

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2021-20

June 2, 2021

BRAZEAU SENIORS FOUNDATION

Case File Number 005582

Office URL: www.oipc.ab.ca

Summary: The Applicant is a former employee of Brazeau Seniors Foundation (the Public Body). Following an incident between him and a third party individual (the Incident) the Applicant filed several labour grievances and a complaint under the *Alberta Human Rights Act* (the Human Rights Complaint). The Incident and the Public Body's investigation into it (the Investigation) were relevant issues in the grievances and the Human Rights Complaint. The manner in which the Applicant's Union represented him in the grievances became the subject of a fair representation complaint before the Labour Relations Board (the Fair Representation Complaint).

The Applicant made an access to information request under the *Freedom of Information and Protection of Privacy Act* (the Act) to the Public Body, seeking records related to the Incident and the Investigation. The Public Body responded to the access request, but withheld third party personal information under section 17(1) of the Act, and information subject to solicitor-client privilege and litigation privilege under section 27(1)(a) of the Act.

The Adjudicator found that the Public Body withheld information under section 17(1) that was not third party personal information, including statements made by its employees in the course of the Investigation. The Adjudicator also found that contextual information related to third party individuals who participated in the Investigation was also not third party personal information, since it was not about an identifiable individual.

The Adjudicator ordered the Public Body to disclose information withheld under section 17(1) that was not third party personal information.

The Adjudicator confirmed that the Public Body properly withheld information subject to solicitor-client privilege and litigation privilege under section 27(1)(a) of the Act.

Statutes Cited: AB: *Alberta Human Rights Act*, RSA 2000, c A-25.5; *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(n), 1(n)(i), 1(n)(ii), 1(n)(iii), 1(n)(vi), 1(n)(viii), 1(r); 17(1), 17(2)(b), 17(4), 17(4)(g)(i) and (ii); 17(5), 17(5)(c), 17(5)(e), 17(5)(f), 17(5)(i); 27(1)(a); 72. *Personal Information Protection Act*, SA 2003, c P-6.5 s. 1(1)(k); *Rules of Court*, Alta Reg 124/2010, ss. 5.6-5.8.

Authorities Cited: AB: Orders F2013-39, F2013-40, F2013-53, F2014-41, F2018-16, F2020-16, F2020-17, F2020-23, P2011-D-003, P2015-05, P2016-03, P2020-04

Cases Cited: *Blank v. Canada (Minister of Justice)*, 2006 SCC 39; *Edmonton (City) Police Service v Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10; *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52.

I. BACKGROUND

[para 1] The Applicant is a former employee of Brazeau Seniors Foundation¹ (the Public Body). In early 2015, while working for the Public Body, he was involved in an incident (the Incident) with a private individual who was visiting the Public Body's facilities. The Public Body retained external legal counsel to assist with investigating the Incident (the Investigation).

[para 2] Subsequently, the Applicant filed several labour grievances and a complaint under the *Alberta Human Rights Act* (the Human Rights Complaint). The same external legal counsel that had assisted with the investigation represented the Public Body in the grievances and the Human Rights Complaint.

[para 3] The Human Rights Complainant is ongoing. The parties disagree on whether or not the labour grievances are settled. The Public Body states they are; the Applicant takes the position that they are not, and is in disagreement with his own Union on that point. The crux of the dispute between the Applicant and his Union is whether he agreed to a settlement, a condition of which is that he resigns his employment with the Public Body. According to the Public Body, the Applicant filed a fair representation complaint (the Fair Representation Complaint) with the Labour Relations Board against his Union, which leaves the status of the grievances uncertain.

¹ The Public Body spells its name differently throughout its submissions; with an apostrophe and without. The name without an apostrophe appears to be the most common spelling, and is used throughout the Order, with the exception of direct quotations of the Public Body's submissions where an apostrophe appears.

[para 4] On September 28, 2016, the Applicant made an access to information request to the Public Body, under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (the Act). The Public Body had difficulty understanding the scope of the access request and sought clarification from the Applicant. The Applicant restated the scope of the access request in a letter to the Public Body dated December 5, 2016. The Public Body replied to the Applicant in a letter dated December 16, 2016. Per the letter, the Public Body understood that the Applicant was requesting the following 11 categories of information:

1. all statements regarding the January 11, 2015 Incident (written or signed) including: all investigation documents, statements by witnesses, if any, as listed in your request and records regarding the results of the investigation;
2. emails dated April 15, 2015 referring to you as a "sociopath";
3. email dated January 20, 2015 from [name] to [name] and [name] regarding Draft Letter;
4. copies of all Communications sent from Brazeau Senior's Foundation and Brazeau Senior's Foundation legal counsel to the union representative of [the Applicant], [name of union representative] and [name of union representative] between December 1, 2015 and January 31, 2016;
5. email sent from [name] to [name] regarding June 28/29/30 hearing dates, Would you please supply additional information regarding this email; month/date it was sent etc. or additional information regarding its information.
6. email dated November 2, 2015 from [name] to [External Counsel 1], cc: [External Counsel 2], [name];
7. email dated November 3, 2015 from [name] to [External Counsel 1], cc: [name] re: Grievance Hearing Level 1 meeting Notes;
8. email dated November 5, 2015 from [name] to [External Counsel 2], [External Counsel 1];
9. email from [name] to [name] dated November 8, 2015, Subject: [Applicant's first name];
10. email dated November 13, 2015 from [External Counsel 2] to [name] cc: [External Counsel 1] ; and
11. a copy of records contained in your personnel file.

[para 5] The Public Body then informed several third parties whose personal information appeared in responsive records about the access request; it notified the Applicant of the same.

[para 6] The Applicant responded to the Public Body's request for a range of dates regarding no. 5 above, in an e-mail dated December 18, 2016. The Applicant did not provide a range of dates and suggested that the Public Body search for records by the topic of the request.

[para 7] The Public Body responded to the access request on February 2, 2017. It provide 182 pages of records. It withheld some information, and some records entirely, relying on sections 17(1) and 27(1)(a) of Act. Information withheld under section 27(1)(a) was withheld on the basis that it is subject to litigation privilege and/or solicitor-client privilege.

[para 8] On May 31, 2017 the Applicant submitted a request for review of the Public Body's response to the access request, to this office. Investigation and mediation were authorized to attempt to resolve the issue between the parties. Portions of some pages initially withheld entirely under section 17(1) were disclosed to the Applicant. However further issues about the application of sections 17(1) and 27(1)(a) remained unresolved, and this matter proceeded to inquiry.

II. RECORDS AT ISSUE

[para 9] The Records at Issue are those pages from which the Public Body withheld information, or withheld in their entirety. They are listed in this Order below.

[para 10] Each page of the Records at Issue is first numbered according to which category of information it is responsive, and is then assigned a page number within the records responsive to that category. For example, page 05-003 is third page of information provided in response to the fifth category of information requested by the Applicant. I use the same numbering in this Order.

III. ISSUES

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

Issue B: Did the Public Body properly apply section 27(1) of the Act to the information in the records?

IV. DISCUSSION OF ISSUES

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

[para 11] The Public Body withheld the following pages entirely under section 17(1):

Pages: 01-002 to 01-011, and 01-020.

[para 12] The Public Body also withheld some information from the following pages under section 17(1).

Pages: 01-001, 01-012, 01-014 to 01-019, 01-021 to 01-031, 01-049 to 01-051, 11-045, 11-048, 11-051, and 11-052.

Applicable Law

[para 13] “Personal Information” is defined in section 1(n) of the 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 14] The scope of “personal information” is not limited to the categories in section 1(n). It encompasses any information that is “about an identifiable individual.”

[para 15] Section 17(1) of the Act requires a public body to withhold third party personal information in response to an access request where disclosing it would be an unreasonable invasion of the third party’s personal privacy. Section 17(1) states,

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.

[para 16] The application of section 17(1) is informed by sections 17(4) and (5) which provide for presumptions that disclosure is an unreasonable invasion of third party personal privacy, and circumstances to consider in determining whether disclosure is an unreasonable invasion of third party personal privacy, respectively. Sections 17(4) and 17(5) state,

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

(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,

(b) the personal information is an identifiable part of a law enforcement record, except to the extent that the disclosure is necessary to dispose of the law enforcement matter or to continue an investigation,

(c) the personal information relates to eligibility for income assistance or social service benefits or to the determination of benefit levels,

(d) the personal information relates to employment or educational history,

(e) the personal information was collected on a tax return or gathered for the purpose of collecting a tax,

(e.1) the personal information consists of an individual's bank account information or credit card information,

(f) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations,

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

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

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

or

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

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

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

- (b) *the disclosure is likely to promote public health and safety or the protection of the environment,*
- (c) *the personal information is relevant to a fair determination of the applicant's rights,*
- (d) *the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,*
- (e) *the third party will be exposed unfairly to financial or other harm,*
- (f) *the personal information has been supplied in confidence,*
- (g) *the personal information is likely to be inaccurate or unreliable,*
- (h) *the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and*
- (i) *the personal information was originally provided by the applicant.*

[para 17] The list of circumstances in section 17(5) is not exhaustive. Any other relevant circumstances must also be considered when determining whether or not disclosure is an unreasonable invasion of third party personal privacy.

[para 18] The application of section 17(1) is also limited by section 17(2), which lists circumstances where disclosure is not an unreasonable invasion of third party personal privacy. In this case, the index of records provided by the Public Body indicates that it applied section 17(2)(b) to some records; the provision states,

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

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

Application of the Law

[para 19] While its index of records indicates that it applied section 17(2)(b) to some records, I note that the Public Body does not provide argument about the applicability of section 17(2)(b) in this inquiry.

[para 20] If the Public Body applied section 17(2)(b) to any of the records at issue when responding to the access request, it misunderstood the section. Section 17(2)(b) describes circumstances where section 17(1) does *not* prohibit releasing third party personal information, while the Public Body's index of records indicates that it completely *withheld* the following pages, citing section 17(2)(b) as authority to do so. However, since there is no evidence or argument before me that section 17(2)(b) applies to any of the records, I do not need to consider it any further.

Is the withheld information third party personal information under the Act?

[para 21] The Public Body describes the information that it withheld under section 17(1) as follows:

The records and information withheld under section 17 include the personal information of various third parties. Specifically, the third parties consisted primarily of Brazeau employees and witnesses to the Incident were either interviewed as part of the Investigation or similarly provided a witness statement.

* * *

The nature of these records was such that the individual's personal information could be determined from the context of the particular record, even where the individual's name was redacted. This resulted in the entire record requiring to be redacted in several instances. These interview notes were received from the third parties whose interests could be affected by the disclosure of such records. Additionally, the fact that such records were created in the course of the Investigation (at the direction of Brazeau's legal counsel) into the Applicant's conduct and provided to Brazeau in confidence with the expectation that they would remain confidential and would not be disclosed to third parties, including the Applicant is a critical factor weighing against disclosure.

[para 22] The Public Body does not elaborate on what personal information can be determined from the context of any record. With the possible exception of the information on pages 01-011, 01-014, 01-015, and 01-016 (discussed below) I do not see how the context of any of the records permits anyone to determine any third party personal information.

[para 23] Information withheld under section 17(1) applies to two categories of people; Public Body employees, and individuals not employed by the Public Body (Third Party Individuals). I consider each category in turn.

Information related to Public Body Employees

[para 24] Much of the information related to Public Body employees is not third party personal information.

[para 25] Information withheld under section 17(1) relating to Public Body employees consists primarily of witness statements from them taken during the Investigation, and the content of memos stating the Public Body's understanding of its employees' versions of events.

[para 26] I considered statements made by public body employees in the course of a workplace investigation in Order F2020-23. My finding here is the same as my finding there: such statements are not personal information unless there is something about them that adds a personal dimension. In Order F2020-23, I stated at paras. 158 to 161,

Under section 17(1), the Public Body redacted its employee's answers to the investigator's questions in their entirety, applying section 17(1) in a blanket fashion. It appears that the Public Body considered that the mere fact that a statement was made in the context of an investigation makes the statement, or the fact that a certain person made it, personal information. This is not the case.

The Public Body's employees took part in the investigation as matter of their employment duties. The fact that they made any particular statement is a matter of performance of their duties, and as such is not their personal information. See Order F2009-026 at paras. 10 to 11. This principle also extends to opinions about an applicant that are formed as a result of dealing with the applicant in the course of employment duties, when the opinion is given as matter of employment duties, such as answering the investigator's questions. As stated by the Adjudicator in Order F2009-026 at paras. 14 to 17:

The employee brought an incident that took place in the course of her employment to the attention of the Public Body's security office. As the records at issue indicate that the Applicant has knowledge of the incident described in the records at issue, and is aware of the employee's role in the incident, it would not be possible to provide the Applicant with his own personal information, without also providing information about the employee. The question becomes whether the information about the employee is personal information, or information about the employee as a representative of the Public Body.

Not only do I find that the employee's knowledge of the incident arose from her duties as an employee, but I find that reporting the incident to the security office and making a statement about the incident was also part of her duties as an employee. All of her dealings with the Applicant were done as an employee of the Public Body and decisions made in relation to his requests were made with the authority of the Public Body. This finding is supported by the employee's reported statement referring to "enforcing guidelines", which appears in paragraph 1(e) of page 2 of the records at issue.

Under section 1(n) of the Act, cited above, an opinion held about an individual is the personal information of the subject of the opinion. However, the fact that an individual holds an opinion about another individual can be information about the individual who has formed the opinion. In Order F2006-006 the Adjudicator noted:

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

In this case, the opinion formed about the Applicant is based on the employee's experience providing services to the Applicant on behalf of the Public Body, and on a conversation that took place between the Applicant and the employee regarding the

Public Body's guidelines. Further, review of the records at issue indicates that this opinion was given to the security office so that the security office could assess the situation and take any steps that office considered necessary. I find that the opinion was also provided by the employee in a representative capacity, as part of her employment duties.

As I find that the information in the records at issue about the employee is about her as a representative of the Public Body, I find that section 17 does not apply to that information.

I agree with the Adjudicator in Order F2009-026.

Accordingly, section 17(1) does not apply in blanket fashion to the answers given to the investigator. As with the Public Body's other redactions under section 17(1), it must be applied to individual pieces of personal information. The result is that much of the information redacted from these pages should be disclosed to the Applicant.

[para 27] Accordingly, information revealing that an employee participated in the Investigation or what they said about the Incident is not personal information, and cannot be withheld under section 17(1). Similarly, the fact that an employee holds an opinion about the Applicant is not personal information where the opinion is provided in an employment capacity is not personal information.

[para 28] As in Order F2020-23, even though the witness statements are not third party personal information on the whole, they may contain third party personal information which the Public Body is required to withhold under section 17(1). Reviewing the records reveals that there is some third party personal information about Public Body employees present on these pages, as described below.

Statements about an employee's state of mind

[para 29] In Order F2014-41, the Adjudicator considered whether the statement of an employee about a safety concern in the workplace was the employee's personal information. The employee's statement described the employee's state of mind. The Adjudicator held the statement was the employee's personal information, stating at para. 22,

With regard to the employee Information, the Information has a personal dimension as it refers to her personal point of view. The information that was severed is therefore about her, rather than about the public body she represents as an employee.

[para 30] Information of this type appears in the records at issue, and is personal information under the Act, since it is about an identifiable individual.

One employee's opinions about another employee (not the Applicant)

[para 31] Some information in the records contains statements by one employee about another. These statements involve an assessment about the state of mind of the other

employee, and what one employee believe another was feeling. They are the personal views of one colleague about another, rather than the Public Body’s views. Since these opinions are about other individuals, the content of them is the personal information of the individual the opinion is about under section 1(n)(viii). As noted in the above passage from Order F2020-23, the fact that one person holds an opinion of another, is also the personal information of the one who holds the opinion.

Information related to Third Party Individuals

[para 32] Much of the information withheld in respect of the Third Party Individuals is not personal information. It consists of statements of fact about what a Third Party Individual saw or heard during the incident, but is not about an identifiable individual.

[para 33] Below, I describe information that is personal information about Third Party Individuals.

The Fact that a Third Party Individual took part in the Investigation

[para 34] The Applicant strenuously argues that the fact that an individual took part in the Investigation is not personal information. As described above, the Applicant’s position is correct regarding Public Body employees who participated in the Investigation as a matter of their employment duties. The circumstances differ for those who are not Public Body employees; they took part in the Investigation as private individuals, rather than as actors for the Public Body. What an individual does is personal information. This point has been made several times in decisions under the *Personal Information Protection Act*, SA 2003, c P-6.5 (PIPA). In Order P2011-D-003, former Commissioner Work stated at para. 30,

...What is "about him" is information such as what he has said or expressed as an opinion, the fact he has done certain things or taken certain steps, details of his personal history, and personal details about him such as his name and other associated information such as where he lives or his telephone number. This is not meant to be an exhaustive list, but is provided to illustrate the type of information that is personal information,...

[emphasis added]

[para 35] The above understanding of “personal information” was subsequently applied in further orders. See, for example, Orders P2015-05 at para. 24, P2016-03 at para. 22, and P2020-04 at para. 20.

[para 36] While the definition of “personal information” under PIPA does not exactly mirror that under the Act, the foundation of “personal information” is the same in both pieces of legislation; it is information that is about an identifiable individual. The definition of “personal information” in section 1(1)(k) of PIPA states,

(k) “personal information” means information about an identifiable individual;

[para 37] Given the foundational similarity of the definitions of “personal information” in PIPA and the Act, I find that the statement of the Former Commissioner from Order P2011-D-003 applies to personal information under the Act as well. There is no difference between them so significant that what an individual does is personal information under one, but not the other. This is not to say that a description of something that *anyone* did is necessarily personal information; the information must be such that the individual doing something is identifiable.

Personal Information listed in section 1(n) of the Act

[para 38] The information withheld under section 17(1) in respect of Third Party Individuals includes their names, details of family relations, details of an individual’s health, opinions about an individual, and states the colour of an individual. This is personal information under sections 1(n)(i), (ii), (iii), (vi), and (viii) of the Act. I note that some of the third party names that were withheld are the beneficiaries listed on the Applicant’s benefits program.

Other information about an identifiable individual

[para 39] The withheld information contains statements about a Third Party Individual’s feelings and state of mind. This is personal information for the same reasons that statements about a Public Body employee’s state of mind are personal information.

[para 40] Some of the information withheld under section 17(1) reveals that the Third Party Individual holds an opinion or view about the Applicant. While the content of views and opinions about the Applicant are his personal information under section 1(viii), the fact that an individual holds the opinion is that individual’s personal information.

Contextual Information related to Third Party Individuals

[para 41] Here, I consider whether the context in which the witness statements and notes from interviews with Third Party Individuals found on pages 01-011, 01-014, 01-015, and 01-016 appear constitutes personal information or permits someone to determine third party personal information. The features of the context are that the statements were made as part of the Investigation, by individuals who witnessed the Incident.

[para 42] I do not see that the context of these statements reveals any personal information not expressly present in the statements themselves. At most, the context could reveal whether *an* individual was directly involved in the Incident, and/or that *an* individual spoke to the Public Body in the course of the Investigation. Simply revealing that someone took part in the Investigation does not lend itself to identifying who that person is. As such, the contextual information is not about an “identifiable” individual and is not personal information.

Some of the Withheld Information is the Applicant’s personal information

[para 43] I note that the information withheld under section 17(1) contains information about the Applicant, in the form of opinions that others have about him. Under section 1(n)(viii) of the Act, the content of opinions about the Applicant are the Applicant's personal information. Such information is not third party personal information.

[para 44] Section 17(1) only applies to third party personal information. "Third party" is defined in section 1(r) as follows.

(r) "third party" means a person, a group of persons or an organization other than an applicant or a public body;

Presumptions under section 17(4)

[para 45] I note that the parties have argued about the applicability of the presumptions under section 17(4) on the basis that all information that the Public Body withheld under section 17(1) is personal information. Above, I have found that much of it is not. Accordingly, this discussion, and discussion of relevant circumstances under section 17(5), is limited to considering whether they apply to information that I have found is third party personal information.

[para 46] The Public Body applied presumptions against disclosure under section 17(4)(g) to all information that it withheld under section 17(1). It did not specify whether section 17(4)(g)(i) or (ii) was applied to any particular information.

[para 47] Upon my review of withheld information, I find that the presumptions against disclosure under sections 17(4)(g)(i) and 17(g)(ii) apply to the names of the Third Party Individuals, where it appears with other personal information about them, as described above, including information that reveals that a Third Party Individual took part in the Investigation.

[para 48] I find that the same presumptions against disclosure apply to the names of Public Body employees where the information shows that the name is used in a personal capacity rather than as a matter of employment duties and appears along with statements about an employee's state of mind, or personal opinions about other employees.

[para 49] The presumptions arising under sections 17(4)(g) do not apply to the names of Public Body employees when acting in their capacity as employees.

[para 50] I find that there are no other applicable presumptions under section 17(4).

Relevant Circumstances under section 17(5)

[para 51] The Public Body states that it considered all of the listed circumstances in section 17(5) when responding to the access request. In its submissions in this inquiry, it highlights sections 17(5)(c), (e), and (f) as relevant. I agree that they are; I discuss them in turn below.

[para 52] The Public Body makes contradictory submissions regarding section 17(5)(c). It states at para. 18 of its initial submission:

The Incident, Investigation and findings from the Investigation are relevant issues in the human rights proceedings, which are still ongoing.

[para 53] Later, at para. 32 of its submissions, the Public Body states,

Additionally the witness interview notes and any other record where section 17 was applied are not relevant to any other proceedings that the Applicant may have commenced against Brazeau, including proceedings before the Human Rights Tribunal or the Labour Board. The release of these records would have no bearing on the determination of those proceedings, if disclosed.

[para 54] I do not see how the Incident, the Investigation, and the findings of the Investigation can be relevant, while the witness interviews about the Incident collected through the Investigation and other records from the Investigation are not. The Public Body does not elaborate on how this might be the case.

[para 55] The Public Body did not comment on the relevance of withheld information to the Fair Representation Complaint.

[para 56] The Applicant explains that the records are relevant to the Human Rights Complaint and the grievances. The Applicant's position is that he has been improperly terminated, and discriminated against in connection with the Incident and the Investigation. I note that while I do not have a copy of the Human Rights Complaint, the Applicant attributes the Public Body's treatment of him throughout the Incident and the Investigation to stereotypical views, based on his colour and gender. Allegations of this nature are captured under the *Alberta Human Rights Act*.

[para 57] The Applicant further states that withheld personal information is relevant to the Fair Representation Complaint. He states that his Union has admitted that the witness statements informed the manner in which it represented him during the grievances. Thus they are at the heart of the Fair Representation Complaint.

[para 58] The names of the Third Party Individuals who spoke to the Public Body about the Incident, and information that reveals the fact that they took part in the Investigation, are relevant to a fair determination of the Applicant's rights in the Human Rights Complaint, the grievances, and the Fair Representation Complaint. Knowing who the individuals are will better enable the Applicant to know and challenge the Public Body's, and his Union's, treatment of him. Section 17(5)(c) weighs in favour of finding that disclosing the names is not an unreasonable invasion of third party personal privacy.

[para 59] The statements about a Third Party Individual's health that appear on pages 01-015 and 01-016 are also relevant to the determination of the Applicant's rights. These statements are relevant to considering whether what is reported in several other

statements is accurate. Section 17(5)(c) weighs in favour of finding that disclosing these statements is not an unreasonable invasion of third party personal privacy.

[para 60] None of the other third party personal information withheld under section 17(1) appears relevant to the Applicant's grievances, Human Rights Complaint, or Fair Representation complaint. Section 17(5)(c) does not weigh in favour of disclosing that information.

[para 61] Regarding section 17(5)(e), the Public Body considered that this circumstance weighed in favour of withholding third party personal information since several witnesses expressed that they were scared of the Applicant and concerned for their safety if their personal information were released.

[para 62] I understand that the witnesses are concerned. However, more than mere concern about the possibility of harm is required before section 17(5)(e) becomes a relevant circumstance. (Orders F2013-39 at para. 38, F2013-40 at para. 33, F2018-16 at para. 25, F2020-17 at para. 59) There needs to be some evidence of a prospect of harm, which there is not in this case. I find that section 17(5)(e) is irrelevant.

[para 63] Regarding section 17(5)(f), the Public Body's former Chief Administrative Officer (CAO), swore an Affidavit, attesting to the confidential nature of the Investigation. She states,

All interviews of witnesses were conducted at the direction of Legal Counsel and under the express understanding that all statements and information provided would remain confidential.

[para 64] The Applicant asserts that the statements were not made confidentially, and that, at his request, witnesses were informed that they may be called upon to testify in the proceedings which he commenced.

[para 65] As the one in charge of the Investigation, I find that the CAO is in a better position to know the terms of the Investigation than the Applicant. While the Applicant asserts that witnesses were told they may have to testify, the CAO was in position to establish the terms of the Investigation. I find that the witnesses gave their statements in confidence.

[para 66] With regard to Third Party Individuals, I find that this consideration weighs heavily in favour of a finding that disclosing any of their personal information is an unreasonable invasion of third party personal privacy.

[para 67] The Third Party Individuals who participated in the Investigation provided their own personal information on the understanding that it would be kept confidential. That understanding undoubtedly played a role in their decisions to do so. Under those circumstances, the Public Body's assertion of confidentiality must be afforded enough weight to constitute a substantial promise that will not be set aside lightly. If it were, such

assertions of confidentiality would be rendered nearly meaningless, something that the Act does not intend.

[para 68] Section 17(5)(i) is a relevant consideration in respect of the names of the third parties that are listed as beneficiaries of the Applicant's benefits plan. These names were provided by the Applicant.

[para 69] I consider one relevant circumstance not listed in section 17(5): some of the withheld information is the Applicant's personal information, in the form of Third Party Individuals' opinions about him. Revealing this information may reveal the fact that a Third Party Individual holds a given opinion of the Applicant, which is the third party individual's personal information. Since revealing this information will enable the Applicant to obtain his own personal information, this consideration weighs in favour of a finding that disclosure is not an unreasonable invasion of third party personal privacy.

Weighing the circumstances in section 17(5) against the presumptions against disclosure under section 17(4)

[para 70] Though the names of the Third Party Individuals and statements about the health of a Third Party Individual are relevant for determining the Applicant's rights, I find that the presumptions against disclosure under section 17(4)(g)(i) and (ii) are not outweighed by considerations under section 17(5). Though section 17(5)(c) weighs in favour of disclosure, section 17(5)(f) weighs more strongly against it.

[para 71] Regarding information consisting of the fact that Third Party Individuals hold opinions about the Applicant, I find that the Public Body is required to withhold this information as well. Though releasing the information would enable the Applicant to receive his own personal information in the form of the opinions themselves, this is not a consideration that outweighs the presumption against disclosure arising under sections 17(4)(g)(i) and (ii) and the consideration in section 17(5)(f).

[para 72] Regarding disclosure of the names of the beneficiaries of the Applicant's benefits plan, I find that consideration of section 17(5)(i) is sufficient to outweigh any presumption against disclosure of such information. This information is already known to the Applicant.

[para 73] As for other personal information of Third Party Individuals, there are no factors weighing in favour of disclosure. As such, the presumptions that arise under sections 17(4)(g)(i) and (ii) require the Public Body to withhold this information.

[para 74] Regarding personal information of Public Body employees in the form of statements about their state of mind and opinions of other employees, and names appearing in a personal capacity, I find that the Public Body is required to withhold this information. There are no circumstances that outweigh the presumptions against disclosure arising under sections 17(4)(g)(i) and (ii).

Issue B: Did the Public Body properly apply section 27(1) of the Act to the information in the records?

[para 75] Section 27(1)(a) 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,

[para 76] The Public Body withheld the following pages entirely under section 27(1)(a) on the basis that they are subject to solicitor-client privilege and litigation privilege.

Pages: 01-043 to 01-047, 03-001 to 03-008, 06-001, 06-002, 07-001 to 07-003, 08-001, and 10-002.²

[para 77] As stated in *Edmonton (City) Police Service v Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (*EPS*), when a Public Body does not provide records that it asserts are subject to solicitor-client privilege for review, it may establish that such records were properly withheld by meeting the civil litigation standard for refusing to produce such records, set in the Rules of Court, (Alta Reg 124/2010, ss. 5.6-5.8).

[para 78] The civil litigation standard requires that the Public Body provide an affidavit sufficiently describing the records to enable me to conclude that solicitor-client privilege is properly claimed.

[para 79] In *EPS*, Justice Renke described the criteria for recognizing solicitor-client privilege at para. 66:

The criteria for recognizing solicitor-client privilege were confirmed by Justice Major in *Pritchard v Ontario (Human Rights Commission)*, 2004 SCC 31 at para 15:

15 Dickson J. outlined the required criteria to establish solicitor-client privilege in *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821, at p. 837, as: “(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”. Though at one time restricted to communications exchanged in the course of litigation, the privilege has been extended to cover any consultation for legal advice, whether litigious or not

[para 80] The Public Body provided an affidavit describing records it asserts are privileged, sworn by its Finance Manager (the Privilege Affidavit).

² In its index of Privileged Records, the Public Body indicates that page 03-001 is only subject to litigation privilege. However, the Privilege Affidavit states that it is subject to solicitor-client privilege as well. As such, I include it in this discussion.

[para 81] I find that the descriptions of solicitor-client privilege meet the civil litigation standard. In each description, I can clearly see that the record described is a communication with external legal counsel, for the purpose of seeking legal advice, and was intended to remain confidential.

[para 82] Since I have found that the above records are subject to solicitor-client privilege, I do not need to consider whether they are also subject to litigation privilege.

[para 83] The Public Body asserted that the following records are subject to litigation privilege only:

Pages: 05-001 to 05-003, 09-001, and 09-002.

[para 84] For the reasons below, I find that they are subject to litigation privilege.

[para 85] As with solicitor-client privilege, where a Public Body does not provide records that it asserts are subject to litigation privilege, it must meet the civil litigation standard for refusing to produce such records. (Order F2020-16 at para. 93).

[para 86] The Supreme Court of Canada described litigation privilege in *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52. The Court said, at para. 19,

Litigation privilege gives rise to an immunity from disclosure for documents and communications whose dominant purpose is preparation for litigation. The classic examples of items to which this privilege applies are the lawyer's file and oral or written communications between a lawyer and third parties, such as witnesses or experts: J.-C. Royer and S. Lavallée, *La preuve civile* (4th ed. 2008), at pp. 1009-10.

[para 87] The Supreme Court described when litigation privilege ends in *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 (*Blank*). The Court stated at para. 34,

The purpose of the litigation privilege, I repeat, is to create a "zone of privacy" in relation to pending or apprehended litigation. Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose -- and therefore its justification. But to borrow a phrase, the litigation is not over until it is over: It cannot be said to have "terminated", in any meaningful sense of that term, where litigants or related parties remain locked in what is essentially the same legal combat.

[para 88] The Privilege Affidavit provides descriptions for records over which only litigation privilege is asserted. Each description mentions that the record was created in anticipation, or in the course, of the grievance proceedings. Owing to the uncertain status of the grievances caused by the Fair Representation Complaint, I find that the Applicant and Public Body remain "locked in" the grievance process. The privilege has not yet ended.

[para 89] The descriptions in the Privilege Affidavit all state the records were created for the dominant purpose of litigation. Determining whether a record created in the

course of an investigation is created for the dominant purpose of litigation can be a nuanced task. (See, for example, Order F2020-16). However, the records subject to litigation privilege in this case are not related to the Investigation. Rather, they are all described to be discussion that occurred as the grievances were ongoing, concerning the grievance process, the Public Body's involvement in it, and possible settlement. I find that the descriptions meet the civil litigation standard.

Exercise of Discretion

[para 90] Unlike other discretionary exceptions to disclosure, where information is properly withheld on the basis that it is subject to solicitor-client privilege, the fact that it is subject to solicitor-client privilege justifies exercising discretion to do so. *EPS*, at para. 74.

[para 91] The same approach to exercising discretion has also been applied where information is withheld on the basis that it is subject to litigation privilege. As stated in Order F2020-16 at paras. 138 and 139,

Past Orders of this Office have found that once solicitor-client privilege has been established, withholding the information is usually justified for that reason alone (see Orders F2007-014, F2010-007, F2010-036, and F2012-08 citing *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* (cited above, at para. 71).

I agree and given the Supreme Court of Canada's recent discussion of litigation privilege in *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52, I would extend this rationale to information protected by litigation privilege.

[para 92] Accordingly, I find that the Public Body properly exercised its discretion to withhold information under section 27(1)(a).

V. ORDER

[para 93] I make this Order under section 72 of the Act.

[para 94] I confirm the Public Body's decision to withhold information under section 27(1)(a) of the Act.

[para 95] I order the Public Body to disclose to the Applicant information that it withheld under section 17(1) that is not personal information. I describe the information to be disclosed in the Disclosure Table at the end of this Order.

[para 96] I order the Public Body to confirm to me that it has complied with this Order within 50 days of receiving it.

John Gabriele
Adjudicator
/bah

Disclosure Table

Page	Information to be disclosed
01-002	All information except the names of Third Party Individuals
01-003	All information except the names of Third Party Individuals
01-004	All information except the names of Third Party Individuals
01-005	All information except the names of Third Party Individuals
01-006	All information except: <ul style="list-style-type: none"> - The names of Third Party Individuals - Words after the comma in the last sentence of the second paragraph
01-007	All information except: <ul style="list-style-type: none"> - The names of Third Party Individuals - The first three words of the thirteenth line from the top, referencing an employee's state of mind
01-008	All information except the names of Third Party Individuals
01-009	All information except the names of Third Party Individuals
01-010	All information
01-011	All information except: <ul style="list-style-type: none"> - The names of Third Party Individuals - The first sentence beginning and ending on the second line of the body of the statement - The sentence beginning and ending on the eighteenth line of the body of statement - All words in the body of the statement appearing after the word "when" on the twenty-first line of the body of the statement
01-012	All information except: <ul style="list-style-type: none"> - The names of Third Party Individuals - References to relations of Third Party Individuals
01-014	All information except: <ul style="list-style-type: none"> - The names of Third Party Individuals - The colour of Third Party Individuals - The sentence beginning after the dash on the sixth line from the top - The last two sentences of the body of the statement

01-015	<p>All information except:</p> <ul style="list-style-type: none"> - The names of Third Party Individuals - The last two words of the second paragraph - The last eight words of the third paragraph - The fourth paragraph - The fifth paragraph
01-016	<p>The term “description” used below refers to all information after the semi-colon at the end of the sentence stating who gave the description.</p> <p>All information except:</p> <ul style="list-style-type: none"> - The names of Third Party Individuals - The last nine words of the first sentence in the first paragraph of the description - All words after the word “and” in the fourth sentence of the fourth paragraph of the description - The fifth sentence of the fourth paragraph of the description - The quoted words in the fifth paragraph of the description - The fourth through seventh words of the sixth paragraph of the description - The last sentence of the seventh paragraph of the description - The eighth paragraph of the description - The ninth paragraph of the description
01-017	<p>All information except:</p> <ul style="list-style-type: none"> - The names of Third Party Individuals - The words following the comma in the first sentence of the fifth paragraph, up to but not including the word “it” - The last four words of the second sentence of the fifth paragraph
01-018	All information except the names of Third Party Individuals
01-019	All information
01-020	<p>All information except:</p> <ul style="list-style-type: none"> - The names of Third Party Individuals - The second-last sentence
01-021	<p>All information except:</p> <ul style="list-style-type: none"> - The names of Third Party Individuals - The fifth through eighth words of the first sentence below the list of those in attendance
01-022	All information except the names of Third Party Individuals
01-023	<p>All information except:</p> <ul style="list-style-type: none"> - The names of Third Party Individuals

	<ul style="list-style-type: none"> - The last sentence of the fifth paragraph below the list of those in attendance - The first three words of the last sentence on the page
01-024	All information
01-025	<p>All information except:</p> <ul style="list-style-type: none"> - The names of Third Party Individuals - The third sentence of the third paragraph - The last sentence of the fourth paragraph - The second sentence of the eighth paragraph
01-026	<p>All information except:</p> <ul style="list-style-type: none"> - The names of Third Party Individuals - The last sentence of the fourth paragraph - The last five words of the first sentence of the sixth paragraph
01-027	<p>All information except:</p> <ul style="list-style-type: none"> - The names of Third Party Individuals - The last seven words of the first sentence on the page - References to the relation of a Third Party individual in the third paragraph - The fourth paragraph
01-028	<p>All information except:</p> <ul style="list-style-type: none"> - The names of Third Party Individuals - The last sentence of the second paragraph - The sixth paragraph - The first five words of the last sentence on the page
01-029	<p>All information except:</p> <ul style="list-style-type: none"> - The last five words of the first sentence on the page
01-030	<p>All information except:</p> <ul style="list-style-type: none"> - The names of Third Party Individuals - References to relations in the first sentence of the first paragraph beneath the list of those in attendance - The last six words of the first sentence of the fifth paragraph beneath the list of those in attendance
01-031	<p>All information except:</p> <ul style="list-style-type: none"> - The names of Third Party Individuals - The last five words of the sixth paragraph - The last six words of the first sentence of the seventh paragraph - The fifth, sixth, and seventh words of the second sentence of the seventh paragraph

01-051	All information except: <ul style="list-style-type: none">- The names of Third Party Individuals- The name of a Public Body employee that appears as the eighth word in fifth bullet point
011-045	All information
011-048	All information
011-051	All information
011-052	All information