ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2024-03

January 22, 2024

PUBLIC SAFETY AND EMERGENCY SERVICES

Case File Number 008403

Office URL: www.oipc.ab.ca

Summary: On January 22, 2018, an individual made an access request on behalf of Alberta Prison Justice Society (formerly Alberta Prisoners Legal Services) (the Applicant) to Public Safety and Emergency Services (formerly Justice and Solicitor General) (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the Act), for all information relating to a hunger strike, complaints of the prisoners and investigations into the complaints, which were referred to in an article dated January 11, 2018 from the Edmonton Sun.

The Public Body responded by providing some responsive information and withholding other responsive information under section 17(1) (disclosure harmful to personal privacy), and sections 20(1)(k) and 20(1)(m) (disclosure harmful to law enforcement). The Applicant requested a review and subsequently an inquiry of the Public Body's response.

The Adjudicator found that the Public Body properly applied section 17(1) to withhold the personal information of the third parties.

The Adjudicator found that neither section 20(1)(k) nor section 20(1)(m) applied to the information the Public Body withheld pursuant to these sections. The Adjudicator ordered the Public Body to give the Applicant access to information it withheld under these sections.

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

Authorities Cited: AB: Orders F2021-34 and F2022-46.

Cases Cited: *Canada (Information Commissioner) v. Canada (Prime Minister)*, [1992] F.C.J. No. 1054, *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31.

I. BACKGROUND

[para 1] On January 22, 2018, an individual made an access request on behalf of Alberta Prison Justice Society (formerly Alberta Prisoners Legal Services) (the Applicant) to Public Safety and Emergency Services (formerly Justice and Solicitor General) (the Public Body) under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (the Act), for the following information:

> . . . all records as defined by s. 1(q) relating to the hunger strike, complaints of the prisoners and investigations into them referred to in the attached article.

[para 2] The Applicant attached an article dated January 11, 2018 from the Edmonton Sun, regarding the hunger strike the inmates were involved in.

[para 3] On February 23, 2018, the Public Body responded and informed the Applicant that it had located 44 pages of responsive records and was providing access to 43 pages of these records (the First Release). It informed the Applicant that it was withholding some information under sections 17(1) – Disclosure harmful to personal privacy, and sections 20(1)(k) and 20(1)(m) – Disclosure harmful to law enforcement.

[para 4] On March 7, 2018, the Applicant submitted a request for review to this Office.

[para 5] The Public Body conducted another search for responsive records. In its letter to the Applicant dated January 17, 2019, the Public Body informed the Applicant that it had located an additional 55 pages of responsive records and was providing access to 36 pages of these records (the Second Release). It informed the Applicant that it was withholding some information under sections 17(1), 20(1)(k) and 20(1)(m).

[para 6] As the total number of pages of responsive records in the First Release was 44 pages, and the total number of pages of responsive records in the Second Release was 55 pages, the cumulative total number of pages of responsive records in the two releases was 99 pages.

[para 7] On February 26, 2019, the Public Body disclosed further information on 32 pages that it had initially withheld in the responsive records, to the Applicant (the Third Release).

[para 8] The Applicant subsequently requested the Commissioner conduct an inquiry regarding the Public Body's application of sections 17(1), 20(1)(k) and 20(1)(k) to withhold the undisclosed information in the responsive records.

[para 9] The Commissioner agreed to conduct an inquiry and delegated her authority to conduct this inquiry to me.

[para 10] On July 17, 2023, the Public Body disclosed further information to the Applicant that it had initially withheld in the 99 pages of responsive records pursuant to sections 20(1)(k) and 20(1)(m) (the Fourth Release). It continued to withhold information in the responsive records under sections 17(1), 20(1)(k) and 20(1)(m).

[para 11] The Public Body provided the Applicant with a consolidated redacted version of the responsive records, and provided me with a consolidated redacted and un-redacted version of the responsive records for this inquiry.

II. RECORDS AT ISSUE

[para 12] The information at issue in this inquiry is the information that remains withheld by the Public Body in the 99 pages of responsive records (the Responsive Records) under sections 17(1), 20(1)(k) and 20(1)(m).

III. ISSUES

[para 13] The Notice of Inquiry, dated May 3, 2023, sets out the issues for this inquiry as follows:

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

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

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

IV. DISCUSSION OF ISSUES

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

[para 14] 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 15] Section 17(1) does not say that a public body can *never* disclose a third party's personal information. It is only when the disclosure of the third party's personal information would be an unreasonable invasion of their personal privacy that a public body must withhold the personal information.

[para 16] Section 17(2) sets out the situations in which the disclosure of personal information is not an unreasonable invasion of a third party's personal privacy.

[para 17] 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 about whom the information is about has requested that the information not be disclosed.

[para 18] Section 17(4) sets out the circumstances in which a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy.

[para 19] Section 17(5) sets out the circumstances that a public body must consider in determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy.

[para 20] If a record or part of a record contains personal information about a third party, section 71(2) requires the applicant to prove that disclosure 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 21] 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 Responsive Records consists of personal information of a third party.

Is the withheld information personal information of a third party?

[para 22] Section 1(n) defines personal information under the Act as follows:

> *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 23] 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 24] The Public Body applied section 17(1) to withhold information on pages 4, 8, 9 – 15, 17 – 24, 28 – 32, 34 – 41 and 45 – 99.

[para 25] The information withheld on these pages consists of one or more of the following types of information about inmates:

- an inmate's name (s. 1(n)(i)),
- an inmate's date of birth from which their age can be determined (s. 1(n)(iii)),
- identifying number(s) assigned to an inmate (s. 1(n)(iv)),
- information about an inmate's health or health care history (s. 1(n)(vi)),
- an inmate's criminal history (s. 1(n)(vii)),
- other individuals' opinions about the inmate (s. 1(n)(viii)); and
- an inmate's personal views or opinions (s. 1(n)(ix)).

[para 26] I find that the information withheld by the Public Body pursuant to section 17(1) is personal information under one or more of sections 1(n)(i), (iii), (iv), (vi), (vii), (viii) and (ix) of the Act, reproduced above, or is otherwise information that is personal information of an identifiable individual under section 1(n) of the Act (for example, what an inmate said or did while in custody).

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

[para 27] The next question to be addressed is whether the disclosure of the personal information of the third parties would be an unreasonable invasion of their personal privacy.

[para 28] As noted above, section 17(2) sets out the circumstances in which the disclosure of a third party's personal information would *not* be an unreasonable invasion of their personal privacy. In particular, section 17(2)(a) and (b) state:

17(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

(a) the third party has, in the prescribed manner, consented to or requested the disclosure,

(b) there are compelling circumstances affecting anyone's health or safety and written notice of the disclosure is given to the third party,

. . .

[para 29] Section 17(3) provides that the disclosure of personal information under subsection (2)(j) is an unreasonable invasion of a third party's personal privacy if the third party whom the information is about has requested that the information not be disclosed.

[para 30] The Public Body considered the application of section 17(2) as follows:[1]

> 18. Section 17(2) of the Act defines circumstances where the disclosure of a third party's personal information will not be an unreasonable invasion of the third party's personal privacy. The Public Body submits that none of the circumstances in section 17(2) are applicable. No prescribed consent from the third parties has occurred as contemplated in section 17(2)(a).
>
> 19. Although the Applicant, in his request for a review, has suggested that this is "of very significant present public importance," the Applicant has not provided any evidence to suggest that this meets the threshold of "compelling circumstances affecting anyone's health or safety" or, specifically, how the release of redacted personal information would address these compelling circumstances.
>
> 20. The Public Body submits that sections 17(2)(c) to (j) are not relevant.
>
> 21. The Applicant's request originated from an article published in the Edmonton Sun on January 11, 2018 (see Attachment 1). As the article did not mention any names of the inmates involved in the hunger strike, the Public Body must presume that third party names are not already publicly known. Additionally the Public Body notes that a newspaper article written more than five years ago is not sufficient to establish compelling circumstances warranting the release of personal information.

[para 31] In its rebuttal submission, the Applicant stated:[2]

> 3. At para. 21 APSES argues that "a newspaper article written more than five years ago is not sufficient to establish compelling circumstances warranting the release of personal information". Although this submission is made in relation to inmate identifying information it must be said that the circumstances must be assessed as at the time of the request, in this case January 21, 2018 when the newspaper article was published on January 11, 2018. Invoking FOIPPA processing delays would be perverse.

[1] Public Body's initial submission dated July 10, 2023 at paragraph 18.
[2] Applicant's rebuttal submission dated July 24, 2023 at paragraph 3.

[para 32] In the initial Request for Review/Complaint dated March 7, 2018 the Applicant stated that "[a]s this matter is of very significant present public importance, I suggest it be elevated immediately to a written inquiry".

[para 33] Asking for the matter to proceed directly to a written inquiry because it is a matter "of very significant present public importance" is not the same as arguing that the disclosure of the inmates' personal information to the Applicant would not be an unreasonable invasion of their privacy because there were compelling circumstances affecting anyone's health or safety.

[para 34] The Applicant did not provide any arguments in its Request for Review/Complaint, its Request for Inquiry, or its rebuttal submission, that section 17(2)(b) applied in this case.[3] The fact that the hunger strike was reported on in the newspaper supports the Applicant's position that it was of public interest, but it does not follow that disclosure of an inmate's personal information to the Applicant would not be an unreasonable invasion of their personal privacy.

[para 35] There is insufficient argument and evidence for me to find that section 17(2)(b) of the Act applied when the Applicant initially made its access request in 2018, or that section 17(2)(b) applies now.

[para 36] I find that neither section 17(2) nor section 17(3) apply in this case.

[para 37] The Public Body submitted that, pursuant to sections 17(4)(b) and (g), disclosure of the personal information in the responsive records was presumed to be an unreasonable invasion of privacy. It stated:[4]

> 17(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal information 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.
>
> **Some of the records include names of inmates; their dates of birth along with their offender background information. The records themselves make clear that the named individuals are incarcerated in a correctional facility and would, therefore, be clearly part of a law enforcement record and establish that the named individuals had been subject to criminal sanctions.**
>
> (g) the personal information consists of a third party's name when
>
> (i) it appears with other personal information about the third party, or
> (ii) the disclosure of the name itself would reveal personal information about the third party,

[3] As per the Applicant's email to this Office and the Public Body dated June 6, 2023, the Applicant did not provide an initial submission but instead relied on its Request for Review/Complaint and Request for Inquiry and attachments thereto, as its initial submission.
[4] Public Body's initial submission dated July 10, 2023 at paragraph 18.

As noted, some of the records include name of inmates; their dates of birth along with their offender background information. In short, the records would reveal third party names along with other personal information about these parties. Accordingly, any disclosure of their name and any other personal information is an unreasonable invasion of their personal privacy.

[para 38] Having reviewed the withheld information, I find that the disclosure of the personal information withheld by the Public Body is presumed to be an unreasonable invasion of an inmate's personal privacy under one or more of sections 17(4)(b), 17(g)(i) and 17(g)(ii).

[para 39] Once a public body has determined that information is subject to a presumption under section 17(4), it must then consider whether there are any relevant circumstances, including the circumstances set out in section 17(5), which would outweigh the presumption that disclosure of the personal information would be an unreasonable invasion of the third party's personal privacy.

[para 40] The Public Body provided its analysis of the circumstances set out in section 17(5) as follows:[5]

> . . . To determine whether disclosure would be an unreasonable invasion of the personal privacy of a third party, a public body must also consider and weigh all relevant circumstances under section 17(5):
>
> 17(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,
>
> *The information redacted are third party names and personal information about third parties. The public body take[s] the view that releasing specific inmate names or other personal information about inmates would not be relevant for the scrutiny of any public body action.*
>
> (b) the disclosure is likely to promote health and safety or the protection of the environment,
>
> *Not applicable*
>
> (c) the personal information is relevant to a fair determination of the applicant's rights,
>
> *Not applicable. The Applicant is not named in the records and is in no way affected by the non-disclosure of the third-party information contained in the file.*
>
> (d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,

[5] Ibid., at paragraph 22.

Not applicable

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

Yes, the probable harms were outlines under section 17(4) above. Additionally, records of this type may also include, for example, past or current affiliations with other criminal organizations or previous or alleged criminal activity while in custody. These may, if released, create potential physical or mental dangers to inmates both prior to and after release.

Inmates involved in hunger strikes may also potentially be in danger from other inmates over hunger strikes and, accordingly, the disclosure of their personal information place them in danger of physical or mental harm.

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

Not applicable

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

Not applicable

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

Yes. In Order F2014-12, which dealt with the withholding of video that may identify inmates, the adjudicator said "anyone who views the video or photograph and knows an inmate who appears in the video or photograph would also know the name of the individual and would be able to learn that the individual was an inmate at the Edmonton Remand Centre on a certain date". It is reasonable to assume that relatives, friends, prospective or current employers may not have details of an individual being remanded into custody. Disclosing these details would likely damage their reputation.

As noted above, records of this type may also include, for example, past or current affiliations with other criminal organizations or previous or alleged criminal activity while in custody. These may, likewise, inflict significant reputational harm on third parties.

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

Not applicable

[para 41] The Public Body further stated:[6]

23. It should be noted that the Applicant did not supply consent from any of the third-party individuals whose names were severed from the records. Lawyers may supply confirmation

[6] Ibid., at paragraph 23.

> from their clients that they are acting on their client's behalf; the file is then processed as a personal file. However, this is not the case here.

[para 42] I note that the Applicant has not argued or provided any evidence in this inquiry that it has been authorized to act on behalf of any of the third parties whose personal information was withheld by the Public Body, nor has the Applicant argued or provided any evidence that any of the third parties have consented to their personal information being disclosed to the Applicant.

[para 43] In conclusion, the Public Body stated:[7]

> 25. Given the above, the Public Body submits that it is obligated to withhold the personal information redacted. Nothing in section 17(2) would operate to suggest the requested information is not an unreasonable invasion of third party privacy. By contrast, several sections of sections 17(4) and (5) suggest that the personal information withheld by the public body would constitute an unreasonable invasion of privacy.

[para 44] I have determined that all of the information withheld by the Public Body under section 17(1) is personal information about third parties. I have found that the disclosure of the information to the Applicant is presumed to be an invasion of the third parties' personal privacy under one or more of sections 17(4)(b), 17(g)(i) and 17(g)(ii).

[para 45] Pursuant to section 71(2), the burden of proving that the disclosure of the third parties' personal information would not be an unreasonable invasion of the third parties' personal privacy is on the Applicant.

[para 46] In its rebuttal submission, the Applicant made the following submissions about the personal information withheld by the Public Body:[8]

> 1. After reviewing the Initial Submission of APSES, the Applicant APLS, now named Alberta Prison Justice Society ('APJS'), agrees that names of prisoners shall be withheld.
>
> . . .
>
> 6. This part will only deal with redactions where meaningful submissions can be made. The APJS will refer to the page numbers in the Index of Records:
>
> . . .
>
> 3. APSES provides no hint of the nature of this record.
>
> 4. Parenthetically, it is noted that pre-trial prisoners are labeled throughout as "offender". APJS wonders whether the redactions refer to the "excessive use of force" allegation, a very important issue.
>
> 9. APJS is unable to determine how much of this page has been redacted but it defies logic that the entirety would be justified.

[7] Ibid., at paragraph 25.

[8] Applicant's rebuttal submission dated July 24, 2023.

10 – 11,
28 – 29 It seems that more than inmate identifying information has been redacted.

25 – 55
61,
83 – 84 The substance of the prisoners' complaints need not be entirely redacted.

[para 47] The Applicant did not argue that any of the circumstances which the Public Body submitted applied under section 17(5) and weighed in favor of non-disclosure, did not apply. Nor did the Applicant make any argument that any of the circumstances in section 17(5) were relevant, and weighed in favour of disclosing the inmates' personal information to the Applicant. Nor did the Applicant point to any other circumstances that were relevant and should be considered in determining whether it would not be an unreasonable invasion of the third parties' personal privacy to disclose their personal information to the Applicant.

[para 48] In its rebuttal submission, the Public Body stated:[9]

> **II. REPLIES TO APPLICANT'S SUBMISSION**
>
> . . .
>
> 3. Page 3 appears to be a page separator from the original records package. It was disclosed in its entirety (no information was removed).
>
> 4. In respect of page 4, the public body takes the view, in accordance with our previous submissions, that release of the personal information redacted would constitute an unreasonable invasion of personal privacy of the third parties involved.
>
> 5. For page 9, the information redacted consists of third-party names and ORCA ID numbers only. This is considered personal information pursuant to section 1(n) of the FOIP Act:
>
> 1(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,
>
> (iv) an identifying number, symbol or other particular assigned to the individual,
>
> The redacted information is within the scope of the headings of the columns that remain [un-redacted].
>
> 6. For the remainder of the applicant's rebuttal submissions, the public body takes the view that the information redacted under section 17(1) is personal information. In

[9] Public Body's rebuttal submission dated August 3, 2023.

> particular, this is information drawn from law enforcement records. The public body asserts that the redacted information has the potential to unfairly harm the reputation of the third parties and, in certain circumstances, expose the third parties to actual harm. As such, the Public Body maintains the view that the factors identified in sections 17(2), (4), and (5) would not permit the release of this information.

[para 49] Having reviewed the records, I confirm the following as submitted by the Public Body in its rebuttal submission:

> Page 3: As per the Index of Records provided by the Public Body to me and to the Applicant, page 3 is identified as "Page separator – 2018" and was disclosed in full by the Public Body to the Applicant. The page disclosed to the Applicant is exactly the same as the page disclosed to me. There is nothing on it except the number "2018" in a rectangle.
>
> Page 9: Page 9 is described in the Index of Records as "ERC 2018 Hunger Strike". It is comprised of a table with 8 columns. The heading of the third column, which was disclosed to the Applicant, is "Name". The heading of the fourth column, which was disclosed to the Applicant, is "ORCA". The Public Body withheld all of the names of the inmates in the third column and all of the associated identifying ORCA (Offender Records and Correctional Administration number) numbers in the fourth column. The withheld information is personal information under section 1(n)(i) and section 1(n)(iv). All of the other information on this page was disclosed by the Public Body to the Applicant.

[para 50] The Applicant's comment regarding page 4 of the Responsive Records is not within the scope of this inquiry.

[para 51] With respect to the Applicant's comments regarding the withheld information on pages 10 – 11 and 28 – 29, I have found above that the Public Body has withheld personal information about inmates which includes, but is not limited to their names and associated identifying numbers.

[para 52] I accept that the circumstances identified by the Public Body under section 17(5), for the reasons stated by the Public Body, apply and weigh in favour of not disclosing the personal information of the inmates to the Applicant.

[para 53] I find that the Applicant has not proven that the disclosure of each inmate's personal information to it would not be an unreasonable invasion of their personal privacy.

[para 54] As there are at least one or more circumstances under section 17(5) which weigh in favour of not disclosing the inmates' personal information, I confirm the decision of the Public Body to withhold each inmate's personal information under section 17(1).

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

[para 55] Sections 20(1)(k) and 20(1)(m) of the Act state:

> *20(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonable be expected to*
>
> . . .
>
> *(k) facilitate the commission of an unlawful act or hamper the control of crime,*
>
> . . .
>
> *(m) harm the security of any property or system, including a building, a vehicle, a computer system or a communications system,*

[para 56] The Public Body applied both sections 20(1)(k) and 20(1)(m) to withhold information on pages 2, 67, 69, 71, 73, 75, and 76.[10]

[para 57] In its initial submission, the Public Body stated:[11]

> 26. Section 20(1)(k) and (m) were applied to the Standard Operating Procedures related to refusals to eat, as well as portions of other records that would reveal information about these procedures.
>
> 27. In order to withhold records under section 20(1)(k), the Public Body must show that disclosure of the information could reasonably be expected to address potential harms arising from the commission of an unlawful act or the hampering of the control of crime.
>
> 28. The Public Body submits that the disclosure of the redacted information would reveal certain strategies and procedures used by the Public Body to manage hunger strikes. This information could be used to potentially facilitate the commission of unlawful acts by anticipating the steps the Public Body would take in various circumstances and exploiting these procedures.
>
> . . .
>
> 30. In order for section 20(1)(m) to apply, the Public Body must establish that there must be a clear cause and effect relationship between disclosure of the withheld information and the outcome or harm alleged; the outcome or harm that would be caused by the disclosure must constitute damage or detriment, and not simply hindrance or minimal interference; and the likelihood of the outcome or harm must be genuine and conceivable (Order F2016-10 at paragraph 9).

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[10] Although in its Index of Records the Public Body indicated that it was only applying section 20(1)(k) to page 2 of the Responsive Records, the record itself indicates that the Public Body also applied section 20(1)(m) to withhold the information on this page, and the Public Body's *in camera* affidavit addressed how both section 20(1)(k) and section 20(1)(m) applied to the information on this page. As a result, I have considered the application of both of these sections to the redactions on page 2.

[11] Public Body's initial submission dated July 10, 2023 at paragraphs 26 – 28, 30 and 31.

31. The Public Body submits that the disclosure of the information redacted pursuant to section 20(1)(m) would expose the Public Body's security plans and mechanisms in response to hunger strikes. This would potentially lead to risks to the Public Body's physical and operational security approaches.

[para 58] Additionally, the Public Body stated:[12]

> The Public Body has also redacted the records as little as possible to ensure only the portions of the records that would lead to potential security issues are withheld.

[para 59] In its rebuttal submission, the Applicant made the following arguments with respect to the Public Body's application of section 20(1)(k) and 20(1)(m):[13]

> **Part 3: APSES Record Specific Submissions**
>
> 4. The submission based on *in camera* information and arguments are something the APJS must mainly leave to the Adjudicator as, of course, APJS has no informed basis to respond.
>
> 5. However, APJS makes the following points:
>
> a) Pure speculation will not suffice.
>
> b) It is difficult to even imagine what "unlawful acts" prisoners might devise by knowing the entirety of the ERC SOP on Refusal to Eat.
>
> c) Prisoners would be able to discern policies by how they are implemented in practice. On the other hand, they and the public should know when what is done in practice violates policy. An example of this may be found at pp. 69, 73 – 75 of the records.

[para 60] The Applicant also stated in its rebuttal submission that, with respect to page 2 of the responsive records:[14]

> The entirety of the Standard is redacted. The APJS is familiar with the language in many ERC SOPs and it is highly likely this [withholding the Standard Operating Procedure] is justified.

[para 61] In its rebuttal submission, the Public Body stated:[15]

> **II. REPLIES TO APPLICANT'S SUBMISSION**
>
> 2. In response to paragraph 6-2 we wish to point out that, in the re-release of the records for file 008403-2018-G-0084 Applicant Records, sent by the Web Transfer Service on July 8, 2023, page 1 of the Standard Operating Procedure

[12] Public Body's Request to Provide an *In Camera* Submission provided to this Office and to the Applicant.
[13] Applicant's rebuttal submission dated July 24, 2023 at paragraphs 4 and 5.
[14] Ibid, at paragraph 6.
[15] Public Body's rebuttal submission dated August 3, 2023.

> (page 1 of the records package) was re-released in its entirety and page 2 had minimal redactions under section 20(1)(k)(m),

[para 62] I have reviewed page 2 of the consolidated version of the redacted Responsive Records the Public Body provided to the Applicant. Page 2 of the Responsive Records is the first page of the Public Body's Standard Operating Procedure; Subject: Refusal to Eat.

[para 63] The entirety of the first page of this Standard was disclosed to the Applicant except for the one sentence which appears under the heading "STANDARD", and the one sentence that appears at 1. d. under the heading "PROCEDURES". Page 1 of the Responsive Records, is the second page of this Standard, and was disclosed in full to the Applicant.

[para 64] With respect to the information withheld by the Public Body on pages 67, 69, 71, 73, 75, and 76, it is one sentence that appears identically on all 6 of these pages, that has been withheld.

[para 65] In summary, the Public Body withheld the following very minimal information under sections 20(1)(k) and section 20(1)(m):

- two sentences on the first page of its Standard Operating Procedure; Subject: Refusal to Eat, (page 2 in the Responsive Records)"; and
- one sentence on page 67, which is the same sentence that was withheld on pages 69, 71, 73, 75, and 76.

[para 66] Pursuant to section 71(1) of the Act, the Public Body has the burden of establishing in each case, that the disclosure of the information could reasonably be expected to lead to one of the outcomes set out in sections 20(1)(k) or (m).

[para 67] Section 20(1) contains the phrase "could reasonably be expected to".

[para 68] This phrase was considered by the Supreme Court of Canada in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31.

[para 69] At paragraphs 52 – 54, the Court stated (emphasis in original):

> [52] It is important to bear in mind that these phrases are simply attempts to explain or elaborate on identical statutory language. The provincial appellate courts that have not adopted the "reasonable expectation of probable harm" formulation were concerned that it suggested that the harm needed to be probable: see, e.g., *Worker Advisor*, at paras. 24-25; *Chesal v. Nova Scotia (Attorney General)*, 2003 NCSA 124, 2019 N.S.R. (2d) 139, at para. 37. As this Court affirmed in *Merk Frosst*, the word "probably" in this formulation must be understood in the context of the rest of the phrase: there need be only a "reasonable expectation" of probable harm. The "reasonable expectation of probable harm" formulation simply "captures the need to demonstrate that disclosure will result in a risk of harm that is well beyond the merely possible or speculative, but also that it need not be proved on the balance of probabilities that disclosure will in fact result in such harm": para. 206.

> [53] Understood in this way, there is no practical difference in the standard described by the two reformulations of or elaborations on the statutory test. Given that the statutory tests are expressed in identical language in provincial and federal access to information statutes, it is preferable to have only one further elaboration of that language; *Merck Frosst*, at para. 195:
>
> > I am not persuaded that we should change the way this test has been expressed by the Federal Courts for such an extended period of time. Such a change would also affect other provisions because similar language to that in s. 20(1)(c) is employed in several other exemptions under the Act, including those relating to federal-provincial affairs (s. 14), international affairs and defence (s. 15), law enforcement and investigations (s. 16), safety of individuals (s. 17), and economic interests of Canada (s. 18). In addition, as the respondent points out, the "reasonable expectation of probable harm" test has been followed with respect to a number of similarly worded provincial access to information statutes. Accordingly, the legislative interpretation of this expression is of importance both to the application of many exemptions in the federal Act and to similarly worded provisions in various provincial statutes. [Emphasis added.]
>
> [54] This Court in *Merk Frosst* adopted the "reasonable expectation of probably harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merk Frosst* emphasized, the statute tries to mark out a middle ground between that which is probably and which is merely possible. As institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences": *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. at 41, at para. 40.

[para 70] As noted by the adjudicator in Order F2022-46 at paragraph 13:

> [para 13] The Supreme Court of Canada has made it clear that there is one evidentiary standard to be used wherever the phrase "could reasonably be expected to" appears in access-to-information legislation. There must be a reasonable expectation of the relevant outcome, and the Public Body must provide sufficient evidence to show that the likelihood of the scenario occurring is "considerably above" a mere possibility.

[para 71] In *Canada (Information Commissioner) v. Canada (Prime Minister)*, 1992 F.C.J. No. 1054, the Court made the following observations in relation to the evidence a party must introduce in order to establish that harm will result from disclosure of information:

> . . . While no general rules as to the sufficiency of evidence in a section 14 case can be laid down, what the Court is looking for is support for the honestly held but perhaps subjective opinions of the Government witnesses based on general references to the record. Descriptions of possible harm, even in substantial detail, are insufficient in themselves. At the least, there must be a clear and direct linkage between the disclosure of specific information and the harm alleged. The Court must be given an explanation of how or why the harm alleged would result from disclosure of specific information. If it is self-evident as

> to how and why harm would result from disclosure, little explanation need be given. Where inferences must be drawn, or it is not clear, more explanation would be required. The more specific and substantiated the evidence, the stronger the case for confidentiality. The more general the evidence, the more difficult it would be for a court to be satisfied as to the linkage between disclosure of particular documents to the harm alleged.

[para 72] The Public Body provided me with an *in camera* affidavit sworn by an employee of the Public Body, describing the specific nature of the harm and risk the Public Body projects would result from the release of the redacted information on pages 2, 67, 69, 71, 73, 75, and 76 of the Responsive Records.

[para 73] As the Public Body's affidavit was accepted *in camera*, I cannot reveal the content of the affidavit. To discuss with any detail the outcomes the Public Body has suggested may flow from the release of the withheld information would reveal the means by which the Public Body has surmised the information could be used to effect the harms set out in section 20(1)(k) and/or section 20(1)(m).

Application of section 20(1)(k) Analysis

[para 74] Section 20(1)(k) only applies where the disclosure of the withheld information to an applicant could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime.

The two sentences on page 2 of the Responsive Records

[para 75] I have considered the Public Body's *in camera* submission regarding the application of section 20(1)(k) to the two sentences it withheld from the Applicant on the first page of its Standard Operating Procedure (page 2 of the Responsive Records).

[para 76] In Order F2022-46, the adjudicator stated at paragraph 45:

> [para 45] I agree with the finding in the Ontario Orders that "the law enforcement exemption must be approached in a sensitive matter"; however, the standard set by the Supreme Court must still be met. It is insufficient to merely state that outcomes are possible or likely without explaining how the likelihood is considerabl[y] above a mere possibility.

[para 77] I am not persuaded that the scenario and outcomes described by the Public Body in paragraph 7(a)(i) – (iii) fit within the language of section 20(1)(k). However, even if I accept that the disclosure of the two sentences could result in the scenario and outcomes asserted by the Public Body fall within the parameters of section 20(1)(k), the Public Body has not persuaded me that the likelihood of the scenario and outcomes occurring is considerably above a mere possibility.

[para 78] Furthermore, I agree with the submission of the Applicant that inmates would likely be able to discern the Public Body's policies with respect to hunger strikes by how they are implemented in practice.

[para 79] In addition, the disclosure of the information would not inform inmates of any security measures the Public Body has implemented to address the risk of harm the Public Body has surmised might arise from the disclosure of the information.

[para 80] Accordingly, I find that section 20(1)(k) does not apply to the two sentences withheld on page 2 of the Responsive Records. I will consider whether section 20(1)(m) applies to these two sentences below.

One sentence withheld on pages 67, 69, 71, 73, 75, and 76

[para 81] The Public Body also argued that section 20(1)(k) applied to the sentence it withheld on page 67. This same sentence was also withheld on pages 69, 71, 73, 75, and 76 under section 20(1)(k).

[para 82] The Public Body asserted that the release of this sentence could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime. At paragraph 7(b) of its *in camera* submission, the Public Body asserted there were two significant risks associated with releasing this sentence.

[para 83] At paragraph 7(b)(i) of its *in camera* submission, the Public Body described the first harm it asserted could result if the sentence was disclosed.

[para 84] It is unclear that the harm the Public Body projects could result from disclosure of this sentence without more information being disclosed. In other words, on its own, the disclosure of information in the records to which the Public Body applied section 20(1)(k) could not reasonably be expected to result in the outcome anticipated by the Public Body unless further particulars are disclosed.

[para 85] I find that the information the Public Body is concerned could be disclosed and result in harm is not inferable from the information to which it applied section 20(1)(k).

[para 86] The redacted information itself does not reveal any risk. To the extent that the harm the Public Body projects could result from disclosure of this sentence has happened in the past, based on what the Public Body has told me, it did not arise from the disclosure of this sentence but from carrying out the policy or practice itself.

[para 87] Further, the Public Body has not persuaded me that the likelihood of this harm occurring as a result of the disclosure of the sentence is considerably above a mere possibility.

[para 88] Accordingly, I find that section 20(1)(k) does not apply with respect to the first harm or risk identified by the Public Body.

[para 89] In paragraph 7(b)(ii) of its *in camera* submission, the Public Body described the second harm it asserted could result if the sentence was disclosed. The Public Body has not persuaded me that the likelihood of this scenario and outcomes occurring is considerably above a mere possibility.

[para 90] Furthermore, with respect to both risks the Public Body has suggested might arise from the disclosure of this information, I agree with the submission of the Applicant that inmates would likely be able to discern the withheld information by how the policy is implemented in practice.

[para 91] In addition, the disclosure of the information would not inform inmates of any security measures the Public Body has implemented to address the risks of harm the Public Body has suggested might arise from the disclosure of the information.

[para 92] For these reasons, I find that section 20(1)(k) does not apply to the sentence that appears on pages 67, 69, 71, 73, 75, and 76. I will consider whether section 20(1)(m) applies to this sentence below.

Application of section 20(1)(m) Analysis

[para 93] Section 20(1)(m) only applies where the disclosure of the withheld information to an applicant could reasonably be expected to harm the security of any property or system, including a building, a vehicle, a computer system or a communications system.

The two sentences on page 2 of the Responsive Records

[para 94] The Public Body has submitted that if the two sentences it redacted on the first page of its Standard Operating Procedures (page 2 of the Responsive Records) were disclosed, the disclosure could reasonably be expected to harm the security of any property or system, including a building, a vehicle, a computer system or a communications system.

[para 95] Section 20(1)(m) contemplates harm to the security of any property or a system. I am not persuaded that the harms described by the Public Body in paragraphs 7(a)(i) – (iii) of its *in camera* submission, are harms that fit within the parameters of section 20(1)(m). Even if I accept that the harms described by the Public Body fit within the parameters of section 20(1)(m), the Public Body has not persuaded me that the likelihood of these harms occurring as a result of the disclosure of these sentences is considerably above a mere possibility.

[para 96] Accordingly, I find that section 20(1)(m) does not apply to the two sentences withheld on page 2 of the Responsive Records.

One sentence withheld on pages 67, 69, 71, 73, 75, and 76

[para 97] With respect to the sentence withheld on pages 67, 69, 71, 73, 75, and 76, again I am not persuaded that the harms described by the Public Body that would occur if this sentence was disclosed, fit within the language of section 20(1)(m) – harm the security of any property or system, including a building, a vehicle, a computer system or a communications system. Even if I accept that the harms described by the Public Body fall within the parameters of section 20(1)(m), I am not persuaded that the likelihood of these harms occurring is considerably above a mere possibility.

[para 98] Accordingly, I find that section 20(1)(m) does not apply to the sentence withheld on pages 67, 69, 71, 73, 75, and 76 of the Responsive Records.

Conclusion Regarding the Application of Sections 20(1)(k) and 20(1)(m) by the Public Body

[para 99] As I have found that neither section 20(1)(k) nor section 20(1)(m) apply to the information withheld on pages 2, 67, 69, 71, 73, 75, and 76, I will order the Public Body to disclose this information to the Applicant.

Exercise of Discretion

[para 100] Section 20(1) is a discretionary section meaning that even if information falls within one of the enumerated subsections, the head of a public body may still exercise their discretion and disclose the information.

[para 101] As I have found that neither section 20(1)(k) nor section 20(1)(m) apply to the information withheld under these sections, it is not necessary for me to review whether the Public Body exercised its discretion reasonably in deciding to withhold this information.

V. ORDER

[para 102] I make this Order under section 72 of the Act.

[para 103] I find that Public Body properly withheld the personal information of third parties in the Responsive Records under section 17(1) of the Act.

[para 104] I order the Public Body to give the Applicant access to the two sentences withheld on page 2, and the one sentence withheld on pages 67, 69, 71, 73, 75, and 76, of the Responsive Records.

[para 105] I further order the Public Body to notify me and the Applicant in writing not later than 50 days after being given a copy of this Order, that it has complied with it.

Carmen Mann
Adjudicator
/kh