ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2023-38

September 8, 2023

CALGARY POLICE SERVICE

Case File Number 014742

Office URL: www.oipc.ab.ca

Summary: An individual (the Applicant) made an access request to the Calgary Police Service (the Public Body). The Public Body provided the Applicant with responsive records while withholding some information under sections 17(1), 18(1)(a), 18(3), 20(1)(c), 20(1)(f), 20(1)(m), 24(1)(a), 24(1)(b), and 27(1)(a) of the *Freedom of Information and Protection of Privacy Act* (the Act). The Public Body also refused to confirm or deny the existence of further records related to one of its employees (Employee 14) under section 12(2)(a) of the Act.

At the time of inquiry, the Public Body was no longer withholding information under section 20(1)(f).

The Adjudicator found that the Public Body properly utilized section 12(2)(a), and properly withheld information under sections 18(1)(a), 20(1)(c), and 27(1)(a). In light of changes to the interpretation of section 20(1)(m) the Adjudicator ordered the Public Body to reconsider whether information withheld under that section could be withheld under section 25(1)(c)(i).

The Adjudicator ordered the Public Body to disclose to the Applicant information improperly withheld under section 17(1).

The Adjudicator ordered the Public Body to disclose to the Applicant information improperly withheld under sections 24(1)(a) and (b), and to reconsider its discretion to withhold any information under those sections.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 ss. 1(n), 6(2), 12(2), 12(2)(a), 17(1), 17(4), 17(4)(b), 17(4)(g)(i), 17(5), 18(1)(a), 18(3), 20(1)(c), 20(1)(f), 20(1)(m), 24(1)(a), 24(1)(b), 25(1)(c)(i), 27(1)(a), 72.

Authorities Cited: AB: Orders F2005-030, F2006-012, F2014-06, F2017-60, F2018-75, F2019-17, F2020-08, F2020-13, F2020-22, F2021-12, , F2021-28, F2021-34, F2022-49

Cases Cited: *Alberta (Minister of Municipal Affairs) v Alberta (Information and Privacy Commissioner)*, 2019 ABQB 274; *Bank of Montreal v. Tortora*, 2010 BCSC 1430; *Edmonton (City) Police Service v Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10; *Governors of the University of Alberta v Alberta (Information and Privacy Commissioner)*, 2022 ABQB 316

I. BACKGROUND

[para 1] On April 2, 2019, the Applicant made an access to information request under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (the Act) to the Calgary Police Service (the Public Body). The Applicant sought the following information:

1.) Can I just request an audit of whoever has searched my name from November 1st 2018 until March 31st, 2019? I need their FULL NAME (first/last), 4/5 digit barcode number, where they work, and also WHY they searched my name. I'm looking for the original audit report as well as the extra things that I put here please on a separate sheet.

2.) I'm looking to audit [Employee 1], [Employee 2] (please let me know the 4 digit number also), [Employee 3], [Employee 4] and see what they got from me from January 1st 2018 to March 31st 2019. I also want to see their messages that they may have sent to other people about me. (email conversation, etc).

3.) [Employee 14] I'm not going to mention this thing's name because it makes me wanna puke but I want to know ALL sorts of communication between this thing and the following people with the dates mentioned below please such as emails that may have been sent to each other between the mentioned time-frames.

[Employee 5] - May 2013 to May 2014 (I know this guy has some stuff about me from the above mentioned thing, I saw it in one of the emails that was sent to me)
[Employee 6] - May 2013 to May 2014
[Employee 7] - May 2013 to May 2014
[Employee 4] - May 2013 to March 2018
[Employee 8] - May 2013 to May 2014, January 2018 to April 2019
[Employee 9] - May 2013 to May 2014

4.) Whoever has searched my name on CPIC from January 1st 2013 to March 31st 2019. I want their FULL name (first-last, 4/5 digit barcode number, and where they're currently working)

5.) Any new entries on the system about me from July 1st 2017 until March 31 2019

6.) I need to know what has been documented about me in these people's emails/notes/etc

[Employee 10], October 2016 to December 2016.
[Employee 11], [Employee 15] #4565 - February 2018 to June 2018
[Employee 12] - January 2018 to April 2018.
[Employee 13] (please let me know the 4 digit number also)-Aug 2016 to October 2016, March 2017 to June 2017

[Employee 14] - I want to know if this thing has anything new on me from January 2018 to March 2019. (notes, emails that other people may have sent to it and whatnot, etc).

7.) Any communication between Edmonton Police/Tsuu Tina Police and the ones in Calgary from June 2017 to September 2018.

[para 2] The Public Body sent its response to the Applicant on June 3, 2019. The Public Body stated the access request as follows, in its response:

1. An audit of your name and substantiation from the officers from November 1, 2018 to March 31, 2019

2. Any records (messages, emails, etc.) from [Employee 1], [Employee 2], [Employee 3], and [Employee 4] from January 1, 2018 to March 31, 2019.

3. Any records (emails, notes, communications, etc.) that [Employee 14] may have regarding yourself with the following individuals:

   a. [Employee 5] - May 1, 2013 to May 31, 2014
   b. [Employee 6] - May 1, 2013 to May 31, 2014
   c. [Employee 7] - May 1, 2013 to May 31, 2014
   d. [Employee 4] - May 1, 2013 to March 31, 2018
   e. [Employee 8] - May 1, 2013 to May 31, 2014 and January 1, 2018 to April 30, 2019
   f. [Employee 9] - May 1, 2013-May 31, 2014

4. Whoever has run your name on CPIC form January 1, 2013 to March 31, 2019

5. Any new entries on the system about you from July 1, 2017 to March 31, 2019

6. Any records (emails, notes, etc.) regarding yourself form the following individuals:

    g. [Employee 10] - October 1, 2016 to December 31, 2016
    h. [Employee 11] - February 1, 2018 to June 30, 2018
    i. [Employee 15] - February 1, 2018 to June 30, 2018
    j. [Employee 12] - January 1, 2018 to April 30, 2018
    k. [Employee 13] - August 1, 2016 to October 31, 2016 and March 1, 2017 to June 30, 2017
    l. [Employee 14] - January 1, 2018 to March 31, 2019

7. Any communication between Edmonton Police and TsuuTina Police from June 1, 2017 to September 30, 2018.

[para 3] In its response to the access request, the Public Body refused to confirm or deny the existence of further records (records not already provided to the Applicant in previous access requests) from Employee 14 under section 12(2)(a) of the Act. It also withheld information under sections 17(1), 18(1)(a), 18(3), 20(1)(c), 20(1)(f), 20(1)(m), 24(1)(a), 24(1)(b), and 27(1)(a). Information withheld under section 27(1)(a) was withheld on the basis that it is subject to solicitor-client privilege.

[para 4] On July 10, 2019, the Applicant requested a review of the response to his access request. Investigation and mediation were authorized to attempt to resolve the issues, but did not do so. The matter proceeded to inquiry.

II. RECORDS AT ISSUE

[para 5] The records at issue consist of those records from which the Public Body withheld information under sections 17(1), 18(1)(a), 18(3), 20(1)(c), 20(1)(f), 20(1)(m), 24(1)(a), 24(1)(b), and 27(1)(a).

III. ISSUES

A. Did the Public Body properly refuse to confirm or deny the existence of a record as authorized by section 12(2) of the Act (contents of response)?

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

C. Did the Public Body properly apply section 18 of the Act (disclosure harmful to individual or public safety) to the information in the records?

D. Did the Public Body properly apply section 20(1) of the Act (disclosure harmful to law enforcement) to the information in the records?

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

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

IV. DISCUSSION OF ISSUES

Preliminary Matter – Further Reasons provided in Addendum

[para 6] I accepted the Public Body's submissions on sections 12(2), 18, and 20(1)(c) on an *in camera* basis. Doing so was necessary since the content of the submissions contains information that the Public Body is entitled to withhold, and information that would confirm or deny the existence of further records. For the same reason, portions of my reasons appear in a confidential Addendum, provided only to the Public Body. This is the same approach taken in Orders F2005-030 at para. 11, F2017-60 at para. 17, and F2021-12 at para. 56 (varied on other grounds).

[para 7] I acknowledge that these circumstances must be frustrating to the Applicant since the fact that the Public Body's arguments are made *in camera* limits his ability to respond to them, and the fact that he cannot see the Addendum prevents him from knowing the full reasons for my decision. However, my full reasons will be available to the Court in the event that the Applicant seeks a judicial review of this Order. The Court would thus be able to accurately review whether my specific findings in this case are reasonable or correct.

A. Did the Public Body properly refuse to confirm or deny the existence of a record as authorized by section 12(2) of the Act (contents of response)?

[para 8] Section 12(2)(a) states,

> *(2) Despite subsection (1)(c)(i), the head of a public body may, in a response, refuse to confirm or deny the existence of*
>
> *(a) a record containing information described in section 18 or 20, or*
>
> ...

[para 9] Regarding whether section 12(2)(a) or (b) has been properly applied, Former Commissioner Work stated, in Order F2006-012 at para. 18,

> Earlier orders of this Office have said that section 12(2) is to be used having regard to the objects of the Act, including access principles. In my view, in order to rely on section 12(2)(a) to refuse to say whether information exists that falls into a particular subsection of section 18 or 20, the Public Body should first consider what interest would be protected by

> withholding such information under the particular subsection of section 18 or 20, and then ask whether refusing to say if such information exists would, in the particular case, promote or protect the same interest.

Former Commissioner Work continued, at para. 21:

> …The sensible purpose for both provisions is that it is to prevent requestors from obtaining information from a request indirectly that they cannot obtain directly. Requestors are denied access to information if access would cause harm to law enforcement, or unreasonable invasion of privacy. They should be denied information as to whether a record exists for the same reason, but not otherwise. Despite the difference in wording between sections 12(2)(a) and 12(2)(b), this restriction makes the same sense for both sections; therefore, in my view, it was intended for both, and I interpret section 20(1)(a) as implicitly containing it. The discretion to refuse to confirm or deny is available only if the condition is met that it is being used to protect the same interest as non-disclosure of information. This interpretation is also in accordance with the general principle in the Act of permitting access subject only to limited and specific exceptions.

[para 10] The application of section 12(2)(a) is also to be carried out in consideration of a public body's duty to sever information under section 6(2) of the Act. The Adjudicator in Order F2014-06 stated at para. 13,

> If sections 12(2)(a) and 6(2) are not to be read as being in conflict with one another, section 12(2)(a) should be read as permitting a public body to refuse to confirm or deny the existence of a record when information subject to section 18 or 20 cannot be reasonably severed from the record and a response complying with section 12(1)(c)(i) would have the effect of disclosing the information. This interpretation is consistent with that proposed by former Commissioner Work in Order F2006-012.

[para 11] Considering the above, I find that the Public Body has properly utilized section 12(2)(a) in this case.

[para 12] The Public Body refused to confirm or deny the existence of any further records related to Employee 14, beyond those already provided to the Applicant in earlier access requests.

[para 13] As to whether the Public Body utilized section 12(2)(a) for a proper purpose, the Public Body's *in camera* submission reveals that the purposes of sections 18(1)(a) and 20(1)(c) underpinned its decision to utilize section 12(2)(a). Those sections state:

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

20(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

...

(c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement,

[para 14] As to whether confirming or denying the existence of any further records of Employee 14 might indirectly provide the Applicant with information that he cannot get directly, I consider the wording of his access request, in conjunction with the following points:

[para 15] I can see from information contained in records provided to the Applicant that he was once involved in the recruitment process to become a member (police officer) of the Public Body, but he was determined to be "lifetime ineligible" at the pre-screening stage, on February 6, 2018. He appealed that decision, but the Public Body's Human Resources Appeal Review Committee upheld the finding of lifetime ineligibility on July 25, 2018.

[para 16] Employee 14's title was disclosed to the Applicant in records provided to him in response to earlier access requests. Employee 14 is a Certified Threat Assessment and Management Specialist, working in the Public Body's Behavioural Sciences Unit.

[para 17] Numbers 3 and the last point of number 6 of the access request seek records related to Employee 14. Those parts of the request, in the Applicant's words, state,

> [Employee 14] I'm not going to mention this thing's name because it makes me wanna puke but I want to know ALL sorts of communication between this thing and the following people with the dates mentioned below please such as emails that may have been sent to each other between the mentioned time-frames.
>
> [Employee 5] - May 2013 to May 2014 (I know this guy has some stuff about me from the above mentioned thing, I saw it in one of the emails that was sent to me)
>
> …
>
> [Employee 14] - I want to know if this thing has anything new on me from January 2018 to March 2019. (notes, emails that other people may have sent to it and whatnot, etc).

[para 18] Given that the decision that the Applicant would not be a police officer took place on July 25, 2018 and the Applicant seeks information about whether Employee 14 has "anything new" about him from January 2018 to March 2019, it appears that the Applicant suspects that Employee 14 was concerned with him in some way, during and/or after the application process to become a police officer, and review thereof, came to an end.

[para 19] Considering that Employee 14's title is Threat Assessor and Manager, working in the Public Body's Behavioural Sciences Unit, confirming or denying the existence of further records would signal to anyone whether or not there is reason to anticipate threat or behavioural assessment procedures and/or investigative techniques during the periods of time specified in the access request. It may also reveal whether any particular type of conduct attracts such procedures, if any. Releasing this type of information, directly or indirectly, would permit individuals to tailor their behavior in such a way so as to either avoid behavioral or threat assessment procedures all together, or raising any concerns in the event that such procedures are applied. If that is the case, then it may be appropriate for a public body to apply section 12(2). This conclusion is similar to that of the Adjudicator in Order F2018-75.

[para 20] In Order F2018-75, the Adjudicator considered a public body's application of section 12(2) to refuse to confirm or deny records on the basis that it was important not to confirm or deny whether any law enforcement investigations were ongoing. The Adjudicator stated at paras. 108-109,

> I have noted that it is unlikely that an investigation that was ongoing in 2014 (if any were undertaken) would still be ongoing now. The Public Body has not provided me with any information in this regard. However, in the event that an investigation was ongoing at the time of the Applicant's access requests remains ongoing, it would be appropriate for the Public Body to refuse to confirm or deny the existence of responsive records. Investigations into matters such as possible misrepresentations of an injury would be obviously hampered if the claimant knew s/he was being investigated. For example, behaviour could be altered, materially changing the evidence that can be collected by a medical practitioner observing the claimant, or by covert surveillance in a public setting. This represents actual damage, rather than a simple hindrance or mere interference. The likelihood of this harm is genuine and conceivable. Therefore, this falls within the scope of section 20(1)(a).
>
> The Public Body argues that section 12(2) cannot apply only when there is an ongoing investigation; otherwise, applicants would be alerted of an ongoing investigation in every instance in which this provision was applied. I agree. Therefore, the Public Body may continue to refuse to confirm or deny the existence of records relating to any ongoing investigation.

[para 21] Though the above passage is made with regard to the purpose of section 20(1)(a) [harm to a law enforcement matter], I find its rationale equally applicable to the purpose of 20(1)(c), harm to the effectiveness of investigative techniques and procedures, which is one of the Public Body's purposes in this case. If individuals know that any investigative technique or procedure will or will not be applied to them, it may undermine the effectiveness of those techniques or procedures.

[para 22] Applying the above reasoning to this case, I find that the Public Body properly applied section 12(2). Confirming or denying the existence of any further records of Employee 14 stands to indicate the degree, if any, of his involvement with the

Applicant, and by extension whether or not behavioural or threat assessment investigative techniques were used, and why, which would harm their effectiveness.

[para 23] As I have found that the Public Body properly utilized section 12(2) with respect to the purpose in section 20(1)(c), I do not need to consider section 12(2) with respect to sections 18(1)(a) and (b).

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

[para 24] The Public Body withheld information under section 17(1) from the following pages of the responsive records: 14, 15, 16, 18, 21, 23, 25, 28, 31, 34, 39, 42, 63, 64, and 77.

[para 25] Section 17(1) of the Act requires a public body to withhold third party personal information in response to an access request where disclosing it would be an unreasonable invasion of the third party's personal privacy. Section 17(1) states,

> *17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.*

[para 26] "Personal Information" is defined in section 1(n) of the Act:

> *(n) "personal information" means recorded information about an identifiable individual, including*
>
> > *(i) the individual's name, home or business address or home or business telephone number*
> >
> > *(ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,*
> >
> > *(iii) the individual's age, sex, marital status or family status,*
> >
> > *(iv) an identifying number, symbol or other particular assigned to the individual,*
> >
> > *(v) the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,*
> >
> > *(vi) information about the individual's health and health care history, including information about a physical or mental disability,*
> >
> > *(vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,*
> >
> > *(viii) anyone else's opinions about the individual, and*

(ix) the individual's personal views or opinions, except if they are about someone else;

[para 27] In this case, all of the information withheld by the Public Body is third party personal information under sections 1(n)(i) and (vii) of the Act. The information consists of the name of a third party who was involved in a police matter. Other personal information consists of middle initials and employment history information of several employees of the Public Body.

[para 28] The application of section 17(1) is informed by sections 17(4) and (5) which provide for presumptions that disclosure is an unreasonable invasion of third party personal privacy, and circumstances to consider in determining whether disclosure is an unreasonable invasion of third party personal privacy, respectively. Sections 17(4) and 17(5) state,

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

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

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

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

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

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

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

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

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

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

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

or

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

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

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

(b) the disclosure is likely to promote public health and safety or the protection of the environment,

(c) the personal information is relevant to a fair determination of the applicant's rights,

(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,

(e) the third party will be exposed unfairly to financial or other harm,

(f) the personal information has been supplied in confidence,

(g) the personal information is likely to be inaccurate or unreliable,

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and

(i) the personal information was originally provided by the applicant.

[para 29] The list of circumstances in section 17(5) is not exhaustive. Any other relevant circumstances must also be considered when determining whether or not disclosure is an unreasonable invasion of third party personal privacy.

Presumptions under section 17(4)

[para 30] The Public Body did not make any argument about whether any presumptions under section 17(4) apply.

[para 31] The presumption against disclosure under section 17(4)(d) applies to personal information that relates to employment history.

[para 32] Regarding the name of a third party involved in a police matter, the name is an identifiable part of a law enforcement record. The presumption against disclosure in section 17(4)(b) applies to this information. As the name also appears alongside other personal information present in the record, the presumption under section 17(4)(g)(i) applies as well.

[para 33] Regarding middle names and middle initials of employees of the Public Body, I consider that they appear amidst the first and last names of the employees, which are personal information. The first and last names were disclosed to the Applicant. Given

that the middle names and initials appears with other personal information the presumption against disclosure under section 17(4)(g)(i) applies to them as well.

Relevant Circumstances under section 17(5)

[para 34] Neither the Public Body nor the Applicant made any arguments about which factors under section 17(5), or other circumstances, may be relevant to this case. After reviewing the listed factors, I conclude that none apply. I do not see that there are any other relevant circumstances to consider.

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

[para 35] Since there are no factors to outweigh them under section 17(5), the presumption against disclosure that applies to the name of a third party involved in a police matter as well as employment history information of employees of the Public Body continue to apply. I find that the Public Body properly withheld this information.

[para 36] Regarding middle names and initials of employees of the Public Body, I find that the Public Body was not required to withhold this information. Previous Orders of this office have held that names associated only with performance of employment duties do not have a personal dimension and thus disclosing them is not an unreasonable invasion of personal privacy. The Adjudicator in Order F2020-03 stated at para. 37,

> Names of third parties are personal information under the FOIP Act. However, the disclosure of the names, contact information and job titles of individuals acting in their professional capacities is not an unreasonable invasion of personal privacy under section 17(1) (see Orders 2001-013 at para. 88, F2003-002 at para. 62, F2008-028 at para. 53) unless that information has a personal dimension in the circumstances. In other words, in the absence of a personal dimension, information cannot be withheld under section 17(1).

[para 37] Since the middle initials and names will only be disclosed as part of records of the Public Body employees acting in their professional capacities, that information cannot be withheld under section 17(1).

C. Did the Public Body properly apply section 18 of the Act (disclosure harmful to individual or public safety) to the information in the records?

[para 38] The Public Body withheld information under section 18(1)(a) on the following pages: 14, 18, 20, 22, 25, 27, 31, 34, 38, and 41.

[para 39] The information withheld on page 14 was also withheld under section 18(3).

[para 40] Sections 18(1)(a) and 18(3) state,

> *18(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to*
>
> *(a) threaten anyone else's safety or mental or physical health, or*
>
> *...*
>
> *(3) The head of a public body may refuse to disclose to an applicant information in a record that reveals the identity of an individual who has provided information to the public body in confidence about a threat to an individual's safety or mental or physical health.*

[para 41] I find that the Public Body has applied section 18(3) to information that falls outside of its terms, and therefore applied it incorrectly.

[para 42] In *Governors of the University of Alberta v Alberta (Information and Privacy Commissioner)*, 2022 ABQB 316 (*University of Alberta*) the Court wrote of section 18(3) at para. 33:

> In his reasons, the Adjudicator interpreted this section to mean that certain individuals, as a result of their relationship to the University, are not protected by that section. In other words, the information of one is the information of all. Given the size and complexity of the University's organization, that is an untenable conclusion.

[para 43] *University of Alberta* concerned circumstances where someone with a relationship to the University forwarded pre-existing information to University employees working to implement a University program. The situation in this case is not the same as that in *University of Alberta*.

[para 44] In this case, the information withheld under section 18(3) is the name of an assessor in the Public Body's Domestic Conflict Unit (the Assessor).

[para 45] Any information regarding a threat to an individual's safety or mental or physical health prepared by the Assessor was done as part of the Assessor's work with the Public Body. Under those circumstances, such information was not provided to the Public Body as section 18(3) requires; rather, it was generated by the Public Body itself. To say that when a public body employee generates information in their role as an employee of the public body, the employee is providing information to the public body is, in my view, an unreasonable interpretation of section 18(3). It collapses the distinction between an individual who provides information, and a public body who receives it to the effect that a public body, as one entity, may provide information to itself. It is evident on the plain wording of section 18(3) "*…an individual who has provided information to the public body…"* that it does not include circumstances where one entity - a public body - generates information for itself. The Public Body also did not indicate that any information prepared by the Assessor would have been provided to the Public Body in confidence, which is also a requirement of section 18(3).

[para 46] The information withheld under section 18(1)(a) includes the name of the Assessor as well as the name of a civilian employee (the Civilian Employee) of the Public Body. In records provided to the Applicant, the Civilian Employee, while not identified by name, is described to be investigating a complaint made by the Applicant against Employee 14.

[para 47] The relevant considerations to determining whether section 18(1)(a) has been properly applied were set in Order F2020-08 at paras. 29 – 33, reproduced below:

> In Order H2002-001, former Commissioner Work considered what must be established in order for section 11(1)(a)(ii) of the Health Information Act, which is similar to section 18 of the FOIP Act, to be applicable. He reviewed previous Orders of this Office addressing what is necessary to establish a reasonable expectation of harm under section 18 of the FOIP Act and adopted the following approach:
>
> > In Order 2001-010, the Commissioner said there must be evidence of a direct and specific threat to a person, and a specific harm flowing from the disclosure of information or the record. In Order 96-004, the Commissioner said detailed evidence must be provided to show the threat and disclosure of the information are connected and there is a probability that the threat will occur if the information is disclosed.
>
> This analysis has been followed with respect to section 18(1)(a) of the FOIP Act. In Order F2013-51, the Director of Adjudication reviewed past orders of this office regarding the application of section 18. She summed up those orders as follows (at paras. 20-21):
>
> > These cases establish that section 18 of the FOIP Act applies to harm that would result from disclosure of information in the records at issue, but not to harm that would result from factors unrelated to disclosure of information in the records at issue. Further, a public body applying section 18 of the FOIP Act must provide evidence to support its position that harm may reasonably be expected to result from the disclosure of information (as must a custodian applying section 11(1)(a) of the HIA).
> >
> > Following the approach adopted by the former Commissioner in Order 96-004, and in subsequent cases considering either section 18 of the FOIP Act or section 11 of the HIA, the onus is on the Public Body to provide evidence regarding a threat or harm to the mental or physical health or safety of individuals, to establish that disclosure of the information and the threat are connected, and to prove that there is a reasonable expectation that the threat or harm will take place if the information is disclosed.
>
> In Order F2004-029, the adjudicator also stated that "being difficult, challenging, or troublesome, having intense feelings about injustice, being persistent, and to some extent, using offensive language, do not necessarily bring section 18 into play" (at para. 23).
>
> I agree with the above analyses. Further, the Supreme Court of Canada has clearly enunciated the test to be used in access-to-information legislation wherever the phrase "could reasonably be expected to" is found (such as in section 18(1)(a)). In *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII), the Court stated:

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

[para 48] I agree with the above analysis of section 18(1)(a). I apply that analysis to this case.

[para 49] In this case, as in Order F2021-34, the Public Body provided its submission regarding section 18(1)(a) *in camera*. As such, I cannot reveal the precise details of it. I discuss the Public Body's *in camera* evidence in general terms only.

[para 50] The Public Body has provided arguments with respect to the Assessor and the Civilian Employee. The Public Body's arguments that releasing their withheld names could reasonably be expected to threaten their safety or physical or mental health are particular to the Applicant, and not general in nature. The Public Body's arguments are based on prior events, and not mere possibility. The Public Body's safety concerns are

about the prospect of circumstances that would amount to more than mere challenging or persistent behavior, or offensive language. The Public Body has met the requirements of section 18(1)(a).

[para 51] In light of the above, I find that the Public Body has applied section 18(1)(a) to information that properly falls within its parameters.

Exercise of Discretion under section 18(1)(a)

[para 52] Section 18(1)(a) is a discretionary exception to disclosure; as such, the Public Body must demonstrate that it properly exercised discretion to withhold information under it.

[para 53] As also found in Order F2021-34 at para. 37, given that I have found that the Public Body established the possibility of a threat to the safety or mental or physical health should the names of the Assessor and the Civilian Employee be disclosed, I am satisfied that it has properly exercised its discretion to withhold such information under section 18(1)(a).

D. Did the Public Body properly apply section 20(1) of the Act (disclosure harmful to law enforcement) to the information in the records?

[para 54] The Public Body withheld information under sections 20(1)(c), 20(1)(f), and 20(1)(m). I discuss each in turn below.

Information withheld under section 20(1)(c)

[para 55] Section 20(1)(c) appears above, at paragraph 13.

[para 56] In its June 3, 2019, response to the Applicant regarding his access request, the Public Body indicated that it withheld some information under section 20(1)(c). The response also stated that it refused to confirm or deny the existence of some records pursuant to section 12(2)(a).

[para 57] Upon reviewing the records at issue, what information was withheld under section 20(1)(c) was not evident. Accordingly, I asked the Public Body to clarify what information it withheld under section 20(1)(c). In response, the Public Body noted that a redaction under 20(1)(c) could be found on page 1 of the records provided to the Applicant. In the copy of the records provided to me for review, there is only one redaction to page 1 and the label applied to it indicates that it is a redaction under section 24(1)(b). I will discuss this further, below. Although it was not clear in the Public Body's response to the Applicant, the Public Body states that section 20(1)(c) was referenced to underpin its application of section 12(2)(a); that appears to be the case.

[para 58] As already discussed above, the purpose of section 20(1)(c) was one of the reasons why the Public Body utilized section 12(2)(a). Regarding the information withheld on page 1 of the records at issue, upon review it appears to be of a type of

information that may tend to indicate whether or not further records from Employee 14 exist. I agree with the Public Body's assertion that redacting this information is necessary to the effective operation of section 12(2)(a) in this case. Revealing the redacted information may also harm investigative techniques or procedures in the same way in which confirming or denying the existence of further records would, as discussed above in regard to the Public Body's application of section 12(2)(a). The information is of a type that is captured under section 20(1)(c). It is not the sort of information that would be captured under section 24(1)(b), the parameters of which are discussed below in Issue E.

[para 59] In light of the fact that the information on page 1 falls within the parameters of section 20(1)(c) and not 24(1)(b), and that redacting this information is necessary to the effective utilization of section 12(2)(a), and that the utilization of 12(2)(a) serves the purpose of section 20(1)(c), I am prepared to conclude that the Public Body intended to withhold this information under section 20(1)(c), and not section 24(1)(b). The label indicating redaction under section 24(1)(b) affixed to the redaction on page 1 appears to be an error. I will consider whether the information was properly withheld under section 20(1)(c).

[para 60] As already noted, the information falls within the parameters of section 20(1)(c). As section 20(1)(c) is a discretionary exception to disclosure, the Public Body must demonstrate that it properly exercised its discretion to withhold information under this section.

[para 61] In Order F2020-22 at paras. 81 - 87, the Adjudicator summarized the proper approach to considering a public body's exercise of discretion:

> Section 20(1) is a discretionary exception. In Ontario (Public Safety and Security) v. Criminal Lawyers' Association, 2010 SCC 23 (CanLII), 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 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 also considered the following factors to relevant to the review of discretion:
>
> - the decision was made in bad faith
> - the decision was made for an improper purpose
> - the decision took into account irrelevant considerations
> - the decision failed to take into account relevant considerations
>
> In Order F2010-036 the adjudicator considered the application of the above decision of the Court to Alberta's FOIP Act, as well as considered how a public body's exercise of discretion had been treated in past orders of this Office. She concluded (at para. 104):

> In my view, these approaches to review of the exercise of discretion are similar to that approved by the Supreme Court of Canada in relation to information not subject to solicitor-client privilege in *Ontario (Public Safety and Security)*.

In *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (CanLII) (EPS), the Court provided detailed instructions for public bodies exercising discretion to withhold information under the Act. This decision was issued after the Public Body provided its submissions to this inquiry. However, it might be helpful for the Public Body to review the discussion.

The Court said (at para. 416)

> What *Ontario Public Safety and Security* requires is the weighing of considerations "for and against disclosure, including the public interest in disclosure:" at para 46. The relevant interests supported by non-disclosure and disclosure must be identified, and the effects of the particular proposed disclosure must be assessed. Disclosure or non- disclosure may support, enhance, or promote some interests but not support, enhance, or promote other interests. Not only the "quantitative" effects of disclosure or non-disclosure need be assessed (how much good or ill would be caused) but the relative importance of interests should be assessed (significant promotion of a lesser interest may be outweighed by moderate promotion of a more important interest). There may be no issue of "harm" in the sense of damage caused by disclosure or non-disclosure, although disclosure or non-disclosure may have greater or lesser benefits. A reason for not disclosing, for example, would be that the benefit for an important interest would exceed any benefit for other interests. That is, discretion may turn on a balancing of benefits, as opposed to a harm assessment.

It further explained the weighing of factors at paragraph 419:

> ...If disclosure would enhance or improve the public body's interests, there would be no reason not to disclose. If non-disclosure would benefit the public body's interests beyond any benefits of disclosure, the public body should not disclose. If disclosure would neither enhance nor degrade the public body's interests, given the "encouragement" of disclosure, disclosure should occur. Information should not be disclosed only if it would run counter to, or degrade, or impair, that is, if it would "harm" identified interests of the public body.

Lastly, the Court described burden of showing that discretion was properly exercised (at para. 421):

> I accept that a public body is "in the best position" to identify its interests at stake, and to identify how disclosure would "potentially affect the operations of the public body" or third parties that work with the public body: EPS Brief at para 199. But that does not mean that its decision is necessarily reasonable, only that it has access to the best evidence (there's a difference between having all the evidence and making an appropriate decision on the evidence). The Adjudicator was right that the burden of showing the appropriate exercise of discretion lies on the public body. It is obligated to show that it has properly refrained from disclosure. Its reasons are subject to review by the IPC. The public body's exercise of discretion must be established; the exercise of discretion is not presumptively valid. The public body

must establish proper non-disclosure. The IPC does not have the burden of showing improper non-disclosure.

[para 62] Based upon the Public Body's submissions, I can see that the Public Body considered the need to protect its investigative techniques and processes, and the related need to redact this information in order to effectively utilize section 12(2)(a). The Public Body concluded, and I agree, that harm to its investigative techniques and procedures may result if this information is revealed. I am satisfied that the Public Body properly considered the harm that would result from disclosure. I also find that the potential harm of disclosure outweighs any benefits of it. While the Public Body should explicitly consider the benefits of disclosure any time it exercises discretion, it is evident on the facts of this case and the face of the information withheld, that the chief benefit of disclosure would be to provide a fuller answer to the Applicant's request. There is little else to be gained from disclosure, while the harm that results – undermining investigative techniques and procedures – works against the public interest in having effective law enforcement measures.

[para 63] I find that the Public Body properly withheld information under section 20(1)(c).

Information withheld under section 20(1)(f)

[para 64] Section 20(1)(f) of the Act states,

> *20(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*
>
> ...
>
> *(f) interfere with or harm an ongoing or unsolved law enforcement investigation, including a police investigation,*
>
> ...

[para 65] The Public Body withheld information under section 20(1)(f) in response to the access request since there was an ongoing investigation at that time. The investigation has since ended and the Public Body has released a 13-page record to the Applicant, previously withheld under this section. The Public Body no longer relies on this section to withhold any information.

Information withheld under section 20(1)(m)

[para 66] Section 20(1)(m) of the Act states,

> *20(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*
>
> ...

> *(m) harm the security of any property or system, including a building, a vehicle, a computer system or a communications system, or*
>
> ...

[para 67] The Public Body applied section 20(1)(m) exclusively to information consisting of direct-line telephone numbers of its employees.

[para 68] As noted by the Public Body, in Order F2021-28 at paras. 42 and 43, the Adjudicator questioned the previously accepted rationale for finding that employee telephone numbers could be withheld under section 20(1)(m) given in Order F2020-13. The Adjudicator in Order F2021-28 was skeptical that merely disclosing a telephone number could harm the security of a communications system.

[para 69] The Adjudicator in Order F2021-28 also noted that section 20(1) is specific to law enforcement, but problems associated with disclosing employee telephone numbers could affect any public body, including those not involved in law enforcement activities. The Adjudicator went on to consider whether other sections of the Act might permit public bodies to withhold internal employee telephone numbers and cell numbers. The Adjudicator found that a public body might be permitted to withhold such information under section 25(1)(c)(i) of the Act. See Order F2021-28 at paras. 46 – 53. Section 25(1)(c)(i) states,

> *25(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to harm the economic interest of a public body or the Government of Alberta or the ability of the Government to manage the economy, including the following information:*
>
> ...
>
> *(c) information the disclosure of which could reasonably be expected to*
>
> *(i) result in financial loss to,*
>
> ...
>
> *the Government of Alberta or a public body;*

[para 70] I agree with the comments respecting section 20(1)(m) and 25(1)(c)(i) in F2021-28. I also note that Order F2021-28 was issued after the Public Body responded to the access request.

[para 71] In view of the shift in the understanding of under which sections of the Act Public Body telephone numbers may be withheld described in Order F2021-28, I find that the Public Body improperly withheld telephone numbers under section 20(1)(m). Since this shift in understanding occurred after the Public Body responded to the access request,

I will order the Public Body to reconsider withholding these telephone numbers under section 25(1)(c)(i) of the Act.

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

[para 72] The Public Body withheld information under sections 24(1)(a) and/or (b) from the following pages of the responsive records: 20, 22, 24, 27, 30, 33, 37, 38, 40, 41, 73, 74, 75, 76, 79, 80, 81, and 82.

[para 73] Sections 24(1)(a) and (b) of the Act state,

> *24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*
>
> *(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,*
>
> *(b) consultations or deliberations involving*
>
> *(i) officers or employees of a public body,*
>
> *(ii) a member of the Executive Council, or*
>
> *(iii) the staff of a member of the Executive Council,*

[para 74] The scope of information captured under sections 24(1)(a) and (b) was summarized in Order F2019-17 at paras. 161-166,

> In previous orders, the former Commissioner has stated that the advice, proposals, recommendations, analyses or policy options under section 24(1)(a) should:
>
> 1. be sought or expected, or be part of the responsibility of a person by virtue of that person's position,
> 2. be directed toward taking an action,
> 3. be made to someone who can take or implement the action. (See Order 96-006, at p.9)
>
> In Order F2013-13, the adjudicator stated that the third arm of the above test should be restated as "created for the benefit of someone who can take or implement the action" (at paragraph 123).
>
> In Order F2012-06, the adjudicator stated, citing former Commissioner Clark's interpretation of "consultations and deliberations", that
>
> > It is not enough that records record discussions or communications between employees of a public body; rather, a consultation takes place only when the individuals listed in section 24(1)(b) are asked for their views regarding a potential course of action, and a deliberation occurs when those individuals

> discuss a decision that they are responsible for, and are in the process of, making. (At para. 115)

In Order F2012-10, the adjudicator clarified the scope of section 24(1)(b):

> A consultation within the terms of section 24(1)(b) takes place when one of the persons enumerated in that provision solicits information of the kind subject to section 24(1)(a) regarding that decision or action. A deliberation for the purposes of section 24(1)(b) takes place when a decision maker (or decision makers) weighs the reasons for or against a particular decision or action. Section 24(1)(b) protects the decision maker's request for advice or views to assist him or her in making the decision, and any information that would otherwise reveal the considerations involved in making the decision. Moreover, like section 24(1)(a), section 24(1)(b) does not apply so as to protect the final decision, but rather, the process by which a decision maker makes a decision. (At para. 37)

Further, sections 24(1)(a) and (b) apply only to the records (or parts thereof) that reveal substantive information about which advice was sought or consultations or deliberations were being held. Information such as the names of individuals involved in the advice or consultations, or dates, and information that reveals only the fact that advice is being sought or consultations held on a particular topic (and not the *substance* of the advice or consultations) cannot generally be withheld under section 24(1) (see Order F2004-026, at para. 71).

Bare recitation of facts or summaries of information also cannot be withheld under sections 24(1)(a) or (b) unless the facts are interwoven with the advice, proposal, recommendations etc. such that they cannot be separated (Order 2007-013 at para. 108, Decision F2014-D-01 at para. 48). As well, neither section 24(1)(a) nor (b) apply to a decision itself (Order 96-012, at paras. 31 and 37).

[para 75] I agree with the Adjudicator in Order F2019-17. I now consider information withheld under sections 24(1)(a) and 24(1)(b).

[para 76] After reviewing the information withheld under sections 24(1)(a) and (b), I find that the Public Body has applied those sections to information captured within their terms, with the following exceptions.

[para 77] On pages 30, 33, 37, and 40 of the responsive records, the Public Body withheld information that appears to be records of a decision made, rather than advice or consultation. These redactions are the first redactions under section 24(1)(b) on pages 30, 33, 37, and 40. As quoted in the passage above at para.74, sections 24(1)(a) and (b) do not apply to decisions.

[para 78] The Public Body withheld the entirety of pages 79 – 82 under sections 24(1)(a) and (b). In doing so, it withheld significant amounts of information that does not constitute advice or consultations.

[para 79] Each of pages 79 – 82 contains e-mail messages. The names of the sender and recipients have been withheld, along with the date and time of the messages, subject line, signatures, and at the bottom of page 79, a boiler-plate disclaimer about the intended use of the emails. None of this information is captured under sections 24(1)(a) or (b). The remainder of the withheld information on pages 79 – 82 consists of the bodies/text of the e-mail messages. As described below, I find that the some of the information withheld in the bodies/text of the messages is captured by sections 24(1)(a) and/or (b), but other information is not.

Page 79

[para 80] The bodies of these messages constitute advice and/or consultations and deliberations captured under sections 24(1)(a) and (b). The only exception are the first two words of the body of the second message on the page. These words are an expression of gratitude, and do not constitute advice or consultations or deliberations.

Page 80

[para 81] This page contains the bodies of three e-mails. Only the two paragraphs composing the body of the third e-mail are captured under sections 24(1)(a) and/or (b). The bodies of the other e-mails indicate only that the information in the third e-mail was forwarded on, and do contain any advice, or deliberations or consultations themselves, or reveal the information in the third e-mail.

Pages 81 and 82

[para 82] These pages contain the body of one e-mail; it contains seven paragraphs.

[para 83] The fifth and seventh paragraphs constitute advice under section 24(1)(a).

[para 84] The first, second, third, fourth, and sixth paragraphs consist of statements of fact and/or observations rather than advice, consultations or deliberations, and are not captured under sections 24(1)(a) or (b).

Exercise of Discretion

[para 85] Since section 24(1) is a discretionary exception to disclosure, the Public Body must demonstrate that it properly exercised its discretion by taking into account appropriate considerations. The considerations a public body should undertake are set out in the discussion of section 20(1)(c) under Issue D, above.

[para 86] The Public Body did not explain what considerations it took into account when exercising discretion under section 24(1); accordingly I cannot conclude that it properly exercised that discretion. I find that the Public Body failed to properly exercise discretion under section 24(1).

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

[para 87] Section 27(1)(a) states,

> *27(1) The head of a public body may refuse to disclose to an applicant*
>
> > *(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,*

[para 88] The Public Body withheld information under section 27(1)(a) from pages 73 and 76 of the records at issue. The information appears to be no more than 3 to 4 lines in length. While I cannot review this information, I am able to review the rest of pages 73 and 76. These pages are identical to each other. The Public Body also describes that the withheld information on each page is identical.

[para 89] The Public Body initially provided an affidavit (the Affidavit) describing the record on which the withheld information appears and the withheld information as follows:

> Email from [name] in PSS to investigators on the file.
>
> Included in the email under heading Email 3 – Received 2018-02-19 is a confidential opinion made by CPS legal Counsel [name of legal counsel] regarding email 3.

[para 90] In the Affidavit, the Public Body identified the privilege it was claiming over the information as "27(1)(a)." However, section 27(1)(a) of the Act neither constitutes nor creates a privilege. It permits public bodies to withhold information that is subject to a recognized privilege.

[para 91] By letter dated December 6, 2022, I asked the Public Body to specify what privilege it was claiming. In the event that the Public Body claimed solicitor-client privilege, I also asked it to clarify whether the opinion provided by its legal counsel was a legal opinion or if the opinion was prepared for non-legal purposes. In response, the Public Body clarified that it was claiming solicitor-client privilege over the information, and that the opinion was a legal one.

[para 92] I adopt the same approach to considering the Public Body's claim of solicitor-client privilege set out in Order F2022-49 at paras. 47 to 55, reproduced below:

> The test to establish whether communications are subject to solicitor-client privilege is set out by the Supreme Court of Canada in *Canada v. Solosky*, [1980] 1 S.C.R. 821. The Court said:
>
> > ... privilege can only be claimed document by document, with each document being required to meet the criteria for the privilege--(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties.

The requirements of this privilege are met if information is a communication between a solicitor and a client, which was made for the purpose of seeking or giving of legal advice and intended to be kept confidential by the parties.

Solicitor-client privilege can also extend past the immediate communication between a solicitor and client. In *Blood Tribe v. Canada (Attorney General)*, 2010 ABCA 112 (CanLII), the Alberta Court of Appeal stated (at para 26):

> The appellant also argues that even if some of the documents contain legal advice and so are privileged, there is no evidence that all of the documents do so. For example, the appellant argues that minutes of meetings, emails and miscellaneous correspondence between Justice Canada lawyers and the Department of Indian and Northern Affairs may not contain any actual advice, or requests for advice, at all. The solicitor-client privilege is not, however, that narrow. As the court stated in *Balabel v. Air India*, [1988] Ch 317, [1988] 2 All E.R. 246 at p. 254 (C.A.):
>
> Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communication and meetings between the solicitor and client. The negotiations for a lease such as occurred in the present case are only one example. Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.
>
> The miscellaneous documents in question meet the test of documents which do not actually contain legal advice but which are made in confidence as part of the necessary exchange of information between the solicitor and client for the ultimate objective of the provision of legal advice.

In Order F2015-22, the adjudicator summarized the above, concluding that "communications between a solicitor and a client that are part of the necessary exchange of information between them so that legal advice may be provided, but which do not actually contain legal advice, may fall within the scope of solicitor-client privilege" (at para. 76). I believe this is a well-established extension of the privilege.

Where a public body elects not to provide a copy of the records over which solicitor-client or litigation privilege is claimed, the public body must provide sufficient information about the records, in compliance with the civil standards set out in the Rules of Court (Alta Reg 124/2010, ss. 5.6-5.8). These standards were clarified in *Canadian Natural Resources Limited v. ShawCor Ltd.*, 2014 ABCA 289 (CanLII) (*ShawCor*). *ShawCor* states that a party claiming privilege must, for each record, state the particular privilege claimed and

provide a brief description that indicates how the record fits within that privilege (at para. 36 of *ShawCor*).

The Act places the burden of proof on the Public Body to show that section 27(1)(a) of the Act applies to the records at issue. In *EPS*, cited above, the Court found that the adjudicator in Order F2017-58 correctly identified the standard as follows: evidence supporting a claim of privilege must be sufficiently clear and convincing so as to satisfy the burden of proof on a balance of probabilities (at para. 82 of EPS).

In *EPS* the Court further states that the role of this Office in inquiries involving claims of privilege under section 27(1)(a) of the Act is to review claims and assertions of privilege. The Court commented on the limitations of this review, given that the Office does not have authority to compel production of information over which solicitor-client privilege is claimed. It states that "... the IPC cannot "properly determine" whether solicitor-client privilege exists: 2018 CPS (CA) at para 3. The scope of the IPC's review of claims of solicitor-client privilege is inherently limited. The IPC is not entitled to review the relevant records themselves" (at para. 85).

The Court describes the role of this Office in reviewing a claim of privilege as follows (at paras. 103-105):

> The clear direction from the Supreme Court is that compliance with provincial civil litigation standards for solicitor-client privilege claims suffices to support the exception from disclosure under FOIPPA. The IPC's statutory mandate must be interpreted in light of the Supreme Court's directions. The IPC has an obligation to review and a public body has an obligation to prove the exception on the balance of probabilities. But if the public body claims solicitor-client privilege in accordance with provincial civil litigation standards, the exception is thereby established on the balance of probabilities. It is likely that the privilege is made out, in the absence of evidence to the contrary...
>
> Does this approach mean that the IPC must simply accept a public body's claims of privilege? Is the IPC left with just "trust me" or with "taking the word" of public bodies? Does this approach involve a sort of improper delegation of the IPC's authority to public bodies or their counsel?
>
> In part, the response is that the IPC is not left with just "trust me." The IPC has the detail respecting a privilege claim that would suffice for a court. If the CNRL v ShawCor standards are not followed, the IPC (like a court) would be justified in demanding more information. And again, if there is evidence that the privilege claim is not founded, the IPC could require further information.

I understand the Court to mean that my role in reviewing the Public Body's claim of privilege is to ensure that the Public Body's assertion of privilege meets the requirements set out in *ShawCor*, and that the information provided in support of that assertion is consistent with the relevant tests for the cited privilege.

[para 93] I note that the records on which the withheld information appears is not a communication between a solicitor and client, nor is it is part of a continuum of communications between solicitor and client. As stated in the Public Body's description,

it is a communication between an employee in its Professional Services Section (PSS), and investigators looking into a complaint. For the reasons below, I find that the withheld information is subject to solicitor-client privilege, nevertheless.

[para 94] In *Alberta (Minister of Municipal Affairs) v Alberta (Information and Privacy Commissioner)*, 2019 ABQB 274 (*Municipal Affairs*), the Court stated at paras. 17 and 18,

> There are emails in "chains" that are not directly between lawyer and client, or lawyer and lawyer, but have been sent by and received from members of the client group or department. Communications in this category request and give information, make inquiries, answer questions and otherwise relate topically to those in which legal counsel are directly involved.
>
> Those emails form part of a discrete body of communications that includes clearly privileged material. I must take a holistic approach to this question. In these instances, they are "part of a continuum in which legal advice is given": *Calgary (Police Service)* at para 6. What all of them have in common is that they essentially "transmit or comment" on the work products that, I find, are privileged: *Bank of Montreal v Tortora*, 2010 BCSC 1430 at paras 11-12, 14 BCLR (5th) 386.

[para 95] In *Edmonton (City) Police Service v Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (*EPS*), the Court stated at paras. 256 – 257,

> As for records 10-12, at para 49 of the McCloskey 2016 Affidavit, Ms. McCloskey deposed that
>
> > I have reviewed pages 10-12 of the Responsive Records, and do believe that these records relate to a memorandum written by a legal advisor of the EPS Legal Advisors' Section to the Manager of the Legal Services Branch (the "EPS Legal Memorandum"). My further view of pages 10-12 of the Responsive Records indicates that these portions of the records quote directly from, or make reference to portions of the Legal Opinion. It is my belief that [releasing] the EPS Legal Memorandum would permit the recipient to gain access to information contained in the Legal Opinion.
>
> In my opinion, Ms. McCloskey's description of records 10-12 is accurate and disclosure of the EPS Legal Memorandum would reveal privileged elements of the 2004 Legal Opinion. EPS's initial submissions referred to the author of the EPS Legal Memorandum as a lawyer of the public body: at para 111. The Adjudicator had commented at para 147 that these records "contain the recommendations of a Crown prosecutor seconded to the Public Body's Legal Services area." The author is referred to as a "Senior Crown Prosecutor" seconded to EPS in record 4.
>
> Justice Boyd found at paras 11 and 12 of *Bank of Montreal v Tortora*, 2010 BCSC 1430 that
>
> > …[S]olicitor-client privilege [is not] limited merely to the initial recipient of the solicitor's legal advice and opinion.

> The privilege will extend to documents between employees which transmit or comment on privileged communications with lawyers. The privilege will also extend to include communications between employees advising of communications from lawyer to client ...
>
> In my opinion, again subject to my determinations respecting waiver, records 10-12 fell within the protection of solicitor-client privilege. No elements of these records could be disclosed without disclosing privileged information.

[para 96] In *Bank of Montreal v. Tortora*, 2010 BCSC 1430 (*Tortora*), cited in in *EPS* and *Municipal Affairs* above, Justice Boyd described numerous e-mails chains and commented on whether they were subject to solicitor-client privilege; Justice Boyd stated the following at para. 58:

> Filliter email to Bruce Smith November 7, 2008 providing "Keystroke Analysis". Redacted document is Smith's response to Filliter with copy to Giles, outlining advice on steps to be taken (Privileged). Filliter sends email on to Hitchcock setting out steps to be followed as set out in legal's [sic] counsel advice (Privileged).

[para 97] Bruce Smith, referred to in the above passage from *Tortora* is legal counsel. Filliter is an investigator. Hitchcock is an employee of legal counsel's client.

[para 98] The records on which the withheld information appears, appear to be of the same type mentioned in *Municipal Affairs* and *EPS*, above. They are not communications between client and legal counsel, but are communications between employees of the Public Body. Based upon the Public Body's description of it, the withheld information is a legal opinion which the Public Body's employees are sharing amongst themselves. I can easily infer from the rest of the material on the withheld pages, much of which was also disclosed to the Applicant, that the withheld information relates to how to address and/or what steps to take regarding email 3. This is the same sort of information that Justice Boyd found was subject to privilege at para. 58 of *Tortora*.

[para 99] I find that the information withheld under section 27(1)(a) is subject to solicitor-client privilege.

Exercise of Discretion

[para 100] Since the information withheld by the Public Body is subject to solicitor-client privilege, its exercise of discretion to withhold the information is appropriate. See Order F2022-49 at paras. 69 – 71.

V. ORDER

[para 101] I make this Order under section 72 of the Act.

[para 102] I confirm that the Public Body properly refused to confirm or deny the existence of records under section 12(2)(a).

[para 103] I confirm that the Public Body properly withheld information under sections 18(a), 20(1)(c), and 27(1)(a).

[para 104] I order the Public Body to disclose to the Applicant the middle initials of its employees, improperly withheld under section 17(1).

[para 105] I order the Public Body to reconsider whether information initially withheld under section 20(1)(m), may be withheld under section 25(1)(c)(i) instead. Any information that the Public Body determines cannot be withheld under section 25(1)(c)(i) should be disclosed to the Applicant.

[para 106] I order the Public Body to disclose to the Applicant information improperly withheld under sections 24(1)(a) and/or (b) as described in paragraphs 77 through 84, above, subject to any mandatory exceptions to disclosure under the Act.

[para 107] I order the Public Body to reconsider the exercise of discretion to withhold any information under sections 24(1)(a) and (b), and to provide to the Applicant a written explanation of the considerations it undertakes when reconsidering discretion. Upon reconsideration, the Public Body should also disclose to the Applicant any further information it finds should not be withheld. Again, any further disclosure is subject to any mandatory exceptions to disclosure in the Act, which may apply.

[para 108] I order the Public Body to confirm to the Applicant and me, in writing, that it has complied with this Order within 50 days of receiving a copy of it.

_____
John Gabriele
Adjudicator