ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2023-15

April 12, 2023

CHILDREN'S SERVICES

Case File Number 017864

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request to Children's Services (the Public Body) for records relating to herself and her daughter.

The Public Body initially withheld all information on the basis of privilege and the Applicant requested review by the Commissioner. The Commissioner agreed to conduct an inquiry. When its initial submissions were due, the Public Body decided that most of the records were not subject to privilege. It provided access to most of the records but withheld information under sections 17, 18, 21, 24, and 27 of the *Freedom of Information and Protection of Privacy Act* (the FOIP Act).

The Adjudicator confirmed most of the Public Body's severing decisions under section 17. The Adjudicator confirmed the Public Body's decisions to sever information under sections 18 and 27. The Adjudicator determined that section 21 did not apply to the information to which the Public Body had applied this provision. She directed the Public Body to consider whether sections 17 or 18 applied and to disclose any information to which it had applied section 21 to which sections 17 and 18 did not apply.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act***,** R.S.A. 2000, c. F-25, ss. 1, 17, 18, 21, 24, 27, 72

Authorities Cited: AB: Orders 99-009, 99-018, F2004-032, F2006-006, F2008-027 **BC:** Orders F21-12, F20-5 **ON:** Orders PO-4151, MO-4263 **SK:** Review Report 224-2021 **PEI:** Order FI-17-003

Cases Cited: *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (CanLII), [2012] 1 SCR 23; *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII); *Edmonton Police Service v. Alberta (Information and Privacy Commissioner*), 2012 ABQB 595; *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII), [2016] 2 SCR 555

1. BACKGROUND

[para 1] The Applicant made an access request to Children's Services (the Public Body) for the following records:

> All records relating to myself and my baby girl 08/18/19.

The time range for the request was from January 1, 2019 to the date of the access request, March 16, 2020.

[para 2] The Public Body informed the Applicant on April 1, 2020 that it was refusing to provide access to the records on the basis of section 27(1)(a) (privileged information) of the FOIP Act. The Public Body stated:

> Access has been denied as the records are currently subject to Legal Privilege and are being withheld under section 27 of the FOIP Act which states;
>
> Section 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 3] The Applicant requested review by the Commissioner of the Public Body's decision to withhold all the records.

[para 4] The Commissioner authorized a senior information and privacy manager to investigate and attempt to settle the matter. As the Public Body claimed "legal privilege", the matter could not be resolved. The Applicant requested an inquiry on February 24, 2021.

[para 5] On January 21, 2022, the Public Body requested an extension to the time set down in the notice of inquiry for making its initial submissions as it had decided to review its severing decisions. The Applicant consented to this extension request. The Public Body requested a further extension to provide its initial submissions, until April 29, 2022.

[para 6] The Public Body decided to release most of the records to the Applicant; however, it also decided to sever some information from them under sections 17, 18, 21, 24, and 27. The Public Body's new severing decisions were added as issues to the inquiry.

II. ISSUES

ISSUE A: Does section 17(1) of the Act (disclosure an unreasonable invasion of personal privacy) apply to the information to which the Public Body applied this provision?

ISSUE B: Did the Public Body properly apply section 18 of the Act (disclosure harmful to individual or public safety) to withhold information from the Applicant?

ISSUE C: Did the Public Body properly apply section 21 of the Act (disclosure harmful to intergovernmental relations)?

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

ISSUE E: Did the Public Body properly apply section 27 (privileged information) to the information in the records?

III. DISCUSSION OF ISSUES

ISSUE A: Does section 17(1) of the Act (disclosure an unreasonable invasion of personal privacy) apply to the information to which the Public Body applied this provision?

[para 7] Section 17 requires a public body to withhold the personal information of an identifiable individual when it would be an unreasonable invasion of the individual's personal privacy to disclose his or her personal information.

[para 8] Section 1(n) of the FOIP Act defines personal information. It states:

> *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 9] Information is personal information within the terms of the FOIP Act if it is recorded and is about an identifiable individual.

[para 10] Section 17 sets out the circumstances in which a public body may or must not disclose the personal information of a third party in response to an access request. It 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,

(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 11] Section 17 does not say that a public body is *never* allowed to disclose third party personal information. It is only when the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy that a public body must refuse to disclose the information to an applicant (such as the Applicant in this case) under section 17(1). Section 17(2) (not reproduced) establishes that disclosing certain kinds of personal information is not an unreasonable invasion of personal privacy.

[para 12] When the specific types of personal information set out in section 17(4) are involved, disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. To determine whether disclosure of personal information would be an unreasonable invasion of the personal privacy of a third party, a public body must consider and weigh all relevant circumstances under section 17(5) (unless section 17(3), which is restricted in its application, applies). Section 17(5) is not an exhaustive list and any other relevant circumstances must be considered.

[para 13] The Public Body applied section 17(1) to withhold information that would reveal the names and other personally identifying information of individuals whose personal information is contained in the requested records. Section 17(4)(g) applies to this information and it is therefore subject to a presumption that it would be an unreasonable invasion of personal privacy to disclose it. In most cases I agree with the

Public Body's application of section 17(1) as the presumption created by section 17(4)(g) is not rebutted.

[para 14] I note that there are instances where the Public Body has severed information regarding the Applicant's daughter, where the only information that would be revealed by disclosure would be the fact that she gave birth to a daughter and the date. This information is the Applicant's personal information. As the child's name does not appear in the context of the information, it is not so clearly the child's personal information. There does not appear to be any harm arising from disclosure of this kind of information. The top of record 1 contains this kind of severing. I ask that the Public Body review the records to ensure that it has not needlessly severed this kind of information where there would be no obvious harm in disclosing the information.

[para 15] I confirm the Public Body's decisions to apply section 17 except for those instances where the severed information reveals only that the Applicant had a daughter.

ISSUE B: Did the Public Body properly apply section 18 of the Act (disclosure harmful to individual or public safety) to withhold information from the Applicant?

[para 16] Section 18 authorizes public bodies to sever information when disclosing the information could result in harm to individual or public safety. It states:

> *18(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to*
>
> *(a) threaten anyone else's safety or mental or physical health, or*
>
> *(b) interfere with public safety.*

[para 17] In Order 99-009, former Commissioner Clark explained the necessary elements to establish that there is a reasonable expectation that disclosing information would threaten the health or safety of an individual under what is now section 18 of the FOIP Act. He said:

> In Order 96-004, I said that where "threats" are involved, the Public Body must look at the same type of criteria as the harm test referred to in Order 96-003, in that (i) there must be a causal connection between disclosure and the anticipated harm; (ii) the harm must constitute "damage" or "detriment", and not mere inconvenience; and (iii) there must be a reasonable expectation that the harm will occur.
>
> Consequently, for section 17(1)(a) to apply, [now section 18(1)(a)], the Public Body must show that there is a threat, that the threat and the disclosure of the information are connected, and that there is a reasonable expectation that the threat will occur if the information is disclosed.

[para 18] In Order F2004-032, the Adjudicator found that a Public Body cannot rely on speculation and argument that harm might take place, but must establish a reasonable expectation that harm would result from disclosure before it may apply section 18 of the FOIP Act. Harm is not confined to physical harm; threats to mental health are also to be considered.

[para 19] The Supreme Court of Canada has established the test to be used in access-to-information legislation wherever the phrase "could reasonably be expected to" is found (such as in section 18(1)(a)). In *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII), the Court said:

> 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 20] In this inquiry, the Public Body must establish that it has a reasonable expectation that harm would likely result from disclosure of information to which it applied section 18.

[para 21] I am satisfied that the information to which the Public Body applied section 18 is subject to this provision. I acknowledge that the Applicant disagrees that section 18 applies; however, the records document threats and verbal abuse directed at employees of the Public Body and others. The Public Body has withheld information identifying some of its employees and their roles, as well as information about some decisions made and the reasons for them. Given the evidence of the records, I find that section 18 applies to the information to which the Public Body applied this provision, as

disclosure could reasonably be expected to result in harm to the mental or physical health of the Public Body's employees or that of the Applicant. I also find that the Public Body reasonably applied its discretion when it elected to withhold information under this provision.

ISSUE C: Did the Public Body properly apply section 21 (disclosure harmful to intergovernmental relations)?

[para 22] Section 21 authorizes public bodies to withhold information if disclosing the information could reasonably be expected to result in harm to intergovernmental relations. It 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 23] The Public Body applied both section 21(1)(a) and (b) to withhold communications from the Edmonton Police Service. The Public Body argues:

> The Public Body relied on section 21(1)(a) which states:

> 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:
> >
> > > (iii) a local government body,

Section l (i)(i)(x)(b) defines a local government body to include a police service as defined in the *Police Act*.

The Public Body submits that the relationship between the Children's Services, Child Intervention Division and the various police services is critical as there are a number of investigations and enforcement activities that require collaboration if not collateral processes. The information that may be in the custody of the police service 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 police service risks compromising the relationship that currently exists.

The Public Body also relied on section 21(l)(b) which states:

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

In Order F2006-006 [para 125] the Commissioner refers to the set of four criteria to be met for section 2l(l)(b) to apply:

1. *the information must be supplied by a local government body;*

   The records at issue contain information and records from a police service. Section 1(i)(x)(i)(b) defines a local government body to include a police service as defined in the Police Act.

2. *the information must be supplied explicitly or implicitly in confidence;*

   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 police service in 2003 regarding the disclosure of information in the custody of the Public Body that has been provided by the police service. The result of the consultation is still in place today.

   The police service advised that they would prefer to either be consulted if the Public Body intends on disclosing the records, or, to not disclose them if we have not consulted.

   The Public Body made the decision to withhold the information under section 21 of the Act and therefore did not consult with the police service.

3. *the disclosure of the information must reasonably be expected to reveal the information*;

> The disclosure of the information and records would reveal the information provided by the police service.

4. *the information must have been in existence in a record for less than 15 years.*

The Public Body submits that the information and records have been in existence for less than 15 years.

In Order F2006-006 issued to the Public Body in relation to similar records held on a child protective services investigation the Commissioner found that information from the police service met the criteria for section 2l(l)(b) to apply [126]:

> Although the Public Body did not make specific submissions regarding section 21(1)(b) of the Act, I find that the information on pages....of the records at issue falls under the section. The information was supplied by a local government body and has been in existence for less than 15 years. I find that the information was supplied implicitly in confidence, as the nature and context of information may show that it was supplied in confidence (Order 99-028 at para. 30). Finally, disclosure could reasonably be expected to reveal the information.

The Public Body submits that the nature and context of the information shows that the information provided by the police service was supplied in confidence. The Public Body considers the information to be in the control of the police service and the Applicant can make an access request directly to the police service for information held on the police service files.

Section 21(1)(a)

[para 24] Reproduced above, the Public Body's sole argument regarding the application of section 21(1)(a) is that "the disclosure of information provided by the police service risks compromising the relationship that currently exists."

[para 25] The Public Body argues that disclosure of the information at issue could harm its relationship with the police service that provided the information. It does not explain how this harm could reasonably be expected to result from disclosure. The Public Body has left the information to speak for itself.

[para 26] As noted above, the Supreme Court of Canada has confirmed the test to be used in access-to-information legislation wherever the phrase "could reasonably be expected to" is found (such as in section 21(1)). The Public Body must establish that it has a reasonable expectation that probable harm to its relationship with police services would result from disclosure of the information to which it has applied section 21(1)(a).

[para 27] Section 21(1)(a) incorporates the phrase "could reasonably be expected to" and applies to information that could reasonably be expected to harm relations between the Government of Alberta and a local government body, such as a police service.

[para 28] From the arguments and evidence before me, I am unable to find that disclosure of the information at issue could reasonably be expected to result in a

reasonable expectation of probable harm to relations between the Public Body and the Edmonton Police Service or other police services. I am unable to find that the content of the information in the records would, in and of itself, harm the relationship of the Public Body and the Edmonton Police Service if it is disclosed. The Public Body has not pointed to any information in the records that it believes could result in harm to the relationship or explained what kind of harm it believes could result or why it believes the harm it contemplates would result from release of the information.

[para 29] I note, too, that in some cases, the Public Body has applied section 21(1)(a) to information its representatives provided to a police service. It is especially unclear why the Public Body would be concerned that its relationship with a police service would deteriorate if it discloses information that the Public Body itself provided.

Section 21(1)(b)

[para 30] Section 21(1)(b) applies to information supplied in confidence. The Public Body takes the position that any communications supplied to it by the Edmonton Police Service are confidential as it entered an agreement in 2003 to consult the Edmonton Police Service prior to disclosing information. This agreement was not provided for my review.

[para 31] Cited above, the Public Body provided the following rationale for applying section 21(1)(b):

> The police service advised that they would prefer to either be consulted if the Public Body intends on disclosing the records, or, to not disclose them if we have not consulted.
>
> The Public Body made the decision to withhold the information under section 21 of the Act and therefore did not consult with the police service.

The Public Body's rationale for applying section 21(1)(b) is that it did not consult with the Edmonton Police Service. It therefore reasons that the information was supplied in confidence by the Edmonton Police Service.

[para 32] In my view, asking to be consulted prior to the disclosure of information is not the same thing as supplying the information "in confidence". While the Public Body's FOIP Coordinator indicates she believes that the Edmonton Police Service has indicated that it would prefer it if the Public Body keeps information it supplied confidential if it does not consult with it prior to disclosure, there is no indication that the Public Body requires the *consent* of, or permission from, the Edmonton Police Service prior to disclosing the records. From what I have been told, consultation may amount to providing notice that the Public Body intends to disclose information, or it may amount to seeking advice from the Edmonton Police Service, or obtaining its point of view.

[para 33] It appears possible that the Public Body could meet the terms of the agreement by notifying the Edmonton Police Service that it intends to disclose information prior to disclosing it.

[para 34] The failure of the Public Body to consult with the Edmonton Police Service regarding the information at issue cannot ground the application of section 21(1)(b). If the information was not supplied in confidence, then section 21(1)(b) cannot apply to it.

[para 35] Past orders of this office have considered four factors when determining whether information has been supplied in confidence. In Order 99-018, former Commissioner Clark stated:

> In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:
>
> (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 Third Party prior to being communicated to the government organization.
>
> (3) Not otherwise disclosed or available from sources to which the public has access.
>
> (4) Prepared for a purpose which would not entail disclosure.

The foregoing test is also applied in British Columbia (see British Columbia orders F21-12 and F20-5) Ontario, (see Ontario orders PO-4151 and MO-4263), Saskatchewan (See Review Report 224-2021), and Prince Edward Island (see order FI-17-003).

[para 36] As the Public Body notes, in Order F2006-006, the Adjudicator said:

> Although the Public Body did not make specific submissions regarding section 21(1)(b) of the Act, I find that the information on pages 0036, 0037 and 0038 of the records at issue falls under that section. The information was supplied by a local government body and has been in existence for less than 15 years. I find that the information was supplied implicitly in confidence, as the nature and context of information may show that it was supplied in confidence (Order 99-028 at para. 30). Finally, disclosure could reasonably be expected to reveal the information.

The Adjudicator in Order F2006-006 found that the content of the records before him supported finding that the information they contained had been supplied in confidence. Similarly, in Order F2016-18, the Adjudicator held that the "in confidence" requirement in section 21(1)(b) was met by reference to the nature of the records themselves (see para 45).

[para 37] In Order F2006-006, the Adjudicator did not consider the four factors, as he found that the content of the records was such that it could only have been supplied in confidence. In this case, the information to which the Public Body applied section 21(1)(b) does not support a finding that it could only have been supplied in confidence. I will therefore consider the four factors.

[para 38] In *Edmonton Police Service v. Alberta (Information and Privacy Commissioner*), 2012 ABQB 595 (CanLII), Ross J. denied judicial review of Order F2008-027, in which the four factors set out above had been applied. Ross J. stated:

> The Adjudicator held that the evidence supported a subjective expectation of confidentiality on the part of the parties, while the law requires an objective determination in all of the circumstances that information was communicated on a confidential basis […]
>
> I am satisfied that the Adjudicator's Decision is intelligible and "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." In the result, I hold that her conclusion that the information in question was not supplied in confidence is a reasonable decision based on the law and the evidence before her.

[para 39] In *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (CanLII), [2012] 1 SCR 23, the Supreme Court of Canada determined that it must be proven on the balance of probabilities that information supplied to government is confidential:

> As set out earlier, information is not confidential if it is in the public domain, including being publicly available through another source. As MacKay J. put it in *Air Atonabee*, at p. 272, to be confidential, the information must not be available from sources otherwise accessible by the public or obtainable by observation or independent study by a member of the public acting on his or her own. It follows that information that has been published is not confidential. Moreover, information which merely reveals the existence of publicly available information cannot generally be confidential: knowledge of the existence of the information can be obtained through independent study by a member of the public. To the extent that Merck submits that its compilations of such studies are confidential for the purposes of s. 20(1)(*b*) because the compilations might help a competitor to learn of the existence of the studies, I do not agree.
>
> Merck has the burden of proving the information falls within the terms of the provision on the civil standard – the balance of probabilities.

[para 40] I turn now to the question of whether the Public Body has established that the information over which it claims section 21(1)(b) was supplied in confidence.

Was the information communicated to the Public Body on the basis that it was confidential and that it was to be kept confidential?

[para 41] As discussed above, the agreement the Public Body states it entered with the Edmonton Police Service also does not speak to confidentiality, but consultation. The information was not communicated to the Public Body on the basis that it was confidential or that it was to be kept confidential. Confidentiality is not addressed in the information to which the Public Body applied section 21(1)(b).

[para 42] The Public Body has not provided detailed evidence regarding the agreement it states it entered into with the Edmonton Police Service in 2003. It is important to note that both entities are public entities and not private ones. This means that they may collect and disclose personal information only in accordance with their powers and duties, and may similarly require confidence if doing so accords with those powers and duties. In this case, there is no indication that either public body would require the information to be held in confidence to perform functions or duties.

[para 43] Once the Public Body conducts an investigation, it must also make a decision. The decisions it makes may also be appealed to a panel and then to the Court. Information may have to be shared with legal counsel, the decision maker, and parties affected by the decision. If the Edmonton Police Service were to require the Public Body to hold the information it provides for investigations in confidence in all cases, the Public Body would be effectively prevented from using the information for its own investigations.

[para 44] Without evidence as to the terms of the agreement the Public Body entered with the Edmonton Police Service, and given that what I have been told does not indicate that the Edmonton Police Service requires information it supplies to be held in confidence, I am unable to find that the information in the records was supplied implicitly or explicitly in confidence.

[para 45] The evidence before me does not establish that the information in the records was supplied by the Edmonton Police Service with explicit or implicit expectations of confidentiality.

Was the information treated consistently in a manner that indicates a concern for protection from disclosure prior to being communicated to the government organization?

[para 46] There is no evidence before me as to how the information was treated prior to being communicated. I accept that the information is drawn from police files. Moreover, as the information contains personal information and police services are subject to the FOIP Act it seems likely that the Edmonton Police Service would take steps not to disclose it except for purposes authorized by the FOIP Act. That being said, it appears possible that the information could be disclosed by the Edmonton Police Service for authorized law enforcement purposes, if it were necessary to do so, as was done in this case. Moreover, were the Applicant to request the information from the Edmonton Police Service, the Edmonton Police Service would be required to grant access to her personal information provided no exceptions to disclosure apply. In such a scenario, the Edmonton Police Service would be unable to apply section 21(1)(b) to information its representatives created.

Is the information not otherwise disclosed or available from sources to which the public has access?

[para 47] There is little evidence before me on this point. The Public Body and the Edmonton Police Service are both subject to the FOIP Act, which restricts their abilities to disclose personal information such as that contained in the records. Conversely, they may also be required to disclose the information under the FOIP Act. Both entities bear obligations under their governing legislation to make the kinds of information to which the Public Body has applied section 21 available for the purpose of conducting prosecutions or hearings or appeals. The Public Body and the Edmonton Police Service may have the ability to make arguments to decision makers as to whether information

should be disclosed, but the ultimate decision maker would determine whether information would be disclosed

Was the information prepared for a purpose which would not entail disclosure?

[para 48] The content of the information to which the Public Body applied section 21 indicates that it was prepared for criminal proceedings in one case, or for the Public Body to make informed decisions affecting rights in the other cases. In my view, these purposes are likely to entail certain types of disclosure, given that the information would likely be part of a disclosure package in any criminal or administrative proceedings for which the information was gathered. There is nothing in the nature of the information that would require confidentiality.

[para 49] In considering the factors, I am not satisfied that the information at issue was supplied implicitly or explicitly in confidence within the terms of section 21(1)(b).

[para 50] To conclude, I find that neither section 21(1)(a) nor 21(1)(b) has been shown to apply to the information to which the Public Body applied this provision. As the Public Body has not yet turned its mind to the question of whether sections 17 or 18 apply to the information to which it applied section 21, I will not order it to disclose the information but will direct it to consider whether these provisions apply to any of the information to which it applied section 21. The Public Body must give the applicant access to any information that is not subject to these provisions.

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

[para 51] The Public Body limited its application of section 24(1) to information to which it had also applied section 18. As I have found that it properly applied section 18, I need not consider whether it also properly applied section 24(1).

ISSUE E: Did the Public Body properly apply section 27 (privileged information) to the information in the records?

[para 52] Section 27(1)(a) of the FOIP Act permits a public body to sever information that is subject to privilege. It 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 53] In *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII), [2016] 2 SCR 555 the Supreme Court of Canada quashed a notice to produce issued by this office for records to which the University of Calgary had applied section 27(1)(a), as it determined that the Commissioner lacks the

power to demand records from a public body when the public body decides the records are subject to solicitor-client privilege and applies section 27(1)(a) for that reason. The Court held that the Commissioner has the power under section 56 to demand records subject to privileges of the law of evidence, but not records over which a public body claims solicitor-client privilege. The Court reasoned that the phrase "privilege of the law of evidence" was not sufficiently clear to enable the Court to interpret the phrase as encompassing solicitor-client privilege, given the "importance" the Court assigned this privilege.

> Solicitor-client privilege is clearly a "legal privilege" under s. 27(1), but not clearly a "privilege of the law of evidence" under s. 56(3). As discussed, the expression "privilege of the law of evidence" is not sufficiently precise to capture the broader substantive importance of solicitor-client privilege. Therefore, the head of a public body may refuse to disclose such information pursuant to s. 27(1), and the Commissioner cannot compel its disclosure for review under s. 56(3). This simply means that the Commissioner will not be able to review documents over which solicitor-client privilege is claimed. This result is consistent with the nature of solicitor-client privilege as a highly protected privilege.

[para 54] As a consequence of the Supreme Court of Canada's decision, the Commissioner must issue orders in relation to the application of solicitor-client privilege to government records without the evidence the records would otherwise provide. This is so even though both the Commissioner and her office, and the Public Body, are both branches of the Government of Alberta.

[para 55] The Public Body initially withheld the records in their entirety on the basis that they were subject to solicitor-client privilege. It subsequently reconsidered its decision in relation to most of the records and either provided them to the Applicant or applied different exceptions.

[para 56] With regard to the records to which the Public Body continues to apply section 27(1)(a), the affidavit of the Public Body's FOIP Coordinator states:

> I, […], FOIP Coordinator for Children's Services, of Edmonton, Alberta, make oath and say:
>
> I am an employee of Service Alberta and support Alberta CS in the processing of access requests under the *Freedom of Information and Protection of Privacy Act* (the "FOIP Act").
>
> As part of my employment, I am the FOIP Coordinator for CS and supervise the processing of access requests under the FOIP Act.
>
> The Applicant made an access to information request to the Public Body that is now the subject of this Inquiry ("Applicant's Request").
>
> The head of the Public Body has exercised discretion to withhold the Records from disclosure to the Applicant. The exception relied upon by the head of the Public Body is section 27(1) of the FOIP Act on the grounds that the Records are subject to solicitor-client privilege.
>
> Attached as Schedule 1 to this Affidavit is a list of records that I believe are responsive to the request over which we have claimed legal privilege (the "Records").

I have reviewed the records and believe that they meet the criteria required to claim solicitor-client privilege.

All of the Records consist of either

communications

between a lawyer and the Public Body;

made in confidence; and

in the course of seeking or providing legal advice; or

communications made within the framework of the solicitor-client relationship that were intended to be confidential; or

records reflecting internal discussions about legal advice that were intended to be confidential.

correspondence between an agent or lawyer of the Minister of Justice and Solicitor General and another Legal [Counsel] for litigation purposes.

All of the lawyers referenced in the Records are or were employed as barristers and solicitors and serve as lawyers for the Public Body.

All of the lawyers referenced were acting in their capacity as legal advisors in relation to creation of the Records.

The advice from the lawyers contained in the Records was given in the context of the solicitor-client relationship and is not business, policy or other non-legal advice.

I believe that none of the Records have been made public.

I believe that the Records have only been shared with those within the Government of Alberta who require the Records in order to perform their employment responsibilities.

I do not believe that the solicitor-client privilege claimed over the Records has been waived by the Public Body.

I do not believe that any of the Records were made to further any unlawful conduct.

[para 57] As the records document actions with legal consequences and legal proceedings, I anticipate that the Public Body's employees contacted legal counsel to obtain legal advice.

[para 58] While it is unclear to me how the Public Body could have determined that all the records at issue were subject to privilege, I find that the description it provided of the records and its reasons for applying section 27(1)(a) are adequate to establish that this provision likely applies.

[para 59] For the foregoing reasons, I find that the Public Body is authorized to withhold the information to which it has applied section 27(1)(a) from the Applicant.

IV. ORDER

[para 60] I make this Order under section 72 of the Act.

[para 61] I order the Public Body to reconsider its decisions to apply section 17 to information that reveals only that the Applicant has a daughter.

[para 62] I order the Public Body to give the Applicant access to the information to which it applied section 21. Prior to disclosing the information, the Public Body may review it and determine whether sections 17 or 18 apply to any of the information. If it determines that these provisions apply, it may apply these provisions, and give the Applicant access to the remaining information. The new decision would be subject to review by this office should the Applicant request it.

[para 63] I confirm the Public Body's decisions to withhold the remaining information from the Applicant.

[para 64] I order the Public Body to inform me within 50 days of receiving this order that it has complied with it.

_____
Teresa Cunningham
Adjudicator