

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2014-23

June 12, 2014

CITY OF LETHBRIDGE

Case File Number F6373

Office URL: www.oipc.ab.ca

Summary: The Applicant made a request to the City of Lethbridge (the Public Body) for access to his personal information under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act). Specifically, he requested information regarding an investigation that had been conducted by the Public Body as a result of a complaint he had made, including the report of the investigator's findings.

The Public Body located responsive records but some severed information under section 17 (disclosure harmful to personal privacy) and section 24 (advice from officials) of the FOIP Act.

The Adjudicator determined that not all the information the Public Body had severed was information that could be withheld under section 17. Statements made by employees of the Lethbridge Police Service had been severed in cases even though the statements had been made in their capacities as representatives of the Lethbridge Police Service and appeared to lack a personal dimension. The Adjudicator also found that the Public Body had considered irrelevant factors when it made its decision to withhold information under section 17(5), and had not considered relevant factors. The Adjudicator ordered the Public Body to make a new decision regarding section 17.

The Adjudicator agreed that the information that had been severed under section 24(1) was subject to this provision; however, as it appeared possible that the information might have been discussed with the Applicant, or was intended to be discussed with the

Applicant, the Adjudicator ordered the Public Body to reconsider its decision to withhold the information from the Applicant under section 24(1).

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 6, 17, 24, 30, 72

Authorities Cited: AB: Orders 96-021, F2006-006, F2006-007, F2012-24, F2013-51

Cases Cited: *University of Alberta v. Pylypiuk*, 2002 ABQB 22; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23; *Blank v. Canada (Minister of Justice)*, 2006 SCC 39

I. BACKGROUND

[para 1] The Applicant made a request to the City of Lethbridge (the Public Body) for access to his personal information under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act). Specifically, he requested information regarding a human resources investigation that had been conducted by the Public Body as a result of a complaint he had made, including the report of the Public Body's investigator's findings.

[para 2] The Public Body located responsive records but severed information from them under section 17 (disclosure harmful to personal privacy) and section 24 (advice from officials) of the FOIP Act.

[para 3] The Applicant requested review by the Commissioner of the Public Body's severing decisions.

[para 4] The Commissioner authorized mediation to resolve the dispute. As mediation was unsuccessful, the matter was scheduled for a written inquiry.

II. RECORDS AT ISSUE

[para 5] The records at issue are those records the Public Body has identified as responsive to the Applicant's access request and from which it has redacted information.

III. ISSUES

Issue A: Does section 17 of the Act (disclosure harmful to personal privacy) require the Public Body to withhold the information to which it applied this provision?

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

IV. DISCUSSION OF ISSUES

Issue A: Does section 17 of the Act (disclosure harmful to personal privacy) require the Public Body to withhold the information to which it applied this provision?

[para 6] Section 17 requires a public body to withhold the personal information of a third party if disclosing the personal information would invade the third party's personal privacy.

[para 7] When deciding whether section 17 applies and requires withholding information from an applicant, a public body must first determine whether the information under consideration is personal information. If it decides that the information is personal information, it must then make a determination as to whether it would be an unreasonable invasion of an individual's personal privacy to disclose the information. If it decides that it would be, it must then consider whether it is possible to remove those details that would serve to identify the individual under section 6 of the FOIP Act, and to provide the remaining information to the Applicant.

[para 8] The Public Body has applied section 17 to sever the names of witnesses and the statements they made to an investigator. The first question that must be addressed is whether the information the Public Body has severed is the personal information of a third party.

[para 9] Section 1(n) of the FOIP Act defines "personal information". It states:

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[...]

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

[para 10] Not all information referring to an individual is necessarily personal information. Information associated with an individual in a professional, official or representative capacity may not be “about” the individual. For example, information about the actions of an employee performing work duties, may not be about the employee as an individual, unless the information has personal consequences for the employee, or there is something else about the information that gives the information a personal dimension. In Order F2013-51, the Director of Adjudication considered the question of whether information relating to an individual's work duties was personal information and said:

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 employees of the Public Body and the University of Calgary acting in the course of their duties, as representatives of their employers, cannot be withheld as personal information, unless the information is at the same time that of an individual acting in the individual's personal capacity.

[para 11] It does not appear that the Public Body turned its mind to the question of whether the information it withheld under section 17 was personal information, or was information associated with employees acting in representative capacities. As there are

numerous records and as it is not clear in every case whether information severed from them has a personal dimension or not, I have decided to divide the information into categories and to discuss examples of the information, so that the Public Body may then review the information it severed and make a determination as to whether the information is personal information to which section 17 can apply.

[para 12] The information to which the Public Body applied section 17 falls into five categories: 1) typed statements attributed to employees who are not themselves the subject of an investigation, 2) statements attributed to an employee of a police service other than the Lethbridge Police Service (another police service), 3) typed statements attributed to an employee who was the subject of an investigation, 4) an investigator's handwritten notes, and 5) email communications between an employee of the Public Body and a member of the Lethbridge Police Service.

Typed statements made by employees who are not the subject of an investigation

[para 13] The investigator who conducted the investigation interviewed several employees of the Public Body. The Public Body has severed the witnesses' responses to the investigator's questions (other than the Applicant's responses) under section 17 in their entirety. (The Public Body withheld all the handwritten notes of the investigator, including the Applicant's responses to the investigator's questions, under section 17. As the Public Body's reasons for severing this information appear to be different than its reasons for withholding the typed versions of the responses, I have decided to address the handwritten notes separately, below.)

[para 14] Using record 35 as an example, of the seven paragraphs severed from the record, the fourth, fifth and sixth paragraphs appear to contain only background information that the witnesses became aware of and provided to the investigator by virtue of their roles as employees of the Public Body. A great deal of the information severed from the records consists of narratives of events that lack a personal dimension. Although the names of the witnesses are contained in these paragraphs, in most cases the information is not about them, but relates to their job duties. The witnesses were asked to make statements because they were employees of the Lethbridge Police Service and the Public Body and as such, had knowledge of the events under investigation and the processes followed by the Public Body.

[para 15] Record 46 contains a series of typed statements attributed to employees. Using this record as an example, I note that the statements recount workplace events and circumstances. The Public Body has severed these statements in their entirety. While severed information contains the names of witnesses and their statements, it lacks a personal dimension. Rather, the information consists of factual accounts of practices and policies at the Public Body. The statements do not appear to convey anything personal about the employees making the statements. It is therefore unclear that record 46 contains personal information.

[para 16] There is some information in the witness statements that may be regarded as opinion. Under section 1(n) of the FOIP Act, personal opinions about someone else are the personal information of the subject of the opinion and not the personal information of the opinion holder. In Order F2006-006, the Adjudicator stated:

A third party's personal views or opinions about the Applicant - by that reason alone - are expressly not their personal information under section 1(n)(ix). However, the identification of the person providing the view or opinion may nonetheless result in there being personal information about him or her. Section 1(n)(ix) of the Act does not preclude this conclusion, as that section only means that the content of a view or opinion is not personal information where it is about someone else. In other words, the substance of the view or opinion of a third party about the Applicant is not third party personal information, but the identity of the person who provided it is third party personal information.

[para 17] Where the opinions are about the Applicant, or the individual who is the subject of the investigation, the opinions are the personal information of the Applicant or the subject of the investigation respectively, and not the personal information of the witness who expressed the opinion. Using record 35 as an example again, the seventh paragraph severed from this record contains an opinion about the Applicant. This opinion is the personal information of the Applicant. Using record 39 as an example, the final paragraph severed from this record concludes with an opinion about the third party who was the subject of the investigation. This opinion would be the personal information of the third party who was the subject of the investigation, and not that of the employee who expressed the opinion.

[para 18] As noted above, the seventh paragraph severed from record 35 contains opinions about the Applicant. It is unclear from the context created by the record whether these opinions are personal opinions, or are opinions formed as part of the witness's duties. If the opinions expressed in this paragraph are personal opinions, then the fact that the witness holds the opinion would be the witness's personal information. However, if the opinion was formed in the witness's capacity as a representative of the Public Body or the Lethbridge Police Service, i.e. as a supervisor evaluating an employee, then the fact that the witness formed the opinion would not be the witness's personal information. In cases where an opinion is about an applicant and an individual holds the opinion in a personal capacity, (and it would be an unreasonable invasion of the opinion holder's personal privacy to disclose the fact that they hold the opinion) it is often possible to provide the opinion and to make the holder of the opinion unidentifiable by severing the holder's identity from the record. However, if the opinion is formed in a professional or representative capacity, then both the opinion and the identity of the employee who expressed the opinion may be disclosed.

[para 19] Most of the information the Public Body severed under section 17 is not personal information, but is information relating to the operations of the Lethbridge Police Service. Where individuals are referred to in the records, it is as employees acting in a representative capacity. However, as discussed above, it is possible that some of the information may consist of personal opinions, in which case, the fact that an individual holds a particular opinion may be the individual's personal information. As it remains possible that some of the information the Public Body severed under section 17 is

personal information, I have decided that I must require the Public Body to make decisions as to whether the opinions of employees it has severed from the records have a personal dimension, such that the fact that the employee holds the opinion could be said to be the employee's personal information.

[para 20] To conclude, I am not satisfied that all, or even most, of the typed statements attributed to witnesses are personal information to which section 17 can apply. As the Public Body does not appear to have turned its mind to the question of whether information referring to employees acting as representatives of their employer is personal information, I must require it to review the records again and make this determination.

Statements made by an employee of another police force

[para 21] Records 45, 47, and 129 contain notes of statements made by an employee of another police service. I am unable to tell whether these statements would have a personal dimension for the employee. Certainly, the information communicated in his statement was gathered as a result of his employment; it is less clear whether it was communicated as part of his duties with his own police service, or as a private individual. However, as I find below in my analysis of section 17 that these statements should not be withheld under section 17 even if they are his personal information, I need not decide the question of whether the information is personal information.

Emails from an employee of the Public Body to a member of the Lethbridge Police Service

[para 22] Records 77 and 78 contain emails from an employee of the Public Body to a member of the Lethbridge Police Service. The Public Body disclosed the name of the employee of the Public Body to the Applicant, but withheld the name of the member of the Lethbridge Police Service and the contents of the emails under section 17.

[para 23] I am unable to identify any information in these records that has a personal dimension, such that it could be termed "personal information". Rather, the emails contain discussions of workplace issues and policies. There is nothing in these records to suggest that the member of the police service and the employee of the Public Body involved in these discussions stepped outside their roles as representatives of the Public Body or the Lethbridge Police Service, nor is there anything to suggest that the contents of the emails would have personal consequences for the employee or for the member.

[para 24] I find that records 77 and 78 do not contain personal information and cannot be withheld under section 17.

The investigator's handwritten notes

[para 25] The Public Body severed the investigator's handwritten notes, including notes of conversations with the Applicant, in their entirety. The Public Body provided no

explanation for this severing. Possibly, it considers handwriting to be the personal information of the individual whose handwriting it is.

[para 26] In Order 96-021, former Commissioner Clark stated that handwriting is personal information. He said:

[...] I find that handwriting is personal information because it is “recorded information about an identifiable individual”.

Subsequent orders of this office have held that handwriting is personal information if it would serve to identify an individual or convey other personal information about the individual. In Order F2006-007, I reviewed cases in which handwriting style had been found to be personal information.

Section 17(5) is inclusive and does not provide an exhaustive list of factors to be considered when determining whether disclosure of personal information is or is not an invasion of privacy. In Orders 2000-005, F2003-004, F2004-022, and F2005-016 a relevant circumstance under section 17(5) that weighed in favour of disclosing personal information consisting of names and signatures, was whether individuals were acting in formal representative capacities. In those cases, disclosure of the names and signatures of individuals was found to not be an unreasonable invasion of those third parties’ personal privacy under section 17(1).

Ontario adopts a different approach, as set out in Order MO-1194:

This office has considered handwriting and signatures which appear on records in a number of different contexts.

In cases where the signature is contained on records created in a professional or official government context, it is generally not "about the individual" in a personal sense, and would not normally fall within the scope of the definition. (See, for example, Order P-773, [1994] O.I.P.C. No. 328, which dealt with the identities of job competition interviewers, and Order P-194 where handwritten comments from trainers were found not to qualify as their personal information.)

In situations where identity is an issue, handwriting style has been found to qualify as personal information. (See, for example, Order P-940, [1995] O.I.P.C. No. 234, which found that even when personal identifiers of candidates in a job competition were severed, their handwriting could identify them, thereby bringing the records within the scope of the definition of personal information)...

In my view, whether or not a signature or handwriting style is personal information is dependent on context and circumstances.

In other words, one must decide whether the signature is “about the individual” for the purposes of section 1(1)(n) of the Act, or is about the office held by the individual. In situations where a record is signed as part of employment responsibilities as an office holder, the signature is not personal information. When a record is signed in one’s capacity as an individual, the signature becomes recorded information about an individual and subject to section 17.

I find that the parties, other than the Third Party in this case, were acting as representatives of the public body and government when they signed the contract. The contract would not have been binding on the Public Body had its representatives signed in their personal capacities.

[para 27] Handwriting may be considered personal information if it serves to identify an individual (and the identity of the individual is in issue) or to convey other personal details about an identifiable individual. However, handwriting that does not serve to identify an individual, or that was created by an individual acting in a representative capacity, as is the case here, is not personal information under the FOIP Act. The identity of the investigator who conducted the investigation and made findings was known to all parties who participated in the investigation and the name of the investigator was disclosed to the Applicant where it appears in the records. The investigator wrote notes by hand in the course of his investigation; there is nothing to suggest that he wrote the notes for purposes unrelated to work, or that the notes would have personal consequences for him. Rather, the notes formed the basis for his official findings.

[para 28] That is not to say that some of the information recorded in the handwritten notes is not personal information. The handwritten notes document the responses and comments of employees, including the employee who was under investigation. If these comments and responses contain information about these employees as identifiable individuals, then the information may be personal information. The information would be personal information because of the substance of the handwritten notes, not because the notes are written by hand. I will direct the Public Body to review the handwritten notes to determine whether the information they contain is personal information. If it determines that it is, as discussed below, it must consider whether section 17 requires it to withhold the information, or whether the information may be disclosed. If it decides that it would be an unreasonable invasion of personal privacy to disclose personal information, then it must consider whether it could sever the personal identifiers from the information and disclose the remainder to the Applicant.

Statements made by an employee who was the subject of an investigation

[para 29] I find that the statements made by the employee who was the subject of the investigation and the statements made about him have a personal dimension. While he took the actions that are documented in the records as a representative of the Public Body, the information appears in the context of an investigation as to whether his actions contravened the Public Body's employment policies. The information therefore has personal consequences for the employee and is his personal information.

Conclusion in relation to personal information

[para 30] To conclude, I am not satisfied that all the information to which the Public Body has applied section 17 is personal information. I will require the Public Body to make decisions as to whether the information it has severed has a personal dimension, or whether it is information about its employees acting in representative capacities. I have made findings that information is not personal information in relation to specific information severed from records 77, and 78. As a result, the Public Body cannot continue to apply section 17 to this information.

Section 17

[para 31] I turn now to the question of whether section 17 requires the Public Body to withhold information.

[para 32] 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.

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

- (a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,*
- (b) the personal information is an identifiable part of a law enforcement record, except to the extent that the disclosure is necessary to dispose of the law enforcement matter or to continue an investigation,*
- (c) the personal information relates to eligibility for income assistance or social service benefits or to the determination of benefit levels,*
- (d) the personal information relates to employment or educational history,*
- (e) the personal information was collected on a tax return or gathered for the purpose of collecting a tax,*
- (e.1) the personal information consists of an individual's bank account information or credit card information,*
- (f) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations,*
- (g) the personal information consists of the third party's name when*
- (i) it appears with other personal information about the third party, or*
- (ii) the disclosure of the name itself would reveal personal information about the third party,*

or

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

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

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,

(b) the disclosure is likely to promote public health and safety or the protection of the environment,

(c) the personal information is relevant to a fair determination of the applicant's rights,

(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,

(e) the third party will be exposed unfairly to financial or other harm,

(f) the personal information has been supplied in confidence,

(g) the personal information is likely to be inaccurate or unreliable,

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and

(i) the personal information was originally provided by the applicant.

[para 33] Section 17 does not say that a public body is *never* allowed to disclose third party personal information. It is only when the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy that a public body must refuse to disclose the information to an applicant (such as the Applicant in this case) under section 17(1). Section 17(2) (not reproduced) establishes that disclosing certain kinds of personal information is not an unreasonable invasion of personal privacy.

[para 34] When the specific types of personal information set out in section 17(4) are involved, disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. To determine whether disclosure of personal information would be an unreasonable invasion of the personal privacy of a third party, a public body must consider and weigh all relevant circumstances under section 17(5), (unless section 17(3),

which is restricted in its application, applies). Section 17(5) is not an exhaustive list and any other relevant circumstances must be considered.

[para 35] In *University of Alberta v. Pylypiuk*, 2002 ABQB 22, the Court commented on the interpretation of what is now section 17. The Court said:

In interpreting how these sections work together, the Commissioner noted that s. 16(4) lists a set of circumstances where disclosure of a third party's personal information is presumed to be an unreasonable invasion of a third party's personal privacy. Then, according to the Commissioner, the relevant circumstances listed in s. 16(5) and any other relevant factors, are factors that must be weighed either in favour of or against disclosure of personal information once it has been determined that the information comes within s. 16(1) and (4).

In my opinion, that is a reasonable and correct interpretation of those provisions in s. 16. Once it is determined that the criteria in s. 16(4) is [*sic*] met, the presumption is that disclosure will be an unreasonable invasion of personal privacy, subject to the other factors to be considered in s. 16(5). The factors in s. 16(5) must then be weighed against the presumption in s. 16(4). [my emphasis]

[para 36] Section 17(1) requires a public body to withhold information only once all relevant interests in disclosing and withholding information have been weighed under section 17(5) and, having engaged in this process, the head concludes that it would be an unreasonable invasion of the personal privacy of a third party to disclose his or her personal information.

[para 37] Once the decision is made that a presumption set out in section 17(4) applies to information, then it is necessary to consider all relevant factors under section 17(5) to determine whether it would, or would not, be an unreasonable invasion of a third party's personal privacy to disclose the information. As discussed above, if the decision is made that it would be an unreasonable invasion of personal privacy to disclose the personal information of a third party, the Public Body must then consider whether it is possible to sever the personally identifying information from the record and to provide the remainder to the Applicant, as required by section 6(2) of the FOIP Act.

[para 38] The Applicant states that he is seeking statements made by witnesses, but that he is not seeking their names.

[para 39] The Public Body describes the information it severed in the following terms:

Sections 17(1), 17(4)(b), and 17(5)(f) of the Act allows public bodies to refuse to disclose personal information if the disclosure would be an unreasonable invasion of a third party's personal privacy. In this case, the records relate to third party witness statements and hand written notes regarding an internal investigation involving a bullying complaint. Specifically, the personal information from the third party would be an identifiable part of a law enforcement record.

The City of Lethbridge's practices when undertaking this type of investigation would be to keep the personal information confidential, and to tell those that are being interviewed, that it would be kept confidential and their name would not be disclosed.

The applicant stated that he disagreed with the definition of a “law enforcement” record. It is defined as

- (i) policing, including criminal intelligence operations,
- (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, or
- (iii) proceedings that lead or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the proceedings or by another body to which the results of the proceedings are referred”

In this particular case, the files were directly related to a police, security or administrative investigation, and therefore withheld.

[para 40] The submissions of the Public Body, and the manner in which it severed information from the records, lead me to conclude that the Public Body decided that the witness statements were an identifiable part of a law enforcement record within the terms of section 17(4)(b) and that on that basis, in addition to its understanding that witness interviews are normally kept confidential, it withheld the contents of the statements where they were not made by the Applicant.

[para 41] As discussed above, a great deal of the information severed under section 17 does not appear to be personal information at all, and cannot be withheld under section 17. A public body cannot keep information confidential under the FOIP Act unless a provision of the FOIP Act authorizes or requires the public body to keep the information confidential. If personal information is supplied in confidence to a public body, then that is a relevant factor to the weighing exercise that must be performed under section 17(5). However, information does not become personal information because a public body makes an undertaking to keep information confidential.

[para 42] As the Public Body notes in its submissions, “law enforcement” is defined by section 1(h) of the FOIP Act and states:

I In this Act,

(h) “law enforcement” means

- (i) policing, including criminal intelligence operations,*
- (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, or*

(iii) proceedings that lead or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the proceedings or by another body to which the results of the proceedings are referred[...][my emphasis]

As set out above, an administrative investigation is not a law enforcement investigation unless it leads, or could lead to a penalty or sanction.

[para 43] The Public Body did not provide any evidence or explanation of the investigation documented in the records. The context provided by the records establishes that the investigation was not conducted under the authority of the *Police Act* or the Police Service Regulation, but rather under the Public Body's human resources policy. There is no evidence before me regarding this policy or the consequences to an employee that follow from contravening the policy. The records are silent as to whether there were or could have been consequences resulting from the investigator's findings. However, before an investigation may be considered a "law enforcement" investigation within the terms of the FOIP Act, with the result that a record relating to the investigation is a "law enforcement record" within the terms of section 17(4)(b), it must be established that the investigation could lead to a penalty or sanction.

[para 44] As there is no evidence before me as to whether the investigation could have resulted in a penalty or sanction, I am unable to find that the presumption created by section 17(4)(b) applies to the information about the employee who was under investigation, or about the member from another police service, where such information appears in the records.

[para 45] I considered asking the Public Body questions as to what the possible consequences of the investigation might be; however, as I have decided that the Public Body must make a new decision regarding the application of section 17 in any event, the Public Body may decide whether the presumption set out in section 17(4)(b) applies when it makes the new decision.

[para 46] A finding that the presumption set out in section 17(4)(b) applies does not result in an automatic finding that it would be an unreasonable invasion of personal privacy to disclose personal information. Like the other presumptions set out in section 17(4), section 17(4)(b) is rebuttable. In other words, if factors weighing in favor of disclosure are relevant, it is possible that they may outweigh the presumption that it would be an unreasonable invasion of a third party's privacy to disclose information in a law enforcement record.

[para 47] The presumption set out in section 17(4)(g) can be said to apply in this case, as the names of the employee under investigation and the name of the member of another police service appear in the records in the context of other information about them. The question becomes whether there are relevant factors under section 17(5) that may outweigh the presumption created by section 17(4)(g).

Did the Public Body weigh all relevant factors under section 17(5) when it decided that it would be an unreasonable invasion of personal privacy to disclose information?

[para 48] To the extent that the Public Body has explained its decision to withhold information under section 17, it states:

The City of Lethbridge's practices when undertaking this type of investigation would be to keep the personal information confidential, and to tell those that are being interviewed, that it would be kept confidential and their name would not be disclosed.

[para 49] From the foregoing, I conclude that the Public Body considered section 17(5)(f) to apply to the personally identifying information of witnesses. Section 17(5), cited above, applies to personal information that has been supplied in confidence. It weighs against disclosure when it applies.

[para 50] I will first address the Public Body's decision to sever information about the employee who was the subject of the investigation, and then the information of the member of an external police service.

Information about the employee who was the subject of the investigation

[para 51] The Public Body's explanation of its decision to sever information is contradicted to a certain extent by the information it decided to disclose. The Public Body has disclosed to the Applicant the findings of the investigator, which serve to reveal the investigator's specific findings regarding the employee who was the subject of the investigation and some of the information in his statements. Moreover, the Public Body, although severing the information about the member of another police service in parts, disclosed the substance of his statement when it disclosed the investigator's findings. There is tension between these decisions to disclose information, and the Public Body's broad statements that its investigations are confidential and that information provided to an investigator would not be disclosed.

[para 52] Moreover, if there are consequences that could flow from an investigation, such as a "penalty or sanction" as described by section 1(h), then principles of fairness, or the statutory scheme in which the investigation is conducted, may require disclosure of information gathered from witnesses so that the subject of the investigation may know the case to be met and make representations. In addition, the Applicant may have rights in relation to the complaint that would also require the disclosure of information.

[para 53] I find that it has not been established that section 17(5)(f) has any relevance to the question of whether it would be an unreasonable invasion of a third party's personal privacy to disclose the statements of or about the employee who was the subject of the investigation. There is no evidence before me to support finding that statements made by or about the subject of the complaint were supplied in confidence. On the contrary, the investigator's findings, which include statements made by and about the employee who was the subject of the Applicant's complaint, were provided to the Applicant without severing (records 28 and 29, 50 and 51). While the Public Body's

reasons for doing so have not been stated to me, I infer from its actions that there was no understanding that information about the employee who was the subject of the Applicant's complaint would be withheld from the Applicant.

[para 54] As I find that it has not been established that the personal information of the employee who was under investigation or the member of the external police service was supplied in confidence, it follows that I find that this factor has not been established as relevant to the decision to be made under section 17(5).

[para 55] As discussed above, the Public Body provided the investigator's findings and conclusions to the Applicant. These findings and conclusions summarize the evidence of witnesses, including the employee who was under investigation, and explain how this evidence supports the investigator's conclusion that the Applicant's complaint was sustained.

[para 56] It appears that the Public Body considered the Applicant to have a right to know the outcome of the complaint he made, given that it provided the findings of the investigator to him, even though the findings contain the personal information of the employee who was the subject of the complaint and also excerpts of the evidence it withheld from other portions of the records. Essentially, the Public Body has provided its conclusions to the Applicant and general descriptions of some of the evidence, but not the specific details of the evidence on which it based its conclusions.

[para 57] Neither the Public Body nor the Applicant has discussed the policy under which the investigation was conducted, or produced this policy for my review. Neither party has made any arguments as to whether the Applicant has any rights to the information or a particular need for the information.

[para 58] It is possible that the policy under which the investigation was conducted may require disclosure to the Applicant of some or all the information gathered in the investigation, or possibly the policy is silent as to the extent to which information may be shared. However, if the policy does require evidence to be shared with a complainant, then that would be a factor weighing in favor of disclosure.

[para 59] Although the Public Body has not said so, it is possible that the Public Body disclosed the investigator's findings to the Applicant because the Applicant's complaint centers on a matter affecting his own employment with the Public Body, and the Public Body, as employer, considered it fair to let him know that it had investigated his complaint. If the Public Body formed the opinion that fairness required it to disclose its investigator's findings to the Applicant or supported doing so, then this same factor would be relevant to the decision the Public Body must make regarding the evidence the investigator collected that formed the basis of his findings.

[para 60] Moreover, much of the information about the employee of the Public Body who was the subject of the investigation is the personal information of the Applicant, given that the investigation was intended to address the working relationship

between these two parties. It is a purpose of the FOIP Act to allow individuals access to personal information about themselves in the custody or control of a public body. While this right is restricted by the limited and specific exceptions to disclosure set out in the FOIP Act, the right of the Applicant to his own personal information remains a relevant factor weighing in favor of disclosure.

[para 61] Moreover, the records indicate that in some cases, the personal information is known to the Applicant, either because the information was disclosed when the investigator's findings were disclosed to the Applicant, or because the Applicant was a participant in the events discussed in the investigator's notes. That information is known can serve to reduce the reasonableness of expectations of privacy in relation to the information.

[para 62] As the Public Body has not provided a detailed explanation of its decisions to sever information under section 17, I am unable to comment on the appropriateness of the factors it considered, other than to reject the argument that the personal information in the records was supplied in confidence. As discussed above, it is possible that factors weighing in favor of disclosure apply, but have not been considered. The question becomes whether I should substitute my decision for that of the Public Body, or order the Public Body to comply with its duty to consider relevant factors when making the decision to disclose or withhold personal information under section 17(5).

[para 63] In Order F2012-24, the Director of Adjudication said:

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.

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.)

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.

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 64] As was the case in Order F2012-24, I lack the reasoning of the Public Body as to why particular items of information were withheld. In my view, the approach adopted in that inquiry has merit in this inquiry as well. In relation to many of the records, I am unable to determine whose personal information has been withheld, and for what reason. This is primarily because of the Public Body's decision to withhold information about its employees performing their duties and because it has not indicated in its submissions whose information has been withheld or why. In addition, it appears that the Public Body has not gathered factual information to support its consideration of factors under section 17(5), but has given weight to a factor that have not been established as applying: the possibility that personal information was supplied in confidence. As a consequence, I am not in a position to review the Public Body's decision. Moreover, the Public Body has not considered factors weighing in favor of disclosure, and as a result, has not provided section 30 notice to parties who might provide relevant information regarding the decision the Public Body must make.

[para 65] Under section 72 of the FOIP Act I may require the head of a public body to perform a duty under the Act. As I am not satisfied that the Public Body has met its duty to consider all relevant circumstances under section 17(5), and as I am not satisfied that all the information the Public Body has withheld under section 17 is subject to section 17, I must require the Public Body to make a new decision regarding the application of section 17 in view of the following:

- that only personal information of identifiable individuals may be withheld under section 17;
- that information about employees acting in a representative capacity that lacks a personal dimension is not personal information that can be withheld under section 17;
- that a relevant consideration under section 17(5) is that the findings of the investigator have already been provided to the Applicant;
- that notice under section 30 of the FOIP act should be provided to individuals whose personal information is in the records in order to gather their views and evidence regarding disclosure;
- that there may be other considerations, such as its own policies, or fairness, that may support disclosing personal information, and that it must determine whether these apply;
- that it consider only factors that have been established as applying.
- If, once the Public Body has made its new decision, it finds it necessary to consider severing information, it must consider whether it is possible to sever personally identifying information and to provide the remainder to the Applicant.

Information about a member of an external police service

[para 66] With regard to the information about the member of the external police service, I note that the Applicant supplied this information to the Public Body when he made his complaint. (See records 44, 55, 56, 58, 71, 72, and 79.) Under section 17(5)(i), the fact that an applicant supplied the personal information in question to a public body is a consideration weighing in favor of disclosure. Moreover, record 58 indicates that the member of the external police service provided the information to the Applicant voluntarily. The information about the external member also appears in the investigator's findings, which were disclosed to the Applicant. I am unable to find that the member of the external police service supplied the information to the Public Body with expectations that it would be kept confidential from the Applicant. In my view, all relevant considerations under section 17(5) weigh in favor of disclosing the information about the member of the external police service to the Applicant, and outweigh the presumption created by section 17(4). I will therefore order the Public Body to disclose this information.

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

[para 67] The Public Body applied section 24(1)(b) to records 77 and 78 in order to withhold the contents of emails from the Applicant. Section 24(1)(b) grants a public body discretion to sever information that may reveal consultations or deliberations of a public body's employees. It states:

24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal

(b) consultations or deliberations involving

- (i) officers or employees of a public body,*
- (ii) a member of the Executive Council, or*
- (iii) the staff of a member of the Executive Council [...]*

[para 68] The Public Body severed emails written by the investigator to an employee of the Lethbridge Police Service and emails sent by the employee of the Lethbridge Police Service. (The Public Body severed the name of the employee of the Lethbridge Police Service under section 17. While I find that these records do not contain the personal information of anyone other than the Applicant, as the Public Body severed the name, I will not refer to the rank of the employee, which would serve to identify him, but will only refer to the employee as "the employee of the Lethbridge Police Service" in my discussion of records 77 and 78.)

[para 69] The Public Body argues:

The Public Body reviewed the information and the criteria for which Section 24 should be exercised and the impact of disclosure. The information did contain consultations and

deliberations involving officers or employees of a public body and therefore, the information was severed.

The Public Body took into consideration if the information disclosed would: make advice less candid and comprehensive or make consultations or deliberations less frank.

[para 70] The Public Body did not refer to the contents of records 77 and 78 or describe the circumstances in which they were created in its submissions. Essentially, the records have been left to speak for themselves. However, the emails in records 77 and 78 contain information about a procedural decision the employee of the Lethbridge Police Service was responsible for making. I infer that the Public Body interprets the emails from its own employee as providing advice for the consideration of the employee of the Lethbridge Police Service in making a decision, and the emails of the employee of the Lethbridge Police Service to be deliberations. In this way, the emails consist of consultations and deliberations of employees of public bodies. I agree with the Public Body that the emails are consistent with deliberations within the terms of section 24(1)(b). As a result, I must address the question of whether the Public Body has demonstrated that it exercised its discretion reasonably when it decided to withhold the information in the emails.

Did the Public Body reasonably exercise its discretion under section 24(1)(b)?

[para 71] In *Hearings Before Administrative Tribunals*, 2nd Edition¹, McCauley and Sprague describe how discretion is to be exercised when a statute confers discretion to make a decision. They state:

When Parliament [the Legislature] gives a decision-maker the discretion to make a decision, it expects the decision maker to make each decision on the basis of the circumstances in each individual case.

If the Legislature [or Parliament] did not want this to be so it would not have granted the decision-maker discretion in the first place. It would have set out the circumstances and the thing to be done or authorized that those specifications be set out in regulation. The fact that Parliament granted the power in terms of a grant of discretion means that Parliament wanted the discretion to be exercised on a case-by-case basis.

The underlying purpose in granting a decision-maker discretion is to guarantee flexibility and responsiveness in administrative decision-making. The decision-maker cannot frustrate this purpose by choosing to exercise that power on some other basis that the decision-maker feels is more efficient, effective or expeditious. The decision-maker must take its power as it gets it. The decision-maker will err if, rather than considering the [...] decision on a case by case basis, it simply applies or follows earlier developed procedure or policy without considering whether that policy is appropriate to the particular case. This is known as fettering discretion.

Having to decide a matter on a case-by-case basis means that the decision-maker must apply his or her mind to each matter, and all the components of that matter, and decide each of those components on the basis of their merit in those circumstances. This means that the decision-

¹ Robert W. McCauley and James L.H. Sprague, *Hearings Before Administrative Tribunals* 2nd Edition (Toronto: Thomson Canada Ltd. 2002) pp. 5B-15 – 5B-16

maker must keep an open-mind on all aspects of the matter – procedural just as much as substantive – and decide what to do with the merits of each case.

[para 72] In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, the Supreme Court of Canada explained the process for applying discretionary exceptions in freedom of information legislation and the considerations that are involved. The Court illustrated how discretion is to be exercised by discussing the discretionary exception in relation to law enforcement:

In making the decision, the first step the head must take is to determine whether disclosure could reasonably be expected to interfere with a law enforcement matter. If the determination is that it may, the second step is to decide whether, having regard to the significance of that risk and other relevant interests, disclosure should be made or refused. These determinations necessarily involve consideration of the public interest in open government, public debate and the proper functioning of government institutions. A finding at the first stage that disclosure may interfere with law enforcement is implicitly a finding that the public interest in law enforcement may trump public and private interests in disclosure. At the second stage, the head must weigh the public and private interests in disclosure and non-disclosure, and exercise his or her discretion accordingly.

[para 73] While the foregoing case was decided in relation to the law enforcement provisions in Ontario's legislation, it is clear from paragraphs 45 and 46 of this decision that its application extends beyond law enforcement provisions to the application of discretionary provisions in general and to the discretionary provisions in freedom of information legislation in particular. Section 24(1)(b) of Alberta's FOIP Act is an example of a discretionary exception.

[para 74] Discretion must be exercised on a case by case basis. After determining that section 24(1)(b) applies, the head of a public body must then consider and weigh all relevant factors, including relevant public and private interests weighing in favor of disclosure or non-disclosure in making the decision to sever information under this provision or to disclose it.

[para 75] Section 72(2)(b) of Alberta's FOIP Act establishes that the Commissioner may require the head to reconsider a decision to refuse access in situations when the head is authorized to refuse access. A head is authorized to withhold information if a discretionary exception applies to information. Section 72(2)(b) provision states:

72(2) If the inquiry relates to a decision to give or to refuse to give access to all or part of a record, the Commissioner may, by order, do the following:

(b) either confirm the decision of the head or require the head to reconsider it, if the Commissioner determines that the head is authorized to refuse access...

[para 76] As described by the Supreme Court of Canada in *Ontario (Public Safety and Security)*, (*supra*) applying a discretionary exception is a two-step process: first, it must be found that the exception applies; second, a decision must be made to withhold the information under the discretionary exception. When making the decision to disclose

or withhold information, “the head must go on to ask whether, having regard to all relevant interests, including the public interest in disclosure, disclosure should be made”. As discussed in *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at paragraph 52, the discretionary wording of exceptions is intended to encourage the head of a public body to disclose information, unless he or she forms the opinion that it is in the public interest to withhold the information.

[para 77] The Public Body explained its decision to exercise discretion in favor of nondisclosure in the following terms:

The Public Body took into consideration if the information disclosed would: make advice less candid and comprehensive or make consultations or deliberations less frank.

It is unclear to me why disclosure of the emails would affect the candour with which the Public Body’s employees give advice, or make deliberations. While I accept that preserving the candour of deliberations is among the purposes of section 24(1)(b), it does not follow that all information falling within the broad scope of section 24(1)(b) serves the purpose of the provision. The purpose of exercising discretion is, in part, to ensure that withholding information to which the provision is applied will actually further the purpose behind the exception.

[para 78] In this case, it is not clear to me that the discussion in the email was intended to be confidential. Rather, emails appearing on records 75 and 76 between the Applicant and the employee of the Public Body indicate that some of the information contained in the emails may possibly have been disclosed to the Applicant, or was not necessarily intended to be kept from him. If this is the case, then it is unclear how the candour of the Public Body’s deliberations would be affected by disclosing the contents of the emails on records 77 and 78 to the Applicant.

[para 79] It remains possible that some of the deliberations in the emails were kept confidential, or was intended to be so, in which case discretion to withhold could be exercised appropriately for the reasons stated by the Public Body. However, I lack the information necessary to confirm the reasonableness of the Public Body’s exercise of discretion.

[para 80] I have decided that I must ask the Public Body to reconsider its decision to withhold the emails on records 77 and 78 from the Applicant. When it makes the new decision it must determine whether each of the deliberations contained in the emails was intended to be kept confidential from the Applicant and was kept confidential from the Applicant. If so, then the Public Body’s decision to withhold the emails in order to maintain the candour of its deliberations may be supportable.

V. ORDER

[para 81] I make this Order under section 72 of the Act.

[para 82] I require the Public Body to make a new decision regarding the application of section 17 in view of the following:

- that only personal information of identifiable individuals may be withheld under section 17;
- that information about employees acting in a representative capacity that lacks a personal dimension is not information to which section 17 applies;
- that a relevant consideration under section 17(5) is that the findings of the investigator have already been provided to the Applicant;
- that notice under section 30 of the FOIP Act should be provided to individuals whose personal information is in the records in order to gather their views and evidence regarding disclosure;
- that there may be other considerations, such as its own policies or fairness that may support disclosing personal information and that it must determine whether these apply;
- that the Public Body consider only factors that have been established as applying.
- If, once the Public Body has made its new decision, it finds it necessary to consider severing information, it must consider whether it is possible to sever personally identifying information and to provide the remainder to the Applicant.

[para 83] I order the Public Body to provide the information in the records referring to a member of an external police service to the Applicant.

[para 84] I order the Public Body to reconsider its decision to withhold the contents of emails from records 77 and 78. The new decision should consider whether the deliberations in the emails were intended to be disclosed to the Applicant or were disclosed to the Applicant.

[para 122] 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.

Teresa Cunningham
Adjudicator