

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2019-06

March 14, 2019

EDMONTON POLICE SERVICE

Case File Number 002963

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 Edmonton Police Service (the Public Body) for all records related to its case number 1647586.

The Public Body provided responsive records, with information withheld under sections 17(1) (invasion of third party privacy), 20 (disclosure harmful to law enforcement), and 21 (harm to intergovernmental relations).

The Applicant requested an inquiry into the Public Body's response.

During the inquiry, the Public Body provided the Applicant with a new set of records, with more information disclosed. The severing in the new set of records mirrored the disclosure required of the Public Body to the Applicant for a judicial review proceeding that preceded the inquiry. The Public Body continued to withhold some information under sections 17(1), 20(1)(m) and 21(1)(b).

The Adjudicator determined that the Public Body properly applied section 17(1) to the information in the records, with the exception of a limited amount of non-identifying information on two pages.

The Adjudicator found that the Public Body properly applied section 20(1)(m) to the information.

The Adjudicator found that section 21(1)(b) does not apply to the limited amount of non-identifying information on pages 17 and 18. This limited information was not supplied in confidence, nor does it reveal the information on those pages (found to be properly withheld under section 17(1)) that may have been supplied in confidence.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 17, 20, 21, 71, 72.

Authorities Cited: Orders 97-002, 99-018, F2004-015, F2004-018, F2008-012, F2008-017, F2008-021, F2008-028, F2008-031, F2009-009, F2009-038, F2014-16, F2015-30

Cases Cited: *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2012 ABQB 595, *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23, *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII)

I. BACKGROUND

[para 1] On April 11, 2016, Edmonton Police Service (the Public Body) received a request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) from the Applicant, for all records related to case number 1647586.

[para 2] By letter dated May 4, 2016, the Public Body responded, providing the Applicant with responsive records: a case file (32 pages), and event chronology (2 pages), and two street check reports (2 pages each). Some information was withheld under sections 17(1), 20(1)(m) and 21(1)(b) of the Act.

[para 3] The Applicant requested a review of the response from the Public Body. The Commissioner authorized an investigation; the Applicant subsequently requested an inquiry.

[para 4] The Public Body file relates to events occurring at a City of Edmonton (City) facility on March 31, 2016. On that day, a City employee made a report to the Public Body that three individuals had exhibited inappropriate behaviour at a City facility. Officers employed by the Public Body attended the facility and spoke to City facility employees and patrons. Much of the file relates to individuals other than the Applicant. The file also includes statements made by City employees and/or patrons about behaviour of the Applicant, occurring on previous days (March 10 and 17, 2016).

[para 5] Subsequent to this, the City informed the Applicant by letter dated April 8, 2016, that he would be banned from City recreation centres until April 8, 2018.

[para 6] The Public Body's list of the contents of file 1647586 includes:

- a list of involved persons/businesses;

- a witness statement from [a City facility patron] concerning the events which took place on March 17, 2016 and which involved [the Applicant]; and
- the officer's initial and follow up reports.

[para 7] The file also contains the following, which the Public Body states were provided to the Public Body by a City employee:

- a City of Edmonton incident report provided by a City employee, K and received by a staff member at the Pool, concerning the events which took place on March 10, 2016 and which involved the Applicant and two other individuals (pages 28-31);
- a City of Edmonton incident report provided by a staff member at the Pool, and received by a staff member at the Pool, concerning the events which took place on March 10, 2016 and which involved the Applicant and two other individuals (pages 22-24);
- a City of Edmonton incident report provided by an individual involved in the events and received by a staff member at the Pool concerning the events which took place on March 10, 2016 and which involved the Applicant and two other individuals (pages 19-21);
- a City of Edmonton incident report provided by a staff member at the Pool and received by another staff member at the Pool concerning events which involved two other individuals (pages 25-27); and
- an email from a staff member at the Pool to the Facility foreperson concerning two individuals involved in the events (page 17); and
- an email from a second staff member at the Pool to the Facility foreperson concerning [two individuals involved in the events (page 18)].

[para 8] At the same time the Applicant requested a review by this Office of the Public Body's decisions regarding his access request, the Applicant filed an application for judicial review of the City's decision to ban him from its facilities. Both the City and the Public Body were named as respondents.

[para 9] The Public Body states that it provided the Applicant with a certified record of proceedings, which was nearly identical to the records provided to him in response to his access request (the former included three additional pages). Subsequently, the Public Body was ordered by the court to provide an amended certified record of proceedings, which disclosed the names and job titles of the witnesses and complainants in the records. This amended certified records was given to the Applicant in September 2017 (Amended Judicial Review Record).

[para 10] In July 2018, the Public Body provided the Applicant with an updated version of the records responsive to his access request. The Public Body states that the updated records are identical to the Amended Judicial Review Record.

II. RECORDS AT ISSUE

[para 11] The records at issue consist of the withheld portion of the updated records provided by the Public Body to the Applicant in July 2018.

III. ISSUES

[para 12] The issues as set out in the Notice of Inquiry dated June 22, 2018, are as follows:

1. Does section 17 of the Act (disclosure harmful to personal privacy) apply to the information in the records?
2. Did the Public Body properly apply section 20(1)(m) of the Act (disclosure harmful to law enforcement) to the information in the records?
3. Did the Public Body properly apply section 21(1)(b) of the Act (disclosure harmful to intergovernmental relations) to the information in the records?

IV. DISCUSSION OF ISSUES

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

[para 13] The information withheld by the Public Body under this provision includes the city of residence, contact information, ages, dates of birth and driver's license numbers of witnesses and complainants. The Public Body has also applied section 17(1) to payroll numbers of Public Body and City employees.

[para 14] Contact information of two other individuals involved in the events was withheld. Statements made about other individuals were also withheld, although the names of the other individuals were disclosed in places.

[para 15] With two exceptions, none of the witness names or statements about the Applicant were withheld, presumably because the Public Body had disclosed this information to the Applicant as part of the judicial review proceeding. The exceptions are the names of two City employees making statements regarding the conduct of two individuals other than the Applicant, on pages 17 and 18 of the records. These records were withheld in their entirety under section 17(1) and 21(1). The emails do not contain any reference to the Applicant; they relate only to two individuals other than the Applicant. This may explain why none of the information in these emails was disclosed to the Applicant for the judicial review proceeding.

[para 16] In his rebuttal submission, the Applicant states that he is not interested in statements made about the two other individuals, except to the extent that they relate to the events occurring on March 10, 2016.

[para 17] The Public Body stated that it “applied section 17(1) to the details, reports, views or allegations about [the two other individuals] only (pp 8, 9, 10, 17, 18, 33, 36)... To be clear, the EPS has not applied section 17(1) to details, reports, views or allegations that concern or even related to [the Applicant]” (initial submission, at para. 31).

[para 18] The Applicant’s submissions indicate that he remains uncertain as to whether the withheld information relates to the March 10, 2016 incident such that it is of interest to him. I cannot reveal the content of the withheld information; however, I can confirm the Public Body’s description cited above. Information about the other two individuals is contained on the pages identified by the Public Body. Some of the withheld information includes personal details of the two other individuals that are unrelated to incidents occurring at City facilities. Most of the withheld information does not reference or related to March 10, 2016. The date of March 10, 2016 was referenced only twice in the information withheld from the Applicant. Those references do not include details of events of March 10, 2016, whether they involve the Applicant or not. Rather, those references amount to generalized statements about the behaviour of the two other individuals and/or information about incidents that occurred on different dates that do not mention the Applicant at all.

[para 19] I can also confirm the Public Body’s statement that the details of the March 10, 2016 incident have been provided to the Applicant. Specifically, the details of March 10, 2016 were provided in the narrative of events as described by witnesses on pages 22-23, and 28-31, which were disclosed to the Applicant with only the contact information of the witnesses withheld. Information relating to the two other individuals on these pages was provided to the Applicant.

[para 20] The subject matter of the withheld information, particularly as it relates to the two other individuals, will be relevant to the analysis of section 17.

[para 21] 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 22] Section 17 is a mandatory exception: if the information falls within the scope of the exception, it must be withheld.

[para 23] 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 24] 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 25] The city of residence, contact information, ages, dates of birth and driver's license numbers of witnesses, complainants and other individuals is personal information of those individuals. Opinions and observations about the behaviour of two other individuals is their personal information.

[para 26] The Public Body has withheld the payroll numbers of one Public Body employee and one City employee, under section 17(1). Previous Orders have noted that employee identification numbers fall within the list of personal information in section 1(n) (specifically, under section 1(n)(iv)). In Order F2009-009, the adjudicator found that employee identification numbers have a personal dimension such that section 17(1) can apply (at para. 80) because it can be used to track the actions of an employee. In this case, the payroll number of the Public Body is clearly used for this purpose. Because payroll numbers can be linked to an employee's pay, benefits, and similar human resource-related information, I agree that it has sufficient personal dimension such that section 17(1) can apply.

[para 27] Only pages 17 and 18 of the records were withheld in their entirety under section 17(1); the remaining records had some information severed with the remainder provided to the Applicant.

[para 28] The names of the City employees who made the statements in the emails on pages 17 and 18 have been withheld, along with the name of the employee to whom the statements were made. The Applicant argues that names of employees acting in a representative capacity cannot be withheld under section 17(1). Past Orders of this Office have confirmed this principle, unless there is a personal dimension to the information (see Orders F2008-028 at para. 53). In this case, the statements made by the City employees have a personal dimension. They do not relate only to the employee's performance of their job duties; they reveal personal opinions and feelings of the employees. Opinions about an individual can be the personal information of both the individual discussed and the individual giving the opinion. The information in the statements is personal information about third party individuals being discussed, as well as about the employees making the statements. Therefore, I find the names of the City employees providing the statements is information to which section 17(1) can apply.

[para 29] In contrast, the employee receiving the emails was acting in a work capacity. There is no personal dimension such that section 17(1) could apply to that name.

[para 30] In some cases, severing names can render the remaining information non-identifiable. In this case, because the Applicant has already been provided with much of the information in the records, none of the information about third party individuals can be rendered non-identifiable.

[para 31] That said, there is limited non-identifiable information on pages 17 and 18 to which section 17(1) cannot be applied: the letterhead logo, and the date/time of the email. The following discussion of the application of section 17 does not apply to that non-identifiable information or the name of the recipient of the emails working in her representative capacity.

[para 32] The Public Body states that sections 17(4)(b), (d), and (f), as well as 17(5)(e), (f) and (h) all weigh against disclosure of the third party personal information.

[para 33] The Applicant argues that section 17(5)(a), (c) and (i) weigh in favour of disclosure.

[para 34] Neither party has argued that section 17(3) applies to any of the withheld information, and from the face of the records, it does not.

Section 17(4)(b)

[para 35] Section 17(4)(b) states that the disclosure of personal information is presumed to be an unreasonable invasion if it 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 continue an investigation.

[para 36] Law enforcement is defined in section 1(h) of the Act, to include:

1 In this Act,

...

(h) “law enforcement” means

(i) policing, including criminal intelligence operations,

(ii) a police, security or administrative investigation, including the complaint giving rise to the investigation, that leads or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the investigation or by another body to which the results of the investigation are referred, or

(iii) proceedings that lead or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the proceedings or by another body to which the results of the proceeding are referred;

[para 37] The records at issue are of a police file; therefore, section 17(4)(b) is applicable.

[para 38] The Applicant argues that disclosure of the records is clearly required to dispose of the law enforcement matter or continue an investigation. He cites the *Guidelines and Practices Manual*, which states (at page 125):

Disclosure to an applicant of a third party's personal information in a law enforcement record is not presumed to be an unreasonable invasion of privacy if disclosure is necessary to dispose of the law enforcement matter or to continue the investigation. Section 17(4)(b) recognizes that a public body that is in possession of evidence relating to a law enforcement matter must have the power to disclose that evidence to the police, another law enforcement agency and to Crown counsel or other persons responsible for prosecuting the offence or imposing a penalty or sanction.

[para 39] The phrase in section 17(4)(b), "except... to dispose of the law enforcement matter or continue an investigation", means that the particular disclosure contemplated, to the particular individual or organization, must be necessary to dispose of the matter or continue an investigation. In this case, the Applicant argues that the records are required for him to pursue his complaint with this Office (on a separate file) and to pursue a complaint filed with the Law Enforcement Review Board. The Applicant also has referred to his appeal of a judicial review decision relating to the City's ban, and to his intent to pursue a defamation claim.

[para 40] It is unclear to me how disclosing information in response to an access request would be necessary to dispose of or continue a law enforcement matter or investigation; a similar concern was raised in Order F2008-021 but the issue was unnecessary to decide in that case (see discussion at paras. 19-22).

[para 41] Similarly, I do not have to decide the issue here. Even if the second part of section 17(4)(b) could be engaged in this situation, the Applicant's submissions do not support a finding that the withheld information is relevant to disposing of a law enforcement matter or continuing an investigation. There are two main reasons for this: the avenues pursued by the Applicant do not amount to disposing of a law enforcement matter or continuing an investigation; and the withheld information does not appear directly relevant to the ongoing or contemplated proceedings and complaints.

[para 42] Regarding the first reason, the Applicant has argued that he intends to initiate an action in defamation, and requires the contact information of complainants and witnesses in the records at issue in order to "[serve the individuals] with legal papers as defendants or witnesses in the [defamation] lawsuit" (September 14, 2018 submission, at page 3). However, initiating a defamation lawsuit based on witness statements obtained by police during an investigation is not disposing of the law enforcement matter or continuing an investigation. It is initiating a separate proceeding. The Applicant's arguments regarding contact information are also relevant to section 17(5)(c) and I will address them in that discussion as well.

[para 43] The Applicant is also pursuing an appeal of a judicial review decision relating to the City's decision to ban the Applicant. The Applicant provided me with a copy of the letter from the City banning him from its premises. That ban was later vacated by the Court of Queen's Bench as a result of the judicial review proceedings (the Public Body provided me with the Court's order dated November 23, 2017). The Public Body states that the Applicant has filed for an appeal of the Court's order, and has provided me with the notice of appeal. It is not clear that the appeal amounts to disposing of a law enforcement matter or continuing an investigation. Further, based on the Public Body's submission, the appeal was set to be heard in February 2019 and therefore may have already passed.

[para 44] Even if the Applicant's appeal could be characterized as disposing of a law enforcement matter or continuing an investigation, and even if the appeal date had not passed, the withheld information about the other two individuals does not appear to be relevant. The City's letter informing the Applicant of his ban from City facilities states that the Applicant was banned due to an inappropriate physical interaction; it does not refer to the incident of March 10, 2016. The issues raised in the Applicant's notice of appeal and the other related materials also do not relate to any actions of the two other individuals.

[para 45] Even if the conduct of the other two individuals was relevant to the ban and subsequent appeal, the Applicant has been provided with the details of the March 10, 2016 incident, including the details relating to the other two individuals (see discussion at paragraphs 16-19 of this Order). The remaining withheld information does not provide additional details of the incident as the Applicant believes. Sufficient information in the records has been disclosed to the Applicant for him to know the allegations made against the two other individuals as they relate to him and the incidents that allegedly occurred on March 10, 2016. The specific details about the other individuals that do not relate to the Applicant or March 10, 2016 seem irrelevant, given the Applicant's stated reasons for pursuing the information.

[para 46] The same analysis applies regarding the Applicant's statements that he is pursuing complaints against the Public Body to this Office and the Law Enforcement Review Board (LERB): these complaints do not appear to amount to disposing of a law enforcement matter or continuing an investigation. Even if they do, the details of the March 10, 2016 incident have been provided to the Applicant. The remaining withheld information does not appear to be directly relevant to a complaint about the Public Body's conduct during its investigation of the Applicant.

[para 47] I conclude the first part of section 17(4)(b) is engaged, such that it weighs against disclosure. I have insufficient evidence or arguments to find that the second part of section 17(4)(b) (where disclosure is necessary to dispose of a law enforcement matter or continue an investigation) is engaged in this situation. Therefore, section 17(4)(b) weighs against disclosing the details of the statements made about the allegedly inappropriate conduct of the two individuals other than the Applicant.

[para 48] The Applicant has provided some arguments with respect to the application of section 17(4)(b) that are relevant to sections 17(5)(a) and (c), which I will discuss below.

Section 17(4)(g)

[para 49] 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 all of the personal information where the names were not disclosed.

Section 17(5)(a)

[para 50] 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 51] 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 52] The Applicant argues that this factor applies in this case, stating (request for inquiry, at para. 3(b)):

Certainly in this particular case the public body has made accusations of a quasi criminal / criminal nature, and the power of a public body to make such serious accusations without any evidence to back them up ought to be limited so that the activities of the public body are subject to public scrutiny.

[para 53] The Applicant's submissions indicate that he believes the Public Body officer conducted an incomplete or faulty investigation that led to the Applicant being banned from City facilities. He argues that the police report shows bias and a lack of evidence of the allegations made. He also argues that the information recorded by the EPS officer "ranges from entirely inaccurate to completely fabricated" (September 14, 2018 submission at page 2). The Applicant seems to argue that the City incident reports in the records are unsigned and therefore unverifiable. For this reason, they ought not have been part of the Public Body investigation file. The Applicant also argues that the voice recording of a City employee's call to the Public Body shows that the employee did not report the incident as it was written in the Public Body's file.

[para 54] Past Orders of this Office have made the distinction between allegations of wrongdoing by a public body employee, and allegations of a more systemic nature against a public body. For example, in Order F2015-30, I discussed the application of section 17(5)(a) to allegations made against a police officer in a disciplinary decision. I said (at para. 43, emphasis added):

I find that the Applicant has not provided credible evidence to suggest that activities of the Public Body require scrutiny. The unredacted portions of the Decision reveal that the actions of the Detective were called into question; however, there is no indication that the activities of the Public Body more broadly are being called into question, beyond this particular case in which the Detective may have provided deficient advice to a colleague. I may have found otherwise had the Applicant provided some evidence that the Detective routinely advised colleagues to lie or use misleading language on warrant applications or similar documents. However, the Applicant's arguments merely speculate that this is the case, and the records themselves do not support such a finding.

[para 55] In this case, the Applicant argues that the officer misrepresented complaints made about the Applicant, in the police report. The Applicant has not provided any arguments or evidence to find that the actions of the Public Body more broadly require scrutiny. For example, there is no indication that the issue is recurrent or that the Public Body failed to properly address any problems with the report.

[para 56] Aside from whether the Applicant's allegations regarding the Public Body's conduct meet the standard for section 17(5)(a), the limited information that continues to be withheld from the Applicant does not appear to be directly relevant to those allegations.

[para 57] Regarding the Applicant's allegations of inaccuracies in the file, and unfairness and bias in the investigation, the Applicant has been given the information

relating to complaints made about him, including statements made about his interactions with the two other individuals. The Applicant may mean to argue that he requires the full statements to have a complete picture of the events leading up to his interaction with the two individuals. As noted previously, the Applicant believes that additional details of the March 10, 2016 incident continue to be withheld from him. However, as discussed at paragraphs 16-19 of this Order, the withheld portions of the statements do not refer to the Applicant's conduct or interactions with the individuals; nor do they provide additional detail of the March 10, 2016 incident. The Applicant has not explained why the portion of the statements that concern *only* the two other individuals and *not* the Applicant are relevant to his complaint about the Public Body's investigation into the Applicant's own conduct and interactions. Indeed, the Applicant stated that he is not interested in the information about the other two individuals, except to the extent that it relates to the March 10, 2016 incident.

[para 58] Regarding the alleged inaccuracy of the Public Body's characterization of the call made by the City employee, the Applicant has a copy of the call (this voice recording is not a record at issue in this inquiry). He also has been provided with the written references to the content of that call in the records at issue. It is unclear what further information in the file could shed light on this allegation of inaccuracy.

[para 59] The limited personal information that continues to be withheld from the Applicant does not appear to be relevant to the various allegations made by the Applicant regarding the Public Body's conduct. I find section 17(5)(a) is not a relevant factor.

Section 17(5)(c)

[para 60] 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 61] The Applicant argues that this factor weighs in favour of disclosure. He states (request for inquiry, at para. 3(c)):

It is part of a fair process to disclose to the applicant the records and information related to the ban from the use of all Edmonton public recreation centres, outdoor pools, and

arenas. In addition it is fair to disclose to the applicant the specifics of the criminal / quasi criminal accusations made and who is making those accusations. This applies to all of the report the City of Edmonton made to the EPS, which the EPS used to issue the ban on March 31.

[para 62] As previously noted, the Applicant states that he has made a complaint about the Public Body's investigation to the LERB (and to this Office). He argues that he requires the unredacted records to continue with his complaint. The Applicant also pursued an appeal of a judicial review decision regarding his ban from City facilities.

[para 63] The Public Body argues that the personal information of the third parties that continues to be withheld could not aid the Applicant in pursuing his complaints or other proceedings. It further states (initial submission, at para. 41):

In fact, in the Interlocutory Application, the Alberta Court of Queen's Bench specifically considered what information [the Applicant] needed in order to advance his complaints or challenges against the City of Edmonton and the EPS. The EPS subsequently provided [the Applicant] with the Amended Judicial Review Record exactly as it was ordered to by the Court, providing [the Applicant] with all of the information that the Court determined that [the Applicant] required.

[para 64] The Public Body argued that given the nature of the withheld information, the Applicant has failed to provide sufficient reason to find that it is necessary to a fair determination of his rights.

[para 65] The Public Body's arguments on this point are consistent with my finding above, that there are insufficient reasons to find that the remaining withheld information is required for the Applicant to initiate or continue any complaint made to this Office or the LERB (at para. 46 of this Order). The arguments are also consistent with my finding that there is insufficient connection between the remaining withheld information and the Applicant's appeal of a judicial review decision of the Court of Queen's Bench (at para. 44-45 of this Order).

[para 66] Given my above findings, I agree that the Applicant has failed to provide sufficient reasons to find that the withheld information is relevant to a fair determination of the Applicant's rights vis a vis complaints to this Office and/or the LERB, or in relation to his appeal.

[para 67] As discussed at paragraph 42 of this Order, the Applicant also states that he intends to initiate an action in defamation, and requires the contact information of complainants and witnesses in the records at issue in order to serve the individuals with legal papers.

[para 68] The Applicant has not specified which particular complainants or witnesses may be relevant to such a lawsuit, or why contact information collected almost three years ago from the complainants and witnesses is required to prepare for the proceeding (item (d) in the test cited above). The names of all complainants and witnesses have been

provided to the Applicant; if he intends to serve these individuals with a statement of claim (or other legal document), the contact information in the records may be convenient for him but ‘convenience’ is not the standard set out for section 17(5)(c) to apply.

[para 69] In other words, the Applicant has not provided satisfactory support to find that the contact information for the named witnesses and complainants is required to prepare for such a proceeding.

[para 70] I find that section 17(5)(c) is not a factor.

Section 17(5)(h)

[para 71] This factor weighs against disclosing personal information of a third party where disclosure may unfairly damage the reputation of any person referred to in the record.

[para 72] As stated, the statements withheld from the Applicant are allegations of inappropriate conduct by two other individuals. It is sensitive information, and it is also untested. While some of the information has been disclosed to the Applicant in another process (and subsequently in this process as a result), this doesn’t change the sensitive and untested nature of the remaining withheld information. The nature of the allegations made against the two individuals could damage their reputations. Past Orders of this Office have determined that where allegations are untested, damage to reputations resulting from disclosure may be unfair. I find this factor weighs against disclosure.

Section 17(5)(i)

[para 73] This factor weighs in favour of disclosing personal information of third parties where that information was provided by the Applicant. The Applicant argues that he provided information to the Public Body.

[para 74] I cannot see how any of the information withheld under section 17(1) – contact information, birthdates and identifying numbers of complainants and witnesses, and statements made about two other individuals but not the Applicant – could have been provided to the Public Body by the Applicant. I find this section does not apply.

Other possible factors under section 17

[para 75] The Applicant argues that because much of the information about the two other individuals was disclosed, the rest should be disclosed. I do not find this argument persuasive. In this case, the fact that the Applicant has been provided some information of the third parties – enough to assess the case made against him and make arguments on the merits of that case – weighs against the disclosure of further third party personal information. This is especially true given that the remaining information does not relate to the allegations made about the Applicant.

[para 76] In addition, the Public Body had initially withheld more third party information under section 17(1) than what was more recently disclosed. The Applicant was provided with information in the records as part of the judicial review proceeding, which is not related to the Public Body's FOIP response. In the course of that judicial review proceeding, the Court directed the Public Body to provide additional information to the Applicant.

[para 77] The Public Body later reassessed its application of section 17(1) in the context of the Applicant's FOIP request, and provided the Applicant with the same information he had already been provided for the judicial review proceeding.

[para 78] It does not follow that section 17(1) no longer requires the Public Body to withhold personal information that *was not* provided to the Applicant in the judicial review process, just because it may be similar to some information already disclosed.

[para 79] The Applicant cites several subsections of section 40 of the Act as authority to disclose the information in the records. Section 40 of the Act permits a public body to disclose personal information in the circumstances listed. This section is not relevant to responding to an access request. It also does not apply to information other than personal information.

Weighing factors under section 17

[para 80] The Public Body has identified several factors that weigh against disclosing the remaining withheld third party personal information in the records. I have made findings on only three factors: section 17(4)(b) weighs against disclosing any of the third party personal information in the records; section 17(4)(g) weighs against disclosing the few names that continue to be withheld; section 17(5)(h) weighs against disclosing opinions and observations about the behaviour of two other individuals in the records. The Applicant has not persuaded me that any factors weigh in favour of disclosing any of the remaining third party personal information. As all applicable factors weigh against disclosure, I do not need to consider the remaining factors weighing against disclosure.

[para 81] I find that the Public Body properly applied section 17(1), with the exception of the minimal non-identifying information noted at paragraph 31 of this Order. That information was also withheld under section 21(1)(b), which I will consider under issue #3.

2. Did the Public Body properly apply section 20(1)(m) of the Act (disclosure harmful to law enforcement) to the information in the records?

[para 82] The Public Body applied section 20(1)(m) to the payroll number of a Public Body employee and a computer identification code. I have already found that the payroll number was properly withheld under section 17(1). Therefore, I need only consider the application of this provision to the computer identification number.

[para 83] Section 20(1)(m) states:

20(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

*...
(m) harm the security of any property or system, including a building, a vehicle, a computer system or a communications system*

[para 84] The Public Body's arguments on this issue are minimal. It argues that disclosing the computer identification code could jeopardize the security of the Public Body's computer systems.

[para 85] The Public Body acknowledges that it must meet the harms test – the disclosure of the information could reasonably be expected to result in the alleged harm. There must be sufficient evidence to show that the likelihood of any of the above scenarios is consideration above a mere possibility. This test was upheld by the Supreme Court of Canada in *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, [2012] 1 S.C.R. 23.

[para 86] I infer from the Public Body's submissions that the computer identification number is a code used as part of its audit and security functions for its computer systems. On one hand, it is difficult to see how a computer identification number could harm the type of sophisticated system the Public Body presumably has (based on the sensitive nature of the information the Public Body deals with). On the other hand, security of the Public Body's computer systems is of utmost importance, such that revealing codes normally kept confidential might provide insight into the Public Body's security such that a flaw could be found.

[para 87] Further, as is the case in responding to any access request, the Public Body must consider information disclosed to this Applicant to also be disclosed to a wider public (since the Applicant can do as he pleases with this information).

[para 88] In this case, I accept the Public Body's application of section 20(1)(m).

Exercise of discretion

[para 89] Section 20(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 90] 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 91] The Public Body states that it considered the public and private interests in applying section 20(1)(m). It noted that the nature of the information withheld under this provision, and the minimal amount of information withheld led it to conclude that the purposes of the FOIP Act are not furthered by disclosing the information. The Public Body also noted the significance of the harm to its systems that could result from disclosure. Given these factors, it decided to continue to withhold the information.

[para 92] I am satisfied that the Public Body properly exercised its discretion.

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

[para 93] The Public Body applied this provision to two emails between City employees about the conduct of the two individuals other than the Applicant. These emails were then provided to the Public Body.

[para 94] These emails comprise pages 17 and 18 of the records at issue, in their entirety. I found that most of the information on those pages was properly withheld under section 17(1). Only the letterhead logo, the date/time of the email and to whom the email is sent is information that cannot be withheld under section 17(1). Therefore I need only consider the application of section 21(1) to that limited information.

[para 95] 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 96] Section 21(1) addresses intergovernmental relations. 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 97] 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 98] This test has been applied in subsequent Orders (see Order F2009-038 at para. 74-75, which also addressed EPS as the public body applying the provision).

[para 99] Past Orders of this Office have cited the following factors in determining whether a third party supplied information in confidence:

1. communicated to the public body on the basis that it was confidential and that it was to be kept confidential;
2. treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the public body;
3. not otherwise disclosed or available from sources to which the public has access;
4. prepared for a purpose which would not entail disclosure.

(See Orders 99-018, F2008-017). This test was upheld by the Court of Queen's Bench in *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2012 ABQB 595 (at para. 41).

[para 100] In my view, the limited amount of information on pages 17 and 18, to which section 17(1) does not apply, is not information that was supplied in confidence. Therefore, the second criterion in the test for section 21(1)(b) is not met.

[para 101] The Public Body argues that the emails – reports of inappropriate conduct made by City employees to the City facility foreperson – “were not prepared for a purpose which would entail disclosure” (initial submission at para. 64). The emails were later provided by the City to the Public Body in the course of an investigation.

[para 102] With its initial submission, the Public Body provided an affidavit sworn by a Disclosure Analyst in the FOIPP Unit of the Public Body. The Analyst notes that the emails contain very sensitive information of two individuals other than the Applicant, and that this information has not otherwise been disclosed.

[para 103] The content of the emails, including the names of the individuals who wrote the emails, may have been supplied by the City (a local government body) to the Public Body in confidence within the terms of section 21(1)(b). But the contents of the emails (including the senders' names) were properly withheld under section 17(1). Section 21(1)(b) does not necessarily apply to a record in its entirety, if the confidential information can be severed and the remaining information is not meaningless.

[para 104] The remaining information – letterhead logo, recipient's name, and the date/time of the email – does not appear to have been supplied in confidence. In its initial submission, the Public Body has already disclosed that the information was supplied by the City, so the letterhead logo does not reveal confidential information. The Public Body also disclosed to whom the emails were sent. Presumably these items of information were disclosed by the Public Body because they are not confidential, especially given the amount of information in the records already provided to the Applicant.

[para 105] The date/time of the emails has not been revealed elsewhere in the records or submissions, but no reason was provided to lead me to find that the date/time is information supplied in confidence. There is also no indication that disclosing the date/time would reveal the contents of the emails (including the senders' names) that may have been supplied in confidence.

[para 106] I conclude that once the contents of the emails (including senders' names) has been severed, the limited amount of information remaining does meet the test for section 21(1)(b). While this information is minimal, it is not meaningless and might have some value to the Applicant. Therefore, I will order the Public Body to disclose it to the Applicant.

V. ORDER

[para 107] I make this Order under section 72 of the Act.

[para 108] I find that the Public Body properly applied section 17(1) to the information withheld under that provision, with the exception of the information described at paragraph 31.

[para 109] I find that section 20(1) applies to the computer identification codes.

[para 110] I find that section 21(1) does not apply to the limited amount of information to which section 17(1) also did not apply (described at paragraph 31). I order the Public Body to disclose that information to the Applicant.

[para 111] 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