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OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2024-02

January 15, 2024

CITY OF EDMONTON

Case File Number 002962

Office URL: www.oipc.ab.ca

Summary: On April 5, 2016, an individual (the Applicant) made an access request under the *Freedom of Information and Protection of Privacy Act* (the Act) to the City of Edmonton (the Public Body) for certain information.

The Public Body located 22 pages of responsive records. It provided some records to the Applicant, but also withheld some information under sections 17(1) (disclosure harmful to personal privacy), and 27(1)(a) (privileged information) of the Act.

The Applicant requested a review and subsequently an inquiry into the Public Body's decision to withhold the information.

The Adjudicator found that the Public Body had properly applied section 17(1) and section 27(1)(a) to withhold the information.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 17, 27, 56(3), 71, and 72, *Trespass to Premises Act*, R.S.A. 2000, c. T-7.

Authorities Cited: AB: Orders F2009-018, F2009-026, F2015-41, F2019-06, F2019-07, F2019-10, F2020-13, F2021-20, and F2023-02.

Decisions Cited: AB: *Alberta Health Service (Re)*, 2020 CanLII 97990 (AB OIPC)

Cases Cited: *Canada v. Solosky*, [1980] 1 S.C.R. 821, *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, *[Applicant] v. City of Edmonton and Edmonton Police Service*, 2019 ABCA 272, *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10, and *Alberta Health Services v. Farkas***,** 2020 ABQB 281.

I. BACKGROUND

[para 1] On April 5, 2016, an individual (the Applicant) made an access request under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (the Act) to the City of Edmonton (the Public Body) for the following information:

> All records. But specifically the reason for request is that I've been verbally informed I've been [banned] for life from all Edmonton recreation facilities. All records related to this situation, Incident initiated at Hardisty Facility around 8 to 4 weeks ago.

[para 2] The time frame specified by the Applicant was "Since May 2006".

[para 3] The Public Body assigned file #2016-P-0134 to the Applicant's access request. The Public Body located 22 pages of responsive records. On April 14, 2016, the Public Body provided some records to the Applicant, but also withheld some information under sections 17(1) (disclosure harmful to personal privacy), and 27(1)(a) (privileged information) of the Act.

[para 4] On April 14, 2016, the Applicant submitted a Request for Review/Complaint form to this Office requesting the Commissioner review the Public Body's application of sections 17(1) and 27(1)(a) to withhold responsive information.

[para 5] The Commissioner assigned a Senior Information and Privacy Manager to investigate and settle the matter.

[para 6] The Applicant was not satisfied with the investigation and on September 13, 2016, he requested an inquiry.

[para 7] On May 2, 2017, the Commissioner agreed to conduct an inquiry.

[para 8] On June 30, 2017, the Public Body released further information to the Applicant that it had previously withheld on pages 8 – 14 and 19 – 22.

[para 9] In addition his request for an inquiry, the Applicant also commenced an application in the Alberta Court of Queen's Bench (now the Court of King's Bench) for judicial review of the Public Body's decision to ban him from the Public Body's recreation facilities. The Public Body and the Edmonton Police Service (the EPS) were named as the Respondents.

[para 10] As part of the judicial review proceedings, the Public Body submitted records to the Court, which included the 22 pages of redacted records that it had provided the Applicant in response to his access request under the Act.

[para 11] The Applicant then brought a preliminary application before the Court in the judicial review proceeding, seeking an order directing the Public Body and the EPS to remove all redactions from their respective record of proceedings.

[para 12] On September 6, 2017, the Court ordered the Public Body and the EPS to each file an amended Certified Record of Proceedings without redactions for the names, job titles and signatures of the witnesses and complainants, for all documents contained in the Certified Record of Proceedings, including the records the Public Body and the EPS had provided to the Applicant in response to his access request to the Public Body and his access request to the EPS, made under the Act (the Court Order).

[para 13] The Public Body provided the Applicant with the information in the records as ordered by the Court. It continued to withhold the information which the Court had not ordered it to disclose to the Applicant in the 22 pages of responsive records it had provided to the Applicant in response to his access request under the Act.

[para 14] The Commissioner delegated her authority to conduct this inquiry to me.

[para 15] On March 14, 2023, the Public Body disclosed further information to the Applicant that it had previously withheld under section 17(1). It continued to withhold some information under section 17(1) and section 27(1)(a) in the 22 pages of responsive records.

II. RECORDS AT ISSUE

[para 16] The Public Body provided me with a current version of the 22 pages of records showing the information that remains redacted after its subsequent disclosure of further information to the Applicant on June 30, 2017, its subsequent disclosure of further information pursuant to the Court Order, and its subsequent disclosure of further information on March 14, 2023. It also provided a current version of the redacted records to the Applicant.

[para 17] The records at issue consists of the information that remains redacted under sections 17(1) and 27(1)(a) in the 22 pages of responsive records provided by the Public Body to the Applicant in response to his access request under the Act.

III. ISSUES

[para 18] The Notice of Inquiry, dated July 6, 2018, states the issues for this inquiry as follows:

1. Does section 17(1) of the Act (disclosure harmful to personal privacy) apply to information in the records?

2. Does section 27(1)(a) (privileged information) apply to information in the records?

Preliminary Matter – Scope of Inquiry

[para 19] This inquiry deals solely with whether the Public Body correctly applied sections 17(1) and 27(1)(a) to withhold the information that remains redacted in the 22 pages of responsive records the Public Body provided to the Applicant in response to his access request under the Act.

[para 20] In his submissions, the Applicant raised numerous issues that are either outside the scope of this inquiry or outside my jurisdiction under the Act. For example, the Applicant argued that the decision of the Public Body to withhold the redacted information in the records from him violated his rights under the *Canadian Charter of Rights and Freedoms*. In Order F2015-41, former Commissioner Clayton stated at paragraph 12 that this Office does not have jurisdiction to determine questions of constitutional law. Accordingly, I will not consider further this issue.

[para 21] In addition, the Applicant asked that I look at the records that were the subject of an inquiry on file #002963, in making my decision about whether the Public Body properly withheld the information in the 22 pages of records in this case.

[para 22] The inquiry on file #002963 was dealt with by a different adjudicator and resulted in Order F2019-06. The public body in that case was not the City of Edmonton, but the EPS. That inquiry dealt with whether the EPS had properly withheld information from the Applicant under the Act.

[para 23] The Notice of Inquiry for this inquiry states that:

> If the parties have evidence in the form of documents that relate to the issues in this case (other than the records at issue) that are not attached to this Notice, they should include them with their initial exchangeable submission, in accordance with *Adjudication: Preparing Submissions for an Inquiry (attached)*.

[para 24] The Applicant did not provide the records that were the subject of Order F2019-06 involving the EPS to me in this inquiry, and accordingly they are not before me. Even if the Applicant had provided these records, unless they were the same records that are at issue in this inquiry, it is not clear how they would be relevant to this inquiry.

IV. DISCUSSION OF ISSUES

1. Does section 17(1) of the Act (disclosure harmful to personal privacy) apply to information in the records?

[para 25] Section 17(1) of the Act 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] For section 17(1) to apply, the withheld information must first be found to be personal information and second, the disclosure of the information must be determined to be an unreasonable invasion of the third party's personal privacy.

[para 27] Section 17(1) is a mandatory exception: if the information falls within the scope of the exception, it must be withheld.

[para 28] In Order F2019-07 the Adjudicator discussed section 17 and explained the analysis that is to be undertaken when information is withheld under section 17(1), as follows:

> [para 22] 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 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.
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> [para 23] 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 24] Section 17(1) requires a public body to withhold information once all relevant interests in disclosing and withholding information have been weighed under section 17(5) and the conclusion is reached that it would be an unreasonable invasion of the personal privacy of a third party to disclose his or her personal information.
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> [para 25] Once the decision is made that a presumption set out in section 17(4) applies to information, it is necessary to consider all relevant factors under section 17(5) to determine whether it would, or would not, be an unreasonable invasion of a third party's personal privacy to disclose the information.
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> [para 26] However, it is important to note that section 17(1) is restricted in its application to personal information. Before a public body may apply section 17(1), it must first determine whether the information in question is personal information or that it is likely to be so. In this case, I must consider whether the information to which the Public Body has applied section 17(1) is personal information.

[para 29] Where a record contains personal information of a third party, section 71(2) places the burden on the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy. Section 71(2) states:

> *(2) Despite section (1), if the record or part of the record that the applicant is refused access to contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.*

[para 30] Accordingly, in determining whether section 17(1) applies, the first question that must be answered is whether the information that remains withheld by the Public Body in the 22 pages of responsive records consists of personal information of a third party.

Is the withheld information personal information of a third party?

[para 31] Section 1(n) defines personal information under the Act:

> *1 In this Act,*
>
> *(n) "personal information" means recorded information about an identifiable individual, including*
>
> *(i) the individual's name, home or business address or home or business telephone number,*
>
> *(ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,*
>
> *(iii) the individual's age, sex, marital status or family status,*
>
> *(iv) an identifying number, symbol or other particular assigned to the individual,*
>
> *(v) the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,*
>
> *(vi) information about the individual's health and health care history, including information about a physical or mental disability,*
>
> *(vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,*
>
> *(viii) anyone else's opinions about the individual, and*
>
> *(ix) the individual's personal views or opinions, except if they are about someone else;*

[para 32] Section 1(r) of the Act provides the following definition of "third party":

> *1 In this Act,*
>
> *(r) "third party" means a person, a group of persons or an organization other than an applicant or a public body;*

[para 33] The Public Body located 22 pages of responsive records to the Applicant's access request. The Public Body disclosed all of the information in the 22 pages of responsive records

to the Applicant except for the following limited amount of information, which it withheld under section 17(1) or Section 27(1)(a):

Page #	Redacted Information	Section Applied
5 & 6	Two pages of records over which solicitor-client privilege was asserted, a description of which was provided by the Public Body and reproduced under the discussion of the application of section 27(1)(a).	27(1)(a)
10	Page 10 is a copy of a Corporate Services Department Form. It relates to an incident that occurred at the Hardisty Leisure Centre on March 10, 2016, which involved the Applicant. Except for certain specific information, all of the information on the page, including the witness's name, the name of the employee [N] who reported the incident, and the name of the employee's supervisor [C], was disclosed by the Public Body to the Applicant. The Public Body withheld the witness's address and phone number, and the payroll numbers of employees [N] and [C].	17(1)
13	Page 13 is a duplicate of page 10 and the same information that was redacted on page 10 is redacted on page 13.	17(1)
14	Page 14 is the Witness Statement of the witness to the Applicant's behavior on March 10, 2016. Except for certain specific information, all of the information on the page, including the witness's name (the same name that appears on page 10), was disclosed by the Public Body to the Applicant. The Public Body withheld the witness's age, address and phone number.	17(1)
18	Page 18 is a copy of a Corporate Services Department Form. It relates to an incident involving the Applicant on January 1, 2014. Except for certain specific information, all of the information on the page, including the name of the employee [V] who reported the incident, and the name of the employee's supervisor [J], was disclosed by the Public Body to the Applicant. The Public Body withheld the payroll numbers of employees [V] and [J].	17(1)
19	Page 19 is the first page of an Incident Report about incidents that occurred at the Hardisty Leisure Centre on March 10, 2016. The Incident Report is about and incident involving the Applicant. It includes information about the behavior of the Applicant that was observed by the employee (employee [G]) who completed the Incident Report.[1] The Incident Report is also about	17(1)

[1] The first page of the Incident Report form which appears as page 19 of the responsive records contains a box with the prompt "Reported to (Name of Staff Person or Supervisor)". It also contains a box with the prompt "Date Reported". There is no box with the prompt "Reported By". In other words, there is no place on the Incident Report

	an incident involving another individual (Third Party A). It includes information about the behavior of another individual (Third Party A) that employee [G] also observed on March 10, 2016. Except for certain specific information, all of the information on the page, including the name of employee [G] who reported the incident, and the name of the employee that [G] reported the incident to [S], was disclosed by the Public Body to the Applicant. The Public Body withheld the name, phone number, birthdate and address of Third Party A.	
20	Page 20 is the second page of the Incident Report. It contains employee [G]'s statement about an incident involving Third Party A on March 10, 2016 at the Hardisty Leisure Centre, and an incident involving the Applicant on March 10, 2016 at the Hardisty Leisure Centre. The Public Body withheld the name of Third Party A and observations and opinions of employee [G] about the behavior of Third Party A, and information about an interaction employee [G] had with Third Party A. The Public Body also withheld the name of a Third Party ("Third Party B"), information about Third Party B, and Third Party B's observations about the behavior of Third Party A on March 10, 2016, as relayed by Third Party B to employee [G]. The Public Body disclosed all of the information about the Applicant on page 20 to him. It withheld a small about of information relayed by employee [G] at the end of the fifth sentence of the second paragraph on page 20.	17(1)
21	Page 21 is a copy of a Corporate Services Department form. It relates to the incidents that occurred at the Hardisty Leisure Centre on March 10, 2016. Except for certain specific information, all of the information on the page, including the name of the employee [G] who reported the incidents, and the name of the employee's supervisor [C], was disclosed by the Public Body to the Applicant. The Public Body withheld the payroll numbers of employees [G] and [C].	17(1)
22	Page 22 is a duplicate of page 20 and the same information that was redacted on page 20 is redacted on page 22.	17(1)

[para 34] Where records have been duplicated, I will only refer to the first page the record appears at and my conclusions shall apply equally to the duplicate page.

form to record the name of the person reporting the incident. However, having reviewed all of the responsive records, I have determined that the name of the employee who reported the incidents was typed into the "Reported to" box, and the name of the employee they reported the incident to was typed into the "Date Reported" box.

[para 35] To be clear, the Public Body disclosed all of the Applicant's personal information contained in the 22 pages of responsive records to him. None of the information withheld by the Public Body is personal information about the Applicant.

[para 36] I will first consider whether the employee payroll numbers of employees [C], [G], [J], [N], and [V], which the Public Body withheld on pages 10, 13 (a duplicate of page 10), 18 and 21, are personal information under section 1(n) of the Act.

[para 37] In Order F2009-026, the adjudicator considered whether an employee of a public body could be considered a "third party" for the purpose of section 17(1). She stated:

> [para 11] If information is about employees of a public body acting in a representative capacity the information is not personal information, as the employee is acting as an agent of a public body. As noted above, the definition of "third party" under the Act excludes a public body. In Order 99-032, the former Commissioner noted:
>
> > The Act applies to public bodies. However, public bodies are comprised of members, employees or officers, who act on behalf of public bodies. A public body can act only through those persons.
>
> In other words, the actions of employees acting as employees are the actions of a public body. Consequently, information about an employee acting on behalf of a public body is not information to which section 17 applies, as it is not the personal information of a third party. If, however, there is information of a personal character about an employee of a public body, then the provisions of section 17 may apply to the information. I must therefore consider whether the information about employees in the records at issue is about them acting on behalf of the Public Body, or is information conveying something personal about the employees.

[para 38] Similarly, in Order F2023-02, the adjudicator stated:

> [para 27] Past Orders of this Office state that the disclosure of the names, contact information and other information about public body employees, that relates only to the employees acting in their professional capacities is not an unreasonable invasion of personal privacy under section 17(1) (see Orders 2001-013 at paras. 89 – 90, 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 39] Whether employee payroll numbers are personal information was considered by the adjudicator in Order F2019-06. At paragraph 26 the adjudicator stated:

> [para 26] The Public Body has withheld the payroll numbers of one Public Body employee and one City employee, under section 17(1). Previous Orders have noted that employee identification numbers fall within the list of personal information in section 1(n) (specifically, under section 1(n)(iv)). In Order F2009-009, the adjudicator found that employee identification numbers have a personal dimension such that section 17(1) can apply (at para. 80) because it can be used to track the actions of an employee. In this case

> the payroll number of the Public Body is clearly used for this purpose. Because payroll numbers can be linked to an employee's pay, benefits, and similar human resource-related information, I agree that it has sufficient personal dimension such that section 17(1) can apply.

[para 40] I concur with the conclusion of the adjudicator in Order F2019-06 and find that the employee payroll numbers of the five employees of the Public Body, withheld by the Public Body on pages 10, 13, 18 and 21, are the personal information of the employees under section 1(n)(iv) of the Act.

[para 41] Next I will consider whether the information withheld by the Public Body about the witness is personal information about the witness.[2]

[para 42] The Public Body withheld the witness's address and phone number on pages 10 and 13 (which is a duplicate of page 10), and the witness's address, phone number and age on page 14.

[para 43] Section 1(n)(i) states that personal information includes an individual's name, home or business address or home or business telephone number. I find that the witness's address and telephone number is their personal information. [3]

[para 44] Section 1(n)(iii) states that personal information includes an individual's age, sex, marital status or family status. I find that the witness's age is their personal information.

[para 45] Next I will consider whether the information withheld on pages 19 and page 20, which is the Incident Report completed by employee [G], is personal information.

Findings with respect to the information withheld on Page 19

[para 46] Page 19 is the first page of the Public Body's Incident Report form. It contains the date of the incidents (March 10, 2016), the date they were reported, the name of the employee, [G], who reported the incidents, and the name of the employee, [C], that employee [G] reported the incidents to. It also contains the Applicant's name, phone number, address and estimated age. All of the foregoing information was disclosed to the Applicant.

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[2] In the judicial review preliminary application initiated by the Applicant, the Court ordered the Public Body to disclose the witness's name to the Applicant for the purpose of the judicial review proceeding, but not the witness's address, phone number and age; however, that was a different proceeding with a different purpose and the Court did not rule on whether the Public Body has properly applied 17(1) of the FOIP Act to withhold the witness's address, phone number and age. My responsibility in this inquiry is to determine whether the Public Body properly applied section 17(1) and section 27(1)(a) of the Act to withhold the information in the 22 pages of responsive records that the Court did not order the Public Body to disclose to the Applicant for the purpose of the judicial review proceeding.

[3] While I am unable to determine whether the witness's address and phone number is their home or business address or home or business phone number, both are personal information under section 1(n)(i), and the contact information (whether home or work) appears in the records in relation to the witness in a personal capacity (i.e. to contact them in a personal capacity) and not an employment-related capacity, so 17(1) can apply to it.

[para 47] In addition, page 19 contains Third Party A's name, phone number, address and date of birth. This information was withheld by the Public Body under section 17(1).

[para 48] I will consider whether the name, address, phone number and birthdate of Third Party A, is their personal information under section 1(n).

[para 49] I find that Third Party A's name, address, phone number and date of birth are Third Party A's personal information under sections 1(n)(i) and (iii).[4]

Findings with respect to the information withheld on Page 20

[para 50] Next I will consider whether any of the information withheld by the Public Body on page 20 of the responsive records is the personal information of Third Party A, Third Party B and employee [G].

[para 51] Page 20 is the second page of the Public Body's Incident Report form. It contains employee [G]'s statement about an incident involving Third Party A on March 10, 2016 at the Hardisty Leisure Centre, and an incident involving the Applicant on March 10, 2016 at the Hardisty Leisure Centre.

[para 52] The second page of the Incident Report contains two paragraphs. In it, employee [G] describes an incident involving the Applicant and includes the behavior employee [G] observed the Applicant engaging in on March 10, 2016. In addition, employee [G] describes an incident involving Third Party A and includes the behavior employee [G] observed Third Party A engaging in on March 10, 2016.

[para 53] The Public Body disclosed employee [G]'s observations about the incident involving the Applicant, including the behaviour of the Applicant, the actions employee [G] took, and information about employee [G]'s role, to the Applicant. The Public Body also disclosed employee [G]'s opinion about the Applicant, and what employee [G] had said to the Applicant on a different occasion.

[para 54] The Public Body withheld employee [G]'s observations about the incident involving Third Party A, Third Party A's name, and employee [G]'s opinions about Third Party A's actions on March 10, 2016. It also withheld employee [G]'s observations and opinions of Third Party A's behavior on other occasions. In addition, the Public Body withheld the last two sentences in the second paragraph in the Incident Report, which contained employee [G]'s statement about something that Third Party A did on a different occasion, and what employee [G] did in response.

[para 55] The Public Body also withheld the name of Third Party B, information about Third Party B, and Third Party B's observations of the behaviour of Third Party A on March 10, 2016, as relayed by Third Party B to employee [G].

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[4] This finding is consistent with the finding of the adjudicator in Order F2019-06 at paragraph 25 where the adjudicator stated "The city of residence, contact information, ages, dates of birth and driver's license numbers of witnesses, complainants and other individuals is personal information of those individuals".

[para 56] In the fifth sentence of the second paragraph in the Incident Report on page 20, the Public Body disclosed what employee [G] said to the Applicant on a different occasion, and withheld the balance of the sentence under section 17(1).

[para 57] The name of Third Party A is their personal information under section 1(n)(i) of the Act.

[para 58] Pursuant to sections 1(n)(viii) and (ix), employee [G]'s observations and opinions about Third Party A is Third Party A's personal information.

[para 59] In the last two sentences of the second paragraph on page 20, employee [G] describes an interaction that they had with Third Party A. Based on the description of the interaction, it does not appear to have occurred occur while employee [G] was carrying out their employment duties. I find that the interaction has a personal dimension to it and is personal information about employee [G].

[para 60] As the last sentence of the second paragraph on page 20 contains what employee [G] said Third Party A did in the interaction, it is also the personal information of Third Party A under section 1(n)(viii) and (ix).

[para 61] The name of Third Party B is their personal information under section 1(n)(i) of the Act. The factual information about Third Party B is also their personal information under section 1(n) of the Act. Pursuant to sections 1(n)(viii) and (ix), Third Party B's observations about the behaviour of Third Party A, as relayed to employee [G], is Third Party A's personal information.

[para 62] The Public Body disclosed the fourth sentence and the first portion of the fifth sentence, and withheld the balance of the fifth sentence of the second paragraph on page 20.

[para 63] The fourth sentence, which was disclosed to the Applicant, contains employee [G]'s views or opinions about the Applicant. The first portion of the fifth sentence disclosed to the Applicant contains what employee [G] said they have told the Applicant in the past.

[para 64] The balance of the fifth sentence, which was withheld by the Public Body, contains information about employee [G] that has a personal dimension and is not related to the employee's job. I find that the information withheld by the Public Body in the fifth sentence of the second paragraph is personal information about employee [G], as an individual and not as an employee.

[para 65] In summary, I have found that the information that remains withheld by the Public Body, as set out above, is personal information about the five employees (their payroll numbers), the witness, Third Party A, Third Party B, and employee [G].

[para 66] The next question to be answered is whether the disclosure of this information to the Applicant would be an unreasonable invasion of the third parties' personal privacy.

Would the disclosure of the personal information be an unreasonable invasion of the third parties' personal privacy?

[para 67] Section 17(2) of the Act sets out the situations in which a disclosure of personal information is not an unreasonable invasion of a third party's personal privacy.

[para 68] Section 17(3) provides that the disclosure of personal information under subsection (2)(j) is an unreasonable invasion of personal privacy if the third party whom the information is about has requested the information not be disclosed.

[para 69] Neither party argued that any of the provisions in sections 17(2) or (3) applied in this case. Based on my review of the redacted information and arguments before me, section 17(2) and section 17(3) do not apply in this case.

[para 70] Section 17(4) of the Act sets out the situations in which a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy.

[para 71] In his Request for Inquiry, the Applicant argued that the second portion of section 17(4)(b) applied to the five employees', the witness's, Third Party A's, Third Party B's, and employee [G]'s personal information, such that there was no presumption that disclosure of their personal information to him would be presumed to be an unreasonable invasion of their personal privacy.

Section 17(4)(b) Analysis

[para 72] Section 17(4)(b) states:

> *(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,*

[para 73] As noted by the adjudicator in Order F2019-06 at paragraph 39:

> [para 39] The phrase in section 17(4)(b), "except . . . to dispose of the law enforcement matter or continue an investigation", means that the particular disclosure contemplated, to the particular individual or organization, must be necessary to dispose of the matter or continue an investigation . . .

[para 74] The Applicant stated:[5]

[5] Applicant's Request for Inquiry dated September 13, 2016.

3) The public body has misapplied section 17(1) in order to claim that the disclosure constitutes an unreasonable invasion of privacy. The basis for this assertion is as follows:
   a) The public body has issued a 2-year ban to the applicant, i.e. a penalty was imposed that relates to the information withheld. This clearly makes the record a law enforcement record. Section 17(4)(b) is very clear that the disclosure of records related to law enforcement when required to dispose of a law enforcement matter or to continue an investigation are not considered an unreasonable invasion of privacy. The *FOIP Guidelines and Practices (2009)* on page 125 defines a law enforcement record as follows: "Section 17(4)(b) applies, for example, to records concerning investigations (including complaints) and proceedings relating to offences under the Criminal Code (Canada), offences under other federal and provincial statutes and regulations and contraventions of municipal bylaws, where the applicable statute, regulation or bylaw provides for a penalty or sanction."
   Clearly the records that the City [possesses] meet the definition of Section 17(4)(b) and disclosure of such personal information does not constitute an unreasonable invasion of privacy as the Guidelines and Practices (2009) on page 125 asserts: "Disclosure to an applicant of a third party's personal information in a law enforcement record is not presumed to be unreasonable invasion of privacy if disclosure is necessary to dispose of the law enforcement matter or to continue the investigation. Section 17(4)(b) recognizes that a public body that is in possession of evidence relating to a law enforcement matter must have the power to disclose that evidence to the police, another law enforcement agency and to Crown counsel or other persons responsible for prosecuting the offence or imposing a penalty or sanction." In this particular case the records were disclosed to police on March 31 so that the Edmonton Police Service would issue a ban on March 31.
   Finally the recently released order F2016-32 indicates: "Names and contact information of third parties are personal information under the FOIP Act. However, the disclosure of the names and job titles of individuals acting in their professional capacities is not an unreasonable invasion of personal privacy under section 17 (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." The City of Edmonton has failed to prove that the information has a personal dimension.

[para 75] Law enforcement is defined in section 1(h) of the Act as follows:

1 In this Act,

. . .

(h) "law enforcement" means

(i) policing, including criminal intelligence operations,

(ii) a police, security or administrative investigation, including the complaint giving rise to the investigation that leads or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the investigation or by another body to which the results of the investigation are referred, or

> *(iii) proceedings that lead or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the proceedings or by another body to which the results of the proceedings are referred;*

[para 76] Along with his Request for Review/Complaint,[6] the Applicant provided a copy of the letter he received from the Public Body dated April 8, 2016 notifying him that because of certain inappropriate behavior he engaged in on March 10, 2016 at the Public Body's Hardisty Fitness and Leisure Centre, he was banned from using the Public Body's recreation centers, outdoor pools and arenas until April 8, 2018 (the Notice).

[para 77] In the Notice, the Public Body stated in part:

> As per your behavior at Hardisty Fitness and Leisure Centre on March 10, 2016 of [description of behavior] (Edmonton Police Service File [file number]) effective immediately your privileges to use City of Edmonton Recreation Centers, Outdoor Pools and Arenas is suspended until April 8, 2018. Payment of admission does not in any way nullify or override this ban.
>
> Before you can return to any of these City of Edmonton facilities listed below you must meet with Corporate Security. To set up an appointment please contact [Employee [K]], Corporate Security Advisor at [phone number].
>
> The City of Edmonton is obliged to ensure peaceful operation of its Facilities and to protect its property for the benefit of the public at large. This authority is given pursuant to the Municipal Government Act (R.S.A. 1080 c. M-26 as amended) and the City of Edmonton Parkland Bylaw 2202 as amended.
>
> Pursuant to the Trespass to Premises Act Section 2(a), you are hereby notified not to trespass on these premises owned by The City of Edmonton and located at the municipal addresses identified below. This notice applies to all land and buildings located at these addresses.
>
> A person who commits a trespass on premises with respect to which that person has had notice (orally or in writing) not to trespass is guilty of an offence and liable to a fine not exceeding $2000 for a first offence. They are subject to arrest by a peace officer or an authorized representative of the owner of the premises in respect of which the trespass was committed. This notice is in accordance with the Trespass to Premises Act of Alberta.
>
> . . .

[para 78] The Applicant also provided a copy of an email that the Public Body provided to him in response to his access request (page 2 of the responsive records). In this email, dated March 18, 2016, sent from employee [C] to the Public Body's Corporate Security Advisor [K], employee [C] stated, in part:

> . . . When you have an opportunity I would like to talk to you about a situation which is unfolding at Hardisty. I am still trying to get all the details, however it does involve individuals who are doing inappropriate [description of behavior].

[6] Applicant's Request for Review/Complaint dated April 14, 2016.

> I am just wanting to determine what our course of action is and what exactly are we expected to do.

[para 79] In addition, the Applicant provided a copy of another email that the Public Body provided him in response to his access request (page 7 of the responsive records). In the email, dated March 22, 2016 and sent from employee [C] to other employees of the Public Body, employee [C] stated in part:

> . . .
>
> Please find attached the Incident reports in regards to a situation of [description of behavior] for March 10, 2016 for Hardisty Fitness and Leisure Centre.
>
> This situation is still in the process of being investigated with the assistance from [name of Corporate Security Advisor, Corporate Services/Law Branch].
>
> . . .

[para 80] The definition of "law enforcement" under section 1(h)(ii) of the Act includes the complaint giving rise to the investigation that leads or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the investigation.

[para 81] Based on the information and evidence before me, I find that the Public Body conducted a security or administrative investigation into the Applicant's behavior on January 1, 2014. I find that the investigation falls within the definition of "law enforcement" under section 1(h)(ii) of the Act.

[para 82] As well, I find that the Public Body conducted a security or administrative investigation into the Applicant's behavior on March 10, 2016.

[para 83] The Public Body's investigation into the Applicant's behavior on March 10, 2016 led it to issue the Notice to the Applicant banning him from its facilities.

[para 84] I find that the Public Body's investigation and the issuance of the ban to the Applicant under the *Trespass to Premises Act*, R.S.A. 2000, c. T-7 falls within the definition of "law enforcement" under section 1(h)(ii) of the Act.

[para 85] I find that the Public Body's investigation of Third Party A's behavior on March 10, 2016 also falls within the definition of "law enforcement" under section 1(h)(ii) of the Act.

[para 86] I find that with respect to the January 1, 2014 incident involving the Applicant, the personal information of the employees (their payroll numbers) on page 18 of the responsive records are an identifiable part of a law enforcement record under section 17(4)(b) of the Act.

[para 87] I find that with respect to the March 10, 2016 incident involving the Applicant, the personal information of the employees (their payroll numbers) on pages 10 and 21 of the

responsive records are an identifiable part of a law enforcement record under section 17(4)(b) of the Act.

[para 88] I find that the personal information of the witness that appears on pages 10 and 14 of the responsive records, and the personal information of Third Party A, Third Party B and employee [G], which appears in the Incident Report on pages 19 and 20 of the responsive records, is an identifiable part of a law enforcement record under section 17(4)(b) of the Act.

[para 89] Accordingly, the disclosure of the five employees' personal information (payroll numbers), the witness's, Third Party A's, Third Party B's and employee [G]'s personal information (collectively, the Third Parties) is presumed to be an unreasonable invasion of their personal privacy under section 17(4)(b) of the Act unless the Applicant can establish on a balance of probabilities that the disclosure of all or a portion of this information "is necessary to dispose of the law enforcement matter or to continue an investigation".

[para 90] If the Applicant is arguing that disclosure of the information is necessary for his judicial review of the Public Body's decision to ban him, the Court of King's Bench already decided, and ordered the Public Body to disclose the information in the 22 pages of responsive records that it determined was relevant, or necessary, to the Applicant's judicial review of the Public Body's decision to ban him, and the Public Body disclosed this information to him.

[para 91] It is not clear to me that the judicial review of the Public Body's decision to ban the Applicant would constitute a "law enforcement matter" under section 17(4)(b) of the Act. Regardless of whether it is or not, the Court has already decided what information in the responsive records was necessary for the Applicant to receive for the purpose of challenging the Public Body's ban in the judicial review proceeding. The remaining information that was not ordered to be disclosed by the Court cannot be said to be "necessary to dispose of a law enforcement matter". As a result, the disclosure of the Third Parties' personal information in the responsive records to the Applicant is presumed to be an unreasonable invasion of their personal privacy under the first portion of section 17(4)(b).

[para 92] Furthermore, based on the following comments of the Alberta Court of Appeal in *[Applicant]* v. *City of Edmonton and Edmonton Police Service*, 2019 ABCA 272,[7] it appears that all matters with respect to both the ban and the judicial review of the Public Body's decision to ban the Applicant have long since come to an end:[8]

> **The Court:**
>
> [1] This is an appeal of a judicial review of a decision of the City of Edmonton banning the appellant from using the City's recreation centres, outdoor pools and arenas for a period of

[7] Following the practice of the Director of Adjudication in Order F2020-13, and former Commissioner Clayton in *Alberta Health Services (Re)*, 2020 CanLII 97990 (AB OIPC), I have redacted the Applicant's name where it appears in the citation of this publically reported case.

[8] Neither party informed me of this decision; however, in my role as an adjudicator I am not limited to only considering the Orders of this Office and the cases cited by the parties, and may do my own research and rely on any case law and Orders that I find to be applicable (see *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 at paragraphs 172 – 174).

two years. The ban expired on April 8, 2018. The appellant also appeals various orders related to settlement communications and costs.

I. Facts

[2] Following allegations that the appellant had engaged in inappropriate conduct at a City pool, the facility supervisor contacted the Edmonton Police Service (EPS). Initially, the EPS advised the applicant that he was banned indefinitely from the City's recreational facilities. The EPS later advised the appellant that EPS was not imposing a ban and its role would be limited to enforcing any bans imposed by the City. The City imposed a two-year ban, expiring April 8, 2018. No criminal charges were laid.

[3] The appellant brought an originating application for judicial review of the City's decision. The City and EPS were named as respondents.

[4] The judicial review was heard on November 23, 2017. The application against EPS was moot and was dismissed. While the chambers judge found that it was reasonable for the City to act to protect the patrons of its facilities, he found the two year ban was not reasonable on the record provided. He vacated the ban immediately and remitted the matter back to the City to determine the penalty.

[5] On February 28, 2018, the City notified the appellant by letter that it was imposing a two-year ban that would expire April 8, 2018, and provided the appellant with additional reasons for the duration of that ban. The appellant never sought judicial review of the City's February 28, 2018 decision.

II. Is the appeal of the judicial review moot?

[6] Before the hearing we asked the parties to address the applicability of the doctrine of mootness to this appeal.

[7] An appeal is moot where the decision of the court will have no practical effect on the rights of the parties: *Borowski v. Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 SCR 342. This appeal as it relates to the ban is moot: the "police ban", if it ever existed, expired May 1, 2016, three months before the appellant filed his application for judicial review; and the City's first ban, which was the subject matter of the judicial review, was vacated. The appellant never sought judicial review of the ban imposed on February 28, 2018, which expired over one year ago. There is no longer a concrete dispute or live controversy between the City and the appellant as it relates to the appellant's use of the City's facilities.

[8] If an appeal is moot, the court may nevertheless choose to exercise its discretion to hear the case on its merits. Given scarce judicial resources, and the nature of the administrative decision at issue, we are not persuaded to depart from our usual practice and decide the appeal as it relates to the vacated ban.

[9] Moreover, the appellant in oral argument advised us he "is happy with the form of the Order" given that it set the ban aside; his concerns are with the reasons of the chambers judge. As noted in *ServiceMaster of Canada Limited v Meyer*, 2019 ABCA 130 at para 31:

> [Rule 14.4(1) of the] Alberta Rules of Court allow[s] a party to appeal against features of an order or judgment. In the absence of a statutory provision to the contrary, which does not exist here, a party cannot appeal against the reasons.
>
> . . .

[para 93] As stated by the Court of Appeal in paragraph 7 reproduced above "[t]here is no longer a concrete dispute or live controversy between the City and the appellant as it relates to the appellant's use of the City's facilities."

[para 94] If there is a different law enforcement matter that needs to be disposed of, the Applicant has not told me what law enforcement matter this is, or how the disclosure to him of the personal information of the Third Parties is necessary to dispose of such law enforcement matter.

[para 95] If there is a different investigation in progress, the Applicant has not told me what this investigation is, or how the disclosure to him of the personal information of the Third Parties is necessary to *continue* such investigation.

[para 96] As set out above, I have found that the personal information of the Third Parties is an identifiable part of a law enforcement record under section 17(4)(b) of the Act.

[para 97] I find that the Applicant has failed to provide sufficient evidence or arguments to establish on a balance of probabilities that the second part of section 17(4)(b) (disclosure is necessary to dispose of a law enforcement matter or continue an investigation) applies in this case.

[para 98] Consequently, I find that disclosure of the Third Parties' personal information is presumed to be an unreasonable invasion of their personal privacy under section 17(4)(b).

[para 99] The Public Body argued that section 17(4)(g) applied to the Third Parties' personal information withheld in the responsive records, and therefore the disclosure of the information was presumed to be an unreasonable invasion of the Third Parties' personal privacy.[9]

Section 17(4)(g) Analysis

[para 100] Section 17(4)(g) of the Act states:

> *(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*
>
> *. . .*
>
> *(g) the personal information consists of the third party's name when*
>
> *(i) it appears with other personal information about the third party, or*

[9] Public Body's initial submission received on March 14, 2023, at paragraph 17.

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

[para 101] The Public Body disclosed the employee's names but withheld the employees' personal information (payroll numbers) on pages 10, 18 and 21.

[para 102] The Public Body disclosed the name of the witness as it appeared on pages 10, 13 and 14, to the Applicant, in compliance with the Court's order in the judicial review proceeding.

[para 103] The Court did not order the Public Body to disclose the witness's age, address and phone number, which is personal information about the witness, for the purpose of the Applicant's judicial review, and the Public Body continues to withhold this personal information.

[para 104] The name of Third Party A and the name of Third Party B have been withheld by the Public Body, along with additional personal information about these individuals.

[para 105] The name of the employee, [G], who created the Incident Report, which appears on page 19 of the responsive records, was disclosed by the Public Body to the Applicant; however, personal information about employee [G] which appeared on page 20 of the responsive record was withheld by the Public Body.

[para 106] In light of the foregoing, I find that section 17(4)(g)(i) or (ii) applies to the Third Parties' personal information withheld in the responsive records and therefore, the disclosure of this information is presumed to be an unreasonable invasion of the Third Parties' personal privacy.

[para 107] In summary, I find that the disclosure of the personal information of the Third Parties is presumed to be an invasion of their personal privacy under sections 17(4)(b) and 17(4)(g).

[para 108] Accordingly, I will now consider whether the disclosure of the Third Parties' personal information, would constitute an unreasonable invasion of their personal privacy taking into account all the relevant circumstances, including the factors set out in section 17(5) of the Act.

Section 17(5) Analysis

[para 109] Section 17(5) of the Act states:

(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 110] The Public Body submitted that it considered all relevant circumstances as required by section 17(5) of the Act and that none of the factors weighed in favour of disclosure of the withheld personal information.

[para 111] Additionally, the Public Body submitted that the redacted personal information on page 20 of the responsive records revealed something intimate and/or personal about an individual and the nature of such information was sensitive, which weighed in favour of non-disclosure.

[para 112] The Public Body advised that it determined that disclosure of the redacted portions of the records at issue would be an unreasonable invasion of the Third Parties' personal privacy.[10]

[para 113] Although it did not specifically cite section 17(5)(h) - the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant - as a factor weighing against disclosing some of the information on pages 20, it appears to me from the Public Body's submission that the Public Body is suggesting that section 17(5)(h) applies to weigh in favour of non-disclosure of the information.

[para 114] The Public Body disclosed all of the Applicant's personal information on the second page of the Incident Report (page 20 of the responsive records) to him. The Public Body withheld personal information about Third Party A, personal information about Third Party B, and personal information about employee [G] on the second page of the Incident Report.

[para 115] In Order F2019-06, the adjudicator made the following comments regarding section 17(5)(h) at paragraphs 71 and 72:

[10] Ibid., at paragraphs 19 and 20.

> [para 71] This factor weighs against disclosing personal information of a third party where disclosure may unfairly damage the reputation of any person referred to in the record.
>
> [para 72] As stated, the statements withheld from the Applicant are allegations of inappropriate conduct by two other individuals. It is sensitive information, and it is also untested. While some of the information has been disclosed to the Applicant in another process (and subsequently in this process as a result), this doesn't change the sensitive and untested nature of the remaining withheld information. The nature of the allegations made against the two individuals could damage their reputations. Past Orders of this Office have determined that where allegations are untested, damage to reputations resulting from disclosure may be unfair. I find this factor weighs against disclosure.

[para 116] I find that the personal information withheld about Third Party A on page 20 involves allegations of a sensitive nature about Third Party A's behavior.

[para 117] I find that the disclosure of this information may unfairly damage the reputation of Third Party A. Accordingly, I find that section 17(5)(h) weighs in favour of not disclosing this information.

[para 118] The language in section 17(5) is not exclusive. In other words, circumstances beyond just those listed in section 17(5) are to be considered if they are relevant.

[para 119] I find that the sensitivity of the information withheld by the Public Body regarding the employee's statements in the Incident Report involving separate interactions with the Applicant and Third Party A, is a factor that is relevant and weighs in favour of non-disclosure of the employee's personal information.

[para 120] There is some indication on page 14, the Witness Statement, that this record was to be kept confidential such that section 17(5)(f) might apply to it; however, the Public Body did not make any submission that either the information provided by the witness or the information provided by Third Party B was supplied to the Public Body in confidence. As a result, there is insufficient evidence or argument for me to conclude that section 17(5)(f) would weigh in favour of non-disclosure of the witness's personal information and Third Party B's personal information.

[para 121] The Public Body withheld the payroll numbers of the five employees. As I noted in paragraph 39, in Order F2019-06, the adjudicator found that employee identification numbers have a personal dimension such that section 17(1) can apply because they can be used to track the actions of an employee. In addition, because payroll numbers can be linked to an employee's pay, benefits, and similar human resource-related information, they have a sufficient personal dimension such that section 17(1) can apply.

[para 122] In my view, this is a relevant factor to be considered in determining whether the disclosure of the payroll numbers would be an unreasonable invasion of the five employees. I find this factor weighs against disclosure of this personal information.

[para 123] In summary, I have found that:

- the information that remains withheld by the Public Body in the responsive records is the personal information of the five employees (payroll numbers), the personal information of the witness, Third Party A, Third Party B, and employee [G];
- the disclosure of this information is presumed to be an invasion of their personal privacy under Section 17(4)(b);
- the disclosure of their personal information is also presumed to be an invasion of their personal privacy under section 17(4)(g)(i) or (ii);
- section 17(5)(h) weighs in favour of non-disclosure of Third Party A's personal information; and
- the sensitivity of the personal information of employee [G] weighs in favour of non-disclosure under section 17(5).
- as payroll numbers can be used to track an employee's actions and are linked to an employee's pay, benefits, and similar human resource-related information, this weighs in favour against disclosure of this personal information under section 17(5).

[para 124] As noted above, pursuant to section 71(2), if a record contains personal information of a third party, then it is up to the applicant to prove that the disclosure would not be an unreasonable invasion of a third party's personal privacy.

[para 125] The Applicant argued that sections 17(5)(a), 17(5)(c), and 17(5)(i) weighed in favour of disclosing the Third Parties' personal information to him, and therefore the disclosure of the Third Parties' personal information would not be an unreasonable invasion of their personal privacy. I will consider each of these sections.

Section 17(5)(a)

[para 126] At paragraph 3) b) of his Request for Inquiry, the Applicant stated:[11]

> 3) The public body has misapplied section 17(1) in order to claim that the disclosure constitutes an unreasonable invasion of privacy. The basis for this assertion is as follows:
>
> . . .
>
> b) Section 17(5)(a) states that a public body must consider whether the disclosure is desirable for the purpose of subjecting the activities of the public body to public scrutiny. Certainly in this particular case the public body has made accusations of a quasi criminal/criminal nature, and the power of a public body to make such serious accusations without any disclosure of evidence to back them up ought to be limited in order to protect the constitutional rights of individuals as well as the principles of procedural fairness and natural justice.
>
> . . .

[11] Applicant's Request for Inquiry dated September 13, 2016.

[para 127] In Order F2019-06, which dealt with the review of the EPS's response to an access request made by the Applicant, the adjudicator made the following comments regarding the application of section 17(5)(a):

> [para 50] Section 17(5)(a) weighs in favour of disclosure where the disclosure is desirable to subject the Public Body's activities to public scrutiny. In order for the desirability of public scrutiny to be a relevant factor, there must be evidence that the activities of the public body have been called into question, which necessitates the disclosure of personal information in order to subject the activities of the public body to public scrutiny. (See Order 97-002, at para. 94; Order F2004-015, at para. 88, Order F2014-16, at para. 34)
>
> [para 51] In Order F2014-16, the Director of Adjudication discussed appropriate factors to consider in determining whether public scrutiny is desirable. She said (at paras. 35-36):
>
> > In determining whether public scrutiny is desirable, I may consider factors such as:
> > 1. whether more that one person has suggested public scrutiny is necessary;
> > 2. whether the applicant's concerns are about the actions of more than one person within the public body; and
> > 3. whether the public body has not previously disclosed sufficient information or investigated the matter in question.
> >
> > (Order 97-002, paras 94 and 95; Order F2004-015, para 88).
> >
> > It is not necessary to meet all three of the foregoing criteria in order to establish there is a need for public scrutiny. (See *University of Alberta v. Pylypiuk* (cited above) at para 49.) For example, in Order F2006-030, former Commissioner Work said (at para 23) that the first of these factor "is less significant where the activity that has been called into question, though arising from a specific event and known only to those immediately involved, is such that it would be of concern to a broader community had its attention been brought to the matter", commenting that "[i]f an allegation of impropriety that has a credible basis were to be made in this case, this reasoning would apply".

[para 128] There is no evidence before me to indicate that anyone other than the Applicant has suggested that public scrutiny of the Public Body's actions in this case are necessary. Nor is there any evidence before me to indicate that the personal information of the Third Parties would be of interest to anyone other than the Applicant, or, if known by the broader community, would call into question the Public Body's actions. I find that section 17(5)(a) is not a relevant factor.

Section 17(5)(c)

[para 129] As noted by the adjudicator in Order F2023-02 at paragraph 50, four criteria must be fulfilled in order for section 17(5)(c) to apply:

> [para 50] Section 17(5)(c) weighs in favour of disclosure where the personal information is relevant to a fair determination of the Applicant's rights. Four criteria must be fulfilled for this section to apply:

(a) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds;

(b) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed;

(c) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and

(d) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing. (Order F2008-012 at para. 55, Order F2008-31 at para. 112)

[para 130] At paragraph 3) c) of his Request for Inquiry, the Applicant stated:[12]

3) The public body has misapplied section 17(1) in order to claim that the disclosure constitutes an unreasonable invasion of privacy. The basis for this assertion is as follows:

. . .

c) Section 17(5)(c) is most applicable in that in this case "the personal information is relevant to a fair determination of the applicant's rights". It is part of a fair process to disclose to the applicant the records and information related to the ban from the use of all Edmonton public recreation centres, outdoor pools, and arenas as well as any information relayed to the police. In addition it is fair to disclose to the applicant the specifics of the criminal/quasi criminal accusations made and who is making those accusations. Same applies to the report the City of Edmonton made to the EPS.

. . .

[para 131] The Public Body *did* disclose to the Applicant the identity of the employee who made the Incident Report, and the information in the Incident Report about the Applicant's behaviour on March 10, 2016.

[para 132] Insofar as the Applicant is arguing that the information that remains withheld is relevant to a fair determination of his rights with respect to the Public Body's decision to ban him, as I have noted above, the Court has already decided what information in the 22 pages of responsive records was relevant, or necessary, to the Applicant's judicial review of the Public Body's decision to ban him, and ordered the Public Body to disclose this information to him, which it did.

[para 133] Furthermore, the Court of Appeal has stated that "[t]here is no longer a concrete dispute or live controversy between the City and the appellant as it relates to the appellant's use of the City's facilities."[13]

[12] Applicant's Request for Inquiry dated September 13, 2016.
[13] *[Applicant]* v. *City of Edmonton and Edmonton Police Service*, 2019 ABCA 272 at paragraph 7.

[para 134] Accordingly, section 17(5)(a) does not apply as the Applicant's rights with respect to the ban imposed on him by the City have already been determined and there is no longer a concrete dispute or live controversy between the City and the Applicant as it relates to his use of the City's facilities.

[para 135] In the Applicant's rebuttal submission, the Applicant argued that the personal information of the Third Parties was relevant to a fair determination of his separate complaint before this Office, that the Public Body collected, used and disclosed *his personal information* in contravention of the Act.[14]

[para 136] The Applicant did not explain how the personal information of the Third Parties:

i) had any bearing on or was significant to the determination of his complaint that the Public Body collected, used and disclosed *his personal information* in contravention of the Act, and

ii) was required in order to prepare for the proceeding or to ensure an impartial hearing into his complaint that the Public Body had collected, used and disclosed *his personal information* in contravention of the Act.

[para 137] Accordingly, I find that Section 17(5)(c) does not apply with respect to the Applicant's separate complaint before this Office regarding the Public Body's collection, use and disclosure of his personal information under the Act.

[para 138] The Applicant further argued in his rebuttal submission that section 17(5)(c) was relevant to a fair determination of his separate request that this Office review the Public Body's decision with respect to his request that the Public Body correct his personal information in records he received from the Public Body.

[para 139] Again, the Applicant did not explain how the personal information of the Third Parties:

i) had any bearing on or was significant to the review of the Public Body's decision under the Act regarding his request to have *his personal information* corrected and

ii) was required in order to prepare for the proceeding or to ensure an impartial hearing into the determination of his rights as they related to his correction request.

[para 140] Accordingly, I find that Section 17(5)(c) does not apply with respect to the Applicant' separate request for a review of the Public Body's decision with respect to his request to have the Public Body correct *his personal information* under the Act.[15]

---

[14] Applicant's rebuttal submission received May 24, 2023, and corrected by the Applicant on May 25, 2023.
[15] I also note that in the event that the Applicant's separate complaint before this Office about the Public Body's collection, use and disclosure of his personal information, or his separate request for review before this Office that of the Public Body's decision regarding his request that it correct his personal information, is no longer ongoing,

Section 17(5)(i)

[para 141] At paragraph 3) d) of his Request for Inquiry, the Applicant stated:

> 3) The public body has misapplied section 17(1) in order to claim that the disclosure constitutes an unreasonable invasion of privacy. The basis for this assertion is as follows:
>
> . . .
>
> d) Section 17(5)(i) is also applicable in that the Applicant has provided information that the City recorded and disclosing this information cannot constitute an unreasonable invasion of a third party's personal privacy.
>
> . . .

[para 142] None of the information that remains withheld by the Public Body was provided to it by the Applicant. Accordingly, section 17(5)(i) does not apply.

[para 143] The Applicant also argued that section 40(1)(bb) required the Public Body to disclose the withheld information to him.[16]

[para 144] In Order F2019-06, the adjudicator considered similar arguments made by the Applicant with respect to information withheld by the EPS under the Act. At paragraph 79, the adjudicator concluded:

> [para 79] The Applicant cites several subsections of section 40 of the Act as authority to disclose the information in the records. Section 40 of the Act permits a public body to disclose personal information in the circumstances listed. This section is not relevant to responding to an access request. It also does not apply to information other than personal information.

[para 145] I agree with the adjudicator's conclusion and find that section 40 is not relevant to responding to an access request.

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

[para 146] I have found above that section 17(4)(b) and section 17(4)(g)(i) or (ii) applies to the personal information of the Third Parties withheld by the Public Body and therefore disclosure of this information is presumed to be an unreasonable invasion of the Third Parties' personal privacy.

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then the requirement that "the right is related to a proceeding which is either existing or contemplated, not one which has already been completed" in order for section 17(5)(c) to apply, has also not been met.

[16] Applicant's initial submission dated August 8, 2018.

[para 147] I have found that section 17(5)(h) weighs against the disclosure of Third Party A's personal information, and the sensitive nature of the personal information of the employee is a factor under section 17(5) which weighs against disclosure of the employee's personal information.

[para 148] I have found that the sensitivity of the personal information of employee [G] weighs in favour of non-disclosure under section 17(5).

[para 149] I have found that as payroll numbers can be used to track an employee's actions and are linked to an employee's pay, benefits, and similar human resource-related information, this weighs in favour against disclosure of this personal information under section 17(5).

[para 150] I found that sections 17(5)(a), 17(5)(c), and 17(5)(i) did not apply and therefore did not weigh in favour of disclosing the withheld information to the Applicant.

[para 151] I find that there are no factors under section 17(5) that weigh in favour of disclosure of any of the Third Parties' personal information to the Applicant. As such, the presumptions that arise under sections 17(4)(b) and 17(4)(g)(i) require the Public Body to withhold this information.

[para 152] I find that the Applicant has failed to prove on a balance of probabilities, that the disclosure of the Third Parties' personal information to him would not be an unreasonable invasion of their personal privacy as required by section 71(2) of the Act.

[para 153] I confirm the Public Body's decision to withhold the personal information of the Third Parties pursuant to section 17(1) of the Act.

2. Does section 27(1)(a) (privileged information) apply to information in the records?

[para 154] Section 27(1)(a) of the Act states:

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

[para 155] The Public Body advised that it was applying solicitor-client privilege under section 27(1)(a) of the Act to withhold two pages of emails.[17]

[para 156] The Public Body's in-house legal counsel provided the following description of the email correspondence:[18]

[17] In its initial submission received March 14, 2023, the Public Body asserted that it was withholding the two pages of emails pursuant to solicitor-client privilege and litigation privilege under section 27(1)(a) of the Act; however, in its additional submission dated May 8, 2023, the Public Body clarified that it was asserting solicitor-client privilege over the entire email correspondence.

[18] Public Body's Additional Submission dated May 8, 2023.

- The email correspondence redacted pursuant to section 27(1)(a) of the Act deals with employees of the Public Body discussing a matter that has legal implications and considerations and they are discussing the legal advice and recommendations they received from their assigned Public Body lawyer based on such considerations. A copy of this email correspondence was then shared with the City's head solicitor at the time.

[para 157] The Public Body's in-house legal counsel further submitted:[19]

- Solicitor-client privilege is being applied to the entire email correspondence.

- Information that was present in this privileged correspondence contained matters that were gathered and discussed with a lawyer in anticipation of potential litigation. Although litigation privilege may expire, solicitor-client privilege does not.

- The Public Body confirms that at no time is the Public Body waiving privilege in respect of this email correspondence.

[para 158] The importance of solicitor-client privilege was discussed by the Court in *Alberta Health Services v. Farkas***,** 2020 ABQB 281 (*Farkas*). In *Farkas*, Justice deWit stated:

> [20] The Supreme Court of Canada stated in ***Alberta (Information and Privacy Commissioner) v University of Calgary***, 2016 SCC 53 at paragraph 34, that solicitor-client privilege "is fundamental to the proper functioning of our legal system and a cornerstone of access to justice." Solicitor-client privilege must be "jealously guarded and should only be set aside in the most unusual circumstances" because "without the assurance of confidentiality, people cannot be expected to speak honestly and candidly with their lawyers, which compromises the quality of the legal advice they receive." The court also stated at paragraph 43 that "as a substantive rule, solicitor-client privilege must remain as close to absolute as possible and should not be interfered with unless absolutely necessary."

[para 159] The test to establish whether communications are subject to solicitor-client privilege was set out by the Supreme Court of Canada in *Canada v. Solosky*, [1980] 1 S.C.R. 821 (*Solosky*). At page 837 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.

[para 160] As stated by the adjudicator in Order F2009-018 at paragraph 41:

> [para 41] . . . Legal advice means a legal opinion about a legal issue, and a recommended course of action, based on legal considerations, regarding a matter with legal implications (Order 96-017 at para. 23; Order F2007-013 at para. 73). The test for legal advice is satisfied where the person seeking advice has a reasonable concern that a particular decision or course of action may have legal implications, and turns to his or her legal

[19] Ibid.

advisor to determine what those implications might be; legal advice may be about what action to take in one's dealings with someone who is or may in the future be on the other side of a legal dispute (Order F2004-003 at para. 30).

[para 161] As noted by the adjudicator in Order F2023-02 at paragraphs 153 - 155, solicitor-client privilege can also extend past the immediate communication between a solicitor and a client:

> [para 153] 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 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 no, however, that narrow. As the court stated in *Balabel v. Air India*, [1988] Ch317, [1988] 2 All E.R. 246 at p. 254 (C.A.):
> >
> > > Privilege obviously attaches to a document conveying legal advice from a 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 the 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.
>
> [para 154] 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.

[para 155] The Court in *Alberta (Municipal Affairs) v Alberta (Information and Privacy Commissioner)*, 2019 ABQB 274 found (at paras. 17-18):

> 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 162] The Public Body did not provide me with the two pages of emails over which it is asserting solicitor-client privilege.

[para 163] In *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (*University of Calgary*), the Supreme Court of Canada determined that section 56(3) of the *FOIP Act* does not require a public body to produce to the Information and Privacy Commissioner records over which solicitor-client privilege is claimed.[20]

[para 164] In other words, a public body can, but it does not have to provide this Office with a copy of a record over which it has claimed solicitor-client privilege, and this Office cannot compel a public body to provide it with a record over which the public body has claimed solicitor-client privilege.

[para 165] However, while a public body does not have to produce the record over which it has asserted solicitor-client privilege to the Commissioner for review in an inquiry, pursuant to section 71(1), the burden of proof is on the public body to prove that an applicant has no right of access to the record or part of the record. Section 71(1) of the Act states:

> *71(1) If the inquiry relates to a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part of the record.*

[para 166] This was confirmed by the Court in *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (*EPS*). At paragraph 79, Justice Renke stated:

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[20] *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 at paras. 2, 37 and 71. See also *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (*EPS*) at para. 14.

> [79] Under s. 71(1), a public body must "prove" that an applicant has no right of access to a record or party of a record. The public body bears the burden of proof.

[para 167] At paragraph 80, the Court set out the standard of proof that a public body must meet:

> [80] The standard of proof the public body must meet is the balance of probabilities: 2019 *CPS (QB)* at para. 5; *Alberta Municipal Affairs* at para 11; F2017-58 at paras 124-125; F2013-13 at para 189.

[para 168] The Court further identified what a public body is required to do in order to establish its claim of solicitor-client privilege before this Office (emphasis in original):

> [74] In my opinion, a public body like EPS is required to establish its claim to solicitor-client privilege, but only to the extent required by the Court of Appeal in *Canadian Natural Resources Ltd. v ShawCor Ltd.*, 2014 ABCA 289 – and no farther. Satisfaction of the *CNRL v ShawCor* standard suffices for civil litigation and no higher standard should be imposed in the FOIPPA context. Further, even if s. 27(2) does not apply and a solicitor-client privilege claim remains discretionary, to establish the privilege is the warrant for reliance on the privilege. No additional IPC scrutiny of discretion concerning solicitor-client privilege claims is warranted.
>
> . . .
>
> [94] All three decisions in *University of Calgary*, then, supported the view that sufficient justification for the claim of solicitor-client privilege was provided by compliance with civil litigation rules.

[para 169] Justice Renke's decision in *EPS* has been followed in a number of Orders of this Office, including Order F2021-20 where the adjudicator stated:

> [para 77] As stated in *Edmonton (City) Police Service v Alberta (Information and Privacy Commissioner[])]*, 2020 ABQB 10 *(EPS)*, when a Public Body does not provide records that it asserts are subject to solicitor-client privilege for my review, it may establish that such records were properly withheld by meeting the civil litigation standard for refusing to produce such records, set in the Rules of Court, (Alta Reg 124/2010, ss.5.6-5.8).
>
> [para 78] The civil litigation standard requires that the Public Body provide an affidavit sufficiently describing the records to enable me to conclude that solicitor-client privilege is properly claimed.
>
> [para 79] In *EPS*, Justice Renke described the criteria for recognizing solicitor-client privilege at para. 66:
>
> > The criteria for recognizing solicitor-client privilege were confirmed by Justice Major in *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31 at para 15:
> >
> > > 15 Dickson J. outlined the criteria to establish solicitor-client privilege in *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821, at p. 837, as: "(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". Though at one time restricted to communications exchanged in the course of litigation, the privilege has been extended to cover any consultation for legal advice, whether litigious or not . . .
>
> [para 80] The Public Body provided an affidavit describing records it asserts are privileged, sworn by its Finance Manager (the Privilege Affidavit).
>
> [para 81] I find that the descriptions of solicitor-client privilege meet the civil litigation standard. In each description, I can clearly see that the record described is a communication with external legal counsel, for the purpose of seeking legal advice, and was intended to remain confidential.

[para 170] The Public Body provided an affidavit (the Affidavit) sworn by its Director, Corporate Access and Privacy (the Director), to me and to the Applicant.[21]

[para 171] In the Affidavit, the Director attested to the following:

1. I am an authorized representative of The City of Edmonton.

2. I have reviewed the two pages at issue in this Inquiry to which s. 27(1)(a) of the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c F-25 has been applied.

3. I am informed that the records are subject to solicitor-client privilege as the content of the records contains conversations between employees of the Public Body discussing a matter regarding which legal advice was sought and received. The records contain two conversations, one between City employees discussing relevant legal advice received from a lawyer employed by the City, and the second forwarding that conversation to the City's leadership, including the City Solicitor.

4. I am informed that the records were intended to be confidential.

[para 172] In this case, the records being withheld are not emails from the Public Body's in-house legal counsel providing advice to the Public Body's employees. Rather, according to the submissions of the Public Body, the records being withheld contain two conversations, one between City employees discussing relevant legal advice received from a lawyer employed by the City, and the second forwarding that conversation to the City's leadership, including the City Solicitor.[22]

[para 173] The Public Body has stated that "[i]nformation that was present in this privileged correspondence contained matters that were gathered and discussed with a lawyer in anticipation of potential litigation."[23]

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[21] Affidavit of the Director, Corporate Access and Privacy, sworn (or affirmed) July 17, 2023.
[22] Public Body's Additional Submission dated May 8, 2023.
[23] Ibid.

[para 174] In *EPS*, the Court confirmed that solicitor-client privilege extended to the discussion of legal advice between employees. At paragraph 271, Justice Renke stated:

> [271] In my opinion, the privilege was not lost by circulation of any part of the Crown Opinion Records to the Officer as an employee. See ***Bank of Montreal v Tortora*** at para 12: "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 …." See ***Alberta Municipal Affairs*** at paras 18-19; ***Gardner v Viridis Energy Inc***, 2014 BCSC 204, Pearlman J at para 35 ("Legal advice provided by a solicitor to a client and protected by solicitor-client privilege does not lose that protection when one officer or employee of the client passes that advice on to another …."); Order F2015-32 at para 108 ("solicitor-client privilege applies to information in written communications between officials or employees of a public body in which the officials or employees quote or discuss the legal advice given by the public body's solicitor"); Order F2009-042 at para 58.

[para 175] The Director's Affidavit does not state who informed the Director that the withheld emails were subject to solicitor-client privilege. I am unable to determine from the Director's Affidavit whether someone who is capable of determining whether solicitor-client privilege applied informed the Director of this. If this was all the Public Body had provided, I may have determined that the Public Body had failed to meet its burden of proof that solicitor-client privilege applied on a balance of probabilities.

[para 176] However, in this case, I also have the submissions of the Public Body's in-house counsel, which, although they are not sworn, also address the requirements of the *Solosky* test.

[para 177] In my view, it is appropriate in this case to take a holistic approach to determining whether the Public Body has established on a balance of probabilities that solicitor-client privilege applies to the withheld emails.

[para 178] Having reviewed the submissions of the Public Body's in-house counsel and the Affidavit of the Director with respect to the emails withheld pursuant to solicitor-client privilege, I accept that the two pages of emails are comprised of conversations between City employees discussing legal advice sought and received from a lawyer employed by the City, and that the conversations discussing the legal advice were then transmitted to the City's leadership, including the City Solicitor. I accept that the two pages of emails were intended to be kept confidential.

[para 179] Taking into account the comments of the Courts in the aforementioned decisions, I find that the emails between the employees discussing the legal advice, and the email transmitting the discussion to the City's leadership, including the City Solicitor, form part of the continuum of communication of the lawyer's advice.

[para 180] Accordingly, I find that the Public Body has met the *Solosky* test, and has established its claim of solicitor-client privilege over the emails under section 27(1)(a) of the Act, on a balance of probabilities.

Exercise of Discretion

[para 181] Section 27(1)(a) is a discretionary section, meaning that a public body can exercise its discretion in deciding whether to release a record over which it has claimed privilege.

[para 182] However, as noted above, Justice Renke has stated in *EPS* at paragraph 74 that "to establish the privilege is to establish the grounds for relying on the privilege. The existence of the privilege is the warrant for reliance on the privilege. No additional IPC scrutiny of discretion concerning solicitor-client privilege claims is warranted".

[para 183] Accordingly, as I have determined the Public Body has established its claim of solicitor-client privilege, no further scrutiny of discretion concerning the Public Body's claim of solicitor-client privilege is warranted.

V. ORDER

[para 184] I make this Order under section 72 of the Act.

[para 185] I find that the Public Body has properly applied section 17(1) to withhold the personal information of the Third Parties.

[para 186] I find that the Public Body has established its claim of solicitor-client privilege on a balance of probabilities over the two pages of emails, and has properly applied section 27(1)(a) to withhold the emails.

_____

Carmen Mann
Adjudicator
/bah