

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2017-28

March 3, 2017

CHILDREN'S SERVICES

Case File Number F7907

Office URL: www.oipc.ab.ca

Summary: The Applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) to Alberta Human Services, now Children's Services (the Public Body) for information relating to him and his employment.

The Public Body provided responsive records, with information withheld under sections 17(1) (invasion of third party privacy), 21 (harm to intergovernmental relations), 24 (advice to officials) and 27 (privileged information).

The Applicant requested an inquiry into the Public Body's response, including the adequacy of the search conducted by the Public Body, and the time taken for it to provide the Applicant with responsive records.

The Adjudicator determined that the Public Body conducted an adequate search for records, but did not meet the timeline requirements in section 11 of the Act.

The Adjudicator found that the Public Body properly withheld some information under section 17(1).

The Adjudicator found that the Public Body did not properly apply section 21(1)(a) or (b) to information in the records, including the name and position title of a law enforcement agency employee that had participated in discussions with Public Body employees.

The Adjudicator found that the Public Body properly applied section 24(1)(a) and/or (b) to advice and deliberations in the emails, which comprise most of the records at issue. The Adjudicator agreed with the Public Body that it was appropriate to read the many pages of emails, which occurred over the course of much of a year, together rather than discretely, when making a determination as to whether the severed information is part of advice or deliberations. This is because the emails provided context for each other in concluding what was properly advice or deliberations rather than background facts, the latter of which cannot be withheld under these exceptions. (See para. 91)

The Adjudicator upheld the Public Body's application of section 27(1)(a) to information in the records at issue. The Public Body had withheld some information citing privilege under the *Child, Youth and Family Enhancement Act*, and some information citing solicitor-client privilege.

Regarding the claim of solicitor-client privilege, the Adjudicator noted that the final affidavit and additional evidence (chart) provided by the Public Body regarding solicitor-client privilege was a good example of how to support a claim for that privilege without providing the information in the records to the adjudicator or revealing the legal advice. She remarked that the affidavit and chart would also meet the requirements of the new Privilege Practice Note published by the Office as a result of the Supreme Court of Canada decision, *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII). (See paras. 128 and 129)

The Adjudicator also noted that having the relevant dates for the correspondence and the position titles of the correspondents was valuable for supporting the claim of solicitor-client privilege with respect to emails between Public Body employees who are *not* counsel (i.e. determining the likelihood that those Public Body employees were discussing legal advice that was provided by counsel). (See para. 135)

Statutes Cited: AB: *Child, Youth and Family Enhancement Act*, R.S.A 2000, c. C-12, ss. 4, 126.1, *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 10, 11, 17, 21, 24, 27, 71, 72.

Authorities Cited: Orders 96-006, 96-012, 97-002, 97-006, 2000-020, F2004-015, F2004-018, F2004-026, F2007-029, F2008-012, F2008-027, F2008-028, F2008-031, F2009-033, F2010-036, F2012-06, F2012-10, F2012-24, F2013-13, F2014-16, F2015-42.

Cases Cited: *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII), *Canadian Natural Resources Ltd. v. ShawCor Ltd.*, 2014 ABCA 289 (CanLII), 580 A.R. 265, *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII).

I. BACKGROUND

[para 1] On October 4, 2013, an individual made a request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) to Alberta Human Services, now Children's Services (the Public Body) for:

All records as defined by FOIPPA (1q) relating to any and all communications between personnel both within the Government of Alberta Ministry of Human Services (formerly Children's Services) and between EPS personnel (including those with the Zebra Child Protection Center) pertaining to, and/or with respect to the applicant.

Any and all information as defined by FOIPPA (1q) pertaining and/or relating to the applicant on JOIN ([Justice] Online Information Network) and accessing of same by employees of Human Services.

Any and all information as defined by FOIPPA (1q) pertaining and/or relating to applicant on paper file or database (including, but not limited to: Child Welfare Intervention System) with respect to any formal and/or informal investigations; or wherein Human Services Alberta received information about the applicant by way of another investigation which precipitated discussions and/or interventions about remediation of same with respect to the applicant.

Any and all information as defined by FOIPPA (1q) within the [possession] of Human Services Alberta not included in the applicants personnel file.

The request encompassed records from June 1, 2006 to the date of the request; however, these dates were later amended to include records from January 1, 2012 to October 4, 2013.

[para 2] By letter December 9, 2013, the Public Body responded, providing the Applicant with responsive records with some information withheld under sections 17, 21(1)(b), 24(1)(a) and (b), and 27(1)(a) of the Act. In that letter, the Public Body also informed the Applicant that a complete search had not yet been conducted. It said:

Please note that this does not include any records produced by [a named Public Body employee], whom you specified as someone you wish to complete a search. [The named Public Body employee] is temporarily unavailable and we are working out the logistics of accessing her email account while she is away. Once we have determined if [the named Public Body employee], has any responsive records we will notify you immediately and being processing the records in a separate release. We apologize for any inconvenience this may cause.

[para 3] The Applicant requested a review of the response from the Public Body, as well as the adequacy of the search conducted by the Public Body and the time taken by the Public Body to provide the requested records. The Commissioner authorized an investigation; this was not successful and the matter proceeded to an inquiry.

II. RECORDS AT ISSUE

[para 4] The records at issue consist of the withheld portions of the responsive records located by the Public Body.

III. ISSUES

[para 5] The issues as set out in the Notice of Inquiry dated March 23, 2016, are as follows:

1. Did the Public Body meet its obligations required by section 10(1) of the Act (duty to assist applicants)? In this case, the Adjudicator will consider whether the Public Body conducted an adequate search for responsive records.
2. Did the Public Body comply with section 11 of the Act (time limit for responding)?
3. Does section 17 of the Act (disclosure harmful to personal privacy) apply to the information in the records?
4. Did the Public Body properly apply section 21(1) of the Act (disclosure harmful to intergovernmental relations) to the information in the records?
5. Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information in the records?
6. 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 obligations required by section 10(1) of the Act (duty to assist applicants)? In this case, the Adjudicator will consider whether the Public Body conducted an adequate search for responsive records.**

[para 6] 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 7] 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).

[para 8] 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 (at para. 66)

[para 9] In its initial submission, the Public Body stated the following with respect to the search conducted for responsive records:

Steps Taken to Assist the Applicant

21. On October 15, 2013, the Public Body requested from various Ministry staff all records related to the Applicant. The search request included the following records.
 - All correspondence/communications (including email) between Human Services Staff;
 - All correspondence/communications (including email) between Human Services staff and any other third parties or external agencies;
 - All information relating to the Applicant on paper files or electronic databases with respect to any formal and/or informal investigations;
 - All information about the Applicant that was obtained by Human Services employees by way of another investigation which precipitated discussions and/or interventions about remediation of same with respect to the Applicant;
 - All records pertaining to the Applicant that would not be included in a personnel file.

Program Areas that were searched

22. The Public Body provided to employees of the Ministry the names of individuals the Applicant wanted to have searches completed on. (The scope of the request was agreed upon jointly between the Public Body and the Applicant).
23. The following program areas conducted searches: Yellowhead Youth Centre; Edmonton Crisis Unit; Edmonton and Area CFSA; Placement Resource Assessment Team; Interprovincial / intervention Record Check Desk; Zebra Child Protection Centre; Intervention Support Services Child and Family Services Division. In the search undertaken all information systems were checked for records. (Child Youth Information

Module (CYIM) data base/Intervention Services Information System (ISIS) data base/Microsoft Outlook/Records room; all work related computer hard drives; email threads.

24. In the various program areas identified, staff checked for all paper files, loose documents, transitory records, all information systems including computer hard drives and emails.

Who conducted the search?

25. Over 50 employees of the Public Body conducted individual searches. An exhaustive and thorough search was conducted with each individual recording their search, the method of their search and the outcome of their search.
26. Searches were conducted by Office Managers. Business Managers: Social Workers, Casework Supervisors, Placement Coordinators, Specialized Assessors, Canadian Police Information Centre (CPIC) Caseworker, Crisis Unit Assessors, Interprovincial Coordinators Child at Risk Response Team (CARRT) staff, Policy Analyst, Record room staff and Information and Privacy Office (IPO) staff

Specific Concerns

27. In his submission to the OIPC the Applicant wrote, "It is not without concern to the Applicant that records produced by Ms. N were not included despite request for same." As this employee was away from work, Information Technology Services was able to access the employee's "O" Drive on December 19, 2013. A search was conducted and no documents were found. On January 6, 2014, the Public Body sent a letter to the Applicant to advise him that no additional records were located.

Letter to Applicant dated January 6, 2014 [TAB 8]

28. The Applicant was also concerned that pages were redacted in full and questioned the necessity of withholding these pages. Of the total record of 329 pages, six pages were withheld in their entirety. Four of these pages (57, 58, 59, 60) were records provided by the RCMP and withheld under section 21 of the FOIP Act. Page 129 contained information concerning a third party and page 187 contained information that was determined to be non-responsive to the request.
29. With the clarification of the request by the Applicant, the identification of personnel by the Applicant and the Public Body's search of systems that are in place, the Public Body submits that all responsive records were received, reviewed and processed. Even after the Applicant had received his records, the Public Body' continued to search for additional records based on the Applicant's request for further search. The last search was completed on December 19, 2013.
30. The public body submits that it has conducted an adequate search for responsive records and has met its duty to assist the Applicant as required under section 10(l) of the FOIP Act.

[para 10] In his Request for Inquiry, the Applicant has pointed to specific types of records that he believes are missing from the responsive records; specifically, he said:

The public body [acknowledges] such information exists as evidenced by just one of numerous references on addendum 1 where CYIM (Child and Youth Intervention Module) checks are produced after accessing data on the Child Welfare Intervention [System] database. The applicant requested information specifically relating to himself

such that the records produced would not be subject to exemption/redaction under FOIP. Addendum 2 also specifically shows a request for record check of CYIM database by the applicant wherein records are confirmed and a “summary” of the [involvement] was provided. The applicant again would request that any and all information (not just a summary) contained within [the] CYIM database and/or any databases [accessed] by the public body as a result [of] a request for an Interventions Record Check be released.

Addendum 3, also indicates the existence of:

“3 screenings on [the Applicant] ...and a PRAT assessment”.

It would not appear that the public body has provided same.

[para 11] In a letter dated October 21, 2016, I asked the Public Body to address the Applicant’s concerns. I said:

The Public Body has provided a detailed account of the search conducted in response to the Applicant’s access request. However, the Public Body is in a better position than I am to understand what type of records the Applicant is referring to, whether those types of records would have been responsive to his request, whether they exist, etc. For this reason, I am asking the Public Body to provide further detail regarding:

- Whether the responsive records contain any of the type of records referred to by the Applicant in his Request for Inquiry (and if so, where)?
- If the types of records the Applicant referred to are not contained in the responsive records, would they have been responsive to his access request?
- If the types of records referred to by the Applicant would have been responsive, would the search(es) conducted by the Public Body have found those types of records if they existed?
- If no such records were located, why not (e.g. why they do not and/or no longer exist)?

[para 12] In its response, the Public Body told me that the records identified by the Applicant in his Request for Inquiry were not responsive to his access request, and explained why. In an affidavit, an employee of the Public Body’s FOIP office answered my questions separately with respect to records identified by the Applicant as relating to Addendum 1 (CYIM checks), Addendum 2 (information in the CYIM and/or other databases resulting from an Interventions Record Check) and Addendum 3 (three screenings and a PRAT assessment). Regarding Addendum 1 records, the employee said:

The CYIM check from 2012 (as referenced in Addendum 1) would have been responsive to the Applicant's request in terms of timelines; however, his request did not specifically capture a desire for completed CYIM checks to be produced as the wording used would have been interpreted by Human Services employees as information related to formal and/or informal investigations only (“*All information relating to the Applicant on paper files or electronic databases with respect to any formal and/or informal investigations*”). A CYIM check is not considered to be an investigation; it is a service provided to all Albertans. (Supplemental affidavit, at para. 12)

[para 13] Regarding Addendum 2 records, the employee said:

There are several files within the system that mention [the Applicant] within the context of "All information relating to the Applicant on paper files or electronic databases with respect to any formal and/or informal investigations" (as per his request); however, none of the files or information meet the parameters of the agreed upon search timeline for responsive records of January 1, 2012 to October 4, 2013. All information contained within CYIM relate to the allegations made against [the Applicant] in 2006. (Supplemental affidavit, at para. 14)

[para 14] Regarding Addendum 3 records, the employee said:

So again, based upon [the Applicant's] request as set out in Exhibit A, these records were outside of the request and the responsive time period of January 1, 2012 to October 4, 2013 and are out-of-scope for this request. The IPO and the Ministry would not have considered these records as responsive, thus a search never would have been requested. (Supplemental affidavit, at para. 18)

[para 15] I accept these explanations from the Public Body regarding the concerns raised by the Applicant in his Request for Inquiry. I am satisfied with the Public Body's search for responsive records, based on these explanations and the details of the search conducted by the Public Body as set out in its initial submission. I find that the Public Body conducted an adequate search for records, as required by section 10(1) of the Act.

2. Did the Public Body comply with section 11 of the Act (time limit for responding)?

[para 16] Section 11 of the Act requires a public body to respond to an access request within a specified period of time. It states:

11(1) The head of a public body must make every reasonable effort to respond to a request not later than 30 days after receiving it unless

(a) that time limit is extended under section 14, or

(b) the request has been transferred under section 15 to another public body.

(2) The failure of the head to respond to a request within the 30-day period or any extended period is to be treated as a decision to refuse access to the record.

[para 17] The Applicant's access request is dated October 4, 2013. The Applicant states that although the Public Body's response letter is dated December 9, 2013, he was not provided with the records at that time. A subsequent letter from the Public Body, dated December 12, 2013 (provided with the Applicant's request for review), informs the Applicant that the records were available for him to pick up.

[para 18] In its initial submission, the Public Body states:

The Public Body submits that by way of a letter to the Applicant on October 28, 2013, the Public Body advised that it would respond to the Applicant on or before December 3,

2013. However, the Public Body was not able to respond to the request until December 9, 2013, 6 days after December 3, 2013.

The Public Body concedes that it did not technically comply with section 11(1) of the FOIP Act.

The Public Body has, over the years, maintained a very high volume of requests. It is considered the busiest and most active Public Body of all Government of Alberta ministries. With a greater and greater demand in both numbers and complexity of requests, the Public Body finds itself increasingly challenged to meet all deadlines.

The Public Body has under taken an examination of its processes; streamline operations for greater efficiencies — modifying the intake process, releasing more information informally etc. The Public Body's senior management staff is very supportive of the vital role that FOIP play's within the organization and wants to ensure compliance with all aspects of the FOIP legislation.

[para 19] Section 11 requires a public body to *make every reasonable effort* to respond within 30 days. Although the Public Body has stated that it receives a great many access requests, I do not interpret this information as an argument that the Public Body made every reasonable effort to meet the 30-day timeline. The Public Body has not argued that the 30-day timeline was not reasonable in this case; nor has it otherwise argued that every reasonable effort was taken. The Public Body has merely stated that it receives many requests and takes its responsibilities under the FOIP Act seriously, and admitted that it did not “technically” meet the timelines.

[para 20] I agree with the Public Body that it failed to meet the timeline to respond, as set out in the Act. However, the Public Body has responded to the Applicant, and the extra time taken by the Public Body was not egregious; therefore, there is nothing for me to order in this regard.

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

[para 21] The Public Body withheld information in many of the responsive records under section 17(1).

[para 22] 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

...

(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,

...

(g) the personal information consists of the third party's name when

*(i) it appears with other personal information about the third party,
or*

*(ii) the disclosure of the name itself would reveal personal
information about the third party,*

...

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

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

...

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

...

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

...

(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 provide by the applicant.

[para 23] Section 17 is a mandatory exception: if the information falls within the scope of the exception, it must be withheld.

[para 24] Under section 17, if a record contains personal information of a third party, 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.

[para 25] The Public Body applied section 17(1) in conjunction with other exceptions to access, in most instances (sections 24(1), 21(1), and 27(1)). For the reasons provided in the relevant portions of this Order, where section 17(1) has been applied in conjunction with other exceptions, I have found that one of the other exceptions applies. Therefore, I do not need to consider the application of section 17(1) to that information. I will consider the Public Body's application of section 17(1) only to the information for which other exceptions were not applied.

[para 26] 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 27] The Public Body disclosed information about Public Body employees in most cases, but not all. 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 28] The information withheld under section 17(1) on pages 15 and 16 consists of the phone number of an individual; from the context of the record, the individual appears to be a Public Body employee. It also appears that the number relates to the individual in a personal capacity, even if it was used for work purposes; therefore it is personal information.

[para 29] The information withheld on page 135 consists of personal information about a Public Body employee whose name was disclosed to the Applicant. The information on pages 2 and 130 consists of the name and additional personal information of Public Body employees. The personal information on pages 2, 130 and 135 does not relate only to the employees’ work duties; therefore, it is personal information.

[para 30] The information withheld on pages 284 and 286 consists of the names of third parties along with medical information. The information on page 327 consists of medical information about an unnamed individual. From the context of the remaining information that was disclosed to the Applicant, it is reasonable to believe that the severed information would reveal the identity of the unnamed individual.

[para 31] The Public Body withheld the name of a third party in an email that appears multiple times in the records. This name occurs in the context of an Edmonton Police Service (EPS) file number (which was disclosed to the Applicant). The first instance of this email seems to be on page 194 (last email on the page) and the last instance seems to be on page 296 (second to last email). It is the third party's personal information in each case.

[para 32] The Public Body withheld page 129 in its entirety, under sections 17(1) and 24(1). For the reasons discussed in the section of this Order regarding the application of section 24(1), that section applies to some, but not all, of the information on that page. This page is comprised of a chain of emails; section 24(1) applies to the information in the body of the emails, but not to the information that reveals who participated in the emails, the dates of the emails, or the subject lines (which do not reveal the content of the emails). The Public Body employees participating in the emails are doing so as part of their work duties; therefore those names cannot be withheld under section 17(1). Having reviewed all of the responsive records, I believe I understand the Public Body's rationale for applying section 17(1) to the page in its entirety; however, in my view, the names of the participants in the emails, dates, and subject lines do not reveal personal information *about* a third party, such that section 17(1) can apply. I cannot be more specific on this particular point without revealing too much information. However, the name of the third party appearing in the third line of the last email is personal information.

[para 33] The name severed on page 5 appears only as a result of that individual's work duties on pages 5. Section 17(1) does not apply to that information and I will order the Public Body to disclose it to the Applicant.

[para 34] I will consider whether section 17(1) applies to the information described in paragraphs 28 – 32 of this Order.

[para 35] The Public Body states that it considered sections 17(4)(g), 17(5)(c), (f) and (h) in making its determination regarding section 17(1). Section 17(5)(i) is also a relevant factor and I will briefly discuss section 17(5)(a) as well.

[para 36] Neither party has argued that section 17(2) or (3) apply to any of the withheld information, and from the face of the records, neither provision appears to apply.

Section 17(4)

[para 37] Section 17(4)(g) creates a presumption against disclosure of information consisting of a third party's name when it appears with other personal information about that third party, or where the name alone would reveal personal information about the third party. This section applies to the information described in paragraphs 28 - 32.

Section 17(5)

[para 38] Section 17(5)(a) weighs in favour of disclosure where the disclosure is desirable to subject the Public Body's activities to public scrutiny. In order for the desirability of public scrutiny to be a relevant factor, there must be evidence that the activities of the public body have been called into question, which necessitates the disclosure of personal information in order to subject the activities of the public body to public scrutiny. (See Order 97-002, at para. 94; Order F2004-015, at para. 88; Order F2014-16, at para. 34.)

[para 39] In Order F2014-16, the Director of Adjudication discussed appropriate factors to consider in determining whether public scrutiny is desirable. She said (at paras. 35-36):

In determining whether public scrutiny is desirable, I may consider factors such as:

1. whether more than one person has suggested public scrutiny is necessary;
2. whether the applicant's concerns are about the actions of more than one person within the public body; and
3. whether the public body has not previously disclosed sufficient information or investigated the matter in question.

(Order 97-002, paras 94 and 95; Order F2004-015, para 88).

It is not necessary to meet all three of the foregoing criteria in order to establish there is a need for public scrutiny. (See *University of Alberta v. Pylypiuk* (cited above) at para 49.) For example, in Order F2006-030, former Commissioner Work said (at para 23) that the first of these factor "is less significant where the activity that has been called into question, though arising from a specific event and known only to those immediately involved, is such that it would be of concern to a broader community had its attention been brought to the matter", commenting that "[i]f an allegation of impropriety that has a credible basis were to be made in this case, this reasoning would apply".

[para 40] In his rebuttal submission, the Applicant said that he is seeking "information with respect to individuals and processes which ultimately [led] to the most severe outcome possible, termination by his employer..." He added that he "only seeks clarity and transparency into the processes that [led] to his dismissal."

[para 41] The Applicant's submissions somewhat indicate that the Public Body's actions in terminating his employment were inappropriate. He also refers to Order F2015-42, which resulted from a complaint made by the Applicant about the Public Body's collection, use, and disclosure of his personal information in relation to his termination. In that Order, the adjudicator found that the Public Body collected, used and disclosed the Applicant's personal information in contravention of the Act. I do not know what information the adjudicator had before her in that inquiry, or how it relates to the information in the records at issue in this inquiry.

[para 42] Even if the Applicant's concerns regarding the Public Body's actions were more clearly stated, they lack the public aspect required for section 17(5)(a) to be a factor for disclosure. Any dispute between the Applicant and Public Body appears to be a private matter. Further, while the Public Body withheld significant amounts of information under section 17(1), I am only considering the application of that section to a few items of information in the records. Those items of information do not seem to relate to any alleged impropriety by the Public Body, regarding either the Applicant's termination, or the collection, use and disclosure of his personal information.

[para 43] I find that section 17(5)(a) is not a relevant factor.

[para 44] Section 17(5)(c) weighs in favour of disclosure where the personal information is relevant to a fair determination of the 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 45] The Applicant's arguments do not indicate that the information described at paragraphs 28 - 32 is relevant to a fair determination of his rights. Although he has referred to the possibility of a lawsuit (conceivably in relation to his termination), there is no obvious connection between the information described in paragraphs 28 - 32 and the Applicant's ability to enforce a legal right.

[para 46] Section 17(5)(f) weighs against disclosure of information that was provided in confidence. Section 17(5)(h) weighs against disclosure if disclosure would unfairly damage the third party's reputation.

[para 47] Some of the information described in paragraphs 28 - 32 is of the type that would be provided in confidence, but not all. Some of the information could harm the reputation of the individual if disclosed, but not all. I will discuss the weight given to these factors, below.

Section 17(5)(i)

[para 48] This factor weighs in favour of disclosing personal information of third parties where that information was provided by the Applicant. Page 130 consists of emails written by the Applicant and addressed to the Public Body.

[para 49] In my view, the fact that the Applicant provided the information in these records to the Public Body weighs heavily in favour of disclosure of that personal information.

Other possible factors under section 17

[para 50] The Applicant states that the name of a third party has been provided to him by the Public Body in another process. He also indicates that “much of” the information in the records has been provided to him in other ways and so the Public Body’s reliance on section 17(1) is unnecessary.

[para 51] In its rebuttal submission, the Public Body responds:

The possibility of an applicant knowing third party personal information and having possession of same does not relieve the Public Body of its responsibility to apply the provisions of the legislation. IPC Order 96-008 (page 5, para 5) states that there is a difference between knowing a third party's personal information and having the right of access to that personal information under *the Act*.

[para 52] I agree with the Public Body that there is a difference between “knowing” personal information about an individual and obtaining a copy of records containing that information. Further, I do not know what personal information the Applicant already has, or in what context it occurs. In this case, I find that this is not a relevant factor.

Weighing factors under section 17

[para 53] The Applicant has not provided sufficient reasons for finding that any factor weighs in favour of the disclosure of the items of information described at paragraphs 28 - 32; however, I find that section 17(5)(i) weighs in favour of disclosing the information on page 130 of the records, which is an email from the Applicant to the Public Body.

[para 54] At least one factor weighs against disclosure for each of the items of information. With the exception of the information on page 130 of the records, I find that the Public Body properly applied section 17(1) to the information described in paragraphs 28 - 32.

[para 55] With respect to page 130, the fact that the Applicant provided some of the information in the records at issue to the Public Body weighs heavily in favour of disclosure of that personal information. Section 17(4)(g) weighs against disclosure of that information; arguably the information was provided to the Public Body in confidence (section 17(5)(f)); however, little weight can be placed on that factor since the information was provided to the Public Body *by the Applicant*.

[para 56] Arguably, the disclosure of the withheld information on page 130 could harm the reputation of the third party named on that page. However, it seems to me that this factor is less significant in the case where the information was provided to the Public Body by the Applicant.

[para 57] Further, it seems nonsensical to sever information from emails provided to the Public Body by the Applicant, when he likely already knows the content and may still have his own copies. Therefore I will order the Public Body to disclose the severed information in the email sent to the Public Body by the Applicant (page 130).

4. Did the Public Body properly apply section 21(1) of the Act (disclosure harmful to intergovernmental relations) to the information in the records?

[para 58] Much of the information to which the Public Body applied section 21(1) is also information to which section 24(1) was applied. For the reasons given in that portion of this Order, I have found that section 24(1) applies to most of that information; therefore, I do not need to consider whether section 21(1) was properly applied as well. This portion of the Order will consider only whether section 21(1) was properly applied to information to which section 21(1) was applied alone, as well as to the few items of information to which I have found section 24(1) does not apply.

[para 59] Section 21(1) states:

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

(a) harm relations between the Government of Alberta or its agencies and any of the following or their agencies:

(i) the Government of Canada or a province or territory of Canada,

(ii) a local government body,

(iii) an aboriginal organization that exercises government functions, including

(A) the council of a band as defined in the Indian Act (Canada), and

(B) an organization established to negotiate or implement, on behalf of aboriginal people, a treaty or land claim agreement with the Government of Canada,

(iv) the government of a foreign state, or

(v) an international organization of states,

or

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

[para 60] Section 21(1) addresses intergovernmental relations, or exchanges of information *between* the Government of Alberta and a government listed in section 21(1)(a), as discussed in Order F2008-027. For section 21(1)(a) to apply, there must be an entity listed in section 21(1)(a) with which its relations will be harmed. Section 21(1)(b) applies to information that was supplied to a public body by a government, local government body, or organization listed in section 21(1)(a), or one of its agencies. The Public Body may withhold information if either section 21(1)(a) or (b) apply to that information.

[para 61] In Order F2004-018, the former Commissioner stated that four criteria must be met before section 21(1)(b) applies:

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

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

[para 62] In its initial submission, the Public Body states that the disclosure of the information provided by the police service would risk compromising the relationship between the Public Body and the police service. It said:

...the relationship between the Children and Family Services Division and the various police services is critical as there are a number of investigations and enforcement activities that require collaboration if not collateral processes. This collaboration is critical for purposes of recognizing risk and safety issues of children, families and staff. The information that may be in the custody of the police service is vital in assisting with any investigation or matters under the jurisdiction of the Public Body and its duties under CYFEA. (Initial submission, at para. 51)

[para 63] In my letter dated October 21, 2016, I asked the Public Body to answer further questions regarding its application of section 21(1)(a). I said:

The above [cited argument from the Public Body's initial submission] does not explain why disclosing the information could harm the relationship between the Public Body and the police services that provide it with information. As stated in Order F2006-006, "[t]he fact that the Public Body's relationship with the local government body is critical, and that the latter provides vital information, may establish the importance of the

intergovernmental relationship, but it does not establish a reasonable expectation of harm to that relationship if information were disclosed” (at para. 124).

Can the Public Body please provide more support for its claim that disclosing the information withheld under section 21 would harm the relationship between the Public Body and the police service(s) that provided the information?

[para 64] Regarding the application of section 21(1)(b), the Public Body stated:

The Public Body considers the records received from the police service as provided implicitly in confidence to ensure that the Public Body took steps to reduce risks to vulnerable youth in its care. (At para. 56)

[para 65] In my October 21, 2016 letter, I asked the Public Body to provide further arguments on the application of section 21(1)(b), specifically regarding the confidentiality of information supplied by the police service and why that police service would expect its conversations to be kept confidential. I further asked:

Can the Public Body also specifically provide support for its application of section 21 to names of authors and recipients of emails, as well as the information on pages 57-60? Regarding the latter, the Applicant argues that the Public Body’s description of the information on these pages indicates that he might have obtained this information himself, and provided it to the Public Body.

[para 66] In its response dated November 21, 2016, the Public Body withdrew its application of section 21(1) to pages 57-60, and provided those records to the Applicant. Those pages consist of a RCMP Consent for Disclosure of Criminal Record Information form, which appears to have been filled out and signed by the Applicant, as well as two letters from the RCMP to the Applicant, regarding the criminal record checks.

[para 67] Regarding the late disclosure of these pages, the Applicant states:

The Complainant appreciates the release of records 57-60, however it should be noted that those records are RCMP Criminal Records Checks procured by the Complainant and provided directly to the Public Body. The concern is that, given the Complainant is well aware of those records, and the Public Body would not have had access to said records but not for the provision of same by the Complainant; any reliance on section 21 of *FOIPPA* by the Public Body to redact such records initially would have been grossly inappropriate and suggests a less than complete appreciation and understanding of that section. This unfortunately appears to be a pattern of the Public Body wherein they have an erroneous interpretation, and therefore application of *FOIPPA*. (Supplemental submission, at para. 2)

[para 68] The point of an independent review by this Office is to catch erroneous applications of the Act (or uphold appropriate applications). Errors occur for different reasons, including misunderstandings regarding the Act, an overabundance of caution, or simple oversights. I cannot infer from one error that the Public Body has misapplied section 21(1) in every case. That said, I agree with the Applicant that the information on

pages 57-60 is *not* information over which section 21(1) could have applied on any reading of that provision. Obviously, missing such an error until so late in the review process has had the effect of undermining any confidence the Applicant has in the Public Body's application of the Act.

[para 69] With respect to the remainder of the Public Body's application of section 21(1), the Public Body's supplemental submission states:

The Public Body has applied both section 21(1)(a) and (b) to all the records under review. The Public Body in its submission stated that all information provided in emails by the Edmonton Police Service (EPS) has been provided in implicit confidence and the expectation is that the information not be released without expressed consent.

The Public Body submits that should the information be released; there is the likelihood that the relationship between the Public Body and EPS be compromised. In future, EPS may not disclose or be cautious and reluctant to disclose their information to the Public Body. If this were to occur, the Public Body, in certain circumstances, may lack critical information to make decisions about the risks to children, families and employees of the Public Body. In this context, disclosure may "harm" the working relationship between the Public Body and EPS. Equally so, "harm" could potentially and realistically be directed to children in the course of assessing risks to them.

The Public Body relies on its argument that the information provided by EPS to the Public Body for purposes of investigative activities was done so in confidence and there is the expectation that the information be held in confidence. Should the Public Body disclose the information, there is the possibility that EPS may not share such information in the future. This type of action may create an adverse working relationship between the Public Body and EPS, thus negatively impacting the sharing of information in a candid, open manner. The end result will likely be "harm" both to the relationship as well as potential "harm" to children and families with which the Public Body is engaged. (Supplemental submission, at paras. 5-8)

[para 70] In his request for review the Applicant states:

A cross referencing of information from EPS and GOA, page 170 GOA FOIP and Page 253 EPS FOIP (included as an addendum pg. 1) reveals some correspondence (8-January, 2013, 03:37PM) were quite innocuous and included statements such as "nothing on my end. I haven't had a chance to look at it again". Redaction of such information suggests a less than thorough and conscientious examination of the material on the part of the public body.

[para 71] The Applicant provided, with his request for review, a copy of a page he received from the EPS in response to an access request made to that public body. As he states, the emails in that page are the same as emails in the responsive records (at page 170), which is evident even with information severed. Regarding the particular information identified by the Applicant, I agree that there is nothing on the face of the record that indicates harm would result from disclosure, or that the information was provided in confidence.

[para 72] The page from his EPS access request is numbered 253; clearly the Applicant received a number of responsive records from that public body. However, I do not know what information was disclosed to him from that request, other than what he provided to me.

[para 73] The Applicant also provided, with his request for review, another page that contains information also in the responsive records. Some of the same information in the responsive records was severed by the Public Body. I do not know the source from which the Applicant obtained this page of information, although he refers to having received information from a related grievance process.

[para 74] The Applicant argues that since he has obtained some information in the records at issue in other processes (from other FOIP requests or otherwise), the Public Body ought not to withhold information under section 21(1) (or section 24(1)) in this case. I cannot come to that conclusion, in part because I do not know what other information he has, other than the two pages provided to me.

[para 75] That said, the fact that EPS responded to the access request made to it by the Applicant by disclosing at least one email conversation from one of its employees to the Public Body indicates that the EPS may not consider that information to have been provided in confidence, or that its disclosure would harm relations between it and the Public Body. EPS also disclosed the name of an EPS employee involved in the discussions, which the Public Body continues to withhold under section 21(1).

[para 76] The Applicant provided the same materials to the Public Body that I have before me and the Public Body has not addressed why some of the information provided by the EPS in the emails would have been disclosed by that public body yet the remaining information severed by the Public Body is nevertheless being withheld under section 21(1).

[para 77] The Public Body's submissions in this inquiry indicate that the Public Body has merely surmised that the information ought not be disclosed, without substantive reasons for that conclusion. It is the Public Body's burden to show that section 21(1)(a) or (b) applies to the relevant information. In this case, the Public Body has not provided sufficient reasons to establish the basis for that applying those exceptions, and there is evidence presented by the Applicant – namely that EPS has disclosed some of the information withheld by the Public Body under section 21(1) – that indicates this provision does not apply. For these reasons, I cannot conclude that the Public Body has properly applied either section 21(1)(a) or (b) in any instance.

[para 78] Given that the Public Body is aware that the EPS has disclosed some of the information to which the Public Body continues to apply section 21(1), it is also worth repeating the guidance provided by the Director of Adjudication regarding the application of section 21(3). In Order F2012-24, the Director of Adjudication noted that section 21(3) prohibits the disclosure of information to which section 21(1)(b) applies without consent

of the body that provided the information, but that this provision also requires that the public body withholding the information

...must first exercise its discretion to decide whether it is itself minded, in the circumstances, to disclose or to withhold the information (and if the former, it must ask the provider for consent).

...

In other words, before a public body can exercise its discretion to withhold records *on the ground of harm to relations from violation of confidentiality* in a given case, it must ask the body that supplied the information whether it does or does not consent. It is only if the provider denies permission that the disclosure could harm the relationship, and constitute a reason for withholding. If this has not happened in the present case, the conclusion that there would be harm would, in my view, be an irrelevant consideration to the Public Body's exercise of discretion. (At paras. 81 and 83)

[para 79] The Public Body has withheld a few names together with a position title, and contact information of EPS employees, who were acting in their representative capacity. This occurs in several records. In its submissions regarding section 21(1), the Public Body has revealed that the EPS was involved in the discussions with Public Body employees regarding the Applicant; it is not clear how disclosing the name and position of a specific EPS employee who was involved would harm relations between the Public Body and EPS, or jeopardize any future cooperation between them (section 21(1)(a)). It is also not clear how disclosing that information would reveal information supplied, explicitly or implicitly, in confidence by the EPS (section 21(1)(b)). This is because the Public Body has not explained why the identity of a specific EPS employee involved in the discussions is confidential (as opposed to the substance of any information supplied by that employee).

[para 80] Often the names etc. of the EPS employees were withheld only under section 21(1). As I have found that this provision does not apply, I will order the Public Body to disclose that information to the Applicant. The name and position title appearing as a signature line in the emails was withheld under section 21(1) and sections 24(1). For the reasons discussed below, I have found that section 24(1) also does not apply to that information. Therefore, the Public Body will be ordered to disclose the names and contact information of the EPS employees to the Applicant.

[para 81] The Public Body applied section 21(1) only, to information on pages 182, 196 and 322, (which may also appear elsewhere in the records) without telling me how harm could result from disclosure, or that the information was provided in confidence. The information itself does not indicate that the tests for sections 21(1)(a) or (b) are met. Therefore I cannot conclude that section 21(1) applies.

[para 82] The Public Body withheld some information under both sections 21(1) and 24(1). For reasons provided in the relevant portion of this Order, I find that section 24(1) does not apply to that information. The Public Body also failed to provide me with

sufficient reasons to conclude that section 21(1)(a) or (b) applies to the following information:

- The information withheld on page 44 (and wherever it appears in the records);
- The information withheld in the third of four emails on page 170, discussed above (and wherever it appears in the records);
- The first item of severed information on page 216 (and wherever it appears in the records);
- The first item of severed information on page 292 (and wherever it appears in the records); and
- The first sentence of the email on page 310 (and wherever it appears in the records).

[para 83] Therefore, I will order the Public Body to disclose to this information to the Applicant.

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

[para 84] The Public Body applied section 24(1)(a) and (b) to information on many pages of the records at issue. These sections state:

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

(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,

(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,

(c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Alberta or a public body, or considerations that relate to those negotiations,

...

[para 85] In previous orders, the former Commissioner has stated that the advice, proposals, recommendations, analyses or policy options under section 24(1)(a) should:

1. be sought or expected, or be part of the responsibility of a person by virtue of that person's position,
2. be directed toward taking an action,
3. be made to someone who can take or implement the action. (See Order 96-006, at p.9)

[para 86] In Order F2013-13, the adjudicator stated that the third arm of the above test should be restated as “created for the benefit of someone who can take or implement the action” (at paragraph 123).

[para 87] In Order F2012-06, the adjudicator stated, citing former Commissioner Clark’s interpretation of “consultations and deliberations”, that

It is not enough that records record discussions or communications between employees of a public body; rather, a consultation takes place only when the individuals listed in section 24(1)(b) are asked for their views regarding a potential course of action, and a deliberation occurs when those individuals discuss a decision that they are responsible for, and are in the process of, making. (At para. 115)

[para 88] In Order F2012-10, the adjudicator clarified the scope of section 24(1)(b):

A consultation within the terms of section 24(1)(b) takes place when one of the persons enumerated in that provision solicits information of the kind subject to section 24(1)(a) regarding that decision or action. A deliberation for the purposes of section 24(1)(b) takes place when a decision maker (or decision makers) weighs the reasons for or against a particular decision or action. Section 24(1)(b) protects the decision maker's request for advice or views to assist him or her in making the decision, and any information that would otherwise reveal the considerations involved in making the decision. Moreover, like section 24(1)(a), section 24(1)(b) does not apply so as to protect the final decision, but rather, the process by which a decision maker makes a decision. (At para. 37)

[para 89] Further, sections 24(1)(a) and (b) apply only to the records (or parts thereof) that reveal substantive information about which advice was sought or consultations or deliberations were being held. Information such as the names of individuals involved in the advice or consultations, or dates, and information that reveals only the fact that advice is being sought or consultations held (and not the substance of the advice or consultations) cannot generally be withheld under section 24(1) (see Order F2004-026, at para. 89). As well, neither section 24(1)(a) nor (b) apply to a decision itself (Order 96-012, at paras. 31 and 37).

[para 90] The first step in determining whether section 24(1)(a) and/or (b) were properly applied is to consider whether a record would reveal advice, proposals, recommendations, analyses, or policy options (section 24(1)(a)), or consultations or deliberations between specified individuals (section 24(1)(b)). Neither section 24(1)(a) nor (b) apply to a decision itself (see Orders 96-012, at paras. 31 and 37).

[para 91] In its initial submission, the Public Body states (at paras. 64, 66 and 67)

Section 24(1)(a) and(h) were applied to emails where officials discussed the information obtained from the Edmonton Police Service and the options and risks related to the Applicant’s employment if the Applicant continued to work as a Child and Youth Worker for the Public Body. The information consists of advice, consultations and deliberations

from all levels of staff. It is apparent from the email threads within the records that there was a back and forth discussion that occurred.

...

The advice was sought by the human resources and the directors responsible for the Applicant's employment. The advice was clearly about taking an action (how to minimize the risk to youth at the Applicant's place of work): and making a decision regarding the Applicant's position.

The advice contained in these emails was also made to the people charged with making the decision about the Applicant's position - the directors and human resources personnel.

[para 92] All of the information withheld under sections 24(1)(a) and (b) is contained in emails between Public Body employees (and others) regarding the Applicant. These emails show lengthy discussions among several individuals, taking place over most of a year. I agree with the Public Body that it is appropriate, in this case, to review these emails in a "holistic" manner, i.e. as related to each other. I say this because if each email were reviewed without the context of the other emails, it would not be clear that the severed information relates to advice or deliberations, rather than a mere recitation of facts (the latter of which cannot be withheld under section 24(1)). However, once the emails are read in context, it is clear that that they comprise lengthy conversations about possible approaches to take regarding the Applicant. Taken out of context, some severed information appears to be mere recitations of fact; however, reading the emails together indicates that these 'facts' are reminders between participants of factors previously discussed, or reasons for requesting further information.

[para 93] Further, the Public Body has told me the position titles of many of the email participants, and the roles of many of them are obvious from the context of the records. I am satisfied that the email participants are those who are in a position to take action and those who are in a position to offer relevant information and advice regarding what action to take.

[para 94] I also note that the Public Body has not applied sections 24(1)(a) or (b) too broadly. For example, in most instances, the Public Body applied these exceptions to discrete lines of information in the emails. It is clear that the Public Body applied these exceptions on a line-by-line basis, as they should be applied.

[para 95] However, the Public Body has withheld the name and position of a an employee of another public body (EPS), who was acting in a representative capacity, citing sections 24(1)(a) and (b) (in addition to section 21, as discussed above). This occurs in several records. As stated above, information such as the names of individuals involved in the advice or consultations, dates, and information that reveals only the fact that advice is being sought or consultations held, cannot generally be withheld under section 24(1). The Public Body has not provided any reason to deviate from this general rule in this case, and no reason is obvious from the information in the records before me.

Therefore, I find that the names, position titles and contact information of these employees cannot be withheld under section 24(1), wherever they occur in the records.

[para 96] As mentioned, the Applicant has obtained information (from the EPS through an access request), that the Public Body withheld under section 24(1). The fact that EPS disclosed this information does not necessarily mean that the Public Body misapplied section 24(1). If the EPS supplied information the Public Body used as part of advice or deliberations, EPS may not have been able to withhold that information from the Applicant under section 24(1) itself, as it was not the EPS ultimately advising its officials or deliberating a course of action that the Public Body (and not the EPS) had the authority to undertake. The fact that the Applicant has obtained this information by other means is a factor for consideration in the Public Body's exercise of discretion with respect to the application of section 24(1) but it does not necessarily mean that the information does not fall within section 24(1). In this case, for the reasons I have given, I find that most of the information falls within that provision.

[para 97] However, I find that the information described by the Applicant in the second of three emails on page 170 of the records (and appearing elsewhere) is not information that can be withheld under section 24(1). It is, as described by the Applicant, "innocuous", but more importantly, it does not reveal advice or deliberations of the Public Body.

[para 98] The Public Body has withheld page 129 in its entirety under sections 17(1) and 24(1). I found above that section 17(1) did not apply to the information on this page, with the exception of the name of one third party. Sections 24(1)(a) and (b) do not apply to the names of participants in the discussion, or dates. Therefore, the Public Body cannot withhold the "to/from" or date fields in the emails, the signature lines, or the subject lines (which do not reveal the content of the emails). However, the body of the emails reveals deliberations between Public Body employees, and is captured under section 24(1)(b).

[para 99] The information in the first line of the email on page 216 and the information in the first email on page 292 (and possibly elsewhere in the records) reveals only who was involved in a discussion. Section 24(1) does not apply.

[para 100] The information in the first sentence of the email on page 31 relays information that does not reveal the substance of advice or deliberation, although the remainder of the email does. The first sentence is better characterized as mere background facts, to which section 24(1) does not apply.

Exercise of discretion

[para 101] Section 24(1) is a discretionary exception. In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), the Supreme Court of Canada commented on the authority of Ontario's Information and Privacy Commissioner to review a head's exercise of discretion.

[para 102] The Supreme Court of Canada confirmed the authority of the Information and Privacy Commissioner of Ontario to quash a decision not to disclose information pursuant to a discretionary exception and to return the matter for reconsideration by the head of a public body. The Court also considered the following factors to relevant to the review of discretion:

- the decision was made in bad faith
- the decision was made for an improper purpose
- the decision took into account irrelevant considerations
- the decision failed to take into account relevant considerations

[para 103] In Order F2010-036 the adjudicator considered the application of the above decision of the Court to Alberta's FOIP Act, as well as considered how a public body's exercise of discretion had been treated in past orders of this Office. She concluded:

In my view, these approaches to review of the exercise of discretion are similar to that approved by the Supreme Court of Canada in relation to information not subject to solicitor-client privilege in *Ontario (Public Safety and Security)*. (At para. 104)

[para 104] In its initial submission, the Public Body states (at para. 68):

In exercising its discretion, the Public Body considered that it is important when dealing with a sensitive matter such as employment and possible allegations involving sexual abuse of minors, that the free flow of advice and recommendations within the Public Body be protected so not to discourage officials from having frank and open discussions. The Public Body also considered the Applicant's private interest in obtaining the records and whether that interest outweighed any harm to full and open discussions that section 24 aims to protect. In the end, after balancing the factors the Public Body determined that disclosing this type of information would lead to a situation where officials might not be able to obtain similar advice in the future which could affect the Public Body's ability to protect youth in its care. For this reason, in protecting the consultations and deliberations in the decision making process, the Public Body exercised its discretion appropriately in denying access to some of the records.

[para 105] The Applicant argues that since the ultimate outcome of the Public Body's deliberations is known, his interest in having the information disclosed outweighs the factors in favour of withholding the information. Further, the Applicant argues that the Public Body's actions were inappropriate and not in good faith, which weighs in favour of disclosure.

[para 106] Presumably, the actions of the Public Body that the Applicant is referring to are the actions taken by the Public Body as a result of the deliberations.

[para 107] Lastly, the Applicant states:

In lieu of same, we are left with in camera deliberations about a process that OIPC has already determined to be improper (Order F2015-42).

[para 108] In Order F2015-42, cited by the Applicant, the Adjudicator found that the Public Body had contravened Part 2 of the FOIP Act when it collected an individual's personal information from the JOIN database, when it had used this information, and when it disclosed this information to its Human Resources Division. Presumably the Applicant in this case is the same individual at issue in Order F2015-42. I understand the Applicant to be arguing that the Public Body ought not to be able to withhold information that it obtained without authority.

[para 109] I do not know whether the actions taken by the Public Body as a result of their deliberations were appropriate or done in good faith; such a finding would be beyond my jurisdiction even if I had sufficient information to form an opinion.

[para 110] Regarding Order F2015-42, I do not know what information the adjudicator had before her in that inquiry. It may be that some of the information withheld by the Public Body under section 24(1) is information the Public Body obtained from the JOIN database without authority; however, I do not know that to be the case as it is not obvious from the records before me (I cannot reveal what is, or is not, in the withheld portions of the records at issue). There is nothing in the FOIP Act that states that a public body cannot withhold information from an access request if that information was collected in contravention of the FOIP Act.

[para 111] In some cases, there may be a public interest in disclosing information that reveals wrongdoing on behalf of a public body; such a public interest is a factor in exercising discretion to withhold information in response to an access request. In this case, the Applicant has not satisfied me that such a public interest is established.

[para 112] As noted above, the Applicant has obtained some of the information withheld under section 24(1) by other means. I do not know how much of the information withheld under that provision the Applicant already has. Presumably, the Public Body also does not know. On one hand, it is nonsensical to withhold information the Applicant already has. On the other hand, it seems pointless to order the disclosure of information the Applicant already has, especially where it is not clear *what* information the Applicant already has.

[para 113] I accept the reasons provided by the Public Body for exercising its discretion to withhold information under section 24(1)(a) and (b); as such, I will not order the Public Body to determine what other information the Applicant has obtained through other means and reconsider its decision to withhold that information from the Applicant.

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

[para 114] Section 27 of the Act states:

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,

...

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

...

[para 115] I will first discuss the Public Body's claim of privilege applied pursuant to the *Child, Youth and Family Enhancement Act (CYFEA)*. I will then discuss the Public Body's claim of solicitor-client privilege over other information in the records at issue.

Privilege pursuant to CYFEA

[para 116] Sections 4 and 126.1 of the *CYFEA* state:

4(1) Any person who has reasonable and probable grounds to believe that a child is in need of intervention shall forthwith report the matter to a director.

...

(2) Subsection (1) applies notwithstanding that the information on which the belief is founded is confidential and its disclosure is prohibited under any other Act.

126.1(1) Despite section 126(1), the name of a person who makes a report to the director under section 4 of 5 and information that would identify that person is privileged information of the person making the report and is not admissible in evidence in any action or proceeding before any court or an Appeal Panel or before any inquiry without the consent of the person.

(2) Despite subsection (1), the Minister may direct the release of information under subsection (1) that would identify the person.

(3) If there is a conflict or inconsistency between subsection (1) and the Freedom of Information and Protection of Privacy Act, subsection (1) prevails.

[para 117] The package of unredacted records at issue provided by the Public Body for this inquiry did not include information to which section 27(1) had been applied. By letter dated March 23, 2016, to the Public Body, I said:

I acknowledge that section 126.1(1) of the *CYFEA* prevents the admission into a proceeding of information that would identify a reporter and that this prohibition prevails over the *FOIP Act*.

In some cases, section 27 has been applied to discrete items of information; however, in other cases, it has been applied to entire paragraphs. I ask that the Public Body review the information it has withheld from me, in order to determine whether more information can

be provided to me, for the purpose of deciding the issues at this inquiry. My reasons for believing that more information might be disclosable for that purpose are as follows.

First, section 126.1 of the CYFEA prohibits disclosure of information that names or would identify a reporter. In providing records for my review, I believe the Public Body may withhold only as much information as is necessary for it to conform with the CYFEA. There may be information in the records that, even though it might permit another individual with knowledge of the case to identify a reporter, would not allow me to identify the reporter as long as the person's name is redacted. It seems, therefore, that section 126.1(1) of the CYFEA may permit the Public Body to disclose information to me, *in camera*, that does not reveal the identity of a reporter to me, to help me to determine whether the information is subject to the section 126(1) privilege and is thus withholdable under section 27 of the Act.

Second, because section 59(3) of the FOIP Act prohibits me from disclosing information that a public body is authorized or required to withhold, I may not disclose any information in the course of the inquiry that could identify the reporter to others. As well, section 27 of the Act requires me to uphold the Public Body's ability to withhold privileged information from a requestor, including information that is privileged under section 126.1(1). In other words, disclosure of such information into this inquiry, on an *in camera* basis, would not have the undesired effect of revealing the identity of reporters that the privilege created by section 126.1 is intended to prevent. (Any order that I make that the records be disclosed is also subject to judicial review.)

Finally, I note section 126.1(2) states that the Minister may authorize the disclosure of information that would identify a reporter. Therefore, I believe it is open to me to ask the Minister to consider authorizing disclosure of information for my review, with the name redacted, having regard to the considerations just discussed.

[para 118] With its initial submission, the Public Body provided an *in camera* affidavit and a copy of some of the responsive records that left more information unsevered so that I could review more of the information to which the Public Body has applied section 27 in conjunction with the *CYFEA*.

[para 119] In Order F2009-033 the Director of Adjudication considered the application of sections 126.1 and 4 of the *CYFEA*, and their intersection with section 27 of the FOIP Act. She found that a public body properly applied section 27 of the Act to "information identifying persons who were reporters within the terms of section 4 of the *CYFEA*" (at para. 57). She also noted that "pursuant to section 126.1(1) of the *CYFEA*, the legal privilege that attaches to identifying information of the reporter under section 4 is that person's privilege. It is not the privilege of the Public Body." I agree that section 126.1 creates a statutory privilege such that section 27 applies to the information that identifies a reporter under the *CYFEA*. I also agree that the privilege belongs to the reporter, and not the Public Body. Therefore, section 27(2) appears to prohibit the disclosure by the Public Body.

[para 120] In his rebuttal submission the Applicant points out that section 4 of the *CYFEA* requires a person to make a report to the director if that person has *reasonable and probable grounds* to believe that a child is in need of intervention. He further states:

It is neither reasonable nor probable to believe that an employee with multiple clear Criminal Records checks present any sort of risk to children in care. Nor is it reasonable to proceed as the Public Body did after hearing what amounts to a rumour from a suspect in the custody of EPS. A review of the totality of the actions of the Public Body will reveal unique and precedent setting decisions contrary to their normal course of action. This rather distinctive conduct with suspect motives directly impacted the Complainant and is worthy of complete transparency by way of this Inquiry. (At page 6)

[para 121] Presumably the Applicant is arguing that whoever reported him under the *CYFEA* did not have reasonable and probable grounds to do so. The effect of the “reasonable and probable grounds” in section 4 of the *CYFEA* is to provide a standard that triggers the *obligation* of a person to make a report to the director under that Act. The protection in section 126.1 of that Act for the identity of a person who makes a report under section 4 is not affected by the “reasonable and probable grounds” standard in section 4. In other words, the identity of a reporter is protected, regardless of whether that reporter had reasonable and probable grounds to make the report.

[para 122] As noted above, I have not reviewed all of the information withheld under section 27; in some cases, the Public Body withheld significant amounts of information citing that provision. I can say that in many cases the withheld information clearly would identify a reporter, given the context of the redactions. However, I cannot be absolutely certain of that in every case. This is a case in which the Public Body knows better than I do what information might reveal the reporter(s) to the Applicant. In the instances in which the Public Body continued to apply section 27 but provided me with the unredacted information (as that information would not reveal the reporter’s identity to *me*), I can understand how the information might identify the reporter(s) to someone who knows him or her.

[para 123] I find that the Public Body properly applied section 27(1)(a) to the information withheld pursuant to section 126.1 of the *CYFEA*.

Solicitor-client privilege

[para 124] Before addressing whether the Public Body properly applied solicitor-client privilege to information in the records at issue, I will address the Applicant’s concerns regarding the Public Body’s decision not to provide me with information in the records over which it claims this privilege.

[para 125] In his Request for Inquiry, the Applicant expressed surprised that the Public Body would not provide information, over which solicitor-client privileged had been claimed, to this Office for review. He argued that if the Public Body does not provide that information for the inquiry,

... the process of: requesting, reviewing and/or any complaint with respect to a request under the Freedom on Information and Protection of Privacy Act is, respectively, impugned. It is the applicants position that the Public Body ought to provide any redacted

records under section 27(1) to OIPC as without same the process of this inquiry can neither be fair nor impartial.

[para 126] On November 25, 2016, the Supreme Court of Canada issued its decision regarding the Commissioner's ability, under the FOIP Act, to compel records over which solicitor-client privilege has been claimed (*Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII)). In that decision, the Court determined that the language in the FOIP Act is not sufficient to authorize the Commissioner (or me, as her delegate) to compel the production of information over which a public body has claimed solicitor-client privilege. The Court also suggested that the rules applicable to claims of solicitor-client privilege in the context of civil litigation apply to privilege claims in the context of access requests. The Court also cited *Canadian Natural Resources Ltd. v. ShawCor Ltd.*, 2014 ABCA 289 (CanLII), 580 A.R. 265 (*ShawCor*) as the relevant authority in Alberta. In *ShawCor* the Alberta Court of Appeal stated:

Accordingly, under either interpretation of the relevant Rules, a party must provide a sufficient description of a record claimed to be privileged to assist other parties in assessing the validity of that claim. From this, it follows that all relevant and material records must be numbered and, at a minimum, briefly described, including those records for which privilege is claimed. As noted, though, this is subject to the proviso that the description need not reveal any information that is privileged.

[para 127] As will be discussed later in this Order, after I reviewed the Public Body's submissions, I asked it to provide further support for its claim of solicitor-client privilege, since it had not provided that information for my review. The Public Body responded for my request for further information on November 24, 2016, providing an additional affidavit *in camera*, with further evidence in the form of a chart. Some additional information was provided in the response exchanged with the Applicant.

[para 128] In general terms, the chart includes the type of record contained on each page, the relevant dates for each page, the correspondents involved, including to whom the information was forwarded or copied. The chart was accompanied by a list of the individuals named in the chart, along with their position titles. The chart also notes the difference between instances where legal advice was given or sought, and where the legal advice given was later discussed.

[para 129] Because I have accepted the affidavit and chart *in camera*, I cannot reproduce any part of it in this Order. Had this not been the case, I would have provided an excerpt of the chart as a good example of how to provide support for a claim of solicitor-client privilege when the relevant records are not provided to the adjudicator, and without revealing the substance of the advice. I note that the affidavit and chart provided by the Public Body would comply with the new Privilege Practice Note published by this Office, for use by parties claiming solicitor-client or litigation privilege in response to an access request.

Analysis of the Public Body's claim of solicitor-client privilege

[para 130] The Public Body withheld information under section 27(1)(a), (b) and (c), citing legal privilege. In its initial submission, the Public Body stated:

77. Some information in the records was also withheld under solicitor client privilege. Staff sought advice from legal counsel to provide legal direction respecting information received from the police service as well as legal opinions regarding the complexities of an employment matter.

78. Please note that the Public Body has disclosed additional information to the Applicant on Record #6 where section 27 was previously applied.

79. The Public Body considers that information in the records where Section 27 of the FOIP Act is applied to be confidential and subject to legal privilege under sections 27(1)(a)(b)(c).

[para 131] In my October 21, 2016 letter, I asked the Public Body to provide further explanation for withholding that information. I asked the Public Body to specify whether privilege was being claimed over all of the information, or whether section 27(1)(b) and/or (c) only were being claimed over some information. The distinction is important because the recent court decisions finding that the Commissioner does not have the authority to compel records to which solicitor-client privilege is claimed do *not* purport to extend to information over which sections 27(1)(b) or (c) are applied. I also asked the Public Body for further information regarding its claim of privilege. I said:

If the Public Body means to claim solicitor-client privilege over all of that information, it must provide me with more support for that claim.

...

In this case, the Public Body has merely stated that it sought advice from counsel “to provide legal direction respecting information received from the police service as well as legal opinions regarding the complexities of an employment matter.” In order to support its claim of privilege, I am asking the Public Body to tell me how the information over which this privilege has been claimed meets the test set out in set out by the Supreme Court of Canada in *Canada v. Solosky* [1980] 1 S.C.R. 821:

... privilege can only be claimed document by document, with each document being required to meet the criteria for the privilege--(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties.

While the Public Body's submission has addressed some of the above points, the test above must be met on a record-by-record basis. For example, it would be instructive to know the job duties of the author and recipient(s) of information over which privilege is claimed, in each case. Further, it would be helpful if the Public Body can tell me the *context* of the legal advice without revealing the advice itself. The Public Body's submissions have already provided me with some general context for the advice;

however, I must be satisfied that the *Solosky* test has been met on a record-by-record basis.

[para 132] The Public Body responded with an *in camera* affidavit sworn by an employee of the Public Body's FOIP office, as well as a response exchanged with the Applicant. In the exchanged submissions, the Public Body says that the emails are between solicitor and client, or Public Body employees discussing those emails.

[para 133] As noted above, the Public Body also provided a chart, *in camera*, listing:

- each page of records containing information over which solicitor-client privilege had been claimed,
- the type of record contained on each page,
- the relevant dates for each page, and
- the correspondents involved, including to whom the information was forwarded or copied.

[para 134] The chart was accompanied by a list of the individuals named in the chart, along with their position titles. The chart also notes the difference between instances where legal advice was given or sought, and where the legal advice given was later discussed.

[para 135] In most cases, the Public Body has redacted only small portions of a page under section 27(1)(a), citing solicitor-client privilege. The remaining information in the records afforded context for the Public Body's claim of privilege. That context, along with the additional evidence provided by the Public Body, satisfies me that the Public Body has met the test for solicitor-client privilege. Having the relevant dates for the correspondence and the position titles of the correspondents was helpful, especially in making a determination about emails between Public Body employees who are *not* counsel (i.e. determining the likelihood that those Public Body employees were discussing legal advice that was provided by counsel).

[para 136] I understand the Applicant's frustration with a process for reviewing that Public Body's claim of privilege that does not allow the decision-maker to review the information at issue. However, even with an unsevered copy of the records at issue, it can be difficult to reach a determination with absolute certainty in every instance, with respect to the application of any of the exceptions in the Act. Further, the burden of proof placed on the Public Body under section 71(1) of the Act is not absolute certainty; it is on a balance of probabilities (see Order 2000-020, at para. 15).

[para 137] For the reasons given, the evidence provided by the Public Body in this case was sufficient for me to make a determination on a balance of probabilities that section 27(1)(a) applies to the information.

V. ORDER

[para 138] I make this Order under section 72 of the Act.

[para 139] I find that the Public Body properly applied section 17(1) to information described at paragraphs 28 – 32 of this Order, with the exception of the information withheld on page 130 of the records at issue. I also find that section 17(1) does not apply to information on page 5. I order the Public Body to disclose that information to the Applicant.

[para 140] I find that section 21(1) does not apply to the information described at paragraphs 80-82 of this Order. As no other exception applies to that information, I order the Public Body to disclose it to the Applicant, wherever it appears in the records.

[para 141] I find that the Public Body properly applied section 24(1) to information in the records at issue, with the exception the information described at paragraphs 97-100 of the Order. I order the Public Body to disclose that information to the Applicant.

[para 142] I find that the Public Body properly applied section 27(1)(a) to the information in the records at issue.

[para 143] 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