

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2014-26

June 25, 2014

ALBERTA HEALTH SERVICES

Case File Number F6155

Office URL: www.oipc.ab.ca

Summary: An individual had received harassing telephone calls to her home, allegedly made by employees of Alberta Health Services (the Public Body), between May 2008 and September 2008. The Public Body investigated the matter.

Subsequent to the investigation, the Applicant made a request to the Public Body under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for records “that reference me, persons alleging to be me[,] the email account [...] and involve Alberta Health Services employees (current or former, in any position, in any capacity) who were part of an ongoing harassment from May 2008 until September 2008.” The request related to records created between May 2008 and January 2012.

The Public Body responded to the request by providing partial access to 1156 pages of records. The Public Body had severed information in the records under sections 17 (unreasonable invasion of a third party’s privacy), 19 (confidential evaluations), 24 (advice from officials), and 27 (legal privilege).

The Applicant requested a review from this office. She stated that documents were missing from the response, and that information ought not to have been severed.

The adjudicator found that, for the most part, the Public Body had conducted an adequate search for records.

The adjudicator found that the Public Body properly applied section 17 to withhold personal information of third parties in the records; the adjudicator did not agree with the Applicant that the disclosure of this information would be desirable for public scrutiny of the Public Body, or that it was relevant to a fair determination of the Applicant's rights.

The adjudicator determined that the Public Body properly applied section 27 to some of the information in the records, but that the Public Body did not provide sufficient evidence to conclude that other information was subject to solicitor-client privilege as the Public Body had claimed.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 10, 17, 27, 30, 71, 72, **Can:** *Criminal Code*, R.S.C. 1985, c. C-46, ss. 264, 264.1, 504, 579.

Authorities Cited: **AB:** Orders 96-020, 97-002, 97-006, 99-013, F2002-007, F2004-003, F2004-015, F2004-026, F2006-007, F2007-014, F2007-029, F2008-012, F2008-028, F2008-031, F2009-017, F2009-018, F2010-007, F2010-025, F2010-036, F2011-020, F2012-08, F2013-07, F2013-51.

Cases Cited: *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), 2010 SCC 23, *Solosky v. The Queen* [1980] 1. S.C.R. 821.

I. BACKGROUND

[para 1] An individual had received harassing telephone calls to her home, allegedly made by employees of Alberta Health Services (the Public Body), between May 2008 and September 2008. The Public Body investigated the matter.

[para 2] On January 9, 2012, the Applicant made a request to the Public Body under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for records "that reference me, persons alleging to be me[,] the email account [...] and involve Alberta Health Services employees (current or former, in any position, in any capacity) who were part of an ongoing harassment from May 2008 until September 2008." The request related to records created between May 2008 and January 2012. The Applicant's request specifically included:

- emails, texts and "any form of communication received by Alberta Health Services employees" from persons alleging to be the Applicant and/or from a specific email address;
- a detailed telephone trace log of calls placed by Public Body employees to her home phone number between May 2008 and September 2008;
- all communications, computer forensics investigative notes and logs, statements made and information given by Public Body employees to the Calgary Police Service or Alberta Justice between May 2008 and January 2012;
- all communications by Public Body employees regarding her request; all images of the Applicant or purporting to be of the Applicant;

- all information gathered in response to the Applicant's previous FOIP request to the Public Body; and
- all documented actions taken by Public Body employees regarding the Applicant, persons purporting to be the Applicant, a specified email address and Public Body employees involved in the harassment.

[para 3] The Public Body responded to the request on March 29, 2012, by providing partial access to 1156 pages of records. The Public Body had severed information in the records under sections 17 (unreasonable invasion of a third party's privacy), 19 (confidential evaluations), 24 (advice to officials), and 27 (legal privilege). The Public Body also withheld four disks of surveillance video footage under section 17.

[para 4] The Applicant requested a review from this office. She states that documents are missing from the response, and that information ought not to have been severed. The Applicant did not comment on the Public Body's withholding of the surveillance video footage. The Commissioner authorized a portfolio officer to investigate and to try to settle the matter. This was not successful, so the matter was set down for a written inquiry.

II. RECORDS AT ISSUE

[para 5] The record at issue consists of the withheld portions of 1156 pages provided to the Applicant in response to her request.

III. ISSUES

[para 6] The issues set out in the Notice of Inquiry, dated December 2, 2013, are as follows:

1. Did the Public Body meet its obligations required by section 10(1) of the Act (duty to assist applicants)?
2. Does section 17 of the Act (disclosure harmful to personal privacy) apply to the information in the records?
3. Did the Public Body properly apply section 19 of the Act (confidential evaluations) to the information in the records?
4. Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information in the records?
5. Did the Public Body properly apply section 27(1) of the Act (privileged information) to the information in the records?

[para 7] By letter dated February 19, 2014, the Public Body advised that it would no longer withhold information under sections 19 and 24 of the Act, and would disclose the

information formerly withheld under those provisions to the Applicant. Therefore the remaining issues are as follows:

- 1. Did the Public Body meet its obligations required by section 10(1) of the Act (duty to assist applicants)?**
- 2. Does section 17 of the Act (disclosure harmful to personal privacy) apply to the information in the records?**
- 3. Did the Public Body properly apply section 27(1) of the Act (privileged information) to the information in the records?**

IV. DISCUSSION OF ISSUES

- 1. Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act (duty to assist)?**

[para 8] A public body's obligation to respond to an applicant's access request is set out in section 10, which states in part:

10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.

[para 9] The duty to assist includes responding openly, accurately and completely, as well as conducting an adequate search. The Public Body bears the burden of proof with respect to its obligations under section 10(1), as it is in the best position to describe the steps taken to assist the Applicant (see Order 97-006, at para. 7). The duty to assist also includes the duty to clarify the request, if the situation calls for clarification (see Order F2004-026, at para. 30 and F2011-020, at para. 23).

[para 10] There are two components of an adequate search:

- a) Every reasonable effort must be made to search for the actual record requested; and
- b) The applicant must be informed in a timely fashion about what has been done. (See Order F2009-017, at para. 53)

Public Body's search for records

[para 11] In Order F2007-029, the Commissioner described the kind of evidence that assists a decision-maker to determine whether a public body has made reasonable efforts to search for records:

In general, evidence as to the adequacy of a search should cover the following points:

- The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
- The scope of the search conducted - for example: physical sites, program areas, specific databases, off-site storage areas, etc.
- The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
- Who did the search
- Why the Public Body believes no more responsive records exist than what has been found or produced

[para 12] The Public Body states that the program areas searched were the Protection Services, Human Resources, Volunteer Services, Information and Privacy, Executive Offices of the Vice President, Community, Rural and Mental Health, the Senior Vice President – Calgary Zone, the Chief Executive office and the AHS Board office.

[para 13] Each area conducted a search of physical filing systems, investigative notebooks, and computer systems including email accounts. Protection Services also searched their investigative database.

[para 14] The Public Body states that it believes no further records exist for the following reasons:

- We have searched both electronic and paper based records regarding the Applicant;
- We have searched for records in every program area the Applicant had dealt with during the course of this investigation;
- We did address the Applicant's specific concern regarding the missing records;
- We have reviewed all procedures involved in processing this request;
- We have reviewed all FOIP procedures and best practices applicable in this context ...

[para 15] The Applicant's request specified that she was seeking text messages; she states that the Public Body has not addressed this part of her request. By letter dated April 17, 2014, I asked the Public Body whether it has custody or control of text messages sent or received by Public Body employees using Public Body equipment, whether it has a duty to search text messages in response to an access request, and whether it included text messages in the scope of its search.

[para 16] In its May 7, 2014 letter, the Public Body stated that text messages are not in the Public Body's custody, but are in the custody of the Public Body's vendor. It states that text messages "could potentially be retrieved from AHS' IS vendor. However, the IS vendor only retains text messages for thirty days prior to deletion. In the present case a review of responsive records indicate that [the records] date from 2008-2011."

[para 17] Regarding its duty to search text messages generally, the Public Body responded that if text messages were determined to be responsive, they ought to be included in the scope of a search, as with any other media. It points out that given the 30-day retention period, it would be rare that responsive texts would continue to exist when an access request has been made. However, the Public Body also states that it discourages the use of text messaging as a form of communication:

... if the subject matter of a text is considered to be more than transitory then that information is to be recorded on a more permanent form such as a note to chart/file or other type of recording. Similar to when notes of a telephone conversation are made. A search of those permanent records would therefore include any information of lasting significance that may have been initially recorded as a text.

[para 18] Therefore, the Public Body concludes that if text messages that were responsive to the request had existed, they would have either been recorded in a more permanent format (and would have been caught in the search for records) or would have been deleted long before the Applicant's request. I accept the Public Body's explanation for the absence of any text messages in the responsive records.

[para 19] The Applicant argues that many records she expected to see are missing from the responsive records. For example, she states that some of the responsive records refer to other records that were not provided to her. I note that in an affidavit sworn by the employee responsible for responding to the Applicant's request, the Public Body has identified pages in the records that were provided to the Applicant, which seem to meet her description of some of the missing records. Therefore, in at least some of the instances in which the Applicant believes records are missing, the Public Body has provided the records to the Applicant.

[para 20] The Applicant points out that there are no records of phone calls that she believes were made by or to certain Public Body employees in 2008. There is no requirement in the Act for public body employees to make notes of every phone call; the Applicant does not provide any reason for me to expect that notes of the particular calls specified by the Applicant ought to exist.

[para 21] The Applicant states that records ought to exist of emails between Public Body employees and a particular email account that had been (erroneously or fraudulently) associated with the Applicant. The Public Body states that the responsive records (that it located and provided to the Applicant) indicate that emails between this account and Public Body email accounts had not been located during the Public Body's investigation of the harassment. The records also note that no relevant information was located on the employee pagers at that time. Presumably, the Public Body is indicating that as this information was not located during the investigation, it would not be located in response to the Applicant's request, which came several years after the investigation. In my view, it was reasonable for the Public Body to conclude that records related to this particular email account do not exist.

[para 22] The Applicant also argues that records of emails sent from the personal email accounts of certain Public Body employees should exist. The Public Body states that it did not search personal email accounts of its employees during the investigation, based on legal advice.

[para 23] The Applicant has provided records that were in the possession of a Crown prosecutor, possibly as evidence that the Public Body should also have copies of these, or similar, records. However, the Calgary Police Service also conducted an investigation of the harassment, which may have been the source of these records. In other words, the fact that a Crown prosecutor had certain records does not indicate that the Public Body ought to have those, or similar, records.

[para 24] The Applicant states that a record of phone trace logs from September 8, 2008 is missing from the records at issue, but it is not clear why she expects this record to exist (she has stated that she received many harassing phone calls on September 6, 2008, but not on September 8, 2008). She has also stated that there ought to be records of documented actions taken by AHS during the harassment and the Public Body's investigation; however, I do not know what sort of records she expects, in addition to what she has been provided.

[para 25] The Applicant states that the Public Body has not addressed several questions that she has raised about its investigation; however, the FOIP process does not require a public body to answer questions, only to provide responsive records.

[para 26] I also note that she has referred to items as missing but that were not part of her access request; for example, Item E listed on page 6 of her April 8, 2014 letter to this Office, and her request for records of Public Body employees who were involved in the Applicant's contact with Dr. Duckett's office on September 14, 2009.

[para 27] With respect to the above, I find that the Public Body conducted an adequate search for records. Many of the Applicant's concerns regarding the Public Body's search for records can be more accurately characterized as concerns about the Public Body's initial investigation into the harassment, and its interactions with the Applicant during and after that investigation. The fact that the Applicant believes that the investigation ought to have resulted in the creation of certain records does not mean that the Public Body has (or created) those records. The Applicant has not provided sufficient evidence to believe that the Public Body has further responsive records in its custody or control.

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

[para 28] The Public Body applied section 17 to discrete items of information in many of the records at issue. I note that the Public Body's most recent index of records (provided on April 15, 2014) does not indicate that information was withheld on pages 243-248; however, a previous index of records and the records at issue both indicate that information has been withheld under section 17. Therefore I will consider whether the

Public Body properly applied section 17 to those pages, in addition to the pages indicated in the index.

[para 29] By letter dated March 17, 2014, the Public Body indicated that it was no longer applying section 17 to some information in the records. Although the Public Body provided me and the Applicant with a new copy of the records to reflect these (and other) new decisions regarding access, the new set of records still have information redacted from pages 145 and 146 (telephone number) and 483 (telephone number), which the Public Body indicated it would no longer withhold. Therefore I will not consider whether the Public Body has properly applied section 17 to that information; rather, I will order the Public Body to disclose it.

Is the information personal information?

[para 30] 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 31] The information withheld under section 17 consists primarily of names of individuals who were investigated, interviewed or otherwise discussed in the context of the investigation by the Public Body into the alleged harassment of the Applicant by employees of the Public Body. Many of these names are of individuals who are or were employed by the Public Body. Some of the withheld information includes contact information of these individuals.

[para 32] In one instance (on page 159), the Public Body has withheld a physical description of an unnamed individual, which also included the individual's date of birth. The disclosed portion of the page reveals that this is information of an individual suspected of making harassing phone calls to the Applicant. From her submissions, it appears that the Applicant is aware of the identity of the individuals who were suspected of harassing her and is therefore aware of at least some of the individuals whose names are withheld in the records. Therefore, even with the name of the individual withheld, the description alone may identify the individual on page 159.

[para 33] Names, contact information and physical descriptions of third parties are personal information under the FOIP Act. However, previous orders from this office have found that section 17 does not apply to personal information that reveals only that the individual was acting in a formal, representative, professional, official, public or employment capacity, unless that information also has a personal dimension (Order F2008-028, para. 54). This principle has been applied to information about employees of public bodies as well as other organizations, agents, sole proprietors, etc. (Order F2008-028).

[para 34] The names and contact information withheld in the records at issue that related to current or former employees of the Public Body occur in the context of an investigation into alleged harassment of the Applicant. This adds a personal dimension to the information such that section 17 may apply.

[para 35] Several pages of withheld information consist of an access card log, which appears to log at which entrance a card was used at a Public Body facility, as well as the date and time it was used. The dates of these logs are from 2008. Once the name of the individual and the access card number (which is presumably unique to that individual) is severed, it seems unlikely that the remaining information could reveal the identity of the relevant individual. Therefore, I find that section 17 does not apply to the information in these pages except for the name and card number wherever they appear. This applies to the information on pages 148-157, 197-200, 202-219.

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

[para 36] Section 17 states the following:

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.

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

(a) the third party has, in the prescribed manner, consented to or requested the disclosure,

(b) there are compelling circumstances affecting anyone's health or safety and written notice of the disclosure is given to the third party,

- (c) *an Act of Alberta or Canada authorizes or requires the disclosure,*
 - (d) *repealed 2003 c21 s5,*
 - (e) *the information is about the third party's classification, salary range, discretionary benefits or employment responsibilities as an officer, employee or member of a public body or as a member of the staff of a member of the Executive Council,*
 - (f) *the disclosure reveals financial and other details of a contract to supply goods or services to a public body,*
 - (g) *the information is about a licence, permit or other similar discretionary benefit relating to*
 - (i) *a commercial or professional activity, that has been granted to the third party by a public body, or*
 - (ii) *real property, including a development permit or building permit, that has been granted to the third party by a public body,*
and the disclosure is limited to the name of the third party and the nature of the licence, permit or other similar discretionary benefit,
 - (h) *the disclosure reveals details of a discretionary benefit of a financial nature granted to the third party by a public body,*
 - (i) *the personal information is about an individual who has been dead for 25 years or more, or*
 - (j) *subject to subsection (3), the disclosure is not contrary to the public interest and reveals only the following personal information about a third party:*
 - (i) *enrolment in a school of an educational body or in a program offered by a post-secondary educational body,*
 - (ii) *repealed 2003 c21 s5,*
 - (iii) *attendance at or participation in a public event or activity related to a public body, including a graduation ceremony, sporting event, cultural program or club, or field trip, or*
 - (iv) *receipt of an honour or award granted by or through a public body.*
- (3) *The disclosure of personal information under subsection (2)(j) is an unreasonable invasion of personal privacy if the third party whom the information is about has requested that the information not be disclosed.*
- (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 37] Section 17 is a mandatory exception: if the information falls within the scope of the exception, it must be withheld.

[para 38] If a record contains personal information of a third party within the terms of section 1(n), section 71(2) states that 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.

Section 17(2) and (3)

[para 39] By letter dated February 25, 2014, I asked the Public Body about information withheld under section 17 (on page 566); specifically, there seemed to be reason to expect that the individual the information is about would consent to the disclosure of that information. Section 17(2)(a) states that a public body cannot withhold personal information under section 17 if the individual whom the information is about has consented to the disclosure of the information. I noted that in Order F2013-51, the Director of Adjudication considered whether there is a positive obligation on public bodies to determine whether a third party would grant consent to disclose his or her personal information. I also asked if the Public Body had contacted any third parties.

[para 40] By letter dated March 17, 2014, the Public Body clarified that page 566 was a copy of a page that the Applicant had received from the Calgary Police Service (apparently in response to an access request), which she then provided to the Public Body at some point prior to her access request to the Public Body. Therefore, the information that has been severed on that page under section 17 was severed by the Calgary Police Service and not by the Public Body; further, the Public Body does not have a complete copy of this record.

[para 41] With respect to the general requirement to provide notice to third parties under section 30(1), the Public Body stated:

On the general issue of contacting a third party for consent to disclose AHS did not intend to disclose the personal information of the individuals concerned and therefore did not provide notice. The addresses AHS had on file for the individuals were provided to AHS over five (5) years ago; therefore there was a high likelihood that these individuals were no longer at those addresses. AHS was concerned about the possibility of an information privacy breach occurring, as the notice, would contain over 1,000 pages of sensitive personal information that may be opened by another individual currently residing at such addresses. Even sending the information by courier for personal delivery posed a risk to privacy that was not balanced by likely benefit. Finally, even if the individuals were to receive notice there is was [sic] a very low probability that they would consent to the disclosure as this would subject them to potential legal action.

[para 42] Section 30 of the FOIP Act states in part:

30(1) When the head of a public body is considering giving access to a record that may contain information

...

(b) the disclosure of which may be an unreasonable invasion of a third party's personal privacy under section 17,

the head must, where practicable and as soon as practicable, give written notice to the third party in accordance with subsection (4).

[para 43] In Order F2013-51, the Director of Adjudication considered whether there is a positive obligation on public bodies to determine whether a third party would grant consent to disclose his or her personal information. She stated:

Section 17(2)(a) does not expressly state who is to initiate the provision of consent if consent would be forthcoming. An access requestor will often not be in a position to know whose personal information is in the records or what the nature of the personal information is. Occasionally a requestor may know some of this information and may be able to obtain the consent themselves. However, circumstances undoubtedly arise in which third parties would consent if asked, but the applicant is not in a position to ask. There is no reason in principle that the rule in favour of disclosure under section 17(2)(a) should apply only in the former kinds of circumstances but not the latter; if a third party would willingly consent to disclosure, disclosure would not be an unreasonable invasion of their privacy, regardless of the way in which their position on this question can be elicited. Therefore, if section 17(2)(a) is to ground a public body's decision to release records in the latter type of circumstance, the question of whether third parties consent to disclosure will have to be asked by the public body.

This matter is closely tied with the duty of public bodies under section 30 of the Act, to give notice to third parties if it is considering disclosing their personal information. If there appears from the face of the records or other information in the possession of the public body the distinct possibility that an individual would consent to disclosure of their personal information if consulted, and the public body fails to determine whether this is so, it is failing to properly make the determination under section 30 of whether to "consider giving access", with its associated duty to notify third parties and obtain their views....

[para 44] I agree with the Public Body that the present situation differs from that in Order F2013-51, and that it is unlikely that the individuals whose information has been withheld in the records will consent to the disclosure of their information. For this reason, I agree that it was not necessary for the Public Body to provide notice to the third parties under section 30 and obtain their views regarding the disclosure of their information.

[para 45] Neither party has argued that any other part of section 17(2) or (3) apply to any of the withheld information, and from the face of the records, neither provision appears to apply.

[para 46] However, before turning to the application of sections 17(4) and (5), I have further comments about the privacy concerns raised by the Public Body regarding providing notice under section 30(1). The Public Body has expressed concerns about the privacy risks posed by sending the records at issue to an address when it is not certain that the third party resides at that address. I agree that this practice might pose a risk to privacy; however, in my view, sending the records at issue in their entirety to the third parties may pose a risk even if the Public Body were certain that the third parties still resided at the addresses the Public Body has on file. The records contain a significant amount of personal information of the Applicant that may not be provided to the third parties if any of them had requested these records; further, there are multiple third parties,

and each would be privy to the information of the others if the Public Body were to provide every third party with the records at issue.

[para 47] Section 30 does not require a public body to provide third parties with the records at issue, in their entirety or otherwise. Section 30(4)(b) states that when providing notice under section 30(1) to a third party, a public body must include a copy of the record in whole or in part, *or* describe the contents of the record. The intent of this provision is to ensure that the third party has sufficient information about the records so that they can make decisions such as whether to provide consent to the disclosure and/or provide arguments regarding why the information should not be disclosed. In a situation such as this, the Public Body could have described what information about the third party is contained in the relevant records, and the context in which that information appears. Further, it seems to me that if the Public Body is not certain about whether the addresses it has on file are current, it could have sent a letter asking the third party to contact the Public Body, without providing details that would disclose personal information about the third party.

[para 48] If the concerns expressed by the Public Body in its March 17, 2014 letter reflect the current practices of the Public Body regarding providing notice under section 30(1) (where it is required to do so), the Public Body may want to determine whether those reflect best practices and/or whether they comply with the ‘protection of privacy’ provisions in the Act.

Section 17(4)

[para 49] The Public Body argues that sections 17(4)(b), 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.

[para 50] 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 51] The Public Body has not provided any further detail as to the application of this provision, other than to identify which pages contain information to which the Public Body believes the provision applies.

[para 52] The information in the following pages appears in the context of an investigation by the Public Body into the alleged harassment (for example, statements made by individuals suspected of conducting the harassment, statements of the investigator, pictures from the investigation, incident reports, and a letter from the Public Body to the Calgary Police Service regarding the investigation):

Pages 2-4, 9-14, 55, 61, 63-64, 224-5, 425-6, 163-4, 243-8, 258-263, 794-99, 961-966, 267-78, 334, 336, 342-3, 346-7, 351-2, 356-8, 362, 363, 367, 368, 370-379, 381-95, 405, 409-12, 404, 414-416, 418, 419, 420, 421, 423, 429, 961-966.

[para 53] Although the Public Body's most recent index of records indicates that it did not consider section 17(4)(b) to apply to the information on the following pages, in my view, it does, as these pages appear to be investigator notes and interview notes:

Pages 349, 404, 467, 477, 478, 481-483.

[para 54] The investigation conducted by the Public Body falls within the scope of "law enforcement" in the Act; therefore, section 17(4)(b) weighs against disclosing the information listed above.

Section 17(4)(d)

The Public Body's index indicates that this section applies to information on pages 3, 1128 and 1131. I agree that the information redacted on these pages includes information about employment history – namely that a person (whose name has been withheld) held a particular job at Public Body and/or was terminated from the Public Body. This weighs against disclosing the information on these pages.

Section 17(4)(g)

[para 55] Section 17(4)(g) (third party's name with other information about them) also applies to all of the described personal information, weighing against disclosure.

Section 17(5)

[para 56] 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 57] The Applicant argues that section 17(5)(a) and (c) apply to the personal information in the records at issue, and weigh in favour of disclosure. I will also discuss the application of section 17(5)(h).

Section 17(5)(a)

[para 58] 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 Order F2006-007 the adjudicator stated:

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) [as it then was] speaks to the requirement of public accountability, public interest, and public fairness.

[para 59] 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 60] As part of her submissions to this inquiry the Applicant has provided a submission she had made to inquiry F6046 (to which Order F2013-07 relates). That inquiry relates to a previous access request made by the Applicant to the Public Body for the names of the individuals who were fired from the Public Body for harassing the Applicant (that inquiry resulted in an Order requiring the Public Body to conduct a new search for responsive records).

[para 61] The Applicant states that her submissions for inquiry F6046 include evidence regarding the applicability of section 17(5)(a), and that “the results from Inquiry #F6046 are directly applicable to Inquiry #F6155.” However, in my view, the access requests and responsive records for each inquiry are quite different. Further, the Applicant now seems to know the names of the individual (or individuals) who was fired from the Public Body for harassing her. Therefore, it is not clear how the Applicant’s submissions for inquiry F6046, in which she was seeking the name of a certain individual (or individuals) for a particular purpose, apply to this inquiry.

[para 62] In her submissions to the previous inquiry, as well as the current inquiry, the Applicant argues that the Public Body acted improperly in its investigation of her harassment. For example, she claims that the Public Body did not provide support for her as a victim of crime and did not inform her of the results of its investigation. She also seems to suggest that the investigation undertaken by the Public Body was not adequate.

[para 63] However, the Applicant has not stated why disclosure of the personal information in the records at issue is desirable to subject the Public Body to public scrutiny. Even if the Applicant provided convincing evidence that the investigation was inadequate (which she has not done), it is not clear how the personal information of third parties would shed light on the matter. In my view, this factor does not apply.

Section 17(5)(c)

[para 64] Section 17(5)(c) is a factor that weighs in favour of disclosing information that is relevant to a fair determination of an applicant's rights. Four criteria must be fulfilled for this section to apply:

- (a) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds;
- (b) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed;
- (c) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
- (d) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing. (Order F2008-012 at para. 55, Order F2008-031 at para. 112)

[para 65] The Applicant stated that her submission to inquiry F6046 establishes the applicability of section 17(5)(c) to the personal information in the records at issue in this inquiry.

[para 66] The Applicant had stated in her submission to inquiry F6046 that the purpose for which she requested the name of the individual(s) whose employment was terminated by the Public Body as a result of the Applicant's harassment complaint is so that she might lay an information against that individual pursuant to section 504 of the *Criminal Code*, which states the following:

504. Any one who, on reasonable grounds, believes that a person has committed an indictable offence may lay an information in writing and under oath before a justice, and the justice shall receive the information, where it is alleged

(a) that the person has committed, anywhere, an indictable offence that may be tried in the province in which the justice resides, and that the person

(i) is or is believed to be, or

(ii) resides or is believed to reside,

within the territorial jurisdiction of the justice;

(b) that the person, wherever he may be, has committed an indictable offence within the territorial jurisdiction of the justice;

(c) that the person has, anywhere, unlawfully received property that was unlawfully obtained within the territorial jurisdiction of the justice; or

(d) that the person has in his possession stolen property within the territorial jurisdiction of the justice.

[para 67] The Applicant argued that the harassing phone calls constitute a crime under sections 264 (criminal harassment) and 264.1 (uttering threats) of the *Criminal Code*.

[para 68] In Order F2013-07, which resulted from inquiry F6046, I stated (at paras. 37-38):

If the fair determination of a right includes the ability to lay a private information pursuant to the *Criminal Code*, then section 17(5)(c) would weigh in favour of disclosing the name of the individual terminated for harassing the Applicant (although it may not outweigh other factors against disclosure).

Even if the power to lay a private information and (possibly) pursue a private prosecution under the *Criminal Code* does not fit within an enumerated factor in section 17(5), the Public Body may still consider, as an additional factor under section 17(5), whether the Applicant has a pressing need for the information (for example, to exercise the ability to lay a private information) that would weigh in favour of disclosure.

[para 69] In her submissions to this inquiry, the Applicant states “the names [...] and [...] were provided as two of the men placing harassing telephone calls to the Applicant’s home.” Her submissions also indicate that she laid a private information against these two individuals under the *Criminal Code*, which was stayed by the Attorney General of Alberta on March 7, 2013 (the relevant court document has been provided by the Applicant).

[para 70] The Public Body argues that section 17(5)(c) cannot be a relevant consideration in this inquiry, as

Absent the proof of abuse of process a prosecutor has untrammelled discretion under section 579(1) of the *Criminal Code* about whether and when to enter stay of proceedings and that the exercise by the Attorney General of his prosecutorial discretion to stay is not subject to review by a court, except possibly where there is a flagrant impropriety.

[para 71] Section 579 of the *Criminal Code* states:

579. (1) The Attorney General or counsel instructed by him for that purpose may, at any time after any proceedings in relation to an accused or a defendant are commenced and before judgment, direct the clerk or other proper officer of the court to make an entry on the record that the proceedings are stayed by his direction, and such entry shall be made forthwith thereafter, whereupon the proceedings shall be stayed accordingly and any recognizance relating to the proceedings is vacated.

(2) Proceedings stayed in accordance with subsection (1) may be recommenced, without laying a new information or preferring a new indictment, as the case may be, by the Attorney General or counsel instructed by him for that purpose giving notice of the recommencement to the clerk of the court in which the stay of the proceedings was entered, but where no such notice is given within one year after the entry of the stay of proceedings, or before the expiration of the time within

which the proceedings could have been commenced, whichever is the earlier, the proceedings shall be deemed never to have been commenced.

[para 72] As the Applicant seems to know the names of individuals involved in harassing her, it is not clear to me how her submissions to F6046, in which she sought these names, is relevant to the current inquiry. I also agree with the Public Body that the Applicant has exercised her right to lay a private information under the *Criminal Code*. It appears that since the proceedings have been stayed, the Applicant has no further recourse with respect to pursuing prosecution against these individuals. Other than her submission to the previous inquiry, the Applicant has not provided any arguments regarding the right she believes is relevant to this inquiry.

[para 73] The Applicant has claimed in her submissions that more individuals (employed or formerly employed by the Public Body) were involved in her harassment; it may be the case that the Applicant intends to pursue a private prosecution against those individuals (should they exist). However, this is mere speculation on my part. The Applicant has not provided sufficient evidence or argument for me to conclude that section 17(5)(c) applies to the personal information in the records at issue.

Section 17(5)(h)

[para 74] With respect to unfair damage to reputation, some of the information in the records relates to allegations against the various third parties in the records. In Order F2010-025 the adjudicator stated:

Certainly the nature of a record and the circumstances in which it is created are always relevant to this determination; however, a determination must be made, based on evidence, including the evidence of the information in the record itself and evidence regarding the individual's reputation, that disclosure would result in unfair damage to an individual's reputation, prior to finding that section 17(5)(h) applies.

[para 75] With respect to the individuals who were found to have been involved in the harassment of the Applicant, the disclosure of their information might damage their reputations, but that damage may not be unfair in the circumstances. However, there are other individuals named in the records, who were not found to be involved in the harassment but whose names may have nevertheless come up in the investigation. I do not have evidence regarding the reputations of various individuals whose information appears in the records; however, being identified in an investigation may damage an individual's reputation, unfairly so if the individual was neither cleared nor found to be responsible in the records. This weighs against disclosure of the names of those individuals.

Weighing factors under section 17

[para 76] The Public Body has identified several factors that weigh against disclosure of the personal information withheld in the records at issue. I agree with the Public Body

that those factors are applicable. The Applicant has argued that sections 17(5)(a) and (c) weigh in favour of disclosing the personal information; however, she has not provided me with sufficient evidence to conclude that either factor is applicable to the personal information at issue. Therefore, I uphold the Public Body's application of section 17, with the exception of the information to which I found that section 17 does not apply because it is not about an identifiable individual.

3. Did the Public Body properly apply section 27(1) of the Act (privileged information) to the information in the records?

[para 77] The Public Body applied section 27(1)(a) to information on pages 220-222, 420, 743, 744, 748, 752, 753, 812, 816, 820, 827-834, 841, 842, 846, 864, 868, 871, 872, 874, 876, 888, 908, 916, 925, 927, 929, 931, 933, 953, 954, 970, 971, 973, 974, 984, 986, 987, 992-994, 998, 1004, 1013, 1015, 1017, 1019, 1024, 1025, 1026, and 1066.

[para 78] Section 27(1)(a) states the following:

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

(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege

...

[para 79] The Supreme Court of Canada stated in *Solosky v. The Queen* [1980] 1. S.C.R. 821 that in order to correctly apply solicitor-client privilege, the following criteria must be met:

- a. the document must be a communication between a solicitor and client;
- b. which entails the seeking or giving of legal advice; and
- c. which is intended to be confidential by the parties.

[para 80] As stated in Order F2009-018 (at paragraph 41):

Legal advice means a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications (Order 96-017 at para. 23; Order F2007-013 at para. 73). The test for legal advice is satisfied where the person seeking advice has a reasonable concern that a particular decision or course of action may have legal implications, and turns to his or her legal advisor to determine what those legal implications might be; legal advice may be about what action to take in one's dealings with someone who is or may in future be on the other side of a legal dispute (Order F2004-003 at para. 30).

[para 81] The Public Body also cited Order F2002-007, in which former Commissioner Work stated:

If solicitor-client privilege applies to a record, as here, it applies to the entire record. As a result, I do not have authority to order severing of the Records: see Order 96-015.

[para 82] It is not clear to what information the Public Body believes the above principle from Order F2002-007 applies, as the Public Body has not withheld records in their entirety under section 27(1)(a). In all but one instance, the information to which the Public Body applied section 27(1)(a) was contained in emails; the Public Body severed only the information from the body of the emails, and disclosed remaining information such as the to/from/date/subject lines from emails.

[para 83] The one record containing information to which section 27(1)(a) was applied that is not an email (page 420), is a page from the log book of a Public Body employee in the Protective Services area. The employee had recorded advice from the Public Body's counsel in the log book; only the substantive content of the advice was severed, and the remainder of the page was provided to the Applicant, including a reference to the fact that a legal opinion had been obtained as well as the question that led to the opinion.

[para 84] In its initial submission, the Public Body stated that the relevant information is legal advice provided by legal counsel to AHS employees. The Public Body also stated that releasing the information withheld under section 27(1)(a) would likely reveal the content of the privileged legal advice. Having reviewed the records I was not persuaded that this was the case in each instance that section 27(1)(a) was applied. In some instances the author of the information does not appear to be counsel; although this does not necessarily mean that the information is not subject to privilege, the Public Body has not explained why it would be. In other instances where information was being provided to or by legal counsel, it is not clear how the information relates to legal advice.

[para 85] By letter dated February 25, 2014, I asked the Public Body to clarify its application of section 27(1)(a) to the relevant information in the records.

[para 86] The Public Body responded by letter dated March 17, 2014, which provided minimal context for some of the records. The Public Body also clarified in this letter that it was no longer claiming privilege over the last items severed on pages 220 and 221. As the Public Body has not applied any other exceptions to this information, I presume it will be providing this information to the Applicant.

[para 87] The Public Body's letter also indicates that information has been withheld on page 590 because it reveals a question that legal counsel had asked another Public Body employee. However, this page is not listed in the Public Body's index of records, nor is there any indication in the records themselves that information has been severed on this page.

[para 88] Having reviewed the records, I agree that some of the information meets the test for solicitor-client privilege. The information in the following pages appears in communications between the Public Body's in-house counsel and other employees of the Public Body, seeking and/or giving advice on a legal matter:

Pages 220 (first two items), 221 (first item), 222 (last item), 752-753, 829, 841-842, 953, 954, 986, 992-994, 998, 1013, 1024-1026.

[para 89] Some of the information withheld under section 27(1)(a) appears in discussions between the Public Body's in-house counsel and other employees of the Public Body, but in these discussions it is unclear what the legal issue or consideration is. However, in the particular circumstances (the relationship between the Applicant and the Public Body, and the allegations of harassment of the Applicant by Public Body employees) are such that the Public Body employees involved in the discussions may have included the Public Body's counsel in the discussions because of the possibility legal action could be taken against the Public Body. Although the link between some of the information and a legal issue or consideration is somewhat tenuous, I can accept that, due to these circumstances, section 27(1)(a) applies to the withheld information in the following pages:

Pages 744, 748, 812 (last item)-813, 816 (second item), 820 (second item), 827, 828, 8230834, 846, 864, 868, 871, 872, 874, 876, 888 (second item), 908, 916, 925, 927, 929, 931, 933, 970, 971 (last item), 974, 984 (last item), 987 (last item), 1004, 1015, 1017, 1019, 1066.

[para 90] Some of the information withheld under section 27(1)(a) consists of communications between Public Body employees (other than counsel) that discusses and comments on the lawyer's advice. In Orders 96-020 and 99-013, former Commissioner Clark said that solicitor-client privilege applies to information in written communications between officials or employees of a public body in which the officials or employees quote or discuss the legal advice given by the public body's solicitor. I therefore find that section 27(1)(a) applies to the information withheld on page 420.

[para 91] The Public Body has not made any arguments regarding the confidentiality of the information to which it has applied section 27(1)(a). However, In Order F2004-003, the adjudicator said (at para 30):

... it is implicit in the circumstances under and purposes for which the legal advice was being sought or given in this case that the communications were intended to be confidential.

I agree that confidentiality in this case is implicit from the nature of the documents themselves.

[para 92] Some of the information withheld under section 27(1)(a) has no discernable link between the information and a legal issue or consideration. In one instance (on page 743 and repeated in several other pages), the Public Body states that the information is "an email exchange between legal counsel and clients with a view to ascertain who had responsibility for an operational area and as such it would fall within section 27(1)(a)." The "responsibility for an operational area" has no connection to a legal opinion or consideration, and the information indicates that Public Body's counsel had no part in

determining where the responsibility lay. Further, as noted above, the Public Body has disclosed the To/From, subject, and signature lines of all of the emails; therefore, the Public Body has already disclosed information about the employees involved in the particular discussions. In other words, the Public Body cannot be intending to argue that revealing the content of these emails would reveal the fact that legal advice was sought, as that is already clear from the information that has been disclosed.

[para 93] Similarly, the Public Body describes the first severed item on page 222 as “part of the continuity of the legal advice sought. It is a request from one of the client department’s to Protective Services’ to answer a question posed by legal counsel.” However, the first severed item does not indicate what question was posed by legal counsel; it merely, as stated by the Public Body, indicates that one employee asked another employee to answer *a* question that had been posed by legal counsel. The fact that emails were being sent between these employees has already been disclosed by the Public Body, as has the general subject of the emails. In my view, this information is part of the continuity of a conversation, but is not part of the continuum of advice, as it does not reveal or indicate what advice was sought (over and above what the Public Body has already disclosed in the records and in its submissions).

[para 94] The Public Body may have severed information because it is a continuation of a conversation between the Public Body’s counsel and other employees that *did* contain privileged information. As indicated above, privilege will apply to information that is part of a “continuum of communication” between counsel and a client, but the information must be related to or reveal the legal issue or consideration being discussed. For example, information might not consist of advice, but state facts in relation to which the advice was sought, thus forming part of the “continuum of communications” in the seeking and giving of advice.

[para 95] The fact that counsel and a client discussed a legal matter in an email does not necessarily indicate that any subsequent email in that chain is a continuation of that legal discussion, or that it could reveal that discussion in any way. For these reasons, I find that the Public Body has not provided me with sufficient evidence or explanation to find that section 27(1)(a) applies to information in the following pages:

222 (first item), 743 (both severed items), 752 (first two items), 812 (first severed item), 816 (first severed item), 820 (first severed item), 888 (first severed item), 971 (first severed item), 973, 984 (first severed item), 987 (first severed item).

[para 96] By letter dated March 25, 2014, the Public Body confirmed that it was no longer applying section 27(1)(b) to withhold information in the records. As such, I will order the Public Body to disclose to the Applicant the information for which I have not accepted the Public Body’s claim of solicitor-client privilege.

Exercise of Discretion

[para 97] With respect to the exercise of discretion under section 27(1)(a), withholding information that is subject to solicitor-client privilege is usually justified for that reason alone (see Orders F2007-014, F2010-007, F2010-036). The adjudicator in Order F2012-08 stated (citing *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), 2010 SCC 23):

the public interest in maintaining solicitor-client privilege is such that it is unnecessary to balance the public interests in withholding records subject to this privilege and those in relation to disclosing them, as the public interest in withholding such records will always outweigh the interests associated with disclosing them.

[para 98] As I have found that the withheld information is subject to solicitor-client privilege, I conclude that the Public Body properly exercised its discretion to withhold that information under section 27(1)(a).

V. ORDER

[para 99] I make this Order under section 72 of the Act.

[para 100] I find that the Public Body met its duty to assist the Applicant under section 10(1).

[para 101] I find that the Public Body properly applied section 17 to information in the records at issue, except the information described in paragraph 35. I order the Public Body to disclose this information to the Applicant. I also order the Public Body to disclose the information to which it states it no longer claims section 17 (described in paragraph 29).

[para 102] I find that the Public Body properly applied section 27 to some of the information in the records at issue; however, the Public Body did not properly apply that provision to the information described in paragraph 95. I order the Public Body to disclose that information to the Applicant. I also order the Public Body to disclose the information to which it states it no longer claims section 27 (described in paragraph 86).

[para 103] 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.

Amanda Swanek
Adjudicator