ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2024-13

April 11, 2024

EDMONTON POLICE SERVICE

Case File Number 002925

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Summary: An Applicant made an access request to the Edmonton Police Service (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for the names of members that have been identified as using illegal steroids, and for information regarding the collapse of three tactical squads as the result of an investigation into illegal steroid use. The Public Body responded, severing the names of officers charged with offences and refusing to confirm or deny the existence of records relating to the second portion of the Applicant's access request.

The Applicant requested an inquiry. Affected parties were identified and invited to participate. Many Affected Parties agreed to participate.

The Adjudicator determined that the Public Body did not properly refuse to confirm or deny the existence of a record as authorized by section 12(2) of the Act. The Adjudicator also found that the information characterized by the Public Body as non-responsive to the Applicant's request is responsive. The Adjudicator ordered the Public Body to provide a new response to the Applicant's request without relying on section 12(2) and including the information characterized as non-responsive.

The Adjudicator found that the names of officers in the record must be withheld under section 17(1) with the exceptions of any officers named in the record whose admission to the use of steroids has been made public in news articles. The Adjudicator also ordered

the Public Body to disclose additional information that did not relate to an identifiable individual.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 12, 17, 20, 71, 72, *Police Act*, R.S.A. 2000, c. P-17, Police Service Regulation, Alberta Regulation 356/90, s. 22.

Authorities Cited: AB: Orders 97-002, F2004-015, F2006-012, F2008-009, F2008-012, F2008-020, F2008-031, F2009-029, F2010-008, F2010-017, F2011-010, F2013-13, F2014-16, F2014-23, F2015-30, F2016-10, F2016-24, F2017-55, F2017-57, F2017-58, F2019-07, F2022-R-01, F2023-30

Cases Cited: *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10, *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII), *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), *Newton v. Criminal Trial Lawyers' Association*, 2010 ABCA 399, *R v, Perreault*, 2010 ABQB 714, *R v. Polny*, 2009 CanLII 81890 (ABQB), *R v. Steele*, 2010 ABQB 39

I. BACKGROUND

[para 1] An Applicant made a request to the Edmonton Police Service (the Public Body) dated November 30, 2015, under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for:

1. The names of all Edmonton Police Service Officers identified as using illegal steroids from January 1st, 2005 until the present.

2. I have been advised by a confidential, reliable source that so many tactical unit officers were caught in the investigation into the illegal use of steroids by EPS officers that it was required that the EPS collapse the three tactical squads into two until enough replacement officers were trained. The request is for copies of all records as defined under s.1(a) of *FOIPPA* in relation to that issue and the names of the specific tactical officers identified in the investigation.

[para 2] On February 4, 2016, the Public Body responded, advising the Applicant that two officers were charged under the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, and that the matters are before the courts. The Public Body informed the Applicant that the names of these officers are public, and provided a link to a relevant Alberta Serious Incident Response Team (ASIRT) media release.

[para 3] The Public Body further informed the Applicant that two officers were subject to disciplinary hearings; the Public Body provided the Applicant with copies of the relevant decisions.

[para 4] The Public Body informed the Applicant that the names of any other officers were being withheld under section 17(1) of the Act.

[para 5] Lastly, the Public Body informed the Applicant that it was refusing to confirm or deny the existence of records relating to the second portion of the Applicant's access request.

[para 6] The Applicant submitted a Request for Review to this Office. Mediation was authorized but did not resolve the issues between the parties and the Applicant requested an inquiry.

[para 7] Parties who may be affected by the outcome of this inquiry were invited to participate. Some of the affected parties agreed to participate as undisclosed parties; other affected parties did not respond to the invitation. The Affected Parties who agreed to participate were invited to make submissions on the application of section 17(1) to information in the record responsive to the first part of the Applicant's access request.

[para 8] In the course of reviewing the parties' submissions and the records at issue, it became apparent that the Public Body withheld information from the responsive record for reasons other than the application of section 17. Specifically, the Public Body is withholding some information as non-responsive to the Applicant's request. This decision had not previously been communicated to me or the Applicant. By letter dated February 26, 2024, I instructed the Public Body to communicate to the Applicant all the reasons the Public Body is withholding information in the responsive record. Following the Public Body's new response to the Applicant, I asked the Applicant whether they were interested in pursuing this issue; the Applicant indicated they were. The Applicant and Public Body both made brief submissions on the issue. The Affected Parties were informed that this issue was being added to the inquiry, but were not invited to make submissions.

II. RECORDS AT ISSUE

[para 9] The record at issue consists of one page, which contains information withheld under section 17(1) and as non-responsive.

[para 10] The Public Body has described the information withheld under section 17(1) as officer names and whether they have been subject to an investigation relating to steroid use.

[para 11] As the Public Body has withheld most of the information in the record under section 17(1) or as non-responsive, I cannot describe in detail what information is contained in the record; I can provide only a general description of the record.

[para 12] The record appears to be in the nature of an overview, summary, or status update. The record contains several lists of names, appearing under different category headings. These headings are written in shorthand, and it is not entirely clear what each

of them signifies. As the Public Body has identified these names as responsive to the Applicant's request, I assume that the officers named in the record were found to have used steroids. Some of the names have additional notations beside them; these notations appear to relate to the status or outcome of related matters. The names and any associated notations have been withheld under section 17(1). The category headings have been withheld as non-responsive.

[para 13] The record also contains a title, with a brief explanation of the information provided therein. This information has been withheld as non-responsive.

[para 14] Lastly, at the bottom of the page are three separate, short paragraphs that contain explanatory notes. The first and last of the three paragraphs at the bottom of the page have also been withheld as non-responsive; the middle paragraph has not been withheld as it relates to information already provided to the Applicant.

ISSUES

[para 15] The issues as set out in the Notice of Inquiry, dated October 12, 2023, are as follows:

1. Does section 17(1) of the Act (disclosure harmful to personal privacy) apply to the information in the records withheld by the Public Body in response to the first part of the request?

2. Did the Public Body properly refuse to confirm or deny the existence of a record under section 12(2) of the Act (contents of response) relative to the second part of the request?

The following issue was added to the inquiry, which I will address first:

> Did the Public Body properly withhold information as non-responsive to the Applicant's request?

III. DISCUSSION OF ISSUES

Did the Public Body properly withhold information as non-responsive to the Applicant's request?

[para 16] As stated in Order F2009-025, 'non-responsive' is not an exception from the Act to separate sentences or other items of information from the context of the record as a whole in order to withhold them.

[para 17] In Order F2018-75 I discussed how public bodies should properly characterize information as non-responsive. I said (at paras. 55-58):

> Separate items of information in a record cannot be viewed out of context of the record as a whole when determining if they are separate and distinct from the remaining record…
>
> Information must be considered in the context of the record as a whole, in determining whether it is separate and distinct from the remainder of the record. In the case of a personal information request like the Applicant's, in order to withhold portions of a record as non-responsive, the Public Body must consider whether that portion contains the Applicant's personal information *or* whether that portion provides context to the remainder of the record that *is* the Applicant's personal information.
>
> An example of 'separate and distinct' might be distinct emails in an email chain. Another example relates to police officers' notebooks, which often contain notes on unrelated incidents on a single page. In response to an access request for police records relating to one incident, the part of the notebook page that relates to a different incident might be non-responsive. Another example is where a personal note is added to a work email, such as a note referencing a medical absence, holiday or so on. Where that personal note does not have any relation to the remainder of the email or to the access request, it might be non-responsive.

[para 18] The Public Body's submission on this issue is that a responsive record can contain information that is responsive to a request, as well as non-responsive information. I agree with this basic principle; however, the Public Body has not explained how it determined that the information withheld as non-responsive is, in fact, not responsive to the Applicant's request.

[para 19] The first part of the Applicant's access request was for the names of all Public Body officers identified using illegal steroid in a specified time period. Under section 6 of the FOIP Act, an applicant can request access to "any record in the custody or under the control of a public body". In other words, access requests under the FOIP Act are requests for *records*, rather than *information*. The record at issue contains the names of officers identified as having used steroids.

[para 20] As stated above, the information withheld as non-responsive includes a title for the record with explanatory notes, category headings relating to the different lists of names, and two of three paragraphs of explanatory notes.

[para 21] All of the information in the record relates to the same topic. The information identified by the Public Body as non-responsive provides context for the lists of names appearing in the records. This information cannot be characterized in any way as 'separate and distinct' from the list of names requested by the Applicant. I find that this information is responsive to the Applicant's request. Therefore, I will order the Public Body to include this information in a new response to the Applicant.

Does section 17 of the Act (disclosure harmful to personal privacy) apply to the information in the records withheld by the Public Body in response to the first part of the request?

[para 22] With respect to this issue, the Notice of Inquiry states:

Under section 71(2) of the Act, the Applicant bears the burden of showing that disclosing personal information to which section 17(1) applies would not be an unreasonable invasion of a third party's personal privacy.

[para 23] The Public Body applied section 17(1) to information of third party individuals in the records at issue.

[para 24] If a record contains personal information of a third party, section 71(2) states that it is then up to the applicant to prove that the disclosure would not be an unreasonable invasion of a third party's personal privacy.

[para 25] 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 26] While the Applicant has the burden of proving that it would not be an unreasonable invasion of privacy to disclose personal information to which section 17(1) applies, the Public Body has the burden of establishing that the information withheld under section 17(1) is personal information to which that provision can apply (Order F2010-002, at para. 9).

[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.

[para 28] In other words, in the absence of a personal dimension, such information cannot be withheld under section 17(1).

[para 29] Past Orders of this office have also found there to be a personal dimension to information about an employee's work duties where it appears in the context of allegations of wrongdoing (e.g. investigations into the conduct, disciplinary proceedings, etc.). In Order F2010-031 the Adjudicator stated:

> Information about an individual's performance of work duties may be personal information in a context where it is suggested or alleged that the individual has acted improperly or wrongfully (Order F2008-020, para. 28).

See also Orders F2004-026, F2013-53, F2014-23.

[para 30] In this case, the information withheld under section 17(1) consists of the names of officers identified as using illegal steroids during a specified time period. This is clearly personal information of those officers. In some cases, notations appear beside the names of the officers. This is also their personal information.

[para 31] Section 17 is a mandatory exception: if the information falls within the scope of the exception, it must be withheld. In Order F2019-07 the adjudicator described how section 17(1) operates as follows (at paras. 22-23):

> Section 17 does not say that a public body is *never* allowed to disclose third party personal information. It is only when the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy that a public body must refuse to disclose the information to an applicant (such as the Applicant in this case) under section 17(1). Section 17(2) (not reproduced) establishes that disclosing certain kinds of personal information is not an unreasonable invasion of personal privacy.
>
> 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 32] The relevant portions of section 17 state:

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

...

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

...

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

...

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

...

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

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

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

...

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

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

...

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

...

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

...

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

Sections 17(2) and (3)

[para 33] Section 17(2) prescribes a number of circumstances in which it is not an unreasonable invasion of privacy to disclose personal information. None of the parties have argued that any provisions of section 17(2) are relevant and, from the face of the records, none appear to apply.

[para 34] None of the parties has argued that section 17(3) applies to any of the withheld information, and from the face of the records, this provision does not apply.

Section 17(4)

[para 35] The Public Body and Affected Parties argue that sections 17(4)(b), (d) and (g) are relevant.

[para 36] Section 17(4)(b) applies to personal information that 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 continue an investigation.

[para 37] Law enforcement is defined in section 1(h) of the Act, to include:

> *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 proceeding are referred;*

[para 38] It appears that the record at issue may relate generally to internal investigations conducted by the Public Body into possible steroid use by the officers named in the record. This is because it includes a list of officers who were found to have used steroids and it appears that at least some of the officer were subject to investigations or some kind of disciplinary process. It is not clear whether all of the officers whose names appear in the record were investigated.

[para 39] However, the record is clearly not itself part of any particular investigation. The record may have been created to track the status of various investigations, or it may have been created for a human resources purpose. In any event, the record is not identifiable as part of a law enforcement record and section 17(4)(b) does not apply.

[para 40] Section 17(4)(d) creates a presumption against disclosure of personal information that relates to employment or educational history. As the information relates to possible disciplinary actions taken or contemplated with respect to the named officers, I agree that this presumption applies.

[para 41] Section 17(4)(g) creates a presumption against disclosure of personal information consisting of a third party's name when it appears with other personal information about that third party, or where the name alone would reveal personal information about the third party. As the record is responsive to a request for the names of officers found to have used steroids, the fact that a name appear in the record reveals that the officer was found to have used steroids. Some of the names also appear with additional notations that indicate the status or outcome of an investigation, which is additional personal information. I find that section 17(4)(g) applies to all of the third party personal information in the records.

Section 17(5)

[para 42] The Applicant argued that section 17(5)(a) applies to the information. The Public Body and Affected Parties argued that sections 17(5)(e) and (h) apply. I will also consider section 17(5)(c).

S*ection 17(5)(a)*

[para 43] 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 44] 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 than 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 45] Past Orders of this Office have made the distinction between allegations of wrongdoing by a public body employee, and allegations of a more systemic nature against a public body. For example, in Order F2015-30, I discussed the application of section 17(5)(a) to allegations made against a police officer in a disciplinary decision. I said (at para. 43):

> I find that the Applicant has not provided credible evidence to suggest that activities of the Public Body require scrutiny. The unredacted portions of the Decision reveal that the actions of the Detective were called into question; however, there is no indication that the activities of the Public Body more broadly are being called into question, beyond this particular case in which the Detective may have provided deficient advice to a colleague. I may have found otherwise had the Applicant provided some evidence that the Detective routinely advised colleagues to lie or use misleading language on warrant applications or similar documents. However, the Applicant's arguments merely speculate that this is the case, and the records themselves do not support such a finding.

[para 46] Many of the Applicant's arguments regarding the application of section 17(5)(a) relate to scrutiny of the officers named in the record, rather than scrutiny of actions of the Public Body. I will consider those arguments in a separate heading, below.

[para 47] The Applicant's arguments indicate that there is a need to scrutinize how the Public Body dealt with the officers found to have used illegal steroids.

[para 48] In its rebuttal submission, the Applicant argues that the officers' misconduct was extremely serious; the Applicant states that two officers were found guilty of criminal offences and alleges that other officers facilitated crimes but were not criminally charged. The Applicant further alleges that at least two officers lied to ASIRT in its investigations and as a result were subject only to disciplinary hearings under the *Police Act*, rather than criminal charges of obstruction. The Applicant states that the disciplinary decisions were provided to it by the Public Body.

[para 49] The Applicant argues that one of the reasons it is seeking the responsive records is because it is unknown how the Public Body handled the misconduct of other officers. The Applicant states that in the time since the illegal steroid use was discovered, four officers were promoted, including one to the position of Deputy Chief. The Applicant has not stated which officers received these promotions.

[para 50] The Applicant further argues (rebuttal submission):

> 10. The CTLA's opinion, based on its experience with EPS *Police Act* discipline, is that many, it not all, of the named officers and likely more were disciplined under s.19 of the *Police Service Regulation*, which, in combination with the operation of s.45(4) and (4.1) of the *Act*, results in no public hearing and no avenue of appeal to the Law Enforcement Review Board, with a public hearing. Additionally, it is the practice of the EPS to never disclose information about such dispositions, including by way of disclosure to the

> Crown in prosecutions where the subject officer is involved. This is explained in *R v McKee*, 2023 ABKB 579, a case involving the EPS and the Edmonton Police Association, at paras. 4-11.

[para 51] The Applicant also argued that disclosure is necessary so that members of the public can use the information in civil suits against the Public Body or defending criminal prosecutions where the officers were involved. The Applicant states that this would facilitate public scrutiny of activities of the Public Body.

[para 52] The Public Body argues that the Applicant has not shown why disclosure of the names of the officers in the record at issue is necessary to subject the Public Body to public scrutiny, even if such scrutiny were warranted. The Public Body argues (initial submission):

> 46. Public scrutiny of the institution as a principle of access to information legislation is not to be conflated with facilitating the singling out of individuals and the impugning of their characters. The underlying principle behind s. 17(5)(a) is the ability to scrutinize the activities of the public body as a whole, and not re-subject the individuals in question to a public disciplinary process. An individual's employment history does not have more of a public character simply because they are a police officer.

[para 53] In response to the Applicant's arguments that officers lied to ASIRT in the course of that body's investigation, the Public Body states that the conduct of these officers was investigated and is documented in the news articles and the disciplinary decisions. The Public Body argues that there is no need for public scrutiny on the basis that the Applicant believes that certain investigations ought to have included criminal charges.

[para 54] The Affected Parties argue that disclosing the names in the record at issue would subject those officers to scrutiny, rather than the Public Body. The Affected Parties have cited *Calgary (City) Police Service v Alberta (Information & Privacy Commissioner)*, 2010 ABQB 82 (CanLII) (*CPS*), a decision resulting from a judicial review of Order F2008-009. In that decision, the Court found that the *Police Act* contains systems for the careful balancing of public and private interests; that is, it contains processes by which the public may hold officers to account for misconduct, such as a hearing by the Law Enforcement Review Board (LERB).

[para 55] The Affected Parties also referred to Order F2023-30, in which the adjudicator considered the application of *CPS* where the LERB had not become involved. She commented that the Calgary Police Service had conducted its own investigation and had referred the matter to ASIRT, which also conducted an investigation. Therefore, the adjudicator found that it could not be argued that the situation in that case was not investigated or subjected to public scrutiny within the terms of the *Police Act*.

[para 56] With respect to the present case, the Affected Parties point out that the news articles provided by the Applicant state that investigations were conducted by ASIRT and the Professional Standards Branch of the Public Body.

Analysis of section 17(5)(a)

[para 57] I understand that the Applicant is seeking disclosure of the names of officers in order to review how the Public Body handled their misconduct. However, the information in the record does not provide sufficient detail about any disciplinary process that may have been undertaken by the Public Body in order to subject those activities to scrutiny. At most the information may provide some very high-level information about the statutory processes that some of the officers were subjected to. The Applicant seems to have access to additional information about some of the officers who were found to have used steroids; for example, the Applicant argues that some officers have since been promoted. However, no such details are apparent from the information in the record. If the information in the record could be compared with other information the Applicant has in its possession, such that even the minimal detail in the record could enable public scrutiny of the Public Body's activities, it hasn't explained how.

[para 58] The Applicant argues that disclosure would allow members of the public to use the information in civil or criminal proceedings, which would facilitate public scrutiny. I understand the Applicant to mean that members of the public could use the names in the record in legal proceedings involving the officers and that those legal proceedings would enable public scrutiny. If this is the Applicant's argument, it is not the disclosure of the information in the record itself that would permit public scrutiny but rather a subsequent legal proceeding that could permit public scrutiny. In my view, the argument that disclosing the names in the records could lead to public scrutiny of the Public Body by way of subsequent legal proceedings that relate to the named officers is speculative. In other words, the Applicant has not explained how the names would be used in a subsequent proceeding to scrutinize the actions of the Public Body, as opposed to the actions of the individual officers.

[para 59] In my view, the information in the record would not enable scrutiny of the Public Body's activities and section 17(5)(a) does not apply.

Section 17(5)(c)

[para 60] Section 17(5)(c) weighs in favour of disclosure where the personal information is relevant to a fair determination of the Applicant's rights.

[para 61] The Applicant has not argued that this factor is applicable in this case. However, as the Applicant has stated that the information could be used in pursuing civil actions against the Public Body, or in criminal proceedings where the Public Body officers were involved, and as section 17(5)(c) relates to the rights of individuals in a proceeding, I will briefly discuss this factor.

[para 62] 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 F2008-031 at para. 112)

[para 63] In order for section 17(5)(c) to apply, the personal information must be relevant to a determination of the *Applicant's* rights. In this case, the Applicant is the Criminal Trial Lawyers' Association. It may be that the personal information could be relevant to a determination of the rights of the CTLA's member's clients, but not the CTLA itself. In order for section 17(5)(c) to apply, the access request must be made by or on behalf of the individual asserting the right.

[para 64] Further, the right in question must relate to an ongoing or contemplated proceeding.

[para 65] For the foregoing reasons, section 17(5)(c) cannot apply.

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

[para 66] Section 17(5)(e) weighs against disclosure of personal information where disclosure would expose the third party unfairly to financial or other harm. Section 17(5)(h) weighs against disclosure of personal information where disclosure may unfairly damage the reputation of the third party. The arguments of the Public Body and Affected Parties focus on reputational harm under section 17(5)(h).

[para 67] In *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (*EPS*), a judicial review of Orders F2013-13, F2017-57 and F2017-58, the Court considered the application of section 17(1) to information relating to an investigation into misconduct of a particular officer. The Court commented generally on the interaction between section 17(5)(a) and other factors, such as the age of the information. It said:

> [638] As against a privacy claim relying (in part) on the age of information, the public interest in disclosure under s. 17(5)(a) is an important factor. If the conduct of the Officer and the response of EPS were a matter of public concern, the mere passage of time since the underlying events and any ancillary disclosure occurred would probably not be of much weight in countervailing later disclosure. If the conduct of the Officer and the response of EPS were a matter of very serious public concern, even if the activity occurred decades ago, the mere fact that there had been *no* previous disclosure would not count against disclosure and might even count in favour of disclosure now. And if any

> activity of EPS were a matter of public concern, at least of significant concern for a significant portion of the public, any harm to the reputational interests of third parties implicated in the activity (such as the Officer) could well be subordinated to the public's need to know.

[para 68] The Affected Parties argue that the age of the information is relevant to these factors, citing *EPS*, where the Court said (at para. 642):

> We cannot erase our actions. Sometimes an action, however long ago set into the world, will forever define us, for good or for ill. But sometimes, we can and should be "released from the consequences of what we have done:" Hannah Arendt, "Labor, Work, Action," in J. W. Bernauer, ed, *Amor Mundi: Explorations in the Faith and Thought of Hannah Arendt* (Dordrecht: Springer, 1987) 29 at 41. Some have erred and their reputation has never recovered. Others have erred and have remade their lives, no longer defined by their flaw but on what they have built since their flaw was exposed: ***R v Handy***, 2002 SCC 56, Binnie J at para 38. This was the point of the Officer's reputation arguments. An act and publication of that act do not mean that reputation cannot be recovered. The effect of disclosure must be set against reputation regained – whatever reputation has been regained.

[para 69] The record does not contain any dates that would tell me during what time period the officers were found to have been using illegal steroids. The Applicant requested the names of officers identified as using illegal steroids from 2005 to the date of the request (November 2015). The news articles discussing the use of illegal steroids date from 2015-2018, and discuss incidents that occurred from 2004 to 2012. ASIRT investigations referenced in these articles appear to date around 2013. Neither the Public Body nor the Affected Parties have provided arguments with respect to whether reputations have been regained and how that weighs against disclosure, as discussed in *EPS*.

[para 70] The Public Body argues (initial submission at para. 50):

> Disclosure of the names of EPS members who have been identified as using steroids would allow inferences to be made about those members' conduct and harm their reputation. Section 16(5) of the *Police Service Regulation* already contemplates a desire to provide the public with information about proceedings concerning the professional conduct of EPS members and requires that disciplinary decisions from public hearings be made publicly available.

[para 71] The Public Body also cited Order F2008-020, where the adjudicator found that the applicability of sections 17(5)(e) and (h) may vary depending on whether allegations were proven or not. Specifically, the adjudicator found (at para. 66):

> The focus of what is now section 17(5)(h) is *unfair* damage to reputation (Order 97-002 at para. 75). Disclosure of the consequences that flow from a proper process may negatively affect reputation but it is not unfair (Order F2004-015 at para. 100). Conversely, disclosure of unsubstantiated allegations may unfairly damage reputation (Order 97-002 at para. 85, citing B.C. Order 71-1995). There may also be unfair damage to reputation where allegations are contained in a "preliminary" or

> "interim" report, as opposed to one following a process where the affected individuals were given an opportunity to defend themselves (Order 97-002 at paras. 86 and 87).

[para 72] The Public Body argues that "where allegations have not proceeded to formal disciplinary hearing, a greater privacy right attaches to the members' personal information" (initial submission, at para. 51)

[para 73] The Applicant requested the names of officers who have been identified as using illegal steroids; this indicates that the allegations have been verified as true. My understanding of the responsive record is that the names appearing in the record are all responsive to the request; in other words, these allegations against these officers are not 'unproven'. Some officers' names have been made public: the officers who were charged under the *Controlled Drugs and Substances Act* and the officers who were subject to disciplinary hearings where the decision was made public. The Public Body has not provided any information regarding the process by which the remaining officers were found to have been using illegal steroids. In any event, it is relevant that the allegations made against the officers whose names appear in the record have been, in some manner, proven.

[para 74] In my view, while disclosure of the names in the record could cause harm to the reputations of the named officers, the Public Body and Affected Parties have not persuaded me that such harm would be unfair in the circumstance. I find that section 17(5)(h) does not weigh against disclosure.

[para 75] Neither the Public Body nor the Affected Parties have indicated what other harm, other than reputational harm, could result from disclosure under section 17(5)(e) and none are apparent to me. I find that factor does not weigh against disclosure.

Additional factors

Public interest

[para 76] I have discussed the scope of section 17(5)(a) above; specifically that this factor is not a broad 'public interest' factor. However, this does not mean that a public interest in disclosure cannot be considered as an unenumerated factor under section 17(5).

[para 77] The Applicant cites *Newton v. Criminal Trial Lawyers' Association*, 2010 ABCA 399, which addresses the role of the Law Enforcement Review Board (LERB) in relation to disciplinary proceedings against police officers under the *Police Act*. The Applicant quotes a portion of paragraph 59 of that decision, which connects the powers of police officers with the public interest in police misconduct. The full paragraph states:

> Because of the extraordinary powers they have to use force and to put restraints on liberty, the misconduct of police officers is always a matter of public interest. Some argue that all police discipline should be internal to the police force, because of the police force's quasi-military nature and the need of the chief of police to maintain discipline.

> Others argue that police forces cannot effectively discipline themselves, and that civilian oversight of police conduct is the only acceptable model. Alberta has adopted a hybrid model. The initial investigation and prosecution of police misconduct is done within the police forces. Appeals are then available to the Law Enforcement Review Board, which is a civilian tribunal. Further appeals on points of law are available with leave to the Court of Appeal.

[para 78] These comments are made in the context of determining the proper role of the LERB in appeals of decisions made by presiding officers under the *Police Act*.

[para 79] I agree that there is a general public interest in findings of police misconduct.

[para 80] In its request for inquiry, the Applicant argues:

> The use of illegal drugs by police officers who are also members of the EPS Tactical Unit, regularly involved in high-stress use of force situations, when the side effects of such drugs include personality/psychiatric changes, including anger control, is obviously an issue of great public interest easily outweighing the officers' privacy interests and information about that must be disclosed under s. 17(5)(a).

[para 81] I understand the Applicant to be arguing that there is a public interest in disclosure beyond the individual disciplinary process, because the use of illegal steroids could affect the manner in which an officer performs their duties.

[para 82] The Applicant further argued that "it is also in the public interest that members of the public and the criminal defence bar be aware of the names of such officers they may encounter as it affects their credibility and character."

[para 83] I understand from the Applicant's submissions that there are concerns about the effects of illegal steroid use can have on the behaviour of users. The Applicant's submissions indicate that there is a public interest in members of the public knowing the names of officers who have been found to use illegal steroids. The Applicant has not specified what members of the public can do with this information, except to say that it could be useful to accused, or in civil proceedings brought against the officers (or the Public Body).

[para 84] The Applicant has provided articles discussing the possibility of aggressive behavioural changes in individuals using illegal steroids. One is a July 2012 article from the National Institute on Drug Abuse website. Under the heading "How Do Anabolic Steroids Affect the Brain?" the article states:

> Abuse of anabolic steroids may lead to aggression and other psychiatric problems, for example. Although many users report feeling good about themselves while on steroids, extreme mood swings can also occur, including manic-like symptoms and anger ("roid rage") that may lead to violence. Researchers have also observed that users may suffer from paranoid jealousy, extreme irritability, delusions, and impaired judgment stemming from feelings of invincibility.

[para 85] With its rebuttal submission, the Applicant provided a copy of an article published by *Vice*, which quotes an expert on performance enhancing drugs (Dr. Yesalis):

> Now, obviously the first worry that comes to mind is, “Well, if these officers are juicing then aren't they going to be suffering from fits of roid rage?” The last thing citizens need are juiced-up officers with lethal weapons prowling city streets, on the verge of snapping. Yesalis explains that cases of “roid rage,” which he defines as “a spontaneous fit or episode of violent behaviour,” are very rare in users of anabolic steroids.
>
> “I'd be far more concerned, dramatically more concerned, about an officer who was an alcoholic,” stated Yesalis.

[para 86] I am not in a position to make any sort of finding regarding the possible psychological effects of illegal steroid use.

[para 87] The Applicant also argues that it is seeking disclosure to “publicly express informed opinions”, which is a *Charter* right. The Applicant cites *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII), without providing a pinpoint citation. In this case, the Supreme Court of Canada said (at para. 31):

> We conclude that the scope of the s. 2(*b*) protection includes a right to access to documents only where access is necessary to permit meaningful discussion on a matter of public importance, subject to privileges and functional constraints.

[para 88] In response to this argument, the Public Body states that the Applicant has not explained how it is currently prevented from publicly expressing informed opinions. I agree that the Applicant has not explained how it is prevented from expressing informed opinions. The Applicant is already aware that individuals have been found to have used illegal steroids.

[para 89] The Applicant has further argued that the names of the officers should be disclosed to accused individuals and other members of the public because the information affects the credibility and character of the officers. Given the role of police officers and their direct interaction with members of the public – often in difficult circumstance – I agree that the public has an interest in both having a police force that obeys the law, and also in seeing that steps are taken to address situations where individual police officers do not.

[para 90] That said, from the information before me, it is not clear that there is a causal relationship between the officers having been found to have used illegal steroids at some point between 2005 and 2015, and any other conduct of that officer. The existence of their names in the record does not provide any information such as how long, or when, the officers used the steroids. Nor does the record indicate what type of steroid was used by which officer (presumably, different steroids could have different side effects). In other words, it is unclear that there is a sufficient connection between the appearance of

the officers' names in the records and the performance of the officers' work duties to justify disclosure.

[para 91] In the end, I agree that there is some public interest in disclosure of the personal information in the record. However, for the reasons above, I give only minimal weight to this factor.

Public availability

[para 92] The Applicant has argued that several officers' names have been linked with illegal steroid use in news articles. I will consider the public availability of this information as an unenumerated factor under section 17(5).

[para 93] The Public Body and Affected Parties point to the discussion of a similar argument made in the *EPS* case, discussed above. In *EPS*, the Court considered the public availability of information relating to allegations made against a named officer, as well as disciplinary and legal proceedings relating to the allegations against that officer. The Court concluded that the records at issue contained more personal information of the officer than what had already been disclosed by way of the court decision, news articles, etc.

[para 94] The Court in *EPS* directed this office to conduct a reconsideration of the application of section 17(1) to personal information of an officer in the records at issue. In the reconsideration decision, Order F2022-R-01, I considered the public availability of personal information as a factor weighing in favour of disclosure, in light of the Court's guidance provided in *EPS*. I found that in that case, section 17(1) could not apply to personal information in the records at issue that was the same as personal information that had been made public. I said (at paras. 79-83):

> Order F2017-58 and *EPS* refer to news articles, as well as the *Kubusch* decision and transcripts from that proceeding, as publicly available documents that may contain the same or similar information as that which appears in the records at issue. …
>
> As discussed above, the Public Body has withheld pages in their entirety where the entire page is not comprised of the Affected Party's personal information, rather than severing the personal information and providing the remaining information to the Applicant. In my view, it is not reasonable to sever the Affected Party's personal information from those pages where that information reveals only that the Affected Party was investigated for alleged misconduct in relation to the *Kubusch* decision. That information is clearly publicly available by way of the decision. It was also discussed more recently in Order F2017-58, as well as the *EPS* decision in which the Affected Party was named as a party. This weighs in favour of disclosing this information.
>
> I understand the point made by the Court in *EPS*, that the information may be sufficiently dated such that its disclosure again in this context could unfairly damage the Affected Party's reputation by bringing up past issues that may have since been forgotten. Section 17(5)(h) weighs against disclosure where it could result in unfair damage to the individual's reputation. In this case, these past issues to which the records relate clearly

> have not been forgotten by the Applicant. The Applicant is not restricted in what it can do with the information obtained from its access request, including disclosing it to the public. However, if the same information is already available to the Applicant, nothing stops it from discussing the same information publicly regardless of the access request. In Order F2014-16, cited by the Court in *EPS* with respect to the age of information as a factor against disclosure (excerpted at paragraph 50 of this Order), the Director of Adjudication concluded that the age of the requested information weighed against disclosure, even though some of the information had been made public in the past. In that case, the information at issue in Order F2014-16 was 23 years old by the time the access request was made, and over 30 years old by the time the Order was issued. There was no indication that the information had been made public more recently than 1983.
>
> The Court in *EPS* disagreed with the *extent* to which the adjudicator relied on the public availability of some information in Order F2017-58 to order much of the Affected Party's personal information to be disclosed to the Applicant; the Court did not conclude that this factor was not applicable at all. Further, the Court was not satisfied that all of the personal information in the records was the same as what was already publicly available (at para 621).
>
> My finding regarding the public availability of information weighing in favour of disclosure relates to information about the Affected Party being investigated by the Public Body in relation to the *Kubusch* decision. As noted, this information was disclosed reasonably recently by way of the *EPS* decision, which named the Affected Party, and discussed the fact that the Public Body considered criminal charges and disciplinary proceedings against the Affected Party. Given this, there is no purpose for the Public Body to continue to withhold personal information that reveals only the same information that has been disclosed in these decisions.

[para 95] This analysis applies in this case. The news articles in which officers are associated with illegal steroid use date from 2015-2018.

[para 96] I have reviewed the articles provided by the Applicant. The names of several officers reoccur in the records; some of those names were not withheld under section 17(1) (for example, the officers who were charged under the *Controlled Drugs and Substances Act*).

[para 97] Some other names occur in articles that report on a court proceeding where certain officers provided sworn testimony regarding the purchase, selling and/or use of steroids.

[para 98] I cannot say whether any of the names appearing in the news articles provided by the Applicant appear in the record, aside from those names not withheld by the Public Body under section 17(1). However, it is certainly true that not all of the names in the record appear in the news articles.

[para 99] With respect to any officers named in the record whose information is withheld under section 17(1), if their use of steroids has already been made public in news articles, disclosing those names would seem to disclose only what has already been

made public. The reasoning set out in Order F2022-R-01, excerpted above, applies here such that the passage of time does not mitigate against the weight to be given this factor.

[para 100] I have commented earlier in this Order that some names in the record have notations beside them, and that those notations are personal information of the associated officer. The type of information in these notations is not the same type of information appearing in the news articles provided by the Applicant. Therefore, even where these notations are associated with an officer whose admission to the use of steroids has been made public, section 17(1) requires the Public Body to withhold the additional information in the notations but not the name.

Expungement of police disciplinary records

[para 101] The Affected Parties argue that section 22 of the Police Service Regulation requires records of disciplinary action against officers be expunged in specified circumstances. This provision states:

> *22 When, and only when,*
>
> > *(a) a period of 5 years has elapsed from the day that punishment is imposed on a police officer for a contravention of section 5, or*
> >
> > *(b) a period of not less than one and not more than 3 years, as specified in writing by the chief of police, in respect of a police officer, or the commission, in respect of the chief, has elapsed from the day that an action is taken in respect of a police officer under section 19(1),*
>
> *if during that time no other entries concerning a contravention of this Regulation have been made on the police officer's record of discipline, any record of the punishment, the contravention or the action taken shall*
>
> > *(c) be removed from the police officer's record of discipline and destroyed, and*
> >
> > *(d) not be used or referred to in any future proceedings respecting that police officer.*

[para 102] The Affected Parties argue (initial submission, at paras. 23-24, footnotes omitted):

> This expungement mechanism clearly shows a legislative intent to allow police officers the opportunity to redeem themselves following misconduct and to prevent dated misconduct from being held against them. The allegations against the officers here are all at least 8 years old. It would be unfair if the Applicant could use privacy legislation to access records relating to alleged breaches of the Police Service Regulation, when the *Police Service Regulation* itself would have required the removal and destruction of these records.
>
> Alberta Courts have taken an expansive reading of s 22 of the *Police Service Regulation*. They have found that it prevents disclosure of expunged discipline records to accuseds in

> criminal matters. It would be incongruous and unfair if s 22 protected police officer privacy interests in criminal matters, in which an individual's liberty may be at stake, but the EPS could nonetheless be required to disclose records about that same misconduct where a request is made under the *Act*.

[para 103] The Affected Parties cite *R v. Polny*, 2009 CanLII 81890 (ABQB), *R v. Steele*, 2010 ABQB 39, and *R v, Perreault*, 2010 ABQB 714; in each case, the Alberta Court of King's Bench found expunged disciplinary records were not required to be automatically disclosed to an accused as part of the disclosure process set out in *McNeil*[1]. In *Perreault*, the Court said (at para. 52):

> To require disclosure by police to the Crown of records expunged under s. 22 of the Alberta Regulation would be inconsistent with the Court's determination that criminal records for which a pardon had been granted are not subject to disclosure. It is logical to conclude that a significant period of good conduct following a finding of misconduct lessens the relevance of the misconduct for the purposes of disclosure. In my view, and despite the differences in requirements, the removal of a record pursuant to s. 22 is the equivalent of a pardon and need not be disclosed. As stated by Nielsen J. in Polny at p. 20:
>
> > . . . it would be anomalous that historic information in respect of a criminal conviction which had been addressed by a pardon would not be disclosed by a police service, but disciplinary records which had been dealt with by means of a statutory expungement or a statutory pardon be disclosed.
>
> (See also R. v. Letourneau, 2009 ABPC 222, 11 Alta. L.R. (5th) 348 at para. 142-151).

[para 104] The expungement of disciplinary records may be an appropriate factor to consider under section 17(5) in certain circumstances. However, for the following reasons, I find that it is not applicable here.

[para 105] In the court decisions cited by the Affected Parties, the courts were considering the disclosure of disciplinary records that had already been expunged following the process set out in section 22 of the Police Service Regulation.

[para 106] The record at issue does not consist of disciplinary records; it names officers who were found to have used steroids, whether through a disciplinary process or otherwise. As discussed, it is not clear whether all of the officers whose names appear in the record were subject to a disciplinary process.

[para 107] In any event, section 22 of the Police Service Regulation does not allow for any and all disciplinary records to be expunged after a specified amount of time. Rather, the Regulation seems to also require that "no other entries concerning a contravention of this Regulation have been made on the police officer's record of discipline…". As the

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[1] In *R v. McNeil*, 2009 SCC 3 the Supreme Court of Canada found that police services must disclose to the Crown findings of serious misconduct by police officers involved in the investigation of an accused. The Crown then determines whether it is required to disclose this material to the defense.

Court said in *Perreault* above, "a significant period of good conduct following a finding of misconduct lessens the relevance of the misconduct for the purposes of disclosure."

[para 108] The Affected Parties have not said whether this provision would apply to the officers whose names appear in the record at issue. In other words, if disciplinary records relating to the use of steroids exist in relation to these officers, I do not know whether they have been expunged per the process set out in section 22 of the Regulation.

[para 109] Given the above, I do not find this argument to weigh against disclosure.

Conclusions regarding section 17(1)

[para 110] The presumptions against disclosure outweigh any factors weighing in favour of disclosure of the names of the officers in the record, with the exception of names of officers whose admission to the use of steroids in court proceedings has been published in news articles that remain accessible to the public. I find that section 17(1) requires the Public Body to withhold the names of the officers whose admission to the use of steroids is not contained in the published news articles, but to disclose the names that are contained in those articles.

[para 111] Regarding the additional notations beside some of the officers' names, where the names must be withheld under section 17(1), these notations are no longer associated with an identifiable individual such that section 17(1) can apply. Therefore, I will order the Public Body to disclose these notations wherever the associated officer name is withheld under section 17(1).

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

[para 112] The Applicant's access request was for records relating to information the Applicant received about the Public Body collapsing three tactical squads into two as a result of a number of officers caught in the investigation into the illegal use of steroids.

[para 113] The Public Body cited sections 12(2)(a) and (b) of the Act in refusing to confirm or deny the existence of any responsive records. These sections state:

> *12(2) Despite subsection (1)(c)(i), the head of a public body may, in a response, refuse to confirm or deny the existence of*
>
> > *(a) a record containing information described in section 18 or 20, or*
> >
> > *(b) a record containing personal information about a third party if disclosing the existence of the information would be an unreasonable invasion of the third party's personal privacy.*

[para 114] The Public Body has the burden of proving that it properly relied on section 12(2) (Order F2009-029 at para. 11).

Section 12(2)(a)

[para 115] In Order F2006-012, former Commissioner Work applied a purposive interpretation to section 12(2)(a) (at paras. 18 and 21):

> Earlier orders of this Office have said that section 12(2) is to be used having regard to the objects of the Act, including access principles. In my view, in order to rely on section 12(2)(a) to refuse to say whether information exists that falls into a particular subsection of section 18 or 20, the Public Body should first consider what interest would be protected by withholding such information under the particular subsection of section 18 or 20, and then ask whether refusing to say if such information exists would, in the particular case, promote or protect the same interest.
>
> …The sensible purpose for both provisions [sections 12(2)(a) and (b)] … is to prevent requestors from obtaining information from a request indirectly that they cannot obtain directly. Requestors are denied access to information if access would cause harm to law enforcement, or unreasonable invasion of privacy. They should be denied information as to whether a record exists for the same reason, but not otherwise… This interpretation is also in accordance with the general principle in the Act of permitting access subject only to limited and specific exceptions.

[para 116] With respect to the application of section 12(2)(a), the Public Body's submissions indicate that section 20(1)(a) is relevant to its application of section 12(2). This section states:

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

[para 117] The definition of "law enforcement" has been cited above; however, for ease of reference I will repeat it here:

> *1(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 118] Section 20(1)(a) has been interpreted as applying to specific, ongoing matters (Order F2006-012, at para. 25). If this requirement is met, the public body applying the exception must also meet the following "harms" test in order to determine whether there is a reasonable expectation of harm that would result from the disclosure as to the existence of the requested information:

a. there must be a clear cause and effect relationship between the disclosure and the harm which is alleged;
b. the harm caused by the disclosure must constitute "damage" or "detriment" to the matter and not simply hindrance or minimal interference; and
c. the likelihood of harm must be genuine and conceivable (see Order F2010-017, at para. 69)

[para 119] The Supreme Court of Canada has clearly enunciated the test to be used in access-to-information legislation wherever the phrase "could reasonably be expected to" is found (such as in section 20(1)). In *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII), the Court stated (at paras. 53-54):

> …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. <u>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.</u> [Emphasis added.]
>
> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences": *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41, at para. 40.

[para 120] The Supreme Court 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, regardless of the seriousness of the harm alleged. With respect to section 20(1)(a), the Public Body must satisfy me that there is a reasonable expectation of probable harm that would result from the disclosure of the information.

[para 121] The Public Body provided some arguments on its application of section 12(2)(a) in its exchanged initial submission, and some arguments in a submission that I accepted *in camera*. In its exchanged submission, the Public Body set out the test for section 20(1)(a) and asserted that the arguments provided in *in camera* submission are sufficient to meet this test.

[para 122] However, the arguments provided in the Public Body's *in camera* submission were not sufficient to discharge its burden of showing that section 12(2)(a) was properly applied. By letter dated January 5, 2024, I requested further information from the Public Body. I noted that the questions could be answered in an exchanged response, stating:

> This is because the application of section 12(2) does not depend upon whether responsive records actually exist, or the content of any responsive records. The Public Body can answer these questions as if it had not conducted a search for responsive records and is unable to say whether any would exist. The questions in this letter refer only to the arguments in the Public Body's exchanged submission.

[para 123] With respect to the application of section 12(2)(a), I asked the Public Body to identify specifically what information would be revealed by either confirming the existence of responsive records, or denying the existence of responsive records. I asked the Public Body to explain how revealing that information would harm a law enforcement matter such that the requirements of section 20(1)(a) are met.

[para 124] I also noted that an internet search located a website of the Public Body that discusses the Tactical Unit, including providing the number of teams in that Unit[2]. I asked whether the fact that this information has been published by the Public Body affects the Public Body's reliance on section 12(2)(a) to respond to a request about a possible change in the number of tactical teams.

[para 125] Lastly I asked whether the Public Body was not concerned about revealing the existence of records relating to a change in the number of teams on the Tactical Unit so much as it is concerned about revealing the existence of records relating to a change *as a result of* findings regarding steroid use among officers. If this were the case, I asked the Public Body to explain how revealing the fact that the Public Body made a change to the number of teams in the Tactical Unit as a result of steroid use could reasonably be expected to harm a law enforcement matter such that the requirements of section 20(1)(a) are met.

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[2] https://www.newepsrecruits.ca/specialized-units

[para 126] In its response, the Public Body pointed out that it is not necessary to show that the harm alleged to result from confirming or denying the existence of records both where there are records, and where there are no records. I agree; the harm alleged may arise from either confirming the existence of records or denying the existence of records (or both).

[para 127] In its response, the Public Body argues:

> The EPS considers that the harms test is met as: 1) the disclosure of that fact will publicly expose a weakness in the operations of the Tactical Units, namely that there was one less Unit to respond to calls at that particular time; 2) the disclosure would expose members of the Tactical Unit to increased security risk, as they will be more vulnerable to attacks from malicious actors who will take advantage of a publicized weakness in the operations of the tactical units; and 3) the likelihood of that harm is conceivable.
>
> To elaborate on the first prong of the test, the issue is not disclosing the number of Tactical Unit in the abstract, the issue is that the Applicant's Request was worded in such a way that disclosing the existence of records would confirm a short staffing of Tactical Units in a specific moment because of a specific reason.
>
> The internet search referenced your letter of January 5, 2024 consists of a publication by the EPS of the different units, including the Tactical Units, and states that there are three Tactical Units within the EPS. No other information is provided that is material to this Inquiry. The EPS is not arguing that revealing the number of tactical teams is inherently harmful. On the contrary, in its application of section 12, the EPS has considered the important principle of transparency, and does so in every disclosure decision. For that reason, without confirming with certainty, if any decisions were taken to collapse tactical units for other reasons and in a different context, the EPS may choose to do so. The fact that the EPS had previously disclosed or does, in the normal course of business, voluntarily disclose information relating to the number or activities of tactical units therefore does not affect the Public Body's argument regarding the harm test in section 20(1).

[para 128] The Public Body argues that confirming the existence of responsive records would expose a weakness in the Tactical Units as it would reveal that there are fewer units. The Public Body further clarifies that it is not the number of units, in the abstract, that would cause the alleged harm but rather the fact that the number of units was reduced due to investigations into steroid use.

[para 129] The Applicant argues that the fact that the Public Body publicly discloses the number of teams in the Tactical Unit shows that the Public Body's application of section 12(2)(a) is not legitimate.

Analysis

[para 130] The Public Body has not adequately explained why disclosing the fact that there was a reduction in the number of Tactical Units as a result of investigations into steroid use – as opposed to disclosing that the number of Units was reduced for any other

reason – could reasonably be expected to harm a law enforcement matter. The Public Body's explanation is that Tactical Unit members would be exposed to greater risk, as malicious actors could take advantage of the reduced number of Tactical Units.

[para 131] The Public Body has noted that section 20(1)(a) has been interpreted to apply to "specific, ongoing matters" rather than law enforcement generally. If the Public Body were to make arguments in an exchanged submission to address whether there is an ongoing investigation, this could defeat the point of refusing to confirm or deny the existence of responsive records. I will address in a confidential Addendum to this Order whether this element of section 20(1)(a) is satisfied.

[para 132] Regarding the harms test, the Public Body cannot be asked to prove that something is going to happen in the future. However, the Supreme Court has set out the requirement that the harm is reasonably expected to be probable. In my view, the Public Body's allegation that malicious actors would be able to take advantage of a reduced number of tactical units, is speculative. The Public Body has not provided any reason to expect that the number or types of crimes committed is in any way affected by a reorganization of the Tactical Units.

[para 133] According to the Public Body's website, the Tactical Units participate in:

- high-risk occurrences involving hostages or armed and barricaded persons
- apprehending dangerous criminals
- executing high-risk search warrants
- assisting other areas such as Homicide, Drug and Gang Unit
- security duties (VIPs)
- consulate liaison duties

[para 134] It is difficult to imagine how disclosing a reduction of the number of teams in the Tactical Unit would render the members more vulnerable, given the tasks currently assigned to that Unit. In other words, it is difficult to imagine that individuals inclined to take part in drug- or gang-related activities, would take advantage of knowing that there are fewer teams comprising the Tactical Unit than in the past. This is especially the case if the Public Body argues, as it does here, that a change to the number of teams in the Tactical Unit may disclosed if it were for reasons other than investigations into steroid use.

[para 135] The website doesn't specify how many officers are assigned to each team, only that there are (according to the current information on the website), three full-time teams operating under one staff sergeant and one training and tactics sergeant. Confirming the existence of responsive records (if any exist) would not identify how many officers in the Tactical Unit were affected by investigations into steroid use.

[para 136] The Public Body has not provided sufficient reason to expect that disclosing the existence of responsive records (if any exist) could reveal a vulnerability that could be exploited. In past Orders of this office that have permitted a public body to rely on

section 12(2)(a), the information revealed consisted of *particular* techniques and strategies that officers are trained to employ in particular circumstance; or the *particular* movement of correctional guards when an incident occurred, which thereby revealed which posts became unmanned in that situation (see Orders F2010-008, F2016-10, F2017-55). In such cases, the manner in which the information could be used and exploited is reasonably clear. In this case, the manner in which a reduction in the number of teams in the Tactical Unit could be used is not reasonably clear.

[para 137] Given this, I find that the Public Body cannot rely on section 12(2)(a) in refusing to confirm or deny the existence of responsive records. The Public Body has also relied on section 12(2)(b), which I will consider below.

Section 12(2)(b)

[para 138] In Order F2011-010, the adjudicator set out the test for properly applying section 12(2)(b) of the Act as follows (at paras. 9-10):

> In order for a public body to properly apply section 12(2)(b) of the Act, it must do each of the following: (a) search for the requested records, determine whether responsive records exist and provide any such records to this Office for review; (b) determine that responsive records, if they existed, would contain the personal information of a third party and that disclosure of the existence of the information would be an unreasonable invasion of the third party's personal privacy; and (c) show that it properly exercised its discretion in refusing to confirm or deny the existence of a record by considering the objects and purpose of the Act and providing evidence of what was considered (Order 98-009 at paras. 8 to 10; Order 2000-016 at paras. 35 and 38).
>
> Part (b) of the foregoing test was recently re-worded as requiring the public body to show that confirming the existence of responsive records, if they existed, would reveal the personal information of a third party, and to show that revealing this personal information (that the records exist, if they exist) would be an unreasonable invasion of the third party's personal privacy (Order F2010-010 at para. 14).

[para 139] The question to be answered is therefore whether it would be an unreasonable invasion of the named officers' privacy to confirm whether disciplinary records exist.

[para 140] The Public Body states that if responsive records exist, they would contain the names of Public Body tactical team members who were involved in investigations of illegal steroid use. The Public Body argues that disclosing the existence of information relating to investigative and disciplinary proceedings against these officers would be an unreasonable invasion of their privacy. The Public Body also provided arguments on the various factors under sections 17(4) and (5), discussed earlier in this Order.

[para 141] In my January 5, 2024, letter to the parties, I requested further information from the Public Body regarding its application of section 12(2)(b). I said:

> However, disclosing the *existence* of records is not the same as disclosing the *content* of the records. Even if responsive records exist, the Public Body could confirm the records' existence while also refusing access to the information contained in the records.
>
> It is not clear from the Public Body's submission how confirming the *existence of* records, if any exist, would reveal any personal information *in* the records.

[para 142] I asked the Public Body what personal information would be revealed if the Public Body confirmed or denied the existence of responsive records. The Public Body responded:

> The EPS agrees that disclosing the contents of the records is not the same as disclosing the existence of the records. However, in this instance, personal information about tactical team members would be revealed by the mere disclosure of the existence of the records due to the nature of the Applicant's request. Specifically, the phrasing of the Applicant's request makes it so confirming the existence of records, even without disclosing their content, would confirm a causal link between members of the Tactical Teams and discipline as a result of the use of steroids. The use of s. 17 would therefore not be sufficient to protect the potential affected members as the list of members of Tactical Units can be identified through other sources, and the mere disclosure of the existence of records would confirm personal information about the members.

[para 143] Past Orders have considered the application of section 12(2)(b) in response to access requests for records relating to the discipline of police officers. In Order F2016-24, an applicant made a request for records of prior complaints, decisions, hearings or disciplinary action made against two named officers. The adjudicator accepted the argument that confirming the existence of such records would reveal that a complaint had been made or disciplinary action taken against the officers, because otherwise records would not exist (at para. 10). The fact that an officer had been named in a complaint or had disciplinary action taken against them would be their personal information.

[para 144] Following past Orders of this Office, the adjudicator considered whether the disclosure of that personal information would be an unreasonable invasion of the officers' privacy, using section 17 as a guide. She concluded that in the circumstances before her, the answer was 'yes'. Therefore, the Public Body was permitted to rely on section 12(2)(b) to refuse to confirm or deny the existence of such records.

[para 145] I agree with the approach set out in Order F2016-24. However, in this case the Public Body has not satisfied me that *any* personal information is revealed by confirming or denying the existence of responsive records.

[para 146] If there are responsive records, this would appear to reveal the fact that at least some officers in the Tactical Unit were investigated for illegal steroid use. However, confirming this does not reveal *which* officers were involved, or even how many. Under the FOIP Act, in order for information to be personal information, it must be information about an identifiable individual. As the Public Body has not satisfied me that confirming

or denying the existence of responsive records would reveal personal information of any identifiable individuals, I find that section 12(2)(b) does not apply.

[para 147] I will order the Public Body to respond to the Applicant without relying on section 12(2).

IV. ORDER

[para 148] I make this Order under section 72 of the Act.

[para 149] I find that the Public Body did not properly refuse to confirm or deny the existence of a record as authorized by section 12(2) of the Act. I order the Public Body to respond to the Applicant without relying on that section.

[para 150] I find that the information withheld as non-responsive is responsive to the Applicant's request and order the Public Body to make new decisions under the Act with respect to this information, and include these decisions in its new response to the Applicant.

[para 151] I find that the names of the officers in the record at issue must be withheld under section 17(1), with the exception of any names discussed at paragraph 110 of this Order. I order the Public Body to disclose those names to the Applicant.

[para 152] The notations associated with certain officer names in the record are not associated with an identifiable individual when the names are withheld. As such, I order the Public Body to disclose these notations to the Applicant wherever the associated officer name is withheld under section 17(1), as discussed at paragraph 111. However, if the associated name is disclosed to the Applicant, the notation must be withheld under section 17(1), as discussed at paragraph 100.

[para 153] I further order the Public Body to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

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Amanda Swanek
Adjudicator