ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2023-17

April 19, 2023

JUSTICE

Case File Number 011951

Office URL: www.oipc.ab.ca

Summary: An individual made an access request to Justice (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for copies of written communications between Public Body employees about him regarding a talk given at a conference in Edmonton, and/or communications containing a particular attachment.

The Public Body located 261 pages of responsive records but withheld them in their entirety, citing section 4(1)(a).

The Applicant requested an inquiry into the Public Body's response. The Public Body refused to provide records for the inquiry, stating that the records were not in its custody or control.

In Order F2022-33, resulting from the first part of this inquiry, the Adjudicator determined that the Public Body failed to meet its burden to show that the records in its possession were not in its custody or control, for the purposes of responding to an access request under the FOIP Act. The Adjudicator ordered the Public Body to provide the Adjudicator with the records at issue and/or an affidavit of records for any records containing judicial information or court information, detailing how the information falls within those categories, in order for the Adjudicator to make a determination as to whether the responsive records fall within the scope of the FOIP Act. The Adjudicator retained jurisdiction to make a determination regarding the application of the FOIP Act to the records.

In this part of the inquiry, the Adjudicator found that the Public Body did not have custody or control of the records, except the 26 pages identified by the Public Body.

With respect to the 26 pages that were within the Public Body's custody and control, the Adjudicator found that section 4(1)(a) applies. Therefore, the FOIP Act does not apply to those pages and this Office does not have jurisdiction to review the Public Body's response to the Applicant regarding those pages.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 4, 72

Authorities Cited: AB: Orders F2017-59, F2022-33, **BC**: Order F10-10

Cases Cited: *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10, *Nowegijick v. The Queen*, 1983 CanLII 18 (SCC), *Sarvanis v. Canada*, 2022 SCC 28 (CanLII)

I. BACKGROUND

[para 1] On November 1, 2018, the Applicant made an access request to Alberta Justice and Solicitor General, which is now Justice (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for the following:

> I am seeking written communications of any type regarding [various names of Applicant], or regarding a talk given at the Bsides Edmonton conference, or containing an attachment named "Bsides YEG Presentation.pdf" that was sent or received by ministry staff between September 13th 2018 and present. Responsive accounts are likely to be those of [JP], but a complete search is requested of all Ministry of Justice accounts.

[para 2] The Public Body located 261 pages of responsive records but withheld them in their entirety, citing section 4(1)(a). Specifically, the Public Body informed the Applicant that the responsive records are "judicial administration records and/or records relating to support services provided to the judges of any of the courts, and as such they fall outside of the *FOIP Act*."

[para 3] The Applicant requested a review of the Public Body's response. The Commissioner authorized an investigation to settle the matter. This was not successful and the Applicant requested an inquiry.

[para 4] In Part 1 of the inquiry, the Public Body argued that it did not have custody or control of the records it had initially located as responsive. The Public Body argued that the records were in the custody or control of the courts. At their request, the Chief Justice of Alberta, Chief Justice of the Court of Queen's Bench of Alberta (now the Court of King's Bench of Alberta), and Chief Judge of the Provincial Court of Alberta (now the Chief Justice of the Alberta Court of Justice) were included in the inquiry as an Affected Party and provided a submission.

[para 5] In the Order resulting from Part 1 of the inquiry (Order F2022-33), I found that that the Public Body had failed to substantiate its position that it does not have custody or control of the responsive records. I ordered the Public Body to clarify the scope of the request with the Applicant. I also ordered the Public Body to provide me with a copy of the records over which it

has custody or control in order to determine whether those records fall within the scope of section 4(1)(a) of the Act, and/or an affidavit of records with respect to any records containing judicial or court information detailing how the information falls within those categories.

[para 6] The Chief Justice of Alberta, Chief Justice of the Court of King's Bench of Alberta, and Chief Justice of the Alberta Court of Justice also participated in this second part of the inquiry (the Affected Party).

II. RECORDS AT ISSUE

[para 7] The records at issue are comprised of the pages initially identified by the Public Body as responsive to the Applicant's request.

III. ISSUES

[para 8] The issues as set out in the Notice of Inquiry, dated October 13, 2022, are as follows:

1. Are any of the records initially located as responsive not in the custody or under the control of the Public Body?

   If the Public Body asserts that some of the records initially located as responsive are not in its custody or control for the reason that they contain judicial or court information as set out in Order F2022-33, the Public Body may provide an affidavit of records rather than a providing a copy of those records.

2. Are the records under the custody or control of the Public Body excluded from the application of the Act by section 4(1)(a)?

IV. DISCUSSION OF ISSUES

1. Are any of the records initially located as responsive not in the custody or under the control of the Public Body?

[para 9] In Order F2022-33 I set out the scheme and purpose of the FOIP Act. I also discussed the Memorandums of Understanding that the parties have also referred to and relied on in this part of the inquiry.

[para 10] The Affected Party and the Public Body both made arguments in this part of the inquiry regarding the principle of judicial independence. I discussed the parties' arguments on this point at length in Order F2022-33. The arguments presented in the submissions for this part of the inquiry do not add any new arguments to those previously provided; therefore, I do not need to add to the discussion set out in Order F2022-33.

[para 11] In the initial inquiry, the Public Body stated that it had located 261 pages of records as responsive to the Applicant's request. In an affidavit provided with the Public Body's initial submission to this part of the inquiry, sworn by the Public Body FOIP Coordinator, the affiant

clarified that the Public Body initially located 290 pages of records, including duplicate and non-responsive records. The affiant further states:

> 9. The FOIP Advisor who originally processed this request indicated that 261 records were located, but stated that all were excluded from the scope of the FOIP Act by section 4(1)(a).
>
> 10. As the Public Body was not able to locate records indicating exactly which records the FOIP Advisor counted to arrive at a count of 261 pages records, and that individual is no longer employed in this capacity, the 290 pages of records has been re-analyzed.
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> 11. Additionally, as referenced in paragraph 70 of Order F2022-33, the Applicant clarified that he was "not seeking information about any vulnerabilities, vulnerable servers, or technical remediation activities."

[para 12] The Public Body excluded the following records as non-responsive to the Applicant's request:

- 34 pages of emails that did not include JP or other employees of CTS [Court Technology Services];
- 2 pages of records discussing only technical remediation, excluded based on the Applicant's clarification of his request; and
- 81 pages consisting of one full and one partial unmodified copy of the Applicant's presentation.

[para 13] The Public Body provided 26 pages of records over which it found it had control. The Affected Party's submission indicates that it does not agree that the Public Body has control of these records, but did not object to their being provided to me for this inquiry.

[para 14] The Public Body provided an affidavit of records with respect to the remaining 147 pages of records. All of these pages consist of emails. Many emails are described as being sent to or by "Director, CTS (Court Technology Services), Judicial IT Security Officer and Executive Directors of the Courts of Appeal, Court of King's Bench, and Provincial Court". Some emails also include other CTS employees (Network Analysts, a Web Architect, a Network Specialist, a Network Manager, Manager of Desktop Support). Some emails include employees of Service Alberta (specifically, the Chief Information Security Officer, Sector Chief Information Officers, a Sector Information Security Officer, a Sector Security Analyst Cloud Security Specialist, Director of Server Hosting and Data Centres).

[para 15] The 26 pages of records provided to me are emails that were sent to or by Public Body employees who do not provide services to or report to the courts. I agree that these records fall within the control of the Public Body. The Affected Party did not explain why it believes these records fall within the control of the courts. As discussed in further detail below, copies of these records found in the email inbox of Executive Directors of the courts likely fall under the control of the court. Similarly, copies of the emails found in the inbox of CTS staff are likely under the control of the court (as I accept that CTS reports to the court with respect to the matters to which the records relate, for the reasons to be discussed below). However, when those emails are sent outside the sphere of the court's responsibility, there is no apparent mechanism (or no mechanism explained to me) by which the court can claim to have control over the copies located in the email inbox of other public body employees. This is true whether the emails are

sent to Public Body employees (other than those who report to the court), to Service Alberta employees, or to other outside parties. If these records are found in the email inbox of other public body employees who do not report to the court, then they may fall within the scope of the FOIP Act, subject to the application of section 4(1). As explained in Order F2022-33, the inclusion of section 4(1)(a) in the FOIP Act clearly contemplates that records relating to the court can fall within the control of a public body.

[para 16] The 26 pages of records provided for this inquiry provide helpful context for the arguments of the Public Body and Affected Party. All of the records are comprised of emails. All of the emails provided to me were sent to, from, or copied to Public Body employees who do not report to the courts. Other authors/recipients of the emails include Executive Directors of the Chief Justices of the courts, CTS staff, and Service Alberta employees.

[para 17] Neither the Public Body nor the Affected Party provided me with information about the authors and recipients of the emails. As noted above, the Public Body indicated that the email authors and recipients included Executive Directors of the Chief Justices, the Director of CTS (whose name was specified in the Applicant's access request), other CTS staff, other Public Body employees (who do not work for CTS) and Service Alberta employees. However, very few emails contained signature lines that identified the role of each employee. Therefore, from the information before me, it was difficult to determine who was acting in what capacity.

[para 18] As I have an investigatory role, I am not limited to the information provided by the parties (see *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10). In order to determine the roles of the individuals who sent and received the emails, I resorted to an internet search of the employee names. In this case, the salary and severance disclosure table posted by the Government of Alberta (under the *Public Sector Compensation Transparency Act*, SA 2015, c. P-40.5) revealed the job titles of most of the employees involved, including job titles from the year the records were created.

[para 19] From the information provided by the parties and the information I located myself, I am able to conclude that the CTS staff communicated with the Executive Directors about the Applicant's presentation, which discussed vulnerabilities with Government of Alberta servers, including court servers. The Executive Directors discussed the matter with other Public Body employees whose responsibilities appear to relate to the matter of information security, but who do not report to the court. Service Alberta employees were also involved in the emails; at the time the records were created, the Government of Alberta Corporate Information Security Office fell under the mandate of Service Alberta. Therefore, government-wide information security policies or responses may reasonably have involved Service Alberta.

[para 20] In its initial submission, the Public Body states (at para. 2):

- The [Applicant's] presentation was attended by a Government of Alberta employee who reported on the identified vulnerabilities to the Office of the Corporate Chief Information Officer (part of Service Alberta). The information regarding the Court servers was provided to Court Technology Services (CTS), which is responsible for providing IT services to the Courts and maintaining servers containing Court and judicial information.

- CTS is administratively a part of Alberta Justice, but its staff report to the Courts on matters within the authority of the judiciary, including the security of the Courts' servers.
- CTS remedied the identified vulnerabilities to the Courts servers and reported to the Courts on the matter.

[para 21] As in the first part of this inquiry, the Public Body has provided copies of the Memorandum of Understanding between the Attorney General of Alberta and the Chief Justice of the Court of Queen's Bench (now the Chief Justice of the Court of King's Bench) (QB MOU) and the Memorandum of Understanding between the Attorney General of Alberta and the Chief Judge of the Provincial Court of Alberta (now the Chief Justice of the Alberta Court of Justice) (PC MOU). Both MOUs are substantially similar; for simplicity, I will cite relevant sections only from the QB MOU. Relevant provisions from the MOU were appended to Order F2022-33; the MOUs provided for the first part of the inquiry appear the same as those provided for this part of the inquiry.

[para 22] The QB MOU states that the Chief Justice is responsible for the management of judicial administration within the court, as well as the management of judicial staff. The Chief Justice is also responsible for the supervision and control of court information and judicial information.

[para 23] The MOUs also assign duties to the Executive Director and General Counsel within the Office of the Chief Justice. Section 5.2.1 of the QB MOU states that the Executive Director takes direction from the Chief Justice, and that all judicial staff report through the Executive Director. The Executive Director is accountable to the Public Body to ensure compliance with public service legislation, regulations and policies (section 5.2.2 of the QB MOU).

[para 24] The Attorney General is responsible for the provision of resources for information systems and information support services including repair and replacement of hardware and software, in consultation with the Chief Justice.

[para 25] The MOUs indicate that security of court information and judicial information is a joint responsibility:

> 7.1. The Attorney General and the Chief Justice acknowledge that the judiciary is responsible for policy for the security of Court Information and Judicial Information and acknowledge the need to maintain Information Systems with comprehensive security and privacy specifications for Court Information and Judicial Information, which, in respect of Judicial Information, are in compliance with the principles outlined in the Canadian Judicial Council's Blueprint for the Security of Judicial Information as published from time to time.
>
> 7.2. The Attorney General and the Chief Justice acknowledge that Judicial Information and Court Information must be safeguarded regardless of the organization that administers the Information System containing the Judicial Information and the Court Information, including Corporate Services Division, RCAS, or a commercial entity.

[para 26] The Public Body's submissions reveal that the records at issue include emails to and from the Executive Directors of the Chief Justices. I understand that the Executive Directors are accountable to the Public Body for ensuring judicial staff are managed in accordance with

government policies (as they are all employed under the *Public Service Act*). It also appears that the Executive Directors provide support to the Chief Justice in carrying out the responsibilities of the Chief Justice.

[para 27] With respect to the Court Technology Services (CTS) staff, the Public Body states (initial submission):

> 20. In this matter, the records the Public Body has claimed are outside the scope of its custody or control are email threads sent or received by Court Technology Services staff in their capacity of providing IT and technological support services to the Courts.
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> 21. By way of context, CTS is structured along the lines described in the Canadian Judicial Counsel's Blueprint for the Security of Court Information. The Blueprint suggests that
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>> IT administrators, support and help desk staff working with Judicial Users be made aware of the nature of the judicial role and function within the administration of justice. IT administrators, support and help desk staff must differentiate between Judicial Users and non-judicial users to preserve the independence of the judiciary.
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> 22. This approach is reflected in the constitution of CTS. CTS employees are, from an administrative standpoint, part [of] the Public Body. That said, CTS occupies a "hybrid" role and provides technological support to the Courts and, where they are doing so, are accountable to the Courts specifically. One position within CTS, the Judicial IT Security Officer (JITSO), exclusively reports to the Courts (rather than the Public Body) despite administratively being an immediate subordinate of the Director, CTS.
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> 23. This framework is intended to recognize the independence of the Courts in matters of judicial administration.

[para 28] The Public Body has mentioned the "hybrid" role of CTS; in order to determine which of its two roles the records at issue relate to, I asked the Public Body for additional information about how the hybrid role works. In a letter dated February 28, 2023, I said:

> I am seeking additional information about the role of CTS with respect to the court and the Public Body. The Public Body has argued that CTS staff occupy a hybrid role insofar as they are accountable to the courts in some capacities, and accountable to the Public Body in other capacities. I do not have any information as to how these capacities are divided, or in which specific capacities the CTS staff report to the court and which to the Public Body.
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> The affidavit provided with the Public Body's initial submission to this part of the inquiry, sworn by the Public Body FOIP Coordinator, states that all emails in the records at issue sent to or from the Director of CTS relate to the Director's capacity in which he is responsible to the courts. However, there is no indication of the basis for this statement. For example, I do not know if the FOIP Coordinator has personal knowledge of the Director's role and responsibilities. In addition, there is no such statement with respect to other CTS staff.
>
> I am asking the Public Body to provide additional information identifying the capacities for which the CTS staff (including the Director) are accountable to the courts and the capacities for which they are accountable to the Public Body. For example, it may be the CTS reports to the Public Body for human resources related matters, or for court administration matters (in the latter

> case, it would be helpful to know what falls within the scope of court administration matters in this context). A job description or similar document for the Director of CTS (and possibly other CTS staff) that sets out the accountabilities and/or the types of tasks performed in each capacity (for the court and for the Public Body) would be helpful. Specific examples would be appreciated.
>
> It may also be helpful to provide an affidavit sworn by an individual with personal knowledge of CTS accountabilities, such as the Director.

[para 29] The Public Body states that CTS reports administratively to the Deputy Minister of the Public Body. Administrative reporting includes pay and benefits, position classification and other human resources matters. The Public Body states that CTS has undergone some organizational change since the time the records were created, but that the administrative reporting relationship is substantially the same.

[para 30] The Public Body provided an affidavit sworn by the Executive Director (ED) of Courts IMT, with the ED's job description attached. The job description states:

> This unique position reports functionally to, and is under the joint supervision of, the Chief Justice of Alberta, the Chief Justice of the Court of Queen's Bench of Alberta and the Chief Judge of the Provincial Court of Alberta. The position reports to the Deputy Minister, Justice and Solicitor General, for administrative purposes.
>
> The Executive Director of Courts IMT ("the Executive Director") leads the strategic planning for, and oversight of, all information management and technology ("IMT") related functions for the Courts and court-associated personnel including Resolution and Court Administration Services ("RCAS") staff. This position is critical to achieve effective utilization of IMT resources within each Court for the benefit of Albertans.

[para 31] The ED states that they supervise CTS and they have direct knowledge of that unit's accountabilities. They state (at para. 2 of the affidavit):

> (d) I ultimately report administratively to the Deputy Minister of Justice ("administrative reporting"). Administrative reporting includes matters such pay and benefits administration, position classification, and matters arising under the *Public Service Act*, including administering the recruitment process and administering employee relations.
>
> (e) On a day-to-day basis, my position, and CTS as a whole, is accountable exclusively to and reports exclusively to the Chief Justice of the Court of Appeal, Chief Justice of the Court of King's Bench, and Chief Judge of the Provincial Court ("functional reporting").

[para 32] The ED was not in this role at the time the records were created. The following information from the affidavit is based on information and belief:

> 4. The request that is the subject of this Inquiry occurred in 2018, prior to my employment as Executive Director of Court IMT Services. Accordingly, I have been informed and believe that:
>
>   (a) At the time the search associated with this inquiry was conducted, [JP] was Acting Director of CTS.

(b) CTS was part of the Department of Justice and Solicitor General. It was administratively part of the Department of Justice and Solicitor General and ultimately reported to the Deputy Minister. This administrative reporting relationship was substantially similar to the current relationship described in section 2(d).

(c) At the time this request was made, the Director of CTS was subject to a "hybrid" functional reporting structure.

(d) The Director of CTS functionally reported to the Chief Justice of the Court of Appeal, the Chief Justice of the Court of Queen's Bench (as it then was), and the Chief Judge of The Provincial Court when providing support services to the judges and judicial staff of the courts. These specific services included responsibilities like the following:

   i. oversight of all information management and technology (IMT) related functions for the courts and court-associated personnel
   ii. delivery of IMT to the courts,
   iii. the design, implementation and management of court information systems, and
   iv. the daily operations and maintenance of the courts' information systems and applications including the network architecture, software, videoconferencing equipment, telecommunications, and IMT security.

(e) In 2018, CTS provided certain IMT services to the Department of Justice and Solicitor General itself, such as support to court administration staff using the court IMT systems.

(f) In the instances described in section 4(1)(e), CTS would have functionally reported to the department of Justice and Solicitor General.

[para 33] Based on this affidavit, I understand that CTS provided IMT services to judges and judicial staff, as well as court administration staff. CTS reported to the Public Body for all administrative matters, which primarily concern human resource matters. CTS also reported functionally to the Public Body when providing support to court administration staff. CTS reported functionally to the Chief Justices for its other IMT services provided to judges and judicial staff.

[para 34] As stated above, the affidavit of records provided with the Public Body’s initial submission lists the job titles of the authors and recipients of the emails comprising the records over which the Public Body asserts it does not have custody or control. None of the participants appear to be court administration staff, which leads me to conclude that the IMT services being provided by CTS to which the emails relate were not being provided to court administration staff. It is only with respect to services provided to court administration staff that CTS functionally reported to the Public Body at the time the records were created.

[para 35] Based on the information before me, I am satisfied, on a balance of probabilities, that the services provided by CTS to which the records relate are services for which CTS reports to the Chief Justices. Given this, I am satisfied that these records are properly under the control of the courts. The information in the records I have been able to review (the 26 pages falling

within the Public Body's custody and control) is consistent with this finding. I will discuss those pages in the next section.

2. Are the records under the custody or control of the Public Body excluded from the application of the Act by section 4(1)(a)?

[para 36] As noted, the Public Body argues that section 4(1)(a) applies to the 26 pages of emails that have been provided for this inquiry. If this section applies to the records at issue, I do not have jurisdiction to review the Public Body's decision to withhold them.

[para 37] Sections 4(1)(a) and 4(3) of the Act state:

> *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;*
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> …
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> *4(3) In this section, "judicial administration record" means a record containing information relating to a judge of the Court of Appeal of Alberta, the Court of Queen's Bench of Alberta or The Provincial Court of Alberta or to a master of the Court of Queen's Bench of Alberta or a justice of the peace other than a non-presiding justice of the peace under the Justice of the Peace Act, and includes*
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> > *(a) the scheduling of judges and trials,*
> >
> > *(b) the content of judicial training programs,*
> >
> > *(c) statistics of judicial activity prepared by or for a judge, and*
> >
> > *(d) any record of the Judicial Council established under Part 6 of the Judicature Act.*

[para 38] The Public Body cites BC Order F10-10, which relates to a request for notes made by a family justice counsellor in preparing a report ordered by the court. Section 3(1)(a) of BC's FOIP Act is substantially similar to section 4(1)(a) of Alberta's Act. In BC Order F10-10 the adjudicator found that a report created at the request of a judge for the purpose of a proceeding was not a support service for the purpose of section 3(1)(a) of BC's FOIP Act. He said:

> [14] In Order No. 152-1997,[6] Commissioner Flaherty held that s. 3(1)(a) excludes the following three main categories of records from FIPPA, as follows:
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> 1. records in court files,
> 2. records of judges at all three court levels, masters and justices of the peace, and

> 3. judicial administration records and records relating to support services to judges.[7]
>
> [15] The third category clearly includes records relating to administrative support that is provided to judges. Previous cases have described "administrative functions" generally as personnel and office management functions.[8] In any particular context, this could include any or all of the following: clerical support, correspondence management, appointments and calendar management, filing and records management, communications and information technology support, office budget management, payments and accounts management, facilities management, human resources and personnel support, and contract management.
>
> [16] The term "support services" in s. 3(1)(a) may also refer to services which are provided to judges that are not purely administrative, such as research support provided by law clerks. Like the administrative support, these are services provided directly to judges in the course carrying out their functions.
>
> [17] In contrast, the report the counsellor produced was not for the judge's own use, but rather for the court generally. It was drafted at the direction of the judge, but was shared with the parties for consideration and was intended for use in the court proceedings. The counsellor provided expert analysis to the court for the administration of justice. This is not a "support service" provided to a particular judge of the court.

[para 39] Alberta Order F2017-59, also cited by the Public Body, considers the application of section 4(1)(a) to records relating to complaints about the actions of court employees taken in the course of a particular legal proceeding before the courts. The adjudicator found (at para. 32):

> That being said, the records in this inquiry were about the Applicant's complaints about how the clerks and Case Management Officer performed their roles in relation to a matter the Applicant had before the Courts. Whether a complaint itself, the investigation of a complaint, and the result of a complaint are records relating to support services provided to the judges of any courts referred to in section 4(1)(a) of the Act will depend on the nature of the complaint. I do not believe every complaint submitted to the Courts and every investigation and finding done by or on behalf of the Registrar will fit the terms of section 4(1)(a) of the Act. However, in this case, the complaint was about the services provided by the clerks and Case Management Officer and those individuals were providing their services in support of the judges of the Courts mentioned in section 4(1)(a) of the Act. The words used in the relevant portion of section 4(1)(a) use the wording "related to" which is, I believe, broad enough to cover the records at issue.

[para 40] Given the precedents discussed above, it appears that "support services provided to the judges of any of the courts" in section 4(1)(a) refers to services provided to judges in the course of their (the judges') duties.

[para 41] Generally the duties of the judges would encompass adjudicative functions. However, the Chief Justices have additional administrative functions outside of purely adjudicative functions. In my view, the phrase "support service provided to the judges…" includes support services provided to the Chief Justice for the purpose of carrying out those additional duties.

[para 42] The Public Body's initial submission describes the role of the Executive Directors as "act[ing] on behalf of the Chief Justices in regards to administrative and operational matters" (at

para. 51). This is consistent with the responsibilities assigned to the Executive Directors in the MOUs (as described above).

[para 43] In Order F2022-33, I noted the difficulty in determining the role of CTS in the records as I had not been provided any copies. I said (at para. 151):

> It seems possible that the records contain emails between the courts and CTS regarding the vulnerabilities – how they happened, whether the court's policies had been followed, etc. Possibly records consisting of such communications show how CTS addressed the security issues identified by the Applicant, and possibly such records are properly characterized as records relating to a support service provided to a judge (or master). It is difficult to conclude whether such communications would be within the court's purview by way of creating policies, or whether such communications would be within the purview of the Public Body by way of implementation. It seems likely that it would depend upon the specific content of the records, of which I have no knowledge.

[para 44] Although I have not been provided all of the records initially located by the Public Body, the records I have been given provide a significant amount of context to the arguments made by the Public Body. The content of the records support the Public Body's argument that CTS was reporting to the Executive Directors regarding the security of the court servers, and not to the Public Body. As noted above, the Executive Directors report to their respective Chief Justice.

[para 45] The records also indicate that CTS discussed the Applicant's presentation (and the possible security ramifications) with the Executive Directors before non-CTS Public Body employees were brought into the conversation. Those conversations with the Executive Directors are alluded to in the records before me; I do not have the records of the emails between CTS and the Executive Directors where they did not also involve non-CTS Public Body employees. However, the Public Body's affidavit of records includes emails between CTS and the Executive Directors; it seems reasonably likely that those emails involve the conversations that preceded the emails I have before me.

[para 46] The records provided to me indicate that CTS was communicating with the Executive Directors about the Applicant's presentation and the security vulnerabilities discussed in his presentation because the vulnerabilities could have affected court and judicial information, and may also have affected judicial administration. My explanation is somewhat vague on this point, as I cannot reveal the content of the records. The point I am making is that the conversations between CTS and the Executive Directors about the vulnerabilities affecting the court servers related to the adjudicative functions of the courts.

[para 47] In Order F2017-59 cited above, the adjudicator noted that the relevant portion of section 4(1)(a) uses the term "related to", which has a broad meaning. This is consistent with case law finding that the phrases "in respect of", "in relation to", "with reference to" and "in connection with" all suggest a wide scope (see for example, *Nowegijick v. The Queen*, 1983 CanLII 18 (SCC)).

[para 48] That said, the Supreme Court of Canada, in following *Nowegijick*, cautioned that even a phrase with a broad meaning must be interpreted in the context in which it appears. It said in *Sarvanis v. Canada*, 2022 SCC 28 (CanLII):

> 22 It is fair to say, at the minimum, that the phrase "in respect of" signals an intent to convey a broad set of connections. The phrase is not, however, of infinite reach. Although I do not depart from Dickson J.'s view that "in respect of" is among the widest possible phrases that can be used to express connection between two legislative facts or circumstances, the inquiry is not concluded merely on the basis that the phrase is very broad.
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> …
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> 24 In both cases, we must not interpret words that are of a broad import taken by themselves without looking to the context in which the words are found. Indeed, the proper approach to statutory interpretation requires that we more carefully examine the wider context of s. 9 before settling on the correct view of its reach. In *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, in discussing the preferred approach to statutory interpretation, the Court stated, at para. 21:
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>> . . . Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
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>> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
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> In my view, the nature and content of this approach, and the accuracy of Professor Driedger's succinct formulation, have not changed. Accordingly, we cannot rely blindly on the fact that the words "in respect of" are words of broad meaning.

[para 49] I agree that when CTS responded to the possible security vulnerabilities identified in the Applicant's presentation, it was providing support services to the judges of the courts. In my view, "a record relating to support services provided to the judges…" encompasses not only records of the work done by CTS, but also to records relating to that work (for example, records discussing that work). This includes communications with the Executive Directors about the work, as well as with other public body employees.

[para 50] Although it wasn't argued by the Public Body or Affected Party, it is my view that the Executive Directors also provide support services within the terms of section 4(1)(a), including providing support for the additional duties of the Chief Justices. The phrase "relating to support services provided…" encompasses not only the actual work undertaken by the Executive Directors, but communications or other records relating to that work (for example, discussing that work).

[para 51] It remains my view that in order for record to relate to support services provided to the judges, the support must be provided to the judges (individually or as a group) in relation to the performance of the judges' duties. The preamble in section 4(1) specifies that court administration records fall within the scope of the FOIP Act (assuming the records are in the

custody or control of a public body). Applying the analysis of the Court in *Nowegijick* and *Sarvanis*, the phrase "relating to support services provided to the judges…" does not necessarily include records relating to an activity that somehow supports the functioning of the courts in a broad sense; it must be remembered that the Public Body also has responsibilities relating to the administration of justice, assigned by law, and that it may have custody and control of records that relate to these responsibilities.

[para 52] In this case, having reviewed the 26 pages of records provided to me, I am satisfied that they relate to support services provided to the judges of the courts within the terms of section 4(1)(a). Therefore, the FOIP Act does not apply and I do not have jurisdiction to review the Public Body's response to the Applicant regarding those pages.

V. ORDER

[para 53] I make this Order under section 72 of the Act.

[para 54] I find the Public Body does not have custody or control of the records, except the 26 pages identified by the Public Body.

[para 55] I find that section 4(1)(a) applies to the 26 pages of records withheld under that provision. Therefore, the FOIP Act does not apply to those records.

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Amanda Swanek
Adjudicator