# ALBERTA

# OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

# ORDER F2023-35

## August 10, 2023

## JUSTICE

Case File Number 012249

**Office URL:** www.oipc.ab.ca

**Summary:** The Applicant made the following access request to Justice (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act):

> On September 22, 2016, […], Crown Prosecutor, directed the court clerk to stay the indictment no. 150070167Ql, in which (the Applicant] was accused of sexual assault. [The Applicant] requests disclosure of reasons for the decision not to prosecute under section 20(6) of the FOIP Act. The police investigation has long since been completed, and (the Applicant], as the accused, knew of and had a significant interest in the investigation.
>
> ln determining the proper exercise of the exemption from disclosure of this information, I would ask [the Public Body] to consider whether or not the reasons for the decision were disclosed to any other person, such as the police, the complainant, witnesses, or other public bodies.

The Public Body located 14 pages of records, but withheld all information under section 20(1)(g). Some information was also withheld under section 17(1). It stated:

> There were a total of 14 pages responsive to your request. Unfortunately, access to these records is refused under the following section(s) of the FOIP Act
>
> Section 17(1) - Disclosure harmful to personal privacy,
> Section 20(1)(g) - Disclosure harmful to law enforcement.
>
> We have included a copy of the relevant sections of the FOIP Act to explain why information was withheld.

The Public Body attached the statutory exceptions to disclosure it had applied to its response. The Public Body did not provide reasons for its refusal to release information under section 20(6) although it also attached this provision to the response

The Adjudicator found that the Public Body had not demonstrated that it properly exercised its discretion when it withheld the records under section 20(1)(g).

The Adjudicator also ordered the Public Body to reconsider its decisions in relation to section 17 and to consider whether it was possible to sever personally identifying information under section 6(2).

**Statutes Cited: AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 12, 17, 20, 72

**Authorities Cited: AB:** Orders 96-017, 99-028, F2004-026

**Cases Cited:** *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23

## I. BACKGROUND

[para 1] The Applicant made the following access request to Justice (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act):

> On September 22, 2016, […], Crown Prosecutor, directed the court clerk to stay the indictment no. 150070167Ql, in which (the Applicant] was accused of sexual assault. [The Applicant] requests disclosure of reasons for the decision not to prosecute under section 20(6) of the FOIP Act. The police investigation has long since been completed, and (the Applicant], as the accused, knew of and had a significant interest in the investigation.
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> ln determining the proper exercise of the exemption from disclosure of this information, I would ask [the Public Body] to consider whether or not the reasons for the decision were disclosed to any other person, such as the police, the complainant, witnesses, or other public bodies.

[para 2] The Public Body located 14 pages of records, but withheld all information under section 20(1)(g). Some information was also withheld under section 17(1). It stated:

> There were a total of 14 pages responsive to your request. Unfortunately, access to these records is refused under the following section(s) of the FOIP Act
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> We have included a copy of the relevant sections of the FOIP Act to explain why information was withheld.

The Public Body attached the statutory exceptions to disclosure it had applied to its response. The Public Body did not provide reasons for its refusal to release information under section 20(6) although it also attached this provision to the response.

[para 3] The Applicant requested review by the Commissioner of the Public Body's response to his access request.

[para 4] The Commissioner agreed to conduct a written inquiry and delegated her authority to conduct it to me.

## II. ISSUES

**ISSUE A: Does section 17(1) of the Act (disclosure an unreasonable invasion of personal privacy) apply to information in the records?**

**ISSUE B: Did the Public Body properly apply section 20(1)(g) (disclosure harmful to law enforcement)?**

## III. DISCUSSION OF ISSUES

**ISSUE A: Does section 17(1) of the Act (disclosure an unreasonable invasion of personal privacy) apply to information in the records?**

[para 5] 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 6] 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 7] Information is personal information within the terms of the FOIP Act if it is recorded and is about an identifiable individual.

[para 8] 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*

*[…]*

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

*[…]*

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

*(i) it appears with other personal information about the third party, or*
*(ii) the disclosure of the name itself would reveal personal information about the third party[…]*

*(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal*

*privacy, the head of a public body must consider all the relevant circumstances, including whether*

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

*(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 9] 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 10] 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 11] Section 17 is restricted in application to the personal information of third parties. It cannot be applied to information that is solely about an applicant, or to information that is not about an identifiable individual.

[para 12] The Public Body decided that the information the Crown prosecutor had incorporated in the opinion from transcripts of the preliminary hearing was not subject to section 17(1). Where the Crown prosecutor analyzed the information cited from the preliminary hearing, the Public Body decided that section 17(1) applied and required it to withhold personal information.

[para 13] I note that the Public Body has applied section 17 to information that is solely about the Applicant as well as information that is not about an identifiable individual. Examples of this kind of severing appear on record 3. In addition, the Public Body has severed entire sentences containing reference to persons in addition to the complainant; however, it appears the references could be severed and the remaining information given to the Applicant, as required by section 6(2) of the FOIP Act. Examples of this kind of severing appear on record 4. In such cases the Public Body appears to have severed information without considering whether information about others could be severed from the records and the information about the Applicant be provided to the Applicant.

[para 14] With regard to the severing of personal information, the Public Body's approach is contradictory. It has not severed information the Crown prosecutor took from transcripts from a preliminary hearing on the basis that it would be absurd to withhold them, as the Applicant and his legal counsel were present at the preliminary inquiry and are familiar with the transcripts. It withheld the Crown prosecutor's analysis of the same information. While I do not disagree with the Public Body that the Applicant's familiarity with the preliminary hearing and its transcripts is a relevant consideration, I am unable to agree with the Public Body that the Crown prosecutor's analysis of the same transcripts, where the analysis discusses the same personal information that the Public Body has decided to disclose, would not be subject to this same factor.

[para 15] In response to my question as to why the Public Body decided that section 17(1) did not apply to information originating from the transcript of the preliminary hearing, but not personal information from other sources, such as the Crown prosecutor's analysis, the Public Body asserted:

> While the applicant states and the OIPC (Office of the Information and Privacy Commissioner) indicated they agree that "the record is likely not an opinion about (the complainant) as a person, it is an opinion about the quality of the evidence that she [the complainant] gave to the police and to the Court," the public body maintains it is evident that the opinions were made by the crown prosecutor about the statements of an identifiable individual, who is not the applicant. Furthermore, the information was worded in such a way that a reader may readily infer that the Crown Prosecutor is expressing an opinion about a third party. Therefore, the evaluation made by the crown prosecutor is the personal information of the third party and not the applicant.

[para 16] The Public Body argues that the Crown prosecutor expressed opinions about a third party in the records and that such opinions are present in the records or are inferable from them. I disagree. The Crown prosecutor restricted her analysis to the evidence and what she considered provable at trial. I do not mean to say that the Crown prosecutor's analysis does not contain personal information – only that the Crown prosecutor's analysis does not express the Crown prosecutor's opinions about third

parties and it is impossible to make accurate inferences about any such opinions from the Crown prosecutor's analysis. To the extent that the Public Body considered that the Crown prosecutor was expressing opinions about a third party, I find that that was an inappropriate factor to consider when weighing whether it would be an unreasonable invasion of personal privacy to disclose the information under section 17(5).

*Section 17(5)(f)*

[para 17] The Public Body argues:

> The Public Body submits that the WhatsApp messages and phone call records were supplied by the third party in confidence. Past Orders of OIPC have cited the following factors in determining whether a third party supplied information in confidence:
>
> > a) Communicated to the Public Body on the basis that it was confidential and that it was to be kept confidential;
> > b) 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;
> > c) Not otherwise disclosed or available from sources to which the public has access;
> > d) 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).
>
> In the absence of a direct assertion that personal information was supplied in confidence, or once supplied would remain in confidence, the Public Body can make an assumption of confidence based on the reasonable expectation of third parties that their personal information would not be disclosed. The fact that it was supplied to the Public Body on request after the preliminary hearing shows that the third party, has been treating those records as confidential material. In the supplied Facebook post of the applicant, it shows that the complainant treated the Crown Prosecutor as "my crown prosecutor" and the Crown Prosecutor was supposed to be "fighting for me, for my case" therefore the complainant might believe that the information supplied to the Public Body in a separate private meeting is confidential and protected by solicitor-client privilege. The information was not generally meant shared outside of the parties in the communications and was prepared solely for the use of the Crown prosecutor assigned to a specific case.
>
> The information was disclosed to the Crown Prosecution for the purpose of her evaluation. When personal information is disclosed for a particular purpose, the person supplying the information does not expect that it "will be broadcast publicly or released to third parties without their consent" and that, in such circumstances, the reasonable expectation that the information will not be further divulged "must be protected" [*Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 at para. 75, citing *R. v. Dyment*, [1988] 2 S.C.R. 417 at pp. 429-30]. In the context of this record, the Public Body accordingly argues that the individual identified would have supplied the records or participated in the meeting outside of the court setting on the implicit understanding that her personal information, and her views regarding the individual involved and events, would be collected, used, and disclosed only for the purpose of the evaluation. The records are also not available from sources to which the public or the applicant has access, and the Public Body believes that the records would not entail disclosure and it has been consistently treating it as confidential.
>
> The public body has no control over the information that the 3rd party voluntarily chose to disclose or already disclosed in their social media profile. But the public body has a duty to protect the personal information of a third party in its custody and not to release the information without 3rd party's consent.

[para 18] The Public Body also argues:

> However, it is clear from the records that other information was supplied to the Public Body by the third party after the preliminary hearing (paragraph 3 of page 2) and was supplied in confidence. While some information may be known to the applicant, the Public Body has no evidence that exact copies of these records are available to the applicant. Therefore, the Public Body believes that releasing the extra information supplied by the third party would be an unreasonable invasion of the third party's personal privacy.

[para 19] The Applicant counters:

> Section 17(5)(f) [supplied in confidence] to the WhatsApp messages and phone call records must be assigned minimal weight. Firstly, the applicant does not seek access to the records themselves. Inasmuch as the records sought discuss such things, the overriding fact is that the applicant, being himself a party to the relevant phone calls and messages, already has access to them, and the discussion records do not expose him to any more of the complainant's personal information than what he already has. A page of phone records that apparently shows a phone call between the complainant and a witness, […], was entered as Exhibit P-2 at the preliminary inquiry and is therefore part of a public court proceeding.

[para 20] In the foregoing argument, the Public Body states that it believes some records documenting WhatsApp conversations were provided by a third party after a preliminary hearing. It reasons that this information was supplied in confidence, because individuals presumptively submit their personal information to the government in confidence. While it is true that section 17(4)(b) creates a rebuttable presumption that it would be an unreasonable invasion of privacy to disclose information contained in a law enforcement file, that is not the same thing as a presumption that information is supplied in confidence. There is no presumption that section 17(5)(f) applies whenever a public body receives personal information.

[para 21] The Public Body also argues that it has a "duty" not to release personal information without a third party's consent. I am unable to understand the basis for this argument. The Public Body has already decided that it would be "absurd" to withhold some of the personal information in the records, and is withholding it solely on the basis of section 20(1)(g). Moreover, consent of a third party is only one of many reasons a public body may disclose personal information under section 40. If it were the case that the Public Body may not disclose personal information in its custody or control without consent, its ability to conduct prosecutions would be seriously hampered.

[para 22] From my review of the records to which the confidentiality argument applies, I note that half of the information is that of the Applicant, while the other half could be said to be about a third party. The Public Body has severed all this information under section 17(1) as if it is the personal information of a third party, presumably because a third party provided the records to the Public Body.

[para 23] Section 1(n) defines "personal information" as information "about a third party." Information is not "personal information" simply because it is contained in a record *supplied* by a third party. Again, it is personal information if it falls within the

terms of section 1(n). Information solely about the Applicant is not personal information to which section 17(1) can apply.

[para 24] I am unable to find that the WhatsApp records, or the personal information of a third party they contain, were supplied in confidence. There is no evidence before me to indicate that these records were provided on the basis of confidentiality. I disagree with the Public Body that there is a presumption that personal information is submitted to a Crown prosecutor in confidence. There is also no evidence as to how the third party treated the information prior to providing it to the Crown prosecutor; however, the records themselves indicate their content was shared with the Applicant, or originated from the Applicant. In any event, the argument does not address the Applicant's personal information in the WhatsApp records.

[para 25] It appears likely that the WhatsApp records were submitted for the Crown prosecutor's use without restriction. There is nothing in the Crown prosecutor's opinion to suggest that these records were accepted on the basis of confidentiality, that is, that they were not to be used in Court. Rather, the Crown prosecutor's opinion considers the likely effect of these records being entered into evidence before the Court. As I find it has not been established that the personal information of third parties was supplied to the Public Body in confidence, I find that section 17(5)(f) is an irrelevant consideration in this case.

*Sections 17(5)(e) and (h)*

[para 26] The Public Body also states that it took into consideration that a third party could be subject to unfair financial harm (section 17(5)(e)) or reputational harm (section 17(5)(h)), if it disclosed personal information other than the information cited from the transcripts of the preliminary hearing. I am unable to say that there is any likelihood that disclosure of the information could result in the harms the Public Body projects. It is not evident from the personal information itself that its disclosure could result in financial or reputational harm, unfair or otherwise. As I find that the factor that disclosure would result in unfair harm has not been demonstrated to apply, I find that sections 17(5)(e) and (h) have not been demonstrated to be relevant factors.

[para 27] I note that in making arguments as to unfair harm, the Public Body has attributed a point of view to a third party regarding the disclosure of personal information in the records without consulting the third party in question as to the third party's actual point of view. Section 30 creates a duty to notify third parties and obtain their views when considering whether to disclose personal information. In this case, the Public Body has determined that it would not be an invasion of personal privacy to disclose some personal information but not others. Given that it is considering disclosing some information, the Public Body is under a duty to consult third parties. I am unable to give weight to the Public Body's general arguments as to the third party's point of view. By this I do not mean that the third party's point of view is irrelevant – only, that the Public Body has not taken steps to obtain it in order to determine how it applies to its decision.

*Section 17(5)(c)*

[para 28] The Public Body takes the position that section 17(5)(c) is not a relevant factor in this case. It states:

> The Crown stayed all the charges against the applicant, and from the submitted court decision, it is clear that the proceeding has already been completed. The applicant has not provided any further evidence as to what legal right the applicant is trying to establish or why access to the information is significant to determining the right in question. As the proceedings are no longer before the Courts and are considered complete, the information is not required for a fair determination of rights. As such, subsection 17(5)(c) has little to no bearing on the decision. Subsections 17(5)(e), (f) and (h) are directly pertinent and carry more persuasive weight on the decision of whether to disclose.

[para 29] The Applicant argues:

> With respect to the application of section 17(5)(c) [fair determination of rights], I can confirm that the applicant is presently suing the complainant for the torts of malicious prosecution, abuse of process, conspiracy and defamation arising out of the complaint of sexual assault that caused the prosecution to which the records relate. Enclosed is the amended statement of claim. Thus, the right in question is a legal right which is drawn from the concepts of common law, there is an existing proceeding (as the action has not been discontinued or adjudged yet) and the information has some bearing on the determination of the applicant's claim. I submit that past OIPC orders that require the applicant to show that the information is "required" to prepare for the proceeding or to ensure an impartial hearing are legally erroneous. The statute clearly says that the factor applies to information that is "relevant to," not "required for," a fair determination of the applicant's rights. In any event, it is unfair for the complainant to be able to testify in the context of the applicant's action about her meeting with the Crown Prosecutor while the applicant's access to the records of that meeting is denied.

[para 30] In Order 99-028, former Commissioner Clark identified four criteria to assist in determining whether section 17(5)(c) is a relevant factor in weighing whether it would be an unreasonable invasion of personal privacy to disclose information. The factors are the following:

> (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.

[para 31] The Applicant points out that he is involved in litigation relating to the subject matter of the records. The Applicant also correctly points out that section 17(5)(c)

applies to information that is "relevant to a fair determination of an applicant's rights". Information need not be indispensable to a fair determination of rights for section 17(5)(c) to apply – the information need only have some bearing on a matter to be proven in a case in which the applicant's rights will be fairly determined.

[para 32] The Crown prosecutor's reasons for deciding to stay the proceedings have a bearing on the questions to be addressed in the litigation being undertaken by the Public Body. To the extent that the Crown prosecutor's reasons for staying the prosecution contain the personal information of a third party, the factor created by section 17(5)(c) applies to this information and weighs in favor of disclosure. Having said that, I reiterate that the reasons also contain or reproduce information that is not the personal information of a third party, despite the Public Body's application of section 17(1) to it.

*Section 17(5)(i)*

[para 33] Finally, I note that section 17(5)(i) requires a public body to consider whether the personal information in question was "originally provided by an applicant". As noted above, the WhatsApp records contain information originating from the Applicant. I find that section 17(5)(i) applies to the communications originating from the Applicant.

*Conclusion*

[para 34] I find that the Public Body considered factors that have not been shown to apply when it decided to withhold information under section 17(1). It also did not consider applicable factors such as section 17(5)(c) and (i). Moreover, it has decided that section 17(5)(1) does not apply to personal information originating from transcripts on the basis that it would be absurd to withhold it, without giving notice to third parties whom the information is about under section 30. In addition, the Public Body has not adequately explained why it would be absurd to withhold information originating from the preliminary hearing, which was selected by the Crown prosecutor as relevant, but the same absurdity would not arise with respect to the same personal information where it appears in the Crown prosecutor's analysis or information that was an exhibit at the preliminary hearing. As noted above, I reject the argument that the Crown prosecutor's reasons for staying proceedings contain opinions about a third party. While the Crown prosecutor's reasons do contain some information about a third party, they are primarily about the evidence.

[para 35] As the Public Body has decided to withhold the records in their entirety under section 20(1)(g), its access decisions under section 17 are moot to a certain extent. As will be discussed in more detail below, I find the Public Body has fettered its discretion in its application of sections 20(1)(g) and 20(6) and I must order it to reconsider its decision. When it makes its new decision, I will direct it to review any decisions it must still make under section 17 by considering only relevant factors, and contacting affected third parties to obtain their positions regarding disclosure, if

necessary. In addition, it must consider whether information can be severed under section 6(2).

**ISSUE B: Did the Public Body properly apply section 20(1)(g) (disclosure harmful to law enforcement) to information in the records?**

[para 36] Section 20 states, in part:

> *20(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*
>
> > *(g) reveal any information relating to or used in the exercise of prosecutorial discretion,*
> >
> > *[…]*
>
> *(2) Subsection (1)(g) does not apply to information that has been in existence for 10 years or more.*
>
> *[…]*
>
> *(6) After a police investigation is completed, the head of a public body may disclose under this section the reasons for a decision not to prosecute*
>
> > *(a) to a person who knew of and was significantly interested in the investigation, including a victim or a relative or friend of a victim, or*
> >
> > *(b) to any other member of the public, if the fact of the investigation was made public.*

[para 37] Section 20(1)(g) authorizes the head of a public body to withhold information relating to, or used in, the exercise of prosecutorial discretion, provided the information has not been in existence for 10 years or more. Section 20(6) authorizes the head of a public body to disclose the reasons for a decision not to prosecute.

[para 38] The Applicant requested information regarding a decision not to prosecute after the conclusion of a police investigation. As the accused in the matter, the Applicant has a significant interest in the investigation.

[para 39] The Public Body applied section 20(1)(g) to the information in the records and refused to provide information regarding the reasons for the decision not to prosecute. The Public Body argues:

> The records of the Crown Prosecution's memo will reveal information relating to or used in the exercise of prosecutorial discretion, irrespective of whose personal information is contained there. We are dealing with information and opinion relating to prosecutorial power to bring, manage and

terminate prosecutions which lies at the heart of the Crown Prosecution's role and has given rise to an expectation that he or she will be, in this respect, entirely independent from any pressure.

The Supreme Court of Canada has repeatedly affirmed that prosecutorial discretion is a necessary part of a properly functioning criminal justice system: the fundamental importance of prosecutorial discretion was said to lie not in protecting the interests of individual Crown attorneys but in advancing the public interest by enabling prosecutors to make discretionary decisions in fulfilment of their professional obligations without fear of judicial or political interference. [R. v. Anderson, 2014 SCC 41 (CanLII), [2014] 2 SCR 167, at para. 37].

The disclosure of these records would prevent the Crowns from providing candid views about decisions surrounding all prosecution matters. The Crown must be able to make these types of analyses and decisions without the threat of disclosure.

Moreover, in the Court of Appeal of Alberta, it was held that "the Crown is not required to articulate the reasons for its decision. There must be an admission or evidence or an allegation with an offer of proof to warrant an inquiry into whether the exercise of discretion met the required standard." [*R. v. Ng*, 2003 ABCA 1 (CanLII) at para 68]. In the current inquiry, no such admission or evidence was tendered, nor was an allegation with an offer of proof made. Therefore, the Public body submits that the Crown Prosecution Services is not required to provide any rationale regarding its application of discretion.

Section 20(6) of the Act provides that, after a police investigation is completed, the head of a public body may disclose under this section the reasons for a decision not to prosecute. The public body believe this provision relates only to police investigations and their decision not to prosecute but not to the whole field of law enforcement i.e. the Crown Prosecution.

In Alberta, Crown prosecutors generally do not become involved in cases prior to the initiation of the prosecution by the informant, usually a peace officer or police. After the incitation of the prosecution the Crown prosecutors may decide to continue with the original charges in the Information or Indictment, to change the charges, or to stop the prosecution entirely. As such, the usual issue for the prosecutor is whether to continue or to terminate proceedings. In current case the Crown prosecutor [decided] to terminate proceedings.

Section 20 generally apply to all law enforcement and Act provided a very board definitions of 'law enforcement' in section 1(h) which includes various investigating including police investigation. But in the section 20(6) the intention of the legislators is very clear when the mentioned only the Police investigation that this this section only apply to Police Services regarding their decision not to initiate a prosecution.[*sic*]

Also the records do not include any police investigation information but only contains information related to an interview with the third-party, frank views about legal issues or other elements of the case, thoughts about the case and its possible outcomes. Therefore, the public body submits that Section 20(6) is not relevant in this inquiry.

[para 40] The Applicant argues:

Section 20(6) clearly applies to the public body in this case. The legislature's limitation of this section to "after a police investigation is completed" pertains to timing, not to the category of public bodies that may make the disclosure. Premature disclosure of the reasons for a decision to not to prosecute might in certain circumstances interfere with an ongoing police investigation. For example, where the identity of a perpetrator of a crime is uncertain, disclosure of the reasons why a particular suspect was not prosecuted might prejudice an ongoing investigation into a different suspect. There is no other significance to the words cited by the public body, and no significance to this case.

> The principles set out in *R. v. Ng*, 2003 ABCA 1 cited by the public body bear no application to section 20(1)(g). The Court of Appeal determined that the trial judge in a criminal trial did not have the jurisdiction to compel the prosecutor to disclose the reasons for refusing consent to the accused's re-election of the mode of trial, absent sufficient evidence of abuse of process. That has nothing to do with any duties imposed on the public body by provincial statute. Prosecutorial discretion is the decision to prosecute (or not prosecute), and how to conduct the prosecution. The public body's exercise of discretion under section 20(1) is not the exercise of prosecutorial discretion itself, nor is it comparable. The public body has the discretion to provide access to the records sought, and has failed to articulate reasons that are specific to these particular records as to why, more than 6 years after the prosecution was terminated, the discretion under this section militates against access.

[para 41] I agree with the Applicant that section 20(6) is not restricted in its application to police services. The reference to the conclusion of a police investigation is only to indicate the time after which information regarding a decision not to prosecute may be released. If the Legislature intended that only police services could disclose reasons not to prosecute, it could easily have done so by indicating that the discretion may be exercised only the head of a police service. Moreover, it is unclear how a police service would be in a better position to explain the reasons for terminating a prosecution when that decision has been made by a Crown prosecutor.

[para 42] The Public Body argues that it is concerned that if the information the Applicant requested is disclosed to him, that doing so would prevent Crown prosecutors from providing candid views about decisions surrounding all prosecution matters. The Crown must be able to make these types of analyses and decisions without the threat of disclosure.

[para 43] The purpose of section 20(1)(g) is to ensure that Crown prosecutors may make decisions in the exercise of prosecutorial discretion without interference. The provision is discretionary, as evidenced by the word "may", and is not an absolute bar to disclosure. In addition, once information otherwise falling within the terms of section 20(1)(g) is ten years old, it may not be withheld under this provision. The time limit set out in section 20(2) supports finding that the Legislature considered the age of information to be a relevant factor in the application of section 20(1)(g). That is, once information relating to or used in the exercise of prosecutorial discretion has existed for more than ten years, its content cannot interfere with the exercise of prosecutorial discretion because of its age.

[para 44] As the Public Body correctly points out, section 20(2) does not apply to the records in this case, as the information at issue has been in existence in some cases for 6 ½ years (the Crown's decision) and in others, 9 years (information from the WhatsApp records). At the time the Public Body made its decision, the records were 2 ½ years old and 5 years old respectively and the prosecution had been stayed for 2 ½ years. While the information does not fall within the terms of section 20(2), the existence of this provision in the FOIP Act is indicative that the Legislature considers the age of information to be relevant to the application of section 20(1)(g); that is, the age of the information is a relevant factor in the exercise of discretion when applying this provision. There is

nothing before me to indicate that the Public Body considered the age of the records or the age of the decision to stay proceedings when it elected to withhold information. The Public Body did not provide reasons for withholding information despite the request that it make a decision under section 20(6). The Public Body referred only to the exceptions it had applied.

[para 45] Both sections 20(1)(g) and 20(6) are discretionary provisions. In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, the Supreme Court of Canada commented on the authority of Ontario's Information and Privacy Commissioner to review a head's exercise of discretion. The Court noted:

> The Commissioner's review, like the head's exercise of discretion, involves two steps. First, the Commissioner determines whether the exemption was properly claimed. If so, the Commissioner determines whether the head's exercise of discretion was reasonable.
>
> In IPC Order P-58/May 16, 1989, Information and Privacy Commissioner Linden explained the scope of his authority in reviewing this exercise of discretion:
>
> In my view, the head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. It is my responsibility as Commissioner to ensure that the head has exercised the discretion he/she has under the Act. While it may be that I do not have the authority to substitute my discretion for that of the head, I can and, in the appropriate circumstances, I will order a head to reconsider the exercise of his/her discretion if I feel it has not been done properly. I believe that it is our responsibility as the reviewing agency and mine as the administrative decision-maker to ensure that the concepts of fairness and natural justice are followed. [Emphasis in original]
>
> Decisions of the Assistant Commissioner regarding the interpretation and application of the FIPPA are generally subject to review on a standard of reasonableness (see Ontario (Minister of Finance) v. Higgins (1999), 1999 CanLII 1104 (ON CA), 118 O.A.C. 108, at para. 3, leave to appeal refused, [2000] 1 S.C.R. xvi; Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor) (1999), 1999 CanLII 19925 (ON CA), 46 O.R. (3d) 395 (C.A.), at paras. 15-18; Ontario (Attorney General) v. Ontario (Freedom of Information and Protection of Privacy Act Adjudicator) (2002), 2002 CanLII 30891 (ON CA), 22 C.P.R. (4th) 447 (Ont. C.A.), at para. 3).
>
> The Commissioner may quash the decision not to disclose and return the matter for reconsideration where: the decision was made in bad faith or for an improper purpose; the decision took into account irrelevant considerations; or, the decision failed to take into account relevant considerations (see IPC Order PO-2369-F/February 22, 2005, at p. 17).
>
> In the case before us, the Commissioner concluded that since s. 23 was inapplicable to ss. 14 and 19, he was bound to uphold the Minister's decision under those sections. Had he interpreted ss. 14 and 19 as set out earlier in these reasons, he would have recognized that the Minister had a residual discretion under ss. 14 and 19 to consider all relevant matters and that it was open to him, as Commissioner, to review the Minister's exercise of his discretion.
>
> The Commissioner's interpretation of the statutory scheme led him not to review the Minister's exercise of discretion under s. 14, in accordance with the review principles discussed above.
>
> Without pronouncing on the propriety of the Minister's decision, we would remit the s. 14 claim under the law enforcement exemption to the Commissioner for reconsideration. The absence of reasons and the failure of the Minister to order disclosure of any part of the voluminous documents sought at the very least raise concerns that should have been investigated by the Commissioner.

> We are satisfied that had the Commissioner conducted an appropriate review of the Minister's decision, he might well have reached a different conclusion as to whether the Minister's discretion under s. 14 was properly exercised.

[para 46] The Supreme Court of Canada confirmed the authority of the Information and Privacy Commissioner of Ontario to quash a decision not to disclose information pursuant to a discretionary exception and to return the matter for reconsideration by the head of a public body. The Court considered that the absence of reasons for a public body's decision raised concerns as to whether discretion had been properly exercised.

[para 47] While this case was decided under Ontario's legislation, in my view, it has equal application to Alberta's legislation. Section 72(2)(b) of Alberta's FOIP Act establishes that the Commissioner may require the head to reconsider a decision to refuse access in situations when the head is authorized to refuse access. A head is authorized to withhold information if a discretionary exception applies to information. Section 72(2)(b) provision states:

> *72(2) If the inquiry relates to a decision to give or to refuse to give access to all or part of a record, the Commissioner may, by order, do the following:*
>
> > *(b) either confirm the decision of the head or require the head to reconsider it, if the Commissioner determines that the head is authorized to refuse access […]*

[para 48] In Order 96-017, the former Commissioner reviewed the law regarding the Commissioner's authority to review the head of a public body's exercise of discretion and concluded that section 72(2)(b), (then section 68(2)(b)), was the source of that authority. He commented on appropriate applications of discretion and described the evidence necessary to establish that discretion has been applied appropriately.

> A discretionary decision must be exercised for a reason rationally connected to the purpose for which it's granted. The court in *Rubin* stated that "Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act..."
>
> The court rejected the notion that if a record falls squarely within an exception to access, the applicant's right to disclosure becomes solely subject to the public body's discretion to disclose it. The court stated that such a conclusion fails to have regard to the objects and purposes of the legislation: (i) that government information should be available to the public, and (ii) that exceptions to the right of access should be limited and specific.
>
> In the court's view, the discretion given by the legislation to a public body is not unfettered, but must be exercised in a manner that conforms with the principles mentioned above. The court concluded that a public body exercises its discretion properly when its decision promotes the policy and objects of the legislation.
>
> The Information and Privacy Commissioners in both British Columbia and Ontario have also considered the issue of a public body's proper exercise of discretion, both in the context of the solicitor-client exception and otherwise. In British Columbia, the Commissioner has stated that the fundamental goal of the information and privacy legislation, which is to promote the accountability of public bodies to the public by creating a more open society, should be supported

> whenever possible, especially if the head is applying a discretionary exception (see Order No. 5-1994, [1994] B.C.I.P.C.D. No. 5).
>
> […]
>
> In Ontario Order 58, [1989] O.I.P.C. No. 22, the Commissioner stated that a head's exercise of discretion must be made in full appreciation of the facts of the case and upon proper application of the applicable principles of law. In Ontario Order P-344, [1992] O.I.P.C. No. 109, the Assistant Commissioner has further stated that a "blanket" approach to the application of an exception in all cases involving a particular type of record would represent an improper exercise of discretion.
>
> I have considered all the foregoing cases which discuss the limits on how a public body may exercise its discretion. In this case, I accept that a public body must consider the objects and purposes of the Act when exercising its discretion to refuse disclosure of information. It follows that a public body must provide evidence about what it considered.

[para 49] In that case, the Commissioner found that the Public Body had not made any representations or provided any evidence in relation to its exercise of discretion. Further, he determined that the head must consider the purpose of the exception in the context of the public interest in disclosing information when exercising discretion. As the head of the public body had not provided any explanation for withholding information, the Commissioner ordered the head to reconsider its exercise of discretion to withhold information under a discretionary exception.

[para 50] In Order F2004-026, former Commissioner Work said:

> In my view a Public Body exercising its discretion relative to a particular provision of the Act should do more than consider the Act's very broad and general purposes; it should consider the purpose of the particular provisions on which it is relying, and whether withholding the records would meet those purposes in the circumstances of the particular case. I find support for this position in orders of the British Columbia Information and Privacy Commissioner. Orders 325-1999 and 02-38 include a list of factors relevant to the exercise of discretion by a public body. In addition to "the general purposes of the legislation (of making information available to the public) the list includes "the wording of the discretionary exception and the interests which the section attempts to balance". It strikes me as a sound approach that the public body must have regard to why the exception was included, and whether withholding the information in a given case would meet that goal.

[para 51] Section 12(1) of the FOIP Act requires the Public Body to communicate its reasons for withholding information from the Applicant. It states:

> *12(1) In a response under section 11, the applicant must be told*
>
> *(a) whether access to the record or part of it is granted or refused,*
>
> *(b) if access to the record or part of it is granted, where, when and how access will be given, and*
>
> *(c) if access to the record or to part of it is refused,*

> *(i) the reasons for the refusal and the provision of this Act on which the refusal is based,*
>
> *(ii) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and*
>
> *(iii) that the applicant may ask for a review of that decision by the Commissioner or an adjudicator, as the case may be.*

[para 52] Once it is determined that a discretionary exception to disclosure applies, a public body must determine whether it will withhold the information or release it to the applicant. In making this decision, the public body will weigh any applicable public and private interests, including the purpose of the provision, in withholding or disclosing the information. In cases where the purpose of a provision is obvious from the language of a provision, less explanation is required regarding the exercise of discretion; however, where a provision, such as section 20(1)(g) does not indicate its purpose, more explanation is required. Further, where a public body is asked to provide records under section 20(6), it should state its reasons for denying the request.

[para 53] The Commissioner will review the public body's reasons for exercising discretion to withhold information from an applicant. If the Commissioner determines that the public body failed to consider a relevant factor or took into consideration irrelevant factors, or did not provide adequate reasons for withholding information, the Commissioner will direct the public body to reconsider its exercise of discretion.

[para 54] I find that the Public Body has not demonstrated that it exercised its discretion appropriately when it decided to apply section 20(1)(g) to the records at issue. First, it has indicated that it believes the independence of prosecutors will be threatened by disclosure of the records, without providing an adequate explanation as to why this would be so, particularly in view of the final paragraph of the records at issue. The Public Body has not explained why providing the Crown's reasons for staying the proceedings to the Applicant would be likely to result in the harms it projects in its inquiry submissions.

[para 55] The Public Body has not considered whether the harms to prosecutorial independence it projects could reasonably be expected to result from disclosure in view of the age of the records. It did not address this issue in its decision of February 5, 2019, and the information in the records has only aged since then. The Public Body's decision of February 5, 2019 does not contain its reasons for applying, or not applying, provisions.

[para 56] The Public Body failed to address the Applicant's request that it consider releasing the Crown prosecutor's reasons under section 20(6) in its response to the Applicant. Its submissions for the inquiry indicate that the Public Body has fettered its discretion in relation to section 20(6) by adopting an overly narrow interpretation that is not supported by the language of the provision.

[para 57] As the Public Body has not demonstrated that it properly exercised its discretion when it applied section 20(1)(g) to withhold all the information in the records, I must require it to make a new decision that relies on relevant considerations, including the age of the records. As the Applicant made a request for the reasons of a decision not to prosecute under section 20(6), I must direct the Public Body to make a decision regarding that request.

## IV. ORDER

[para 58] I make this Order under section 72 of the Act.

[para 59] I order the Public Body to provide a new decision to the Applicant and to me regarding the application of sections 20(1)(g) and 20(6). The new decision must consider any relevant public or private interests weighing for or against disclosure and also the age of the records.

[para 60] I order the Public Body to meets its duties under the FOIP Act when responding to an access request for records that may include personal information. In this case, the Public Body must

- consider whether it may sever information under section 6(2) and provide the remainder to the Applicant
- consider only relevant factors under section 17(5) when it is considering whether it would be an invasion of personal privacy to disclose personal information
- provide notice to third parties under section 30 regarding the personal information it is considering disclosing, if it is considering disclosing it.

[para 61] If the Applicant is dissatisfied with the new decision, he may request review of it.

[para 62] I order the Public Body to inform me within 50 days of receiving this order that it has complied with it.

_____

Teresa Cunningham
Adjudicator
/bah