, of significant use to them. In my view, the circumstances of this case are similar in that either outcome – the records indicate mistreatment or they do not – is significant information to the Applicant and her understanding of her son's death.

[para 63] In my view, some of the withheld information in the records at issue would allow the Applicant to know whether, and/or to what extent, the circumstances of her son's arrest and detention contributed to his death (for example, information about the actions of the arresting officers, the circumstances of the son's arrest, and details of his detention). Information about the alleged criminal activity may also serve the purpose of providing the Applicant with information about events that may have contributed to her son's death (for example, the complainant's statement and police narratives of the event), although the Applicant has not specifically addressed this in her submissions. A small amount of information is not obviously relevant to these concerns, such as the information in the vehicle towing invoice, information related to the son's driving record, and information in the Prisoner Property report (pages 31, 32, 35 and 36). That said, the information in these records may provide additional context around the son's arrest and detention.

Other considerations raised by the parties

[para 64] The Applicant also argues that prior to his death the son

> had an interest in disclosing the information in question for the purposes of the Applicant's complaint. The complaint alleges that EPS officers abused their authority and mistreated [the son] while he was in their care. This complaint is supported by notes that were made by [the son], which were clearly made to help his family understand why he committed suicide. It must be inferred that he wanted them to do something about how he was treated by the police. The Applicant submits that when the deceased was alive, he had an interest in the success of her complaint, and, by extension, he would have had an interest in disclosing the record in question for the purposes of furthering the complaint.

[para 65] Even if the Applicant's son felt he was mistreated by the officers, I have no evidence that he had an interest in filing a complaint against them. I do not know if the

Applicant provided me with all of the notes from her son or only a portion thereof; however, the notes I have reviewed make no mention of complaints or other actions against the officers.

[para 66] The Applicant argues that the information in the records at issue are "crucial" to her complaint against the Public Body officers and that she requires the information to effectively question what the Public Body says occurred at the time of the arrest and detention. She also states that without the information in the records at issue, she will not be able to make an informed decision about whether to appeal any finding to the Law Enforcement Review Board (LERB).

[para 67] The Public Body states that the Applicant has already made her complaint to the Public Body, an investigation which is still ongoing. It also argues that the Applicant does not require the information to ensure that her complaint is properly investigated, and cites *Newton v. Criminal Trial Lawyers' Association*, 2010 ABCA 399 (CanLII), which outlines the role of the complainant in a complaint made under the *Police Act*. The Court states:

> The complainant can obviously initiate a complaint, but thereafter is not given a role to play in the investigation or prosecution of the matter. But after the decision is rendered, the complainant has a right of appeal to the Board.
>
> The *Police Act* and the *Regulation* allow the chief of police to appoint a presenting officer to prosecute charges against police officers. The complainant is not given standing at the initial hearing. Section 45(7) of the *Act* only requires that the chief of police give the complainant a progress report every 45 days, and s. 47(5) requires that the complainant be advised of the outcome of the hearing. Throughout the investigation and the hearing before the presiding officer the only role of the complainant would be as a witness. It is the presenting officer who has the conduct of the prosecution. However, once the presiding officer has rendered his decision, s. 48(2) of the *Act* gives the complainant the right to appeal the outcome to the Board. The complainant thereby becomes a party to the proceedings late in the day, at the appellate level. This unusual feature of the appeal régime is relevant to setting the standard of review that the Board should apply to the decision of the presiding officer.

(at paras. 66-67)

[para 68] The Public Body also argues that other avenues – such as the Public Body's own internal investigation process or a complaint to the LERB – are open to the Applicant and that the Applicant may be entitled to the information at issue in a disciplinary process. (This may be the rationale behind the Public Body's argument that the Applicant does not have a pressing need for the information in the records at issue but the Public Body did not provide details with respect to that argument.)

[para 69] Section 3(a) of the FOIP Act states that that Act is in addition to, and does not replace, existing procedures for access to information or records. Past orders of this office have also state that a public body is not excused from providing information in response to a FOIP request simply because another avenue exists for accessing the

information. In Order F2009-015, the Director of Adjudication found that an alternate avenue for accessing the requested information may determine how much weight is placed on a particular factor that weighs in favour of disclosure:

> I reject the idea that an access request need not be met simply on the basis that other avenues exist for accessing the same information. However, if I were convinced that such other means were available to obtain the particular documents at issue, it might affect the weight of the argument that the records are relevant to a fair determination of the Applicant's rights: though the records might still be "relevant' in the sense of being relevant to the matters at issue in the litigation, the fact they could be obtained through other means could make this a less compelling point.

(Order F2009-015 at para. 68)

[para 70] That said, I do not know what information the Applicant would receive were she to appeal the outcome of her complaint to the LERB; further, the Applicant is requesting the information *in order to determine whether* to appeal the result of her complaint to the LERB.

[para 71] As noted, the Applicant has made a complaint under the *Police Act*, and is anticipating the possibility that she may appeal any finding to the Law Enforcement Review Board (LERB). Under the *Police Act*, an individual may make a complaint regarding the conduct of police officers:

> *42.1(1) Subject to subsection (2), a person may make a complaint respecting the conduct of a police officer.*
>
> *(2) The following persons may make a complaint referred to in subsection (1):*
>
> *(a) a person to whom the conduct complained of was directed;*
>
> *(b) a person who was present at the time the incident occurred and witnessed the conduct complained of;*
>
> *(c) an agent of a person referred to in clause (a);*
>
> *(d) a person who*
>
> *(i) was in a personal relationship with the person referred to in clause (a) at the time the incident occurred, and*
>
> *(ii) suffered a loss, damage, distress, danger or inconvenience as a result of the conduct complained of.*

[para 72] Based on the Applicant's arguments, as well as the copy of her complaint to the Public Body which she provided to me, it seems that the Applicant has made the complaint pursuant to section 42.1(2)(d) of the *Police Act*. A complaint made about the conduct of a police officer must be investigated (section 45) unless the complaint has been informally resolved or the chief is of the opinion that the compliant is frivolous, vexatious or made in bad faith. Given that the *Police Act* provides the Applicant with an ability to make a complaint and that complaint must be investigated (subject to certain

conditions), the Applicant has a right to make her complaint. Further, as noted by the Court in *Newton* above, the *Police Act* provides the Applicant with the ability to request an appeal of the decision resulting from her complaint (section 48(2)).

[para 73] I agree with the Public Body that the Court in *Newton*, in the quote above, indicates that a complainant plays a minor role in the investigation of a complaint under the *Police Act*, at least initially. However, in that same paragraph, the Court also indicates that the role of the complainant becomes more important if that complainant chooses to appeal the outcome of the complaint. It appears to me that the Applicant (as a complainant) still has some role to play in the process and an interest in ensuring that she can participate as fully as possible (to whatever extent that may be). I find that the personal information in the records at issue is relevant to the Applicant's complaint (and possible appeal) under the *Police Act* and that this weighs in favour of disclosing the information.

[para 74] The Applicant also argues that she has a right to access the information pursuant to section 2(b) of the *Charter*. She cites *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), 2010 SCC 23 (*CLA*), paraphrasing part of that decision as follows:

> If a claimant can establish that the denial of access effectively bars meaningful commentary, there is a *prima facie* case for the disclosure of the documents in question. If a *prima facie* case is established, it may be defeated if there are factors such as privilege that remove s. 2(b) protection. If no such factors exist, then s. 2(b) protects access to the documents. If the actions of the government infringe on this access, then s. 2(b) of the *Charter* is engaged.

[para 75] The Public Body states that "[t]he current operation of the FOIPP Act does not impair any meaningful commentary, scrutiny of a public body, or hinder the Applicant's ability to make a complaint against EPS officers. Regardless, the EPS submits that the constitutional question is beyond the scope of this Inquiry."

[para 76] The Public Body is correct that the applicability of section 2(b) of the *Charter* is beyond the scope of this inquiry as I do not have jurisdiction to decide constitutional matters. That said, it seems to me that the Applicant need not rely on the *Charter* to make her argument; she argues that section 17 of the FOIP Act is not a factor that removes the protection of section 2(b) of the *Charter* because the disclosure of the records at issue would not be an unreasonable invasion of privacy under section 17. If the Applicant is correct that section 17 does not properly apply to the records at issue there is no need to refer to the *Charter* because the FOIP Act itself would require the disclosure in this case (as no exception to disclosure other than section 17 has been applied by the Public Body to withhold the information in the records).

Balancing section 17 factors

[para 77] Balancing the relevant factors discussed above, I find that disclosing the son's name, gender, date of birth, contact information, drivers licence number and

information about his vehicle would not be an unreasonable invasion of privacy (except where this information is located in the witness statements and narratives related to the details of the alleged criminal activity, as discussed below). In my view, this information helps to provide context to the events around the arrest and detention of the Applicant's son. It is already clear from the Public Body's response and submissions that the records at issue relate to criminal allegations against the Applicant's son; further, some of this information, such as the son's gender, contact information and date of birth, are clearly known to the Applicant. This information, as well as the drivers licence number and vehicle information, are no longer sensitive information due to the death of the son; even if concerns such as identity theft that are often related to information such as date of birth and drivers licence numbers remain relevant, in my view, those concerns are not germane to the discussion of whether the disclosure is an unreasonable invasion of the son's privacy. I make the same finding regarding the information in the Prisoner Property form.

[para 78] I have found that the "compassionate grounds" factor, as well as the fact that the records at issue are relevant to the Applicant's complaint under the *Police Act*, weighs conclusively in favour of disclosing some of the personal information in the records. Specifically, I find that the information relating to the circumstances of the son's arrest (i.e. actions of the officers in arresting the Applicant's son) and detention should be disclosed to the Applicant; the Applicant believes this information may provide her with some answers regarding events leading to her son's death and may provide the Applicant with information regarding her son's treatment by members of the Public Body. These factors outweigh the factors against disclosure of this information, as the information related only to the arrest and detention itself is not particularly sensitive. I note that the medical information is also information to which the Applicant herself has referred in the documents submitted to me, and therefore she already knows it.

[para 79] Accordingly, I find the following information is information that cannot be withheld under section 17:

- pages 1 and 6 – information related to the son (but not the complainant) except the information related to the "Involvement/WillSay" (i.e. the charge against the son);
- page 7 – information under the second (of seven) bolded subheading; the first three of four lines under the third subheading; and the information under the last three subheadings;
- page 8 – information under the first two (of three) subheadings;
- page 10 – information under the first subheading;
- page 18 – the first *full* paragraph, except the quoted remarks; the second and third full paragraphs, except the name of the third party other than the son; and the fourth full paragraph (which is the last paragraph before the last subheading);
- pages 19, 31, 32, 33, 34 and 35 – all severed information;
- page 36 – information under "Involved Vehicles" heading.

[para 80] I find that the Public Body properly applied section 17 to withhold the information about the alleged criminal activity. Given the Applicant's arguments

regarding the reasons she is seeking access to the records, the information related to the alleged criminal activity appears to be less relevant to her concerns about circumstances contributing to her son's death. I therefore afford the compassionate grounds for disclosure less weight with respect to that information. Even if I am wrong and the information regarding the alleged criminal activity is as important to the Applicant's understanding of circumstances leading to her son's death as the information regarding the arrest and detention, I find that the factors weighing against disclosure outweigh the compassionate grounds factor and other factors weighing in favour of disclosure. The allegations against the son have not been tested and so the son did not have an opportunity to respond to them. Further, the personal information of the complainant involved in the alleged criminal activity is sensitive in nature. In most cases (for example, the complainant's statements to police and the narrative of events in the records) the complainant's personal information is so intertwined with the personal information of the son that it cannot reasonably be severed from his. I agree with the Public Body that simply severing the complainant's name and/or other identifiers in the records at issue would not render the remaining personal information of the complainant non-identifiable.

[para 81] Further, I find that the Public Body properly withheld all the information in the witness statements and narrative of events, even where that information is to be disclosed elsewhere in the records. This is because disclosing that information in the context of these records may reveal details of the alleged criminal activity and/or the remaining information would be meaningless.

V. ORDER

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

[para 83] I find that section 4(1)(a) applies to pages 26-30, which are therefore excluded from the scope of the Act and outside my jurisdiction.

[para 84] I find that EPS improperly applied section 17 in some instances. I order EPS to disclose information per paragraphs 24 and 79.

[para 85] I further order the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that it has complied with the Order.

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Amanda Swanek
Adjudicator