ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2023-13

March 27, 2023

CHILDREN'S SERVICES

Case File Number 022220

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 Children's Services (the Public Body) for family services records relating to her.

The Public Body provided responsive records, with information withheld under sections 4(1)(a) (records in a court file), 17(1) (invasion of third party privacy), 21 (harm to intergovernmental relations), and 27 (privileged information).

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

The Adjudicator found that some of the information withheld under section 17(1) is not information to which that provision applies. The Adjudicator also found section 17(1) did not apply to information that had been supplied to the Public Body by the Applicant. The Adjudicator upheld the Public Body's application of section 17(1) to the remaining information.

The Adjudicator found that section 21(1) did not apply to the information in the records.

The Adjudicator found that the Public Body properly applied section 27(1)(a) to the information in the records.

Statutes Cited: AB: *Child, Youth and Family Enhancement Act*, R.S.A 2000, c. C-12, ss. 4, 126.1, *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 17, 21, 27, 71, 72, *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, s. 9.

Authorities Cited: *Alberta (Attorney General) v. Krushell*, 2003 ABQB 252 (CanLII), 2003 ABQB 252, *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2012 ABQB 595, *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2022 ABCA 397 (CanLII), *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (CanLII), [2012] 1 S.C.R. 23, *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner), 2014 SCC 31 (CanLII)*

Cases Cited: AB: Orders 97-002, 99-018, F2004-015, F2004-018, F2006-006, F2008-009, F2008-012, F2008-017, F2008-028, F2008-031, F2009-033, F2010-031, F2013-08, F2013-51, F2014-02, F2014-16, F2016-18, F2018-75, F2020-35, **Ont**: Orders MO-1288, MO-3052, MO-3517

I. BACKGROUND

[para 1] The Applicant made an access request dated July 7, 2020, under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) to Children's Services (the Public Body) for:

> Full discloser (sic) of family services records from Jan. 2016 to (including) last phone cal (sic) to [LC] dated July 6th, 2020. Copy of fax sent to [LC] in February 2017. Copy of all text messages of Death threats sent to family services in 2016-2017. Copy of meeting in central Alberta Dec 2016. Copies of Emergency protection orders sent to your organization. Any other copy and reason for taking my child out from under my feet. I have given an aprox (sic) date.

The date range was for January 1st, 2016 to July 7th, 2020.

[para 2] The Applicant's request was subsequently narrowed to only her own information and not her children's information, as the Applicant did not want to provide a copy of her custody agreement.

[para 3] The Public Body provided 118 pages of responsive records, with information withheld under sections 4(1)(a) (records in a court file), 17(1) (invasion of third party privacy), 21 (harm to intergovernmental relations), and 27 (privileged information).

[para 4] The Applicant requested a review of the response from the Public Body. The Commissioner authorized an investigation; this was not successful and the matter proceeded to an inquiry.

II. RECORDS AT ISSUE

[para 5] The records at issue consist of the withheld portions of the responsive records located by the Public Body that contain the Applicant's personal information.

III. ISSUES

[para 6] The issues as set out in the Notice of Inquiry dated July 21, 2022, are as follows:

1. Are the records excluded from the application of the Act by section 4(1)(a) (court records)?

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

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

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

IV. DISCUSSION OF ISSUES

Preliminary Issue – Scope of inquiry

[para 7] The Applicant's submissions to this inquiry primarily address the custody dispute between her and her former partner. The Applicant has provided copies of text messages from her former partner (and others), as well as other documents such as emergency protection orders, apparently in support of arguments relating to her former partner's parenting and appropriateness as a guardian. Custody matters do not fall within the scope of the Commissioner's authority under the FOIP Act. As such, I will not address such arguments in this Order.

[para 8] The Applicant also makes arguments regarding the appropriateness of the Public Body's actions in relation to the Applicant, her child, and her former partner. How the Public Body fulfilled its obligations under the *Child, Youth and Family Enhancement Act* (*CYFEA*) are also not at issue in this inquiry. I will address these arguments where applicable to the discussion of section 17(1).

1. Are the records excluded from the application of the Act by section 4(1)(a) (court records)?

[para 9] The Public Body has withheld pages 88-91 citing section 4(1)(a). If this provision applies to the records at issue, I do not have jurisdiction to review the Public Body's decision to withhold them.

[para 10] Section 4(1)(a) of the Act states:

> *4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:*
>
> > *(a) information in a court file, a record of a judge of the Court of Appeal of Alberta, the Court of Queen's Bench of Alberta or The Provincial Court of Alberta, a record of a master of the Court of Queen's Bench of Alberta, a record of a justice of the peace other than a non-presiding justice of the peace under the Justice of the Peace Act, a judicial administration record or a record relating to support services provided to the judges of any of the courts referred to in this clause;*

[para 11] This provision applies to information taken or copied from a court file (Order F2004-030 at para. 20 and F2007-007 at para. 25); it also applies to information copied from a court file to create a new document, such as a court docket (*Alberta (Attorney General) v. Krushell*, 2003 ABQB 252 (CanLII), 2003 ABQB 252). However, these orders state that records emanating from the Public Body itself or from some source other than the court file are within the scope of the Act, even though duplicates of the records may also exist in the court file (Order F2010-031).

[para 12] The Public Body states that pages 88-89 and pages 90-91 are documents that were filed with the court.

[para 13] Both records are stamped as having been filed with the court. As such, I agree that these pages are copies from a court record. Nothing on these pages indicate that they have been amended or altered such that they would be new records (e.g. notations added by the Public Body that do not appear on the filed copy of records – see Order F2018-75, at para. 73). Therefore, the FOIP Act does not apply to pages 88-91 and I do not have jurisdiction to review how the Public Body responds with respect to those pages.

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

[para 14] The Public Body withheld information in many of the responsive records under section 17(1).

[para 15] 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*

...

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

[para 17] 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 18] 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 19] Pages 24, 65, 66 were withheld in their entirety. The information in these pages is described in the Public Body's index of records as "File Information/third party." Pages 24 and 66 appear to be file cover sheets and do not contain any information that identifies an individual. However, the Public Body's initial submission states that Children's Services files are created under the name of the child and not the name of guardians. Given the context of the Applicant's access request, it is clear that the information on the file cover sheets relates to the Applicant's child. As such, the information on the cover sheets that provides details of the file, constitutes the child's personal information. Possibly this information could be severed from these pages and provided to the Applicant; however, the information does not relate to the Applicant at all. As the Applicant narrowed her request to include only her own personal information, I find that these pages are not responsive.

[para 20] I make the same finding with respect to page 65, which consists of a standard form that has been filled out, and contains the name of a third party, as well as the file number associated with that third party. Similarly, pages 64, 67, 69, 72 and 112 do not contain personal information of the Applicant. I needn't consider the application of section 17(1) to these pages.

[para 21] A few other pages of the records do not contain the Applicant's personal information but they are part of a record that does contain the Applicant's personal information. In Order F2018-75 I discussed how public bodies should properly characterize information as non-responsive. I said (at paras. 55-58):

> Separate items of information in a record cannot be viewed out of context of the record as a whole when determining if they are separate and distinct from the remaining record. For example, there may be an email written about the Applicant, but the signature line of the author, or the date of the email, or the address line, are not the applicant's personal information if separated from the context of the email. However, it would be unreasonable to characterize those items of information as not responsive to a personal information request from the Applicant for emails written about him. As stated in Order F2009-025, 'non-responsive' is not an exception from the Act to separate sentences or

> other items of information from the context of the record as a whole in order to withhold them.
>
> Information must be considered in the context of the record as a whole, in determining whether it is separate and distinct from the remainder of the record. In the case of a personal information request like the Applicant's, in order to withhold portions of a record as non-responsive, the Public Body must consider whether that portion contains the Applicant's personal information *or* whether that portion provides context to the remainder of the record that *is* the Applicant's personal information.
>
> An example of 'separate and distinct' might be distinct emails in an email chain. Another example relates to police officers' notebooks, which often contain notes on unrelated incidents on a single page. In response to an access request for police records relating to one incident, the part of the notebook page that relates to a different incident might be non-responsive. Another example is where a personal note is added to a work email, such as a note referencing a medical absence, holiday or so on. Where that personal note does not have any relation to the remainder of the email or to the access request, it might be non-responsive.

[para 22] Following the above analysis, and because the Public Body has not argued that these pages are not responsive to the Applicant's request, I will consider these records to be responsive in their entirety.

[para 23] Many of the records at issue are handwritten notes that can be difficult to decipher. For completeness, I will assume that the notes include personal information of the Applicant.

[para 24] The remainder of this discussion addresses information withheld under section 17(1) that is responsive to the Applicant's request for her own personal information.

[para 25] The Public Body has withheld two phone numbers associated with an organization on page 26. The last item of information withheld on page 30 is also about an organization and not an individual. This is not personal information of an identifiable individual. As such, section 17(1) cannot apply.

[para 26] Names, contact information and physical descriptions of third parties are personal information under the FOIP Act. However, previous orders from this Office have found that section 17 does not apply to personal information that reveals only that the individual was acting in a formal, representative, professional, official, public or employment capacity, unless that information also has a personal dimension (Order F2008-028, para. 54). This principle has been applied to information about employees of public bodies as well as other organizations, agents, sole proprietors, etc. (Order F2008-028).

[para 27] The Public Body withheld the name and phone number of a counselling professional appearing twice on page 26. The name and contact information seems to relate to that individual in their professional capacity. I note that the phone number is

provided on Government of Alberta documents available online, for family counselling services. Given this, section 17(1) does not apply to this information.

[para 28] The Public Body has withheld the names and contact information of various professionals who provided information to the Public Body about the Applicant, such as counsellors and outreach workers, as well as the Applicant's lawyer (on pages 43, 68, 70, 71, 73). From the records, it appears that all of these individuals interacted with the Applicant in a professional capacity, and provided information to the Public Body in the same capacity. The Public Body has not indicated why it considers this information to have a personal dimension, and from the records themselves, it does not appear to have such a dimension. Therefore, I find that section 17(1) does not apply to this information.

[para 29] The Public Body withheld the name of a Public Body employee on page 71 that has been disclosed elsewhere in the records (on the same page, as well as page 67). There is no indication that there is a personal dimension to the name where it is withheld on page 71 such that section 17(1) could apply. Therefore, I find that section 17(1) cannot apply.

[para 30] The Public Body also withheld the name of an RCMP officer on page 92, who was assigned to follow up with the Public Body on a request for information. This officer's name appears solely in a work capacity; section 17(1) does not apply to that name.

[para 31] There are some names and contact information for individuals acting in a professional capacity whose identities would disclose personal information of the child to whom the file relates. Therefore, although disclosing this information is not an unreasonable invasion of the individuals acting in their professional capacity, it may be an unreasonable invasion of the child. As such, section 17(1) can apply to those names and contact information.

[para 32] The remainder of this discussion on the application of section 17(1) relates only to the information I have identified above as information to which section 17(1) can apply, and which is responsive to the Applicant's request.

[para 33] The Public Body states that it considered sections 17(4)(g), 17(5)(c), (f) and (h) in making its determination regarding section 17(1). Section 17(5)(i) is also a relevant factor and I will briefly discuss sections 17(5)(a) and (c) as well.

[para 34] Neither party has argued that section 17(2) or (3) apply to any of the withheld information, and from the face of the records, neither provision appears to apply.

Section 17(4)

[para 35] 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.

[para 36] This provision applies to all of the third party personal information to which section 17(1) can apply.

Section 17(5)

[para 37] 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 38] 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 39] As stated above, the Applicant's submissions primarily address the custody dispute between herself and her former partner, and the Public Body's actions as they relate to the Public Body's obligations under the *CYFEA*. For example, the Applicant questions why the Public Body did not take any action as a result of an emergency protection order granted to the Applicant against her former partner (the Applicant provided a copy of this order).

[para 40] As set out above, in order for section 17(5)(a) to apply, there must be evidence that the *activities of the public body have been called into question*, which necessitates the disclosure of personal information in order to subject the activities of the public body to public scrutiny. As stated in Order F2008-009 (at para. 65) and several subsequent Orders:

> What is most important to bear in mind is that the reference to public scrutiny of government or public body activities under section 17(5)(a) requires some public component, such as public accountability, public interest or public fairness (*University of Alberta v. Pylypiuk* at para. 48; Order F2005-016 at para 104).

[para 41] Possibly the Applicant means to argue that the Public Body did not conduct a proper investigation under the *CYFEA* in relation to her child, and as such, the Public Body's actions should be subject to public scrutiny. However, the Applicant has not provided sufficient reason to expect that there is a systemic or public component such that the activities of the Public Body require public scrutiny.

[para 42] I find that section 17(5)(a) does not apply.

[para 43] 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 44] The Applicant has not argued that the information in the records is relevant to a fair determination of her rights. It may be the case that the records relate to her custody of her child; however, the records also indicate that her child is no longer a minor. Therefore, even if custody of a child could be characterized as a determination of a right, the issue of custody no longer seem to be a live one.

[para 45] Therefore, I find that section 17(5)(c) does not apply.

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

[para 47] Some of the information in the records is of the type that would be provided in confidence, and some of the information could harm the reputation of the individual if disclosed. I will discuss the weight given to these factors, below.

Section 17(5)(i)

[para 48] This factor weighs in favour of disclosing personal information of third parties where that information was provided by the Applicant.

[para 49] In its latest release of records, the Public Body disclosed all copies of text messages that the Applicant had provided to the Public Body. The only information remaining that the Applicant provided to the Public Body is found in notes of caseworkers from phone conversations they had with the Applicant.

[para 50] The Public Body argues that these notes contain the Applicant's opinions of other individuals; as such, these opinions are the personal information of those other individuals (section 1(n)(viii)). This is true; however, as stated by the Director of Adjudication in Order F2013-51, the fact that an individual expressed an opinion can be *that* individual's personal information as well. In this case, I find that the statements made by the Applicant to the Public Body are her personal information as well.

[para 51] In Order F2013-08, the adjudicator found that notes taken by a public body employee during an interview with the applicant was information supplied by the applicant for the purposes of section 17(5)(i).

[para 52] In contrast, in Order F2020-35, I found that notes taken by a caseworker of conversations and other things said/done by an applicant during meetings or visits were the author's interpretation of what was said and done, as well as the surrounding context and circumstances. I found that the information was therefore not information provided by the applicant for the purposes of section 17(5)(i).

[para 53] Similarly, in Order F2014-02, I said (at para. 70):

> However, where the Public Body has taken information supplied by the Applicant and discussed it, investigated it, provided an analysis of it etc., it is no longer merely information provided by the Applicant, and in my view, section 17(5)(i) no longer weighs in favour of disclosure.

[para 54] Whether notes taken during a conversation with an applicant can be characterized as information provided by the applicant or not will depend on the circumstances of each case and the particular information at issue.

[para 55] I have carefully reviewed the caseworker notes taken from conversations with the Applicant. The notes of what the Applicant said to Public Body employees on pages 39-41, 49, 52, 54, 55 and 60 appear to relay only what the Applicant said to the author. There is no indication that the information is influenced by or includes the author's assessment or opinions. As such, I find that the recorded statements made by the

Applicant to the Public Body in these pages is information supplied by the Applicant. This weighs heavily in favour of disclosure of the third party personal information in those statements.

[para 56] In saying this I note that not everything withheld under section 17(1) on these pages consists of notes taken of conversations with the Applicant; any information in these pages that is not comprised of notes taken of conversations with the Applicant is not affected by this analysis.

Weighing factors under section 17

[para 57] The Applicant has not provided sufficient reasons for finding that any factor weighs in favour of the disclosure of the personal information of third parties to which section 17(1) can apply. However, I find that section 17(5)(i) weighs in favour of disclosing the information provided by the Applicant.

[para 58] At least one factor weighs against disclosure for each of the items of information.

[para 59] With respect to the notes that record statements made by the Applicant to the Public Body about third parties, the fact that the Applicant provided that information weighs heavily in favour of disclosure of the personal information of the third parties. Section 17(4)(g) weighs against disclosure of that information. Arguably the information was provided to the Public Body in confidence (section 17(5)(f)); however, little weight can be placed on that factor since the information was provided to the Public Body by the Applicant.

[para 60] Similarly, section 17(5)(h) weighs against disclosure of some of the information insofar as it can be characterized as disparaging third parties the Applicant talked about. However, this factor carries little weight in this context. This is because the information merely relays statements made by the Applicant to the Public Body. These statements are not dissimilar to statements made by the Applicant in her submissions to this inquiry. Disclosing the third party personal information in the statements made to the Public Body reveals nothing more than the fact that the Applicant has made these statements to the Public Body. There is nothing in the context of the records that provide any additional information, such as whether the Public Body found these statements to be credible, or whether the Public Body considered them at all.

[para 61] I find that section 17(5)(i) outweighs the factors against disclosure of the third party personal information in the statements made by the Applicant to the Public Body. I will order the Public Body to disclose this information to the Applicant.

[para 62] There are no factors that weigh in favour of disclosing any other third party personal information in the records. Therefore, the Public Body must continue to withhold this information.

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

[para 63] The Public Body applied sections 21(1)(a) and (b) to pages 93 and 94 in their entirety.

[para 64] 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 65] Under section 71(1) of the Act, the Public Body has the burden of proving that the Applicant has no right of access to the information that it refused to disclose under section 21.

[para 66] Section 21(1) addresses intergovernmental relations, or exchanges of information between the Government of Alberta and a government listed in section 21(1)(a). For section 21(1)(a) to apply, there must be an entity listed in section 21(1)(a) with which its relations will be harmed.

[para 67] Section 21(1)(a) applies to information the disclosure of which "could reasonably be expected to" harm intergovernmental relations. Section 21(1)(b) applies to information the disclosure of which "could reasonably be expected to" reveal information supplied in confidence by one of the identified bodies.

[para 68] The Supreme Court of Canada has clearly enunciated the test to be used in access-to-information legislation wherever the phrase "could reasonably be expected to" is found (such as in section 20(1)). In *Ontario (Community Safety and Correctional*

Services) v. Ontario (Information and Privacy Commissioner), 2014 SCC 31 (CanLII), the Court stated (at paras. 53-54):

> …Given that the statutory tests are expressed in identical language in provincial and federal access to information statutes, it is preferable to have only one further elaboration of that language; *Merck Frosst*, at para. 195:
>
> > I am not persuaded that we should change the way this test has been expressed by the Federal Courts for such an extended period of time. Such a change would also affect other provisions because similar language to that in s. 20(1)(*c*) is employed in several other exemptions under the Act, including those relating to federal-provincial affairs (s. 14), international affairs and defence (s. 15), law enforcement and investigations (s. 16), safety of individuals (s. 17), and economic interests of Canada (s. 18). In addition, as the respondent points out, the "reasonable expectation of probable harm" test has been followed with respect to a number of similarly worded provincial access to information statutes. Accordingly, the legislative interpretation of this expression is of importance both to the application of many exemptions in the federal Act and to similarly worded provisions in various provincial statutes. [Emphasis added.]
>
> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences": *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41, at para. 40.

[para 69] The Supreme Court of Canada has made it clear that there is one evidentiary standard to be used wherever the phrase "could reasonably be expected to" appears in access-to-information legislation, regardless of the seriousness of the harm alleged. With respect to section 21(1)(a), the Public Body must satisfy me that there is a reasonable expectation of probable harm that would result from the disclosure of the information.

[para 70] In Order F2006-006, the adjudicator considered the application of section 21(1)(a) and said (at paras. 123-124):

> The Public Body submits that it withheld the information because its relationship with the local government body in question "is a critical one, as there are a number of investigation and enforcement activities that often require collaboration if not collateral processes." The Public Body states that information from the local government body is "often vital to establishing the grounds for any protection issues" and that "it is important that the [local government body] have a say in how the information that [it] provide[s] is managed." The Public Body concludes that disclosure of the information at issue "risks compromising and eventually eroding the relationship that currently exists" between it and the local government body. These submissions suggest that the Public Body

> specifically applied section 21(1)(a)(ii) of the Act to the information on pages 0036, 0037 and 0038 of the records.
>
> The fact that the Public Body's relationship with the local government body is critical, and that the latter provides vital information, may establish the importance of the intergovernmental relationship, but it does not establish a reasonable expectation of harm to that relationship if information were disclosed. Under other sections of the Act, the "harm" test requires a clear cause and effect relationship between the disclosure and the alleged harm, the disclosure must cause harm and not simply interference or inconvenience, and the likelihood of harm must be genuine and conceivable (Order F2004-014 at para. 42). The Public Body has not satisfied this test.

[para 71] 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 72] 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 73] 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 74] Following *Ontario (Community Safety and Correctional Services* and *Merck Frosst*, the Public Body must provide evidence "well beyond" or "considerably above" a mere possibility that the test for this exception is met.

[para 75] The Public Body states that the information on pages 93 and 94 was supplied by the Airdrie RCMP detachment. It states that the information is a report from the RCMP's Police Reporting and Occurrence System (PROS). It states (rebuttal submission, at page 4):

> The report is considered confidential personal information provided to Children's Services to assist in an investigation.

[para 76] Some of the information in the report is about the Applicant and some is about other third parties. I have found above that section 17(1) requires the Public Body to withhold information about other third parties where that information was not provided to the Public Body by the Applicant. As the information in pages 93 and 94 was clearly not provided by the Applicant, the Public Body must withhold third party personal information in these records under section 17(1). Therefore, I will consider only the application of section 21(1) only to information on pages 93 and 94 that is about the Applicant.

[para 77] The Public Body disclosed a fax sheet sent to Airdrie RCMP requesting "information on any involvement [the listed individuals] may have or had with RMCP." The listed individuals included the Applicant; the identity of other individuals listed on that page was withheld under section 17(1).

[para 78] Following *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2022 ABCA 397 (CanLII), the Airdrie RCMP detachment is a body listed in section 21(1)(a)(i)-(v) and as such, can provide information to a GOA department within the terms of sections 21(1)(a) and (b).

[para 79] With respect to the application of section 21(1)(a), the Public Body further states (initial submission, at page 6):

> The Public Body submits that the relationship between the Children's Services, Child Intervention Division and the various police services which includes RCMP, is critical as there are a number of investigations and enforcement activities that require collaboration if not collateral processes. The information that may be in the custody of the RCMP is vital to establishing the grounds for any protection issues when the Public Body is investigating child protection reports.
>
> The records at issue contain information and records from a police service as a collateral resource to assist the Public Body in their child protection investigation. The Public Body submits that the disclosure of information provided by the RCMP risks compromising the relationship that currently exists.

[para 80] The above argument is similar to the argument that was rejected in Order F2006-006, excerpted above. In that case, the adjudicator found that the public body failed to show how disclosing the information at issue met the harms test.

[para 81] According to an RCMP website[1], the PROS system contains detailed information on all events reported to RCMP:

> PROS is the RCMP solution to its modern-day policing needs and will meet strategic objectives by ensuring consolidated and timely information at the working levels on a national basis. It will over time replace the RCMP's legacy systems: PIRS, OSR and SPURS. PROS will provide automated capabilities to create, store, update, maintain, retrieve, sequester, purge and dispose of information. Authorized users will have the ability to record and manage details of court proceedings from the time the original charges are laid through the disposition of charges. Furthermore, PROS will provide a common platform for sharing information to respond more efficiently to requests in areas such as Access to Information and Privacy Acts.

[para 82] The above seems to contemplate that information in PROS may be provided in response to access requests. Given this, it is not clear why providing the Applicant with information about her from PROS could reasonably be expected to result in harm. In this case, the Public Body has said only that disclosure could compromise the relationship between the Public Body and the RCMP but has not said why. As stated by the Supreme Court of Canada, the Public Body "must provide evidence 'well beyond' or 'considerably above' a mere possibility of harm." The Public Body has not provided any evidence to meet this test, aside from a mere assertion.

[para 83] If the argument is that disclosing information that was provided in confidence could harm the relationship, I will discuss this under section 21(1)(b), below.

[para 84] I find that section 21(1)(a) does not apply.

[para 85] With respect to section 21(1)(b), the Public Body states (initial submission at page 7):

> The Public Body considers the records and information received from the police service as provided implicitly in confidence for an investigation involving child protection and that the police service has an implicit expectation that the information will be held in confidence and not be disclosed. The Public Body has had past consultation with the RCMP regarding the disclosure of information in the custody of the Public Body that has been provided by the RCMP. The RCMP requested that records be withheld and an Applicant be directed to make a formal access request to the RCMP.

[para 86] The Public Body did not provide any detail regarding the past consultation or how the information in that past consultation relates to, or is similar to, the information at issue in this inquiry. By letter dated February 8, 2023, I asked the Public Body to provide

[1] https://www.rcmp-grc.gc.ca/en/police-reporting-and-occurrence-system-pros

additional support for its claim that the information on paged 93 and 94 was supplied in confidence. I said:

> Specifically, I am asking the Public Body for some evidence to support its claim that information provided by the RCMP was implicitly supplied in confidence. The Public Body has stated that information provided by the RCMP in the past has been supplied in confidence but I do not know whether that past information, or the context in which it was provided, has any bearing on the information at issue in this case, or the context in which it was provided. Can the Public Body please provide additional arguments for its presumption that the information on pages 93 and 94 of the records was provided in confidence?

[para 87] The Public Body responded as follows (rebuttal submission, at page 4):

> Children's Services Intake Worker requested information from the Airdrie RCMP. The RCMP provided an Occurrence Report to Children's Services. This information provided by the RCMP is a report from their secure Police Reporting and Occurrence System (PROS). The report is considered confidential personal information provided to Children's Services to assist in an investigation. The Public Body considers the report in the control of the RCMP and therefore withheld the information under section 21 of the FOIP Act.
>
> *In Order F2016-18 para [47 and 48] The Commissioner stated:*
>
> *[47] Although the Public Body's conversation with the police service took place over a decade ago, it is reasonable to expect that the police service's position would remain the same. It is reasonable to expect that the police service would want to be consulted on any disclosure to ensure that information would not be disclosed that the police service would withhold. Rather than undertaking such a consultation, the Public Body provided the Applicant with enough information to enable her to make another access request to the police service for that information.*
>
> *[48] In this case the police service is a public body under the FOIP Act. Due to the nature of the records, it is very likely that the police service has them and that the Applicant can therefore request access to them. The police service is also in a better position that the Public Body to know what information can be disclosed to the Applicant. For these reasons, I find that section 21(1)(b) applies to the information withheld under that provision, and the Public Body properly exercised is discretion to withhold it.*

[para 88] The Public Body did not provide any detail about the information at issue in Order F2016-18 that would explain why the finding in that Order should apply to the information at issue here.

[para 89] In Order F2016-18, the information at issue related to an investigation conducted by the Joint Investigation Child Abuse Team, which was conducted under the *CYFEA*. This is not the same as information from PROS about the Applicant's interactions with police, which she is likely to already know about.

[para 90] The Public Body also did not address the test for determining whether information was supplied in confidence, cited above. As the Public Body has not provided any evidence to support its claim that the information on pages 93-94 was supplied implicitly or explicitly in confidence within the terms of section 21(1)(b), I am left with only the records themselves upon which to make a determination.

[para 91] Regarding the first part of the test, there is no indication in the Public Body's submissions or the records themselves that the information was provided with the intent that it be kept confidential.

[para 92] The second part of the test asks whether the disclosing party treated the information in a confidential manner. The information at issue is about individuals' interactions with police. In most or all cases, this is sensitive information about those individuals. It is reasonable to conclude that it is provided with the intention that it is to be treated as confidential information in a general sense. However, as noted, the RCMP's website indicates that information from PROS can be provided in response to an access request; possibly individuals are provided with access to their own information upon request.

[para 93] Similar arguments have been considered regarding information obtained from the RCMP CPIC (Canadian Police Information Centre) database. The RCMP's website compares the CPIC and PROS systems as follows[2]:

> PROS is a complete occurrence and records management system which provides the electronic capability to create, store, update, maintain, retrieve, sequester, purge and dispose of information. CPIC uses computerized files and telecommunications technology to store, retrieve and communicate information.

[para 94] Ontario Order MO-1288 considered the application of section 9(1) of the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA), which is substantially similar to section 21(1)(b) of Alberta's Act, to information from the CPIC database. In that case, the information related to the individual who made the access request. The public body in that case provided the following excerpt from the CPIC Manual:

> Information that is contributed to, stored in, and retrieved from CPIC is supplied in confidence by the originating agency for the purposes of assisting in the detection, prevention or suppression of crime and the enforcement of law. CPIC information is to be used only for activities authorized by a police agency.

[para 95] The adjudicator found that while information by the RCMP from the CPIC database must be protected, the expectation of confidentiality does not necessarily extend to the individual the information is about. Whether the expectation of confidentiality extends to the individual the information is about will depend on the particular context. She said:

[2] https://www.rcmp-grc.gc.ca/en/integrated-query-tool

> The CPIC computer system provides a central repository into which the various police jurisdictions within Canada enter electronic representations of information they collect and maintain. Not all information in the CPIC data banks is personal information. That which is, however, deserves to be protected from abuse. Hence, a reasonable expectation of confidentiality exists between authorized users of CPIC that the personal information therein will be collected, maintained and distributed in compliance with the spirit of fair information handling practices. However, the expectation that this information will be treated confidentially on this basis by a recipient is not reasonably held where a requester is seeking access to his own personal information.
>
> There may be specific instances where the agency which made the entry on the CPIC system may seek to protect information found on CPIC from the data subject. Reasons for this might include protecting law enforcement activities from being jeopardized. These concerns will not be present in every case, and will largely depend on the type of information being requested. The Police have not identified any particular concerns in this area in the circumstances of this appeal, and it is hard to conceive of a situation where an agency inputting suspended driver or criminal record information would require the Police to maintain its confidentiality from the data subject. In fact, although members of the public are not authorized to access the CPIC system itself, the CPIC Reference Manual contemplates disclosure of criminal record information held therein to the data subject, persons acting on behalf of the data subject, and disclosure at the request or with the consent of the data subject.
> Accordingly, I find that there is no reasonable expectation of confidentiality in the circumstances of this appeal, where the appellant is the requester and the information at issue relates to the suspension of the appellant's drivers licence and a history of his previous charges and convictions, the fact of which he must be aware. In my view, section 9(1)(d) does not apply to the information severed from Records 188, 189, 191 and 192.

[para 96] This analysis has been applied in subsequent Ontario Orders (see Orders MO-3052, MO-3517).

[para 97] The third part of the test asks whether the information is otherwise disclosed or available from sources to which the public has access. As stated above, it appears that the RCMP contemplate providing information from PROS in response to an access request.

[para 98] The fourth part of the tests asks whether the information was prepared for a purpose which would not entail disclosure. The Public Body has not provided any information on this point. Presumably, given the sensitivity of the information in children's services files, they are intended to be kept confidential.

[para 99] Some factors of the above test lead to the conclusion that the information was provided in confidence, while others do not. As the information relates to the Applicant's involvement with police, I find the analysis from the Ontario orders to be persuasive in this case. Nothing in the records themselves or the Public Body's submissions indicates that the information about the Applicant provided by the RCMP from PROS was intended to be kept confidential from the Applicant herself. Again, this analysis applies

only to the information about the Applicant and not to information about other third parties, which must be withheld under section 17(1).

[para 100] I find that section 21(1)(b) does not apply. As the only other exception applied to this information is section 21(1)(a), which I have also found does not apply, I will order the Public Body to disclose this information to the Applicant, once it has severed information to which section 17(1) applies.

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

[para 101] The Public Body applied sections 27(1)(a) and (2) to information that reveals the identity of a reporter under the *CYFEA*.

[para 102] Section 27 of the Act states:

> *27(1) The head of a public body may refuse to disclose to an applicant*
>
> *(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,*
>
> *...*
>
> *(2) The head of a public body must refuse to disclose information described in subsection (1)(a) that relates to a person other than a public body.*
>
> *...*

[para 103] Sections 4 and 126.1 of the *CYFEA* state:

> *4(1) Any person who has reasonable and probable grounds to believe that a child is in need of intervention shall forthwith report the matter to a director.*
>
> *...*
>
> *(2) Subsection (1) applies notwithstanding that the information on which the belief is founded is confidential and its disclosure is prohibited under any other Act.*
>
> *126.1(1) Despite section 126(1), the name of a person who makes a report to the director under section 4 of 5 and information that would identify that person is privileged information of the person making the report and is not admissible in evidence in any action or proceeding before any court or an Appeal Panel or before any inquiry without the consent of the person.*
>
> *(2) Despite subsection (1), the Minister may direct the release of information under subsection (1) that would identify the person.*
>
> *(3) If there is a conflict or inconsistency between subsection (1) and the Freedom of Information and Protection of Privacy Act, subsection (1) prevails.*

[para 104] In Order F2009-033 the Director of Adjudication considered the application of sections 126.1 and 4 of the *CYFEA*, and their intersection with section 27 of the FOIP Act. She found that a public body properly applied section 27 of the Act to "information identifying persons who were reporters within the terms of section 4 of the *CYFEA*" (at para. 57). She also noted that "pursuant to section 126.1(1) of the *CYFEA*, the legal privilege that attaches to identifying information of the reporter under section 4 is that person's privilege. It is not the privilege of the Public Body."

[para 105] In Order F2016-18, I agreed that section 126.1 creates a statutory privilege such that section 27 applies to the information that identifies a reporter under the *CYFEA*. I also agreed that the privilege belongs to the reporter, and as such, section 27(2) appears to prohibit the disclosure by the Public Body.

[para 106] Having reviewed the records and submissions, I am satisfied that the above analysis also applies in this case. Some of the information in the records identifies individuals who made a report under the *CYFEA*. As such, section 27(2) applies.

[para 107] That said, it was not clear that all of the individuals identified as reporters under the *CYFEA* were reporters within the terms of that Act. By letter dated February 8, 2023, I asked the Public Body to provide additional information about particular reporters.

[para 108] The Public Body provided its response in an *in camera* portion of its rebuttal submission, as the response could have identified the individuals who were identified as reporters.

[para 109] In responding to my questions, the Public Body reconsidered its application of section 27(1) and (2) to some information in the records. It determined that this provision did not apply to some information, and provided additional information to the Applicant on pages 79, 86 and 104.

[para 110] The Public Body also provided additional information about its application of sections 27(1) and (2) to other information in the records. I cannot discuss the details of this additional information without possibly revealing the identity of the individual identified as a reporter. However, I am satisfied that this individual is a reporter within the terms of the *CYFEA* and that section 27(2) applies.

[para 111] Lastly, the Public Body noted that it erroneously applied section 27(1) to part of a paragraph on page 61. Most of the paragraph had been withheld under section 17(1), and the Public Body explained that section 17(1) ought to have been applied to the portion withheld under section 27(1). I have considered this information in the discussion of section 17(1), above.

[para 112] I find that the Public Body properly applied section 27(1)(a) and (2) to the information it continues to withhold under those provisions, pursuant to section 126.1 of the *CYFEA*.

V. ORDER

[para 113] I make this Order under section 72 of the Act.

[para 114] I find that the Public Body properly applied section 17(1) to withhold information in the records, except the information discussed at paragraphs 25, 27, 28, 29, 30, 55 and 56 of this Order. I order the Public Body to disclose the information as set out in those paragraphs.

[para 115] I find that section 21(1) does not apply to the information in pages 93 and 94 of the records. I order the Public Body to disclose these pages to the Applicant, subject to the application of section 17(1) discussed at paragraph 76 of this Order.

[para 116] I find that the Public Body properly applied sections 27(1)(a) and 27(2) to the information in the records at issue.

[para 117] 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