ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2024-15

April 30, 2024

JUSTICE

Case File Number 005621

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request to Justice (formerly Justice and Solicitor General) (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for any information and documentation in relation to himself in the custody of the "Red Deer Crown Prosecution Office". He also requested that the email inboxes of 25 Government of Alberta employees be screened for any emails and/or any information in relation to him.

The Public Body located 875 pages of responsive records and provided the Applicant with 120 pages of the responsive records. It informed the Applicant that it had withheld all or a portion of the information in the responsive records pursuant to sections 4 (records to which this Act applies), 17 (disclosure harmful to personal privacy), 18 (disclosure harmful to individual or public safety), 20 (disclosure harmful to law enforcement), 24 (advice from officials), and 27 (privileged information).

The Applicant requested a review of the adequacy of the Public Body's search as well as its severing decisions.

Following the review, the Public Body released additional information in 21 of the 120 pages to the Applicant, but continued to withhold some information on these pages under sections 18, 20, and 24.

The Applicant was not satisfied with the outcome of the review and requested that the Commissioner conduct an inquiry. The Commissioner agreed to conduct an inquiry.

The Adjudicator found that section 4(1)(a) applied to certain records and therefore the FOIP Act did not apply to these records.

The Adjudicator found that the Public Body conducted an adequate search for responsive records and met its duty to assist the Applicant under section 10(1) of the FOIP Act.

The Adjudicator found that the Public Body properly withheld information under section 17(1).

With the exception of a small amount of information withheld under section 18(1)(a), the Adjudicator found that the Public Body had properly withheld information under section 18(1)(a). The Adjudicator ordered the Public Body to re-process information where she found section 18(1)(a) did not apply.

The Adjudicator concluded that while sections 27(1)(b) or (c) applied to the information the Public Body had withheld under these sections, it had not established that it had properly exercised its discretion in withholding this information. The Adjudicator ordered the Public Body to reconsider its exercise of discretion and inform the Applicant of its reconsideration decision.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 4, 10, 12, 17, 18, 20, 24, 27, 71, and 72; *Occupational Health and Safety Act*, S.A. 2020, c O-2.2, ss. 1.

Authorities Cited: AB: Orders F2007-021, F2007-029, F2009-026, F2015-34, F2017-08, F2020-28, F2022-26, F2022-44, F2023-02, F2023-38, F2024-09, and F2024-12.

Cases Cited: AB: *Edmonton Police Service v. Alberta (information and Privacy Commissioner)*, 2020 ABQB 10, and *Royal Bank of Canada v. Anderson*, 2023 ABKB 686.

Cases Cited: Federal: *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31.

I. BACKGROUND

[para 1] On August 4, 2015, the Applicant made an access request to Justice (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 FOIP Act) for any information and documentation in relation to himself in the custody of the "Red Deer Crown Prosecution Office". He also requested that the email inboxes of 25 government of Alberta employees (the Employees) be screened for any emails and/or any information in relation to him.

[para 2] On March 9, 2017, the Public Body responded to him and stated, in part (emphasis in original):[1]

> On August 4, 2015, the Alberta Justice and Solicitor General (JSG) Office received your email request under the *FOIP Act* for access to records containing your personal information.
>
> Specifically, your request was clarified to be for access to a copy of any records from the Red Deer Crown Prosecution Office, including emails contained within the specific email accounts you identified (see attached), which relate to a traffic violation issued to you on July 6, 2012. The time period for the request is July 2012 to March 21, 2013. You also requested that we exclude copies of information and/or emails that you are already in possession of, including emails that you sent or that were sent to you. This is now the scope for this request.
>
> Please note that nothing in this correspondence (or its attachments) constitutes a waiver of any privilege.
>
> **We are pleased to provide access to 120 pages you requested; copies of which are enclosed. There were a total of 875 pages responsive to your request.**
>
> Some of the records located contain information that is withheld from disclosure under the *FOIP Act*. We have severed (removed) the excepted information so that we could disclose the remaining information in the records. The severed information is withheld from disclosure under the following section(s):
>
> - Section 4(1)(a) - Records to which the FOIP Act applies,
> - Section 17(1) - Disclosure harmful to personal privacy,
> - Section 18(1)(a) - Disclosure harmful to individual or public safety,
> - Section 20(1)(g) - Disclosure harmful to law enforcement,
> - Section 24(1)(a) and 24(1)(b) - Advice from officials,
> - Section 27(1)(a) and 27(1) - Privileged information,
>
> . . .

[para 3] The Applicant requested a review of the adequacy of the Public Body's search as well as its severing decisions.[2]

[para 4] The Commissioner appointed a Senior Information and Privacy Manager (the SIPM) to investigate and attempt to settle the matter.

[para 5] Following the review, the Public Body released additional information in 21 of the 120 pages but continued to withhold some information on these pages under sections 18, 20, and 24.[3]

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[1] In Order F2017-08, this Office ordered the Public Body to respond to the Applicant. I note that there is a typographical error in paragraph 1 of Order F2017-08: the end date for the time period for the Applicant's access should have been March 21, *2013*, not 2016.

[2] Applicant's Request for Review dated March 17, 2017.

[3] Letter from Public Body to Applicant dated December 1, 2017.

[para 6] The Applicant was not satisfied with the outcome of the review and requested that the Commissioner conduct an inquiry.[4]

[para 7] The Commissioner agreed to conduct an inquiry and delegated her authority to conduct the inquiry to me.

II. RECORDS AT ISSUE

[para 8] The information at issue is the information withheld by the Public Body in the 875 pages of records, excluding any information that was already in the Applicant's possession (which would include correspondence that he sent or received, as well as emails that he sent or received). Information that was already in the Applicant's possession is outside the scope of his access request. To the extent the Public Body applied exceptions to withhold the information already in the Applicant's possession, it was unnecessary to do so, and I do not need to consider these exceptions.

III. ISSUES

[para 9] The Notice of Inquiry, dated December 6, 2019, states the issues for this inquiry as follows:

1. Are the records excluded from the application of the Act by section 4(1)(a) (information in a court record)?

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

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

4. Did the Public Body properly apply section 20(1)(g) of the Act (disclosure that could reasonably be expected to reveal information used in the exercise of prosecutorial discretion) to information in the records?

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

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

7. Did the Public Body meet its obligations required by section 10(1) of the Act (duty to assist applicants)?

[4] Applicant's Request for Inquiry dated December 1, 2017.

IV. DISCUSSION OF ISSUES

Preliminary Matter – Inquiry is de novo

[para 10] As a preliminary matter, I note that in the Applicant's Request for Inquiry, one of the reasons he stated for requesting an inquiry was:[5]

> . . . I also believe that the OIPC fact finder may have erred, including in fact, law and/or a mix of fact and law. Other concerns and grounds may exist, and I reserve and preserve my rights . . .

[para 11] As I stated in Order F2020-28 at paragraph 7:

> [para 7] As noted in prior Orders of this Office, an inquiry is not a review of the investigation, mediation or findings or the Senior Information and Privacy Manager (see, for example, Orders F2013-27 at para. 4, F2015-34 at para. 5, F2017-02 at para. 14, F2017-39 (upheld on judicial review) at para. 10 and F2017-40 (upheld on judicial review) at para. 10). Therefore, in this inquiry I will not be reviewing or considering any of the findings of the Senior Information and Privacy Manager.

[para 12] Accordingly, I will not be reviewing or considering what occurred during the investigation phase of the Applicant's request for review, or the findings or recommendations of the SIPM in this inquiry.

[para 13] Additionally, in his Request for Inquiry, the Applicant stated "Other concerns and grounds may exist and I reserve and preserve my rights". Similarly, in his rebuttal submission the Applicant stated "Other concerns, grounds and evidence exists or may exist and I reserve and preserve my rights".

[para 14] In an inquiry before this Office, just as in a proceeding before the Courts, an applicant/complainant does not get to "reserve and preserve" their rights.[6] The applicant/complainant must make all of their arguments and present all of their evidence as it relates to the issues in the inquiry, in their submission(s). They do not get to withhold other "concerns", "grounds" or "evidence" that "exists or may exist" to raise at some later time.

1. Are the records excluded from the application of the Act by section 4(1)(a) (information in a court record)?

[para 15] The Public Body applied section 4(1)(a) to withhold information on pages 410 – 607. The record is a Memorandum of [the Crown's] Argument, date stamped December 23, 2014 by the Registrar of the Court of Appeal of Calgary (the Memorandum). It is therefore non-responsive as it is outside the date range for the Applicant's access request.

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[5] Applicant's Request for Inquiry dated December 1, 2017.

[6] See, for example, *Royal Bank of Canada v. Anderson*, 2023 ABKB 686 at paragraph 47 where the Court states "When one appears before this Court, you do not get to "reserve rights"".

[para 16] It may be that the Public Body considered the Memorandum responsive because it contains transcripts and information from the Applicant's trial, part of which fell within the date range of the Applicant's access request.

[para 17] Accordingly, I will address the application of section 4(1)(a) to the Memorandum so there is no doubt as to whether I have the jurisdiction to review the Public Body's decision to withhold it.

[para 18] Section 4(1)(a) of the FOIP Act states:[7]

> *4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but noes not apply to the following:*
>
> *(a) information in a court file, a record of a judge of the Court of Appeal of Alberta, the Court of King's Bench of Alberta, or The Provincial Court of Alberta, a record of an applications judge of the Court of King's Bench of Alberta, a record of a justice of the peace other than a non-residing justice of the peace under the Justice of the Peace Act, a judicial administration record or a record relating to support services provided to the judges of any of the courts referred to in this clause;*

[para 19] Previous Orders of this Office have determined that documents filed with the Court, as well as transcripts of Court proceedings fall under section 4(1)(a) of the FOIP Act.

[para 20] For example, in Order F2007-021, at paragraphs 23, 25 and 28 the adjudicator stated:

> . . .
>
> [para 23] Copies of transcripts of court proceedings emanate from a court file, as they are prepared by or on behalf of the court and not the Public Body. I find that the court transcripts therefore constitute information in a court file and are excluded from the application of the Act under section 4(1)(a). This is the case whether the transcript appears on its own in the Crown prosecutor's file, or is attached as an exhibit to an affidavit . . .
>
> . . .
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> [para 25] When a party files documents with a court, the party usually takes in several copies, all of which are stamped as "filed" and certain of which are retained by the party for its own use and for service on other parties. A "filed" stamp essentially means that the document was notionally once on the court file and then immediately "taken back" by the party that filed it. To put the point another way, the records are

[7] I refer to the current version of the FOIP Act in this Order. While a few of the sections that the Public Body relied on to withhold responsive information when it made its decisions in March of 2017, have been subsequently amended, the amendments are not material to my analysis and I would have reached the same conclusions if I had considered the FOIP Act as it existed in March of 2017.

> exact versions of the records in the court file. Either way, I find that copies of court-filed documents emanate from a court file and are excluded from the application of the Act under section 4(1)(a).
>
> . . .
>
> [para 28] I conclude that a copy of a filed version of a court record is "information in a court file". Besides the records to which the Public Body specifically applied section 4(1)(a), I note copies of other filed versions of court records in the Crown prosecutor's file. While the Public Body did not apply section 4(1)(a) to those records, I must apply the section myself, as it addresses whether or not I have jurisdiction over the records (Order F2002-024 at para. 11).

[para 21] Accordingly, section 4(1)(a) applies to the Memorandum and I do not have jurisdiction to review the Public Body's decision to withhold it.

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

[para 22] The Public Body applied section 17(1) to withhold information on pages 10, 115 – 116, 129 – 130, 137 – 139, and 159 – 403, on the basis that the information was personal information about third parties.

[para 23] Section 17(1) of the FOIP Act is a mandatory provision. It requires a public body to withhold personal information from an applicant if disclosure would be an unreasonable invasion of personal privacy. It 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 24] Sections 17(2) identifies the situations in which a disclosure of personal information is not an unreasonable invasion of a third party's personal information.

[para 25] Section 17(3) applies only to information under subsection (2)(j) and provides that the disclosure of personal information under subsection (2)(j) is an unreasonable invasion of personal privacy if the third party whom the information is about has requested that the information not be disclosed.

[para 26] Section 17(4) sets out the situations where a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy. It states:

> *17(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*
>
> > *(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,*

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

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

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

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

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

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

(g) the personal information consists of 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,

or

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

[para 27] Section 17(5) provides that 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:

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

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

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

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

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

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

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

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

[para 28] The first question to be determined is whether the information withheld by the Public Body under section 17(1) is "personal information".

[para 29] "Personal information" is defined in section 1(n) of the FOIP 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;

Information on pages 10, 115 – 116, 129 – 130, and 137 – 139

[para 30] The information withheld on page 10 is an employee's personal email address. The Public Body disclosed the employee's name and the content of the email to the Applicant. The content of the email was work related and responsive to the Applicant's access request.

[para 31] The information withheld on pages 115 – 116, 129 – 130, and 137 – 139 are emails between employees of the Public Body.

[para 32] In Order F2009-026, the adjudicator considered whether an employee of a public body could be considered a "third party" for the purpose of section 17(1). She stated:

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

[para 33] Similarly, in Order F2023-02, the adjudicator stated:

> [para 27] Past Orders of this Office state that the disclosure of the names, contact information and other information about public body employees, that relates only to the employees acting in their professional capacities is not an unreasonable invasion of personal privacy under section 17(1) (see Orders 2001-013 at paras. 89 – 90, F2003-002 at para. 62, F2008-028 at para. 53) unless that information has a personal dimension in the circumstances. In other words, in the absence of a personal dimension, information cannot be withheld under section 17(1).

[para 34] Recently, in Order F2022-26, the adjudicator discussed whether, when an individual uses their personal email address for work purposes, the personal email address is no longer "personal information" about the individual, and therefore can not be withheld under section 17(1) of the FOIP Act.

[para 35] At paragraphs 19 – 27, the adjudicator stated:

> [para 19] Previous orders from this Office have found that section 17 does not apply to personal information that reveals only that the individual was acting in a formal, representative, professional, official, public or employment capacity, unless that information also has a personal dimension (Order F2008-028, para. 54).
>
> [para 20] Where this provision was applied to business contact information (such as work phone numbers of public body employees or business employees), it is not information to which section 17 can apply.

[para 21] The Public Body has mostly disclosed contact information for public body employees; however, in a few instances, the Public Body withheld contact information under section 17(1). For example, in Documents 19, 52, 61, 83, 102, 111, email addresses or cell phone numbers are withheld, even though they appear to relate to public body employees, and they appear in the context of the employees performing their work duties. From the context of the records, it appears that these email addresses or cell numbers are the individuals' personal contact information; many emails indicate that public body employees were emailed at both their work addresses and personal addresses. The Public Body has withheld only the contact information that appears to be personal. The Public Body has confirmed this in its initial submission.

[para 22] As well, the Public Body has withheld contact information of some individuals who appear to be acting in a professional capacity for third party businesses or associations (at Documents 96, 111, 133). In its initial submission, the Public Body states that it applied section 17(1) only to personal contact information.

[para 23] Past Orders have found that a home or personal phone number or email address may constitute business contact information such that section 17(1) does not apply, if the contact information is regularly used for work purposes. In Order F2008-028, the adjudicator said (at paras. 60-61):

> Given the foregoing, I find that disclosure of many of the telephone numbers, mailing addresses and e-mail addresses that the Public Body withheld would not be an unreasonable invasion of the personal privacy of third parties. This is where I know or it appears that the third party was acting in a representative, work-related or non-personal capacity and the telephone number, cell number or personal e-mail address (i.e. one not assigned by the public body or organization for which an individual works) may also constitute business contact information if an individual uses it in the course of his or her business, professional or representative activities. In this inquiry, where individuals include a cell number at the bottom of a business-related e-mail or other communication (as on pages 510 and 511), or where individuals send or receive business-related e-mails using what may be a personal e-mail address (as on pages 343 and 345, as well as throughout the records in relation to a communications consultant), I find that disclosure of the telephone number or e-mail address would not be an unreasonable invasion of personal privacy. Section 17 therefore does not apply.
>
> There may sometimes be circumstances where disclosure of a home number or personal e-mail address that was used in a business context would be an unreasonable invasion of personal privacy and therefore should not be disclosed. For instance, on page 238, a home number is included along with a business number and cell number, leading me to presume that the home number is being included for the limited purpose of allowing a specific other person to contact the individual at a number other that the usual business or cell number. I therefore find that section 17 applies.

[para 24] More recent Orders of this Office have accepted that where public body employees use their personal contact information for occasional work use, section 17(1) can apply to that contact information. Order F2020-36 states (at para. 63):

> The fact that public body employees offer to be reached via a personal number or email in a particular situation does not make that number or email business contact information. In the cases described above, it seems clear that the personal contact information was not being offered for long-term or ongoing business contact purposes. I find that section 17(1) can apply to this information; this finding is consistent with past Orders (see Orders F2020-03 at para. 42, F2020-16 at para. 23).

> [para 25] I agree with the above analyses, that a personal phone number, email address, or home address can become business contact information if it is used routinely for that purpose, such that section 17(1) does not apply. However, where personal contact information is provided for ad hoc communications, it remains information to which section 17(1) can apply. This is true of private sector employees as well as public body employees.
>
> [para 26] In most cases, the Public Body has withheld personal contact information where it is being used as an alternative method of contact (as opposed to routinely for work purposes). However, there are some instances in which section 17(1) cannot apply.
>
> [para 27] In one instance, the Public Body has withheld the name of a public body employee along with their personal email address, in Document 95. While the email address is personal, the email relates to the individual's work duties. Therefore section 17(1) can apply to the email address, but not the individual's name.

[para 36] As noted above, in one instance, the Public Body withheld the personal email address of an employee. The Public Body disclosed all of the other information in this record, including the employee's name, to the Applicant. Following the rationale of the adjudicator in Order F2022-26, I find that section 17(1) can apply to the employee's personal email address located at page 10 of the records.

[para 37] I further find that the information withheld about the Public Body's employees on pages 115 – 116, 129 – 130, and 137 – 139 has a personal dimension and is their personal information under sections 1(n)(i), (vii) and (ix).

[para 38] The Public Body asserted that subsections 17(4)(d), 17(4)(g)(i) and 17(4)(g)(ii) applied to the records and therefore the disclosure of the personal information was presumed to be an unreasonable invasion of the third parties' privacy.

[para 39] The Public Body submitted that the records contained personal information that related to a third party's employment performance and internal communication regarding personal opinions not about the Applicant, that if disclosed would be an unreasonable invasion of the individual's privacy (s. 17(4)(d)).

[para 40] It further submitted that the records contain the names and other personal information of third parties that if disclosed would be an unreasonable invasion of the individual's privacy (i.e. personal email address) (s. 17(4)(g)(i) and/or (ii)).

[para 41] The Public Body performed the analysis required under section 17(5). It submitted that subsections 17(5)(a), (b), (c), (d), (g), and (i) were not applicable to the records at issue.

[para 42] The Public Body submitted that section 17(5)(e) - the third party will be exposed unfairly to financial or other harm, section 17(5)(f) – the personal information has been supplied in confidence, and section 17(5)(h) – the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, applied and weighed in favour of withholding the information.[8]

[para 43] In conclusion, the Public Body submitted:[9]

> 40. Given the above, the records contain personal information that relates to a third party's employment performance and internal communications regarding personal opinions not about the Applicant. The description of the records provides the context for the reason why information was withheld in its entirety. Disclosure of the individual names involved in the emails would be an unreasonable invasion of the third parties privacy. Additionally, the personal email address of a third party was withheld under section 17(1).
>
> 41. The Public Body submits that it has established the records contain personal information of third parties and maintains that the third party information was properly withheld from disclosure in accordance with section 17 of the FOIP Act.

[para 44] I find that section 17(4)(d), section 17(4)(g)(i) and section 17(4)(g)(ii) apply to the personal information withheld on pages 10, 115 – 116, 129 – 130, and 137 – 139. Therefore, there is a presumption that the disclosure of the personal information would be an unreasonable invasion of the employees' personal privacy.

[para 45] Section 71(2) of the FOIP Act states:

> *71(2) Despite subsection (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 information.*

[para 46] The Applicant chose to rely on his Request for Review and his Request for Inquiry and any attachments thereto, as his initial submission. He did not make any submissions or provide any evidence to establish on a balance of probabilities that disclosure of the employees' personal information would not be an unreasonable invasion of their privacy. I find that the Applicant has not met his burden of proof under section 71(2).

[para 47] As a result, given that I have found that the disclosure of the personal information is presumed to be an unreasonable invasion of the employees' personal privacy under section 17(4), and the Applicant's failure to identify any factors under section 17(5) which weigh in favour of disclosure, I find that section 17(1) applies and the Public Body is required to withhold the information on pages 10, 115 – 116, 129 – 130, and 137 – 139, from the Applicant.

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[8] Public Body's initial submission dated March 10, 2020 at paragraph 39.
[9] Public Body's initial submission dated March 10, 2020 at paragraphs 40 and 41.

Information on pages 159 – 403

[para 48] The Public Body also asserted section 17(1) applied to the information on pages 159 – 403.

[para 49] The Public Body also asserted that section 27(1)(b) or (c) applied to the information on pages 159 – 403. As I have found below that sections 27(1)(b) or (c) apply to the information on pages 159 – 403, it is not necessary for me to determine whether it also properly applied section 17(1) to information in these pages.

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

[para 50] The Public Body relied on section 18(1)(a) to withhold information on pages 22 – 26, 32 – 33, 34 – 35, 40 – 41, 43 – 44, 45, 47 – 49, 59 – 61, 64 – 66, 68, 79 – 80, 87 – 89, 92, 94 – 95, 100 – 101, 102, 104, 107 – 109, 112, 115 – 116, 121 – 122, 129 – 130, 131, 135, 137 – 139, 140, 142 – 143, 144, 159 – 403 and 688 – 875.

[para 51] Many of the records withheld by the Public Body under section 18(1)(a) are records which appear numerous times. If the Applicant had excluded duplicate records from his access request, the number of responsive records would have decreased by a fair amount.

[para 52] Section 18(1) permits a public body to withhold responsive information from an applicant. It states:

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

[para 53] The Public Body made the following submissions:[10]

> 45. When considering the application of section 18 it is important to take other legislation the Public Body is subject to into account including the review of the *Occupational Health and Safety Act*, Regulation, Codes and related policies. These documents [require] the Public Body to ensure that employees are not subject to threats to their safety, mental or physical health and are briefly reviewed below.
>
> 46. The purpose of the *Occupational Health and Safety (OHS) Act* is stated in section 2 [Tab 3]:
>
> *(a) the promotion and maintenance of the highest degree of physical and social well-being of workers,*

[10] Public Body's initial submission dated March 10, 2020 at paragraphs 45 – 58.

(b) to prevent work site incidents, injuries, illnesses and diseases,
(c) the protection of workers from factors and conditions adverse to their health and safety,

47. This requires employers to ensure the health and safety of their workers, workers are required to take reasonable care to protect the health and safety of their co-workers and workers are required to co-operate with the employer for the purposes of protecting their health and safety and that of their co-workers.

48. Part 27 Violence and Harassment of the OHS Code 2009 updated in 2020 [Tab 4], indicates that workplace violence and harassment are considered to be a hazard.

49. More specifically, Part 27 Violence and Harassment of the OHS Code requires:

50. In accordance with the OHS Act and Code, the Government of Alberta (GoA) has developed the GoA Occupational Health and Safety Program – Hazard Management, and includes Workplace Violence policy to assist staff in identifying and controlling workplace violence and establishing employees' responsibilities for dealing with workplace violence. This is available online at:

http://psc.alberta.ca/Practitioners/?file+health/ohsprogmanual/hazard-mgm/titlepage&cf=398

51. Workplace violence is defined under the GoA Alberta Occupational Health and Safety Program – Hazard Management, Workplace Violence policy, as the threatened, attempted, or actual conduct of a person that causes or is likely to cause physical injury. Workplace violence towards an Alberta Public Service employee is unacceptable, whether by the public or by co-workers, and includes incident or potential incidents of violence by the public or by co-workers, and includes incidents or potential incidents of violence by the public to Alberta Public Service employees.

52. The early recognition of the potential for workplace violence and harassment is critical to the prevention of incidents. This includes the ability to recognize inappropriate behavior as a warning sign of potential hostility or violence that if left unchecked can escalate to higher levels. The Alberta Public Service has implemented measures to prevent exposure to and reduce the risk of workplace violence while employees carry out their responsibilities. This is outlined in the Employee Workplace Violence Prevention Guideline available on the above noted website.

53. At no time are Public Body employees expected to tolerate aggressive or abusive behaviour, nor are they required to exhaust valuable resources to process complaints or matters known to lack substance or merit.

54. In order to properly apply sections 18, a Public Body must satisfy the *harms test* developed in Order 96-003.

55. In paragraph 10 of Order F2003-010 the adjudicator states . . . to determine whether there is a threat to a person's safety . . . a public body must apply the test for harm developed in Order 96-003:

1) There is a causal connection between disclosure of the information and the anticipated harm;
2) The harm must constitute damage or detriment, not mere inconvenience; and
3) There is a reasonable expectation that the harm will occur.

56. The Public Body submits that the records in question meet this three (3) part harms test.

57. It is the Public Body's position that the Applicant uses information from FOIP requests to target employees and program areas and has pursued a plethora of actions against the Public Body and certain employees. This includes complaints documented in this FOIP request regarding Sheriffs and Crown Staff (e.g. pages 14 – 18 and 45 – 46). It is therefore conceivable that if information in the records withheld under section 18(1)(a) were to be disclosed the Applicant may use it against the Public Body, its staff and other third parties.

58. Given the nature and content of the records, further information is being provided *in camera*.

[para 54] "Harassment" and "violence" are defined in section 1 of the *Occupational Health and Safety Act*, S.A. 2020, c O-2.2 (the OH&S Act) as follows (my emphasis):

1 In this Act,

. . .

(n) "harassment" means <u>any single incident or repeated incident of objectionable or unwelcome conduct, comment, bullying or action by a person that the person knows or ought reasonably to know will or would</u> cause offence or humiliation to a worker, or <u>adversely affects the worker's health</u> and safety, and includes

(i) conduct, comment, bullying or action because of race, religious beliefs, colour, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status, gender, gender identity, gender expression and sexual orientation, and

(ii) a sexual solicitation or advance,

. . .

(rr) "violence", whether at a work site <u>or work-related</u>, means the <u>threatened, attempted or actual conduct of a person that causes or is likely to cause</u> physical or <u>psychological injury or harm</u>, and includes domestic or sexual violence;

. . .

[para 55] In his rebuttal submission, the Applicant stated:

> Please know that I wish to rely upon my initial submissions with respect to the above captioned matter. Also, I wish to reiterate that I did not in any way engage in any harassment of the public body staff and wish to put anyone who may allege otherwise to strict proof thereto. I have a right to pursue remedies under the foip act and request access to internal public body correspondence involving myself. Trying to hide under the "cloak" of

> harassment so as to circumvent provincial privacy legislation and so as to avoid transparency as i understand it is not a proper strategy to be applied by the public body, and these practices should immediately cease. Other concerns, grounds and evidence exists or may exist and I reserve and preserve my rights.

[para 56] While the FOIP Act gives the Applicant a right to request information from the Public Body under the FOIP Act, it also gives the Public Body the right to assert exceptions to the disclosure of responsive information. In some cases those exceptions are discretionary and in some cases they are mandatory.

[para 57] The Applicant provided no evidence to support his allegation that the Public Body was applying section 18(1)(a) as a strategy to circumvent provincial privacy legislation.

[para 58] In Order F2015-34, the adjudicator considered what a public body was required to establish in order for section 18(1) to apply. At paragraphs 47 and 48 the adjudicator stated:

> [para 47] Prior decisions of this office regarding this section were reviewed by the Director of Adjudication in Order F2013-51. After reviewing those decisions, she stated (at para. 20 and 21):
>
> > These cases establish that section 18 of the FOIP Act applies to harm that would result from disclosure of information in the records at issue, but not to harm that would result from factors unrelated to the disclosure of information in the records at issue. Further, a public body applying section 18 of the FOIP Act must provide evidence to support its position that harm may reasonably be expected to result from the disclosure of information . . .
> >
> > Following the approach adopted by the former Commissioner in Order 96-004, and subsequent cases considering either section 18 of the FOIP Act or section 11 of the HIA, the onus is on the Public Body to provide evidence regarding a threat or harm to the mental or physical health or safety of individuals, to establish that disclosure of the information and the threat are connected, and to prove that there is a reasonable expectation that the threat or harm will take place if the information is disclosed.

[para 59] The Public Body pointed to the records at pages 14 – 18 and information on pages 45 – 46 which it disclosed to the Applicant, as evidence that supported its position that if it were to release the information withheld under section 18(1)(a) to the Applicant, the disclosure could reasonably be expected to threaten the mental health of its employees or other third parties.

[para 60] I understand the Public Body to be arguing that when the Applicant does not get what he wants from the Public Body's employee, or does not like the action or decision an employee of the Public Body has taken or made with respect to the Applicant, or even the tone of voice the employee used to speak with the Applicant, the Applicant retaliates against the employee by making and/or filing complaints, and/or commencing actions against the employee wherever he can.[11]

[11] For example, complaints about the employee to their supervisor/manager; complaints to an employee's regulatory body; complaints to various tribunals, commissions or boards; and commencing actions in the Courts.

[para 61] The Public Body's position is that Applicant's actions could reasonably be expected to negatively affect its employees' mental health by inflicting mental suffering and stress on those employees, and that this amounts to harassment, or bullying, of its employees.

[para 62] I understand the Public Body to be arguing that it has an obligation under the OH&S Act to protect its employees from harassment and violence, and that the Applicant's prior actions in relation to its employees has amounted to harassment of and/or violence in the form of psychological injury or harm, as defined in the OH&S Act, against its employees.

[para 63] I understand the Public Body to be arguing that if it discloses the information it has withheld under section 18(1)(a) to the Applicant, the Applicant will use this information to continue his pattern of making complaints and/or commencing actions in retaliation against the employee or employees or other third parties wherever he can, or engaging in other behavior that is intimidating and/or relentless, and threatens the mental health of the employee or employees' or third party.

[para 64] The Applicant argues there is no merit to the Public Body's argument. He argues that he "did not in any way engage in the harassment of the public body staff".

[para 65] Section 18(1)(a) permits the head of the Public Body to withhold the responsive information on the basis that the disclosure *could reasonably be expected* to threaten anyone else's safety or mental or physical health.

[para 66] It is the head of the Public Body that makes this decision. Neither how the Applicant perceives his interactions with the Public Body's employees, nor whether he intends for his behaviour to threaten the mental health of the Public Body's employees, is relevant to a determination as to whether section 18(1)(a) applies.

[para 67] Section 18(1)(a) does not require a Public Body to determine that the disclosure of the information *will* threaten anyone else's, safety or mental or physical health, only that disclosure *could be reasonably expected* to threaten anyone else's safety or mental or physical health.

[para 68] If, based on the Public Body's prior experience with the Applicant, and the actions the Applicant has taken against its employees, or other third parties, the Public Body believes that the disclosure of the information to the Applicant could reasonably be expected to threaten the Public Body's employees', or anyone else's, safety or mental or physical health, then the Public Body may withhold this information from the Applicant under section 18(1)(a).

[para 69] I have reviewed records located at pages 14 – 18 and 45 – 46 referred to by the Public Body as evidence which supports its position. These records were disclosed to the Applicant.

[para 70] The record at pages 14 - 16 is a letter (the Letter) from the Public Body's Professional Standard Unit (PSU) responding to a multitude of complaints the Applicant made

against a Sheriff who had issued him a traffic ticket (pages 17 – 18). The decision maker for the PSU in that case stated at pages 14 – 16, in part:

> . . .
>
> . . . You advised Sheriff [NAME] is intentionally targeting and intimidating you for retaliatory reasons due to your various legal actions you are pursuing against the Sheriffs Branch.
>
> You complained that on July 6, 2012 you were "the falsely accused, received a frivolous, vexatious, specious, false, defamatory and retaliatory speeding violation by an individual who represents my [ex] employer, who I am in current labour relations litigation with."
>
> The Professional Standards Unit (PSU) reviewed the allegations against Sheriff [Name] as outlined in your complaint and emails . . .
>
> During the traffic stop Sheriff [Name] is professional, calm and does not make any derogatory comments towards you. There is no evidence in the video to confirm your complaint that Sheriff [Name] has targeted you . . .
>
> The second part of your complaint deals with a court appearance on October 2, 2012. You were in Red Deer Provincial Court to deal with the violation ticket issued to you by Sheriff [Name] on July 6, 2012. You advised you were approached by Sheriff [Name] and you attempted to explain to Sheriff [Name] that you were not speeding and would like to have the matter reduced. You advised Sheriff [Name] denied you the opportunity to reduce the violation ticket. You advised "I vividly observed him deny me such and refer to me with exclamations of contempt in a very malicious tone of voice and snarky, overconfident facial characteristics which caused me to come to the conclusion that he may have been seeking vindication for some perceived hurts/or slights". You then advised Sheriff [Name] you were going to speak to his supervisor and Sheriff [Name] allegedly responded by indicating he could file a grievance as well, followed by a smirk.
>
> It must be noted Sheriff [Name] does not have the authority to provide reductions in traffic tickets and all requests for reduction in monetary fines or points attached to violations must be dealt with by a Crown Prosecutor. The comments which caused you to come to the conclusion Sheriff [Name] was seeking vindication is purely specious and without merit and do not constitute breaches pursuant to the Sheriffs and Security Operations Branch Code of Conduct.
>
> . . .
>
> After careful review by the PSU, it was determined the concerns alleged by you do not meet the threshold of a breach of the Sheriffs and Security Operations Branch Code of Conduct. Your allegations are bordering on being frivolous, vexatious and made in bad faith.
>
> . . .
>
> The remainder of your allegations are vexatious, specious, without merit and do not constitute breaches pursuant to the Sheriffs and Security Operations Branch Code of Conduct and this complaint should not be investigated further.

. . .

[para 71] The record located at pages 45 – 46 is an email dated November 8, 2012 (the Email) the Applicant sent to the Office Manager, Crown Prosecutors' Office and the Alberta Ombudsman, in response to a letter the Office Manager sent to him from the Crown Prosecutor, in relation to the trial stemming from the traffic ticket he received from the Sheriff referenced in the records located at pages 14 – 16, and 17 – 18.

[para 72] In the Email, the Applicant states:

> WITHOUT PREJUDICE SAVE AS TO COSTS
>
> Hi Miss [Name],
>
> Further to our telephone correspondence which occurred a few minutes ago, we have discussed your reasons as to why such below threatening and intimidating correspondence dated NOV. 7TH, 2012 was sent to me.
> In response, you've stated because and I quote "you are calling our office." I have only called your office twice to find out who the crown is in relation to my matter.
> In addition to such, I must point out that in other cities, the proper process is to call the Crown Prosecution Plaza and find out who is dealing with your matter.
> Apparently not in Red Deer, as you have advised. Furthermore, I have asked you why the phrase "Please seek real legal advice" is placed on the letter. To this, you have stated that my counsel is not a member of the bar. Please know that having just gotten off the phone with the law society of Alberta, I was advised to put everything in writing and send all materials, including the letter and correspondence from Mr. [Name of Crown Prosecutor] relayed by yourself miss [Name], as you are a witness to this unbecoming and threatening conduct, in complaint form and forward such to the law society for disciplinary purposes, for such conduct, as I was advised, is contrary to the law society of Alberta Rules and Regulation, for a prosecutor must always be candid. The general public is to not be talked to in such a manner by members of the bar, as this has the potential of bringing the profession of law into disrepute and may be worthy of a sanction. Phrases such as "Please seek real legal advice", and "you're not welcome to send any correspondence" are very concerning and are perceived as bullying tactics. Also, please know that I will be filing an Alberta ombudsman complaint so as to have all of the concerns discussed addressed on the executive director level.
>
> Thank you for your time.
>
> Regards,
>
> [Applicant]

[para 73] I find that the Letter and the Email, as well as other records in the responsive records, support the Public Body's submission regarding the Applicant's proclivity to make or file complaints and/or commence other actions wherever he can, in retaliation against an employee who is simply carrying out their employment duties, when he does not like what the employee says or does.

[para 74] In its *in camera* submission, the Public Body provided me with further information as to why the disclosure of the information withheld under section 18(1)(a) could reasonably be expected to threaten the Public Body's employees' and other third parties' mental health. It supplied information of the Applicant's behaviors in a number of past incidents that can objectively be considered to be intimidating and/or harassing, and which negatively affected its employees' mental health.

[para 75] In *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, the Supreme Court held that when an access to information statute uses the phrase "could reasonably be expected to", the "reasonable expectation of probable harm" formulation adopted by the Court in *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 should be used. At paragraph 54 the Court stated:

> [54] 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 M*erk 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 ad 199. This inquiry is of course 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 the "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. 41 at para. 40.

[para 76] Based on the evidence, the exchanged submissions and the *in camera* submission provided to me by the Public Body, I find that the Public Body has established that the Applicant's prior conduct and interaction with the Public Body's employees was intimidating and harassing, and threatened their mental health.

[para 77] Based on the Public Body's evidence, its exchanged submissions, and its *in camera* submission, I find that there is a reasonable expectation of probable harm if some of the information withheld under section 18(1)(a) is disclosed to the Applicant.

[para 78] I find that the Public Body has provided sufficient evidence to show that there is a causal connection between the disclosure of some of the information withheld under section 18(1)(a) and the anticipated harm. Further, the Public Body has shown that the harm would constitute damage and not mere inconvenience, and that there is a reasonable expectation, considerably above a mere possibility, that harm would occur.

[para 79] In a number of the cases where I have found section 18(1)(a) applies, the information is also about an employee that has a personal dimension (pages 44, and 47 – 48, 66, and 68 for example), or personal information about a third party (pages 34 – 35, 59, and 60 – 61, for example). In some of these cases, but not all, the Public Body also applied s. 17(1) to the information.

[para 80] As noted above, section 17(1) is a mandatory provision. Had I determined that section 18(1)(a) did not apply in these cases, and no other exceptions asserted by the Public Body applied, I would have ordered the Public Body to re-process these records giving consideration to whether the disclosure of the information would be an unreasonable invasion of the employee's or third party's personal privacy under section 17.

[para 81] In this case, I find that section 18(1)(a) applies to some of the information withheld under section 18(1)(a), but not all of the information withheld under section 18(1)(a). I will detail below where I find section 18(1)(a) does not apply to the information withheld by the Public Body pursuant to this section.

Exercise of Discretion

[para 82] Section 18(1)(a) is a discretionary exception to disclosure. This means the Public Body may, but does not have to disclose information to which section 18(1) applies.

[para 83] The Public Body's exercise of discretion is reviewable by this Office.[12]

[para 84] Where an inquiry relates to a public body's decision to withhold responsive information under a discretionary exception, section 72(2)(b) states that the Commissioner may "either confirm the decision of the head or require the head to reconsider it, if the Commissioner determines that the head is authorized to refuse access;".

[para 85] In other words, if I find that the Public Body exercised its discretion reasonably in refusing to provide the Applicant with the information he requested under section 18(1) of the FOIP Act, then I, as the Commissioner's delegate, am to confirm the Public Body's decision.

[para 86] If I find that the Public Body did not exercise its discretion reasonably, I do not have the authority under the FOIP Act to order the Public Body to disclose the information to the Applicant. Rather, section 72(2)(b) of the FOIP Act requires me to order the Public Body to reconsider its decision as to whether to give the Applicant access to all or part of the record containing the information.

[para 87] To reiterate, the FOIP Act does not confer on me the authority to order the Public Body to disclose the withheld information to the Applicant if I find it has not exercised its discretion reasonably. I can only order the Public Body to reconsider its decision.

[para 88] In Order F2024-09, at paragraph 77, the adjudicator stated the following with respect to the review of a public body's discretion:

> [para 77] The Commissioner will review the public body's reasons for exercising discretion to withhold information from an applicant. If the Commissioner determines that the public body failed to consider a relevant factor or took into consideration irrelevant factors, or did not provide adequate reasons for withholding information, the Commissioner will direct the public body to reconsider its exercise of discretion.

[12] See for example, Order F2024-09 at paragraphs 69 – 77.

[para 89] In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, (*Ontario (Public Safety and Security)*) the Supreme Court of Canada stated at paragraph 71:

> [para 71] The Commissioner may quash the decision not to disclose and return the matter for reconsideration where: the decision was made in bad faith or for an improper purpose; the decision took into account irrelevant considerations; or, the decision failed to take into account relevant considerations (see IPC Order PO-2369-F/February 22, 2005, at p. 17).

[para 90] Previous Orders of this Office have concluded that while the *Ontario (Public Safety and Security)* decision of the Supreme Court of Canada was decided under Ontario's legislation, it in has equal application to the FOIP Act.[13]

[para 91] In Order F2023-38, the adjudicator considered the public body's exercise of discretion in withholding information under section 18(1)(a). At paragraph 53, the adjudicator stated:

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

[para 92] I have considered the reasons provided by the Public Body in its initial submission and its *in camera* submission for withholding the information under section 18(1)(a). Where I have found below that the Public Body has established section 18(1)(a) applies, I am satisfied that the Public Body has properly exercised its discretion to withhold such information.[14]

Records over which Section 18(1)(a) was asserted <u>in addition to</u> other exceptions under the FOIP Act: Pages 22 – 26, 32 – 33, 34 – 35, 40 – 41, 43 – 44, 45, 47 – 49, 59 – 61, 64 – 66, 68, 79 – 80, 87 – 89, 92, 94 – 95, 100 – 101, 102, 104, 107 – 109, 112, 115 – 116, 121 – 122, 123 – 124, 129 – 130, 131, 135, 137 – 139, 140, 142 – 143, 144, 159 – 403.

[para 93] As previously mentioned, many of the records to which section 18 was applied appear identically in numerous places in the records. Had the Applicant requested that duplicate records be excluded from the scope of his request, the number of responsive records would have dropped by fair amount.

[para 94] I find that section 18(1)(a) was properly applied to withhold the information/record on pages 22 – 26, 32 – 33, 34 – 35, 40 – 41, 43 – 44, 45, 47 – 49, 59 – 61, 64 – 66, 68, 79 – 80, 87 – 89, 92, 94 – 95, 100 – 101, 102, 104, 107 – 109, 112, 115 – 116, 121 – 122, 123 – 124, 129 – 130, 131, 135, 137 – 139, 140, 142 – 143, and 144.

[para 95] As I have determined below that sections 27(1)(b) or (c) applies to the information withheld on pages 159 – 403, it is not necessary for me to determine whether section 18 also applies to any of the information in these pages.

---

[13] See, for example, Order F2024-09 at paragraph 71 and 72.
[14] See too, Order F2015-34 at paragraphs 50 - 56.

[para 96] With the exception of the records located at pages 688 – 875, which I will discuss below, everywhere else the Public Body asserted section 18(1)(a) applied, it also asserted that sections 24(1)(a) and 24(1)(b) applied. As I have determined that the information has been properly withheld under section 18(1)(a), it is not necessary for me to consider whether sections 24(1)(a) or (b) also apply to the information.

Records over which only Section 18(1)(a) was asserted: Pages 688 - 875

[para 97] The Public Body asserted that section 18(1)(a) alone applied to withhold the records located at pages 688 – 875.

[para 98] Pages 688 – 875 are comprised of pages of transcripts from a trial in the Provincial Court of Alberta involving the Applicant, that occurred over a period of time between Court proceedings on various dates between October 2, 2012 – July 17, 2013, as well as 14 pages which are blank with the exception of very brief handwritten case notes made by a Crown Prosecutor.

[para 99] The Public Body did not assert that section 4(1)(a) of the FOIP Act applied to the pages of transcript; however, I must consider the application of section 4(1)(a) since, if section 4(1)(a) applies to the pages of transcripts, I have no jurisdiction to review the Public Body's decision to withhold them.

[para 100] Section 4(1)(a) of the FOIP Act is reproduced at paragraph 18 above.

[para 101] As noted at paragraph 19 above, previous Orders of this Office have determined that in addition to documents filed with the Court, transcripts of Court proceedings also fall under section 4(1)(a) of the FOIP Act.

[para 102] As previously cited at paragraph 20 above, at paragraph 23 in Order F2007-021, the adjudicator specifically found that copies of transcripts from court proceedings are excluded from the application of the FOIP Act under section 4(1)(a).

[para 103] Accordingly, I do not have jurisdiction to review the Public Body's decision to withhold the pages of transcripts.

[para 104] While I do not have the authority under the FOIP Act to review the Public Body's decision to withhold the transcripts, I do have the jurisdiction to consider the Public Body's application of section 18(1)(a) to withhold the Crown Prosecutor's handwritten case notes, as they are not subject to section 4(1)(a) of the FOIP Act.

[para 105] There is one page of these records, page 688, which is the transcript cover page, on which the Crown Prosecutor has written a case note. There are 14 additional pages in pages 688 - 875, which are blank with the exception of very brief handwritten case notes made by a Crown Prosecutor.

[para 106] I have reviewed the Crown Prosecutor's handwritten case notes. I find that all of the case notes were properly withheld under section 18(1)(a) except for the case notes on the following pages: 688, 704, 709, 714 (second comment only), 724, and 726.

[para 107] Where I have found that section 18(1)(a) does not apply, it is because the case notes appear to be innocuous, and I do not see how disclosure of the case notes to the Applicant could reasonably be expected to threaten anyone's (including the Crown Prosecutor's) safety or mental or physical health.

[para 108] It appears that the Public Body just asserted section 18(1)(a) over *all* of the case notes without considering whether disclosure of *each* case note to the Applicant could reasonably be expected to threaten the Crown Prosecutor's, or anyone else's safety, or mental or physical health, and without considering whether any other provision of the FOIP Act could apply to the case notes.

[para 109] Given the nature of the withheld information, in this case, I have decided it is appropriate to order the Public Body to re-process the case notes where I have found section 18(1)(a) does not apply, and provide a new response to the Applicant that contains the information required in section 12 of the FOIP Act.

[para 110] To be clear, I am not ordering the Public Body to disclose the case notes to the Applicant. I am ordering the Public Body to reprocess the case notes which I have found are not subject to section 18(1)(a), and to inform the Applicant whether it will provide him with access to all or a portion of them, and if not, to inform him of the provision of the FOIP Act on which the refusal is based.

4. Did the Public Body properly apply section 20(1)(g) of the Act (disclosure that could reasonably be expected to reveal information used in the exercise of prosecutorial discretion) to information in the records?

[para 111] Section 20(1)(g) 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*
>
> . . .
>
> *(g) reveal any information relating to or used in the exercise of prosecutorial discretion,*
>
> . . .

[para 112] The Public Body applied section 20(1)(g) to pages 1 – 5, 19 – 21, 27 – 31, 32 – 33, 36 – 39, 50 – 58, 62 – 63, 90, 110 – 111, 113 – 114, 119 – 120, 147 – 158, 159 – 403 and 404 – 409.

[para 113] On every page where the Public Body asserted section 20(1)(g) applied, the Public Body also asserted that one or more other exceptions under the FOIP Act applied.

[para 114] Section 20(2) of the FOIP Act states:

> *(2) Subsection 20(g) does not apply to information that has been in existence for 10 years or more.*

[para 115] The Public Body may have correctly applied section 20(1)(g) at the time it provided its response to the Applicant's access request; however, if the Applicant were to make an access request for these records now, the Public Body could not apply section 20(1)(g) to withhold the information, as it has been in existence for 10 years or more.

[para 116] In light of this, it would be of little assistance to the parties for me to determine whether the Public Body properly applied section 20(1)(g) to withhold information in the responsive records, as it has now been in existence for 10 years or more.

[para 117] What the parties need to know is whether one or more of the other exceptions the Public Body applied to the information in the records over which it asserted section 20(1)(g), was properly applied by the Public Body when it responded to the Applicant's access request, and *still* applies.

[para 118] Accordingly, I will not consider the Public Body's application of section 20(1)(g) to withhold information in the responsive records, but will consider whether any of the other sections applied by the Public Body to withhold information in the responsive records, were properly applied and still apply.[15]

[para 119] There are some email chains which were forwarded to a Public Body employee in 2015, likely to prepare the Public Body's response to the Applicant. These forwarding emails are outside the scope of the date range of the Applicant's access request and as a result, they are non-responsive, and I do not need to determine whether any of the exceptions the Public Body applied to withhold them were properly applied.

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

[para 120] The Public Body applied section 24(1)(a) and (b) to withhold information on pages 22 – 26, 32 – 33, 40 – 41. 43 – 44, 45, 47 – 49, 59 – 61, 64 – 66, 68, 79 – 80, 87 – 89, 92, 94 – 95, 100 – 101, 102, 104, 107 – 109, 112, 115 – 116, 121 – 122, 129 – 130, 131, 135, 137 – 139, 140, 142 – 143, 144, and 159 – 403.

[para 121] Section 24(1)(a) and (b) state:

[15] A similar approach was taken by the Court in *Edmonton Police Service v. Alberta (information and Privacy Commissioner)*, 2020 ABQB 10 (*EPS*) at paragraphs 524 and 525 with respect to information withheld under section 24(1).

24(1) The head of a public body may refuse to disclose information to any applicant if the disclosure could reasonably be expected to reveal

(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,

(b) consultations or deliberations involving

(i) officers or employees of a public body,

(ii) a member of the Executive Council, or

(iii) the staff of a member of the Executive Council,

[para 122] As stated above, since I have found that sections 17, 18, 27(1)(b) or (c) applied to the information in the records over which sections 24(1)(a) and/or 24(1)(b) were also asserted, it is not necessary for me to determine whether sections 24(1)(a) and/or 24(1)(b), also apply to the information.

[para 123] I note that the Public Body did not consistently apply exceptions asserted with respect to a record, to duplicate copies of the record. For example, it applied sections 18(1), 24(1)(a) and (b) to information in one record, and section 20(1)(g) and section 27(1)(c) to the same information where it appeared in another record.

[para 124] Had I determined that sections 17 or 18 did not apply to a record where sections 24(1)(a) and (b) were asserted, I would have ordered the Public Body to re-process the record to determine whether section 24(1)(a), section 24(1)(b), and/or section 27(1)(c) applied to the record.

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

[para 125] The Public Body advised that it was not applying section 27(1)(a) to withhold any information in the responsive records.

[para 126] The Public Body advised that it had applied section 27(1)(b) to withhold information on pages 147 – 152, 153 – 403, and 404 – 409.

[para 127] The Public Body advised it had applied section 27(1)(c), to withhold information on pages 1 – 5, 19 – 21, 27 – 33, 36 – 39, 50 – 58, 62 – 63, 90, 110 – 111, 113 – 114, 119 – 120, and 159 – 403.

[para 128] Sections 27(1)(b) and (c) state:

27(1) The head of a public body may refuse to disclose to an applicant

. . .

(b) information prepared by or for

(i) the Minister of Justice and Solicitor General,

(ii) an agent or lawyer of the Minister of Justice and Solicitor General, or

(iii) an agent or lawyer of a public body,

in relation to a matter involving the provision of legal services, or

(c) information in correspondence between

(i) the Minister of Justice and Solicitor General,

(ii) an agent or lawyer of the Minister of Justice and Solicitor-General, or

(iii) an agent or lawyer of the public body,

and any other person in relation to a matter involving the provision of advice or other services by the Minister of Justice and Solicitor-General or by the agent or lawyer.

[para 129] Section 71(1) of the FOIP Act states:

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

[para 130] Accordingly, the burden of proof lies with the Public Body to prove that section 27(1)(b) or section 27(1)(c) applies to the records at issue.

[para 131] At paragraphs 383 – 457 in *Edmonton Police Service v. Alberta (information and Privacy Commissioner)*, 2020 ABQB 10 (*EPS)*, the Court reviewed the relationship between sections 27(1)(a) – (c), and how sections 27(1)(b) and (c) should be interpreted.

[para 132] The Court's analysis in *EPS* is essential reading for any public body considering applying section 27(1)(a), (b) and/or (c). Given the importance of the Court's guidance to public bodies in applying these sections, and to this Office in reviewing the application of these sections, I have reproduced the key paragraphs below (emphasis in original):

> **VIII. Paragraphs 27(1)(b) and 27(1)(c)**
>
> [383] As an alternative to s. 27(1)(a), EPS relied on ss. 27(1)(b) and (c) as bases for non-disclosure.
>
> . . .

[385] My main conclusions are that the Adjudicator's interpretive approach to the relationship of ss. 27(1)(b) and (c) was reasonable as was (for the most part) the Adjudicator's approach to EPS's exercise of discretion. I agree with the Adjudicator's concerns respecting EPS's approach to justifying its exercises of discretion. In contrast, the Adjudicator's restrictive interpretations of some elements of ss. 27(1)(b) and (c) were unreasonable.

. . .

[387] After reviewing the governing statutory provisions and interpretive issues common to ss. 27(1)(b) and (c), I will consider interpretive issues concerning each of s. 27(1)(b) and (c), then some issues concerning the application of these provisions to the records.

A. Statutory Provisions

[388] Paragraphs 27(1)(b) and (c) read as follows:

. . .

B. The Interpretation of ss. 27(1)(b) and (c)

1. Principles of Statutory Interpretation

[389] In *Geophysical Service v EnCana*, 2017 ABCA 125 at para 77, the Court of Appeal provided a concise and helpful account of the correct approach to statutory interpretation:

> [77] A succinct template for the correct approach is provided by the Supreme Court of Canada in *Rizzo v Rizzo Shoes Ltd*, (Re), [1998] 1 SCR 27 at para 21:
>
> > Although much has been written about the interpretation of legislation . . . Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
> >
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament . . .
>
> See also *Orphan Well Association v Grant Thornton Ltd.*, 2017 ABCA 124 (CanLII) at para 192.

[390] The Drieger approach is consistent with the direction provided by s. 10 of the *Interpretation Act*:

> 10 An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.

[391] A further principle bearing on interpretation in the present context was confirmed by Justice Moldaver in *McLean v British Columbia Securities Commission* at para. 40:

> [40] The bottom line here, then, is that the Commission holds the interpretative upper hand: under reasonableness review, we defer to any reasonable interpretation adopted by an administrative decision maker rather than the courts with "administer[ing] and apply[ing]" its home statute (*Pezim*, at p. 596), it is the decision maker, first and foremost, that has the discretion to resolve a statutory uncertainty by adopting any interpretation that the statutory language can reasonably bear. Judicial deference in such instances is itself a principle of modern statutory interpretation. [emphasis added]

See *Canada Post v CUPW* at para 40. As regards ss. 27(1)(b) and (c), the question, then, is not whether the statutory language bears reasonable interpretations alternative to or even preferable to the Adjudicator's, but whether the Adjudicator's interpretations were unreasonable. I will consider interpretive issues common to ss. 27(1)(b) and (c) before turning to the interpretation of each paragraph.

2. The Relationship of ss. 27(1)(a) – (c)

[392] Justice McMahon provided an overview of ss. 27(1)(b) and (c) in *McDonald (Re)*, 2003 CanLII 71714 (AB OIPC) at para 12:

> [12] As can be seen from the foregoing, the exemptions and exceptions are very wide and have the potential to sweep in a number of government documents. In addition, the head of the public body has a discretion in many cases to release documents or not. Despite the noble sentiments often expressed in support of this kind of legislation, the reality is that a government's desire for secrecy too often trumps the nominal objective in support of this kind of legislation, the reality is that a government's desire for secrecy too often trumps the nominal objective of "freedom of information". When attempting to access information from Alberta Justice files in particular one need only to look to s. 27(1) to see the crafted impediments. Subsection 27(1)(b) permits the public body to refuse disclosure of information prepared by or for an agent or a lawyer of the public body that merely relates to a matter involving the provision of legal services. The information need not involve the provision of actual legal services. Even more sweeping is subsection 27(1)(c). It permits non-disclosure of information in any correspondence between a lawyer of a public body (which would include all Alberta Justice lawyers), or an agent of a public body (which would extend to the non-legal staff of Alberta Justice) on the one hand, and anyone else. The information need merely relate to a matter involving the provision of any kind of advice or any kind of service by the agent or lawyer. [emphasis added]

The architecture of ss. 27(1)(a) through (c) is one of expanding scope, with para (a) (information subject to privilege) having most limited scope; para (b) expanding protection to information "in relation to a matter involving the provision of legal services; " and para (c) expanding protection to information "in correspondence" and "in relation to a matter involving the provision of advice or other services." It follows, as the Adjudicator reasoned, that information protected under para (c) is not necessarily protected under para (b) or para (a), and information protected under para (b) is not necessarily protected under para (a): F2013-13 at para 252. Further, the Adjudicator was right that

"[d]espite the references to the Minister of Justice and Attorney General in these provisions, sections 27(1)(b) and (c) do not appear intended to protect activities uniquely associated with that office, given that these provisions also apply to all public bodies general:" *ibid.*

[393] The Adjudicator's interpretation was not limited to recognizing the increasing scope of the exceptions. According to the Adjudicator, ss. 27(1)(a)-(c) not only expand the bases for non-disclosure, but each paragraph deals with discrete types of information, at least as regards solicitor-client privilege. The Adjudicator wrote as follows in F2013-13 at para 252:

> [para 252] Although section 27(1)(b) may apply in some instances to records that are subject to privilege, it does not follow that section 27(1)(b) applies to all records that are subject to solicitor-client privilege or is intended to do so. Determining whether section 27(1)(b) applies does not involve consideration of whether information is subject to privilege, but involves inquiring whether a person listed in subclauses 27(1)(b) (i-iii) prepared the record, and whether the record was prepared for the purpose of providing legal services. Section 27(1)(b) is clearly not intended to protect privileged information, as that is the purpose of section 27(1)(a) . . .

Paragraphs 27(1)(a), (b), and (c) are adjacent but separate compartments, designed to hold different types of information. The Adjudicator relied on Order F2015-31 at paras 73 – 75 (see F2017-57 at para 110 and F2017-58 at paras 161, 180, 186):

> [para 73] In my view, where the "legal services" or the "advice or other services" that are being provided by a public body's lawyer consist of legal advice, sections 27(1)(b) and 27(1)(c) are not intended to apply to the legal advice itself, nor to the communications made for the purposes of giving it, or the communications subsequently discussing it. Rather, these provisions are meant to cover other kinds of information, having some relationship to that advice, that needs to be freely prepared or exchanged.
>
> [para 74] In other words, the parts of records that seek, provide or discuss legal advice, and thereby reveal it, themselves constitute the legal advice/service; they cannot sensibly be said to be 'information in relation to a matter involving the provision of legal services (or advice or other services) within the terms of the latter two provisions. To say, for example, that legal advice prepared by a lawyer relates to a matter involving the provision (as a service) of that legal advice by that lawyer is to say something grammatically and logically incoherent . . .
>
> [para 75] As well, if the converse was true, if it were the case, for instance, that section 27(1)(b) covered legal advice, or information that reveals legal advice, as one kind of information prepared by a public body or a public body's lawyer in relation to a matter involving the provision of legal services, the protection of solicitor-client privilege for public bodies under section 27(1)(a) would be largely redundant.

[394] EPS contended that the Adjudicator misinterpreted ss. 27(1)(b) and (c). EPS advanced a sort of "matryoshka" or "nesting dolls" interpretation. Information could be covered by solicitor-client privilege under s. 27(1)(a) but also fall under paras (b) or (c) or all three: EPS Brief at paras 169, 179, 181, 203; IPC Brief at para 106.

[395] In my opinion, EPS's interpretation is incorrect. It would mean that a legal opinion (the "information") was "in relation to a matter involving the provision of" a legal opinion (the legal services were to provide a legal opinion).

[396] Further, a virtue of the Adjudicator's interpretation is that it gives a job to each statutory provision, aligning with Professor Sullivan's articulation of the "presumption against tautology" in The Construction of Statutes at §S8.23:

> §S8.23 *Governing principle*. It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain. Every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose . . . [footnote omitted]

The Adjudicator's interpretation avoids the prospect of solicitor/client privilege doctrine, particularly regarding the continuum of communications, expanding from s. 27(1)(a) and obviating the need for paras (b) and (c), at least respecting communications tied to the provision of legal services.

[397] The IPC also argued, correctly in my view, that the Adjudicator's interpretative approach was consistent with the "presumption of orderly and economical arrangement," which Professor Sullivan described in The Construction of Statutes as follows at §S8.21:

> §S8.21 *Presumption of orderly and economical arrangement*. It is presumed that in preparing the material that is to be enacted into law the legislature seeks an orderly and economical arrangement. Each provision expresses a distinct idea. Related concepts and provisions are grouped together in a meaningful way. The sequencing of words, phrases, clauses and larger units reflects a rational plan.

[398] The Adjudicator's interpretation does not unduly narrow the protection of information arising from the solicitor-client relationship. Paragraph (a) imports solicitor-client privilege doctrine. Any information that should be protected by solicitor-client privilege outside *FOIPPA* will be protected by s. 27(1)(a) under *FOIPPA*.

[399] While the Adjudicator's interpretation of the relationship of ss. 27(1)(a) – (c) may not be the only possible interpretation, I do not find that it is an unreasonable interpretation.

[400] Hence, Justice Cromwell's observations in *McLean* provide a full answer to EPS. Even if the EPS interpretation were reasonable that interpretation would not displace the Adjudicator's interpretation. Paragraphs 27(1)(b) and (c) are elements of the Adjudicator's home statute and her interpretation is entitled to deference, so long as it falls within the scope of reasonable interpretation. In my view, the Adjudicator's interpretation is reasonable.

. . .

C. Interpreting s. 27(1)(b)

[423] Paragraph 27(1)(b) refers to information "prepared" "by or for" certain persons, "in relation to a matter" involving certain purposes. The Adjudicator and EPS differed in their interpretations of "prepared," "by or for," and "in relation to a matter." In my opinion, the Adjudicator restrictive interpretations of "prepared" and "matter" were not reasonable.

1. "Prepared"

[para 424] "Prepared" is a common English word. The *Oxford English Dictionary* (OED 3rd ed., March 2007) provides some definitions of "prepare" relevant to s. 27(1)(b):

> 2. . . . To make ready . . .
>
> 6. . . .a. . . . To produce, form, or make . . .; to manufacture; to synthesize, concoct, compound . . .
>
> b. To compose and write out; to draw up (a text or document).

The Adjudicator began appropriately. She interpreted "prepared" to mean "made or got ready for use:" F2017-57 at paras 114, 122, 185; F2017-58 at paras 166.

[425] However, the Adjudicator then claimed in F2017-57 at paras 114 and 122 that

> [para 114] . . . The term "prepared" is not synonymous with "writing" or "creating", and "writing an email" is not the same thing as "preparing an email". Had the Legislature worded section 27(1)(b) so that it encompassed any information "written by an agent or lawyer of a public body in relation to a matter involving the provision of legal services" it could have easily done so. (see also F2017-58 at para 166)
>
> [para 122] . . . In my view, "preparing" information involves something more than obtaining pre-existing information and using it. Preparing information involves creating or altering the information in some way, (such as annotating it) so that it may be used for a particular purpose.

It is true that preparation is for use, and use implies a purpose. (It is difficult to imagine "preparing" anything if the acts of preparation were not for some purpose, even if the purpose turns out to be frustrated (what was done was done "for nothing")). But preparation is different from alteration for a purpose, and different again from creation for a purpose.

[426] The Adjudicator's motivation for adopting a restrictive interpretation of "prepared" appears to have been to confine the scope of s. 27(1)(b) to "substantive" information: para 114. At para 113, the Adjudicator claimed that

> [para 113] . . . Further, section 27(1)(b) applies only to substantive information, and not to information such as dates, letter head, names and business contact information (see Orders F2008-028 and F2013-51).

[427] I have kept in mind Justice Moldaver's comments in *McLean v BC Securities Commission* at para 40 quoted above and Justice Rowe's recent confirmation that the administrative decision maker "holds the upper hand." *Canada Post v CUPW* at para 40. Justice Rowe continued at para 42:

> [42] Where the meaning of a statutory provision is in dispute, the administrative decision maker must demonstrate in their reasons that they were alive to the "essential elements" of statutory interpretation: "the merits of an

> administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision" (*Vavilov*, at para. 120). Because those who draft statutes expect that the statute's meaning will be discerned by looking to the text, context and purpose, a reasonable interpretation must have regard to these elements – whether it is the court or an administrative decision maker tasked with the interpretative exercise (*Vavilov*, at para. 118). In addition to being harmonious with the text, context and purpose, a reasonable interpretation should conform to any interpretative constraints in the governing statutory scheme, as well as interpretative rules arising from other sources of law . . .

What is not licit is "reverse-engineering" a desired outcome: *Vavilov* at para 121; *Canada Post v CUPW* at para 43.

[428] In my opinion, nothing in s. 27(1)(b) suggests a restrictive interpretation of "prepared". It is true that "prepared" is not synonymous with "written," but that is because "prepared" is the more general term. The OED expressly contemplates "write out" as an instance of "prepare." The term "written" would have been too restrictive and would not have included information (e,g,) collected, curated, compiled, organized, provided, or delivered – but all of these are modes of preparation. Preparation may not affect individual items of recorded information but it may affect the contours and composition of a set of information. This may have the effect of changing the meaning of information without otherwise altering the information. *FOIPPA* applies to access to records that contain information (ss. 1(q), 4(1), 6(1)), so the information "prepared" must be in some recorded form.

[429] In my opinion, the goal of separating "substantive" from "non-substantive" information under s. 27(1)(b) is not practically workable. "Pre-existing" information such as dates will be intertwined with other information. Whether "pre-existing" information has "substantive" effect may well be in dispute. In any event, s. 27(1)(b) draws no distinction.

[430] The Adjudicator argued that "the Legislation chose the word 'prepared' to describe a lawyer's interaction with the information covered by this provision. To put the point differently, section 27(1)(b) is intended to encompass information such as Crown prosecutor's work product, although it is not necessarily restricted in its application to such information:" at para 114. However, while the information covered by s. 27(1)(b) must be "by or for" a listed entity and "in relation to a matter involving the provision of legal services," s. 27(1)(b) says nothing about the author of the information. The author may or may not be a lawyer.

[431] The Adjudicator took a different restrictive approach to "prepared" at para 185, concerning records 14-18:

> [para 185] . . . In this case, records 14 – 18 could not be said to have been made ready for use in the provision of legal services, as the Crown prosecutor's decision was that charges should not be brought. In other words, as a consequence of the decision, there was no matter involving the provision of legal services for which the records could be said to have been prepared. As a result, it does not seem likely, based on the evidence before me, that the records were created for use in relation to a matter involving the provision of legal services.

The Adjudicator moved from a sort of formal restriction on "prepared" (must mean creation or alteration for a particular purpose) to a content-based restriction, relating to the content of the information. Paragraph 27(1)(b) cannot bear this interpretation.

[432] Paragraph 27(1)(b) concerns "information" (a general term) "prepared" (in my opinion, a general term), "by or for" a listed entity, "in relation to" a "matter involving the provision of legal services." Information that conveys a decision not to proceed (whether for public policy reasons, economic reasons, a lack of likelihood of success, or the absence of evidence supporting a cause of action nor going forward with a charge) would still concern a matter "involving the provision of legal services," even if the conclusion of the decision were that no further legal services in relation to that matter would occur. The paragraphs does not refer to "the provision of ongoing/continuing/persisting legal services." Further, the term "prepared" does not in itself import reference to a particular purpose. One may "prepare" a memorandum respecting a course of action even if the memorandum recommends or decides against pursuing the course of action.

[433] Hence, the Adjudicator's restrictive interpretation of "prepared" is not reasonable. Paragraph 27(1)(b) should be read employing the ordinary sense of "prepared". "Prepared" means "made or got ready for use" and does not necessarily involve "creation" or "alteration" and does not require a lawyer's involvement in that preparation. Neither is there any sort of restriction of "prepared" to context in which legal services somehow "go forward" (as opposed to a decision being to terminate legal services based on the information). It is true that the Court must defer to reasonable interpretations, but that does not mean that the Court must countenance restrictive interpretations of plain English. This is especially so since FOIPPA applies to a host of public bodies that have to work our for themselves, on the basis of a shared understanding of the language of the FOIPPA text, how to comply with the legislation. From the perspective both of public bodies and the IPC, it makes sense simply to follow the ordinary language of s. 27(1)(b), ensuring that its elements are satisfied on the evidence and ensuring that the discretion not to disclose was exercised reasonably.

[434] The Adjudicator was right that s. 27(1)(b) does impose limitations on the types of information falling within its scope. The work of limitation, however, is done not by the general words "information" or "prepared" but by the remainder of the elements of the paragraph.

2. "By or For"

. . .

[436] On the one hand, "for" could mean "at the direction of" or "requested by," "on behalf of" (e.g. as a delegate of or with the authorization of another). On the other hand, "for" could mean "for the benefit of" or "in the interest of" (as in "I did this for you", meaning for your benefit, without you having asked me to do this). Whether "for" in "by or for" encompasses this second meaning is at issue.

[437] The Adjudicator interpreted "by or for" as meaning "by or on behalf of, by or at the direction of, "excluding the second meaning: F2017-57 at para 112; F2017-58 at para 167.

. . .

[para 441] In my opinion, the Adjudicator correctly interpreted s. 27(1)(b) by not extending "by or for" to "by or for the benefit of" and confining the meaning of "by or for" to "by or on behalf of" or "by or at the direction of."

3. "In Relation to a Matter"

(a) "In Relation To"

[442] The words "in relation to" are "words of the widest possible scope" conveying "some connection between two subjects." Justice Moldaver wrote in *Barton* at para 72 as follows:

> [72] . . . the opening words of s. 276(1) and (2) – proceedings "in respect of" a listed offence – are "of the widest possible scope" and are "probably the widest of any expression intended to convey some connection between two related subject matters" (*Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 39). These words import such meanings as "in relation to", "with reference to", or "in connection with" (*ibid*.).

See also *R v Pununsi*, 2019 SCC 39, Rowe J at para 41.

(b) "Matter"

[443] "Matter" is a similarly broad term. The *Oxford English Dictionary* defines "matter" as

> I. A thing, affair, concern.
>
> 1.a. An event, circumstance, fact question, state or course of things, etc., which is or may be an object of consideration or practical concern; a subject, an affair, a business.

A more restrictive meaning is found at 2a: "A subject of contention, dispute, litigation, etc . . ."

[444] When considering s. 27(1)(c), the Adjudicator interpreted "matter" restrictively as meaning a "legal matter, in relation to which a lawyer may provide advice or services:" F2017-57 at para 117.

[445] The restriction is not warranted by the text of s. 27(1)(b). The text expressly refers to "a matter involving the provision of legal services." A litigation-based restrictive meaning would not be reflected in s. 27(1)(b), since a "matter involving the provision of legal services" could be a commercial matter not necessarily a litigation-related matter. The characterization of the term "matter" is by the words following that term. Further qualification should not be read into the term. Otherwise, s. 27(1)(b) would read, in effect, "a legal matter involving the provision of legal services." Again, the work of limiting the scope of "matter" is done by other elements of s. 27(1)(b), in this case by the requirement of "involving the provision of legal services." Insofar as services provided in relation to the matter are not legal (but are, e.g., policy or business advice), s. 27(1)(b) could not be engaged.

[446] I did not receive argument on the issue of whether there is a practical difference between a "legal matter involving the provision of legal services" or a "matter involving the provision of legal services." No differences are readily apparent.

D. Interpreting s. 27(1)(c)

[447] The s. 27(1)(c) exception applies to

* information
* in correspondence
* between
    * the Minister of Justice and Solicitor General
        * an agent or lawyer of the Minister of Justice and Solicitor General, or
        * an agent or lawyer of a public body,

    and any other person
* in relation to
* a matter
    * involving the provision of advice or other services by the Minister of Justice and Solicitor General or by the agent or lawyer.

A public body has the burden of establishing each of these elements of s. 27(1)(c) on the evidence and that a refusal to disclose was reasonable: see F2017-57 at para 116.

[448] The Adjudicator commented (correctly in my view) at para 263 of F2013-13 that

> [para 263] It appears that section 27(1)(c) anticipates that an agent of the Attorney General or counsel for a public body could be either the sender or the recipient of the correspondence referred to in this provision. It also appears that the "person" referred to in this provision need not be the recipient of the legal services referred to in this provision. As long as the correspondence in question relates, in some way, to a matter that involves the provision of legal services by the agent or lawyer, it appears that section 27(1)(c) gives the head of a public body the discretion to withhold the correspondence . . .

[449] The dispute concerns the Adjudicator's restrictive interpretation of "matter" (again) and "in relation to." I find that the Adjudicator's restrictive interpretations are not reasonable.

1. "Matter"

[450] I addressed the interpretation of the term "matter" above and rejected the Adjudicator's read-in qualifications of the term.

2. "In Relation to a Matter"

[451] As indicated above, the phrase "in relation to" has very broad import.

[452] The Adjudicator distinguished between information that is "in relation to a matter" and information that is "used" in a matter. The Adjudicator had in mind the distinction between information that "addresses" or is "about" a matter and information that was only "used" in the matter: F2017-57 at para 125. The Adjudicator referred to s. 20(1)(g) which expressly distinguishes between information "relating to or used" in the exercise of prosecutorial discretion, and concluded that "the Legislature does not consider the term 'relating to' to encompass the term 'used':" F2017-57 at para 126.

[453] I agree with the Adjudicator that nothing turns on the distinction between "relating to" and "in relation to." I disagree with the Adjudicator's conclusion, however.

[454] Paragraph 20(1)(g) might have simply and safely used the words "relating to" the exercise of prosecutorial discretion. The significant of "relating to or used" in this provision is to capture both information that was actually relied on ("used") and information that either was known but not used or that somehow related to or was connected with or pertained to the exercise of prosecutorial discretion.

[455] Moreover, importing the used/relating to distinction into s. 27(1)(c) would involve some odd interpretive redrafting. The exception would apply to correspondence between the requisite parties "in relation to but not used in/respecting a matter." The Adjudicator herself fell into using "in relation to" language when referring to use: "However, this purpose can be met without expanding this provision to include attachments to correspondence that was merely used in relation to a matter, but was not created to address the matter:" F2017-57 at para 128. The Adjudicator has not disentangled "in relation to" from "use" in this context. Further, the Adjudicator provided no criteria for distinguishing what "relates" to a matter as opposed to what is "used" (concerning/for/respecting) a matter.

[456] Once again, the problem is one of restrictive reading not reasonably justified by the text of the Act. The Adjudicator wished in the present context to exclude case law from s. 27(1)(c) (used but not in relation to). The limitations on the scope of the exception are provided by the language preceding and following the broad language of "in relation to a matter." The usual broad interpretation of "in relation to" recognized by the Supreme Court should be maintained in s. 27(1)(c).

[457] And finally, the Adjudicator claimed that the case law, while used in making a charging decision, was "not in relation to the matter that was the subject of the Crown prosecutor's correspondence as the content of the case law would not be concerning the matter or about it in any way:" F2017-57 at para 128/ But the reason why the case law was provided was because its content did concern the matter or was "about" the matter. The case law wasn't valuable by itself and in itself. It was valuable because of the light it shed on the matter. Put another way, it was the relationship between the case law and the matter that made it relevant. In my opinion, it was unreasonable to suggest that the case law would "not concern the matter" or "be about it in any way."

[para 133] It is with the above comments of the Court in mind that I have reviewed the Public Body's application of section 27(1)(b) or (c) to withhold information in the responsive records.

[para 134] I find that information withheld by the Public Body falls within section 27(1)(b) or (c).

[para 135] As sections 27(1)(b) and (c) are discretionary exceptions, the determination that sections 27(1)(b) and 27(1)(c) apply to the information withheld by the Public Body is not the end of the review. The second part of the review involves determining whether the Public Body exercised its discretion reasonably in deciding to withhold the information.

Exercise of Discretion

[para 136] Section 27(1)(b) and (c) are discretionary provisions, meaning the Public Body may, but is not required, to withhold the information.

[para 137] In *EPS*, the Court stated at paragraph 422:

> [422] In summary, the best approach to the exercise of discretion respecting ss. 27(1)(b) and (c) is to follow the Supreme Court's directions in *Ontario Public Safety and Security* and to weigh considerations for and against disclosure, including the public interest in disclosure, without adding unnecessary restrictions like a "harm" threshold or a requirement of adverse impact on legal interests. A public body must show that it has properly done this weighing.

[para 138] The Public Body submitted that while a decision to apply a discretionary section may have limitations in its application based on the passage of time or circumstances, the Public Body maintains that there had been no change in circumstances and therefore that section 27(1)(b) and (c) were appropriately applied to the records.

[para 139] Apart from this, the Public Body did not inform me what considerations for and against disclosure it took into account, and how it weighed these considerations in order to decide to withhold the responsive information.

[para 140] As a result, I am unable to find that the Public Body exercised its discretion reasonably in withholding the information under sections 27(1)(b) and (c) and will order the Public Body to reconsider its exercise of discretion to withhold the information under these sections.

7. Did the Public Body meet its obligations required by section 10(1) of the Act (duty to assist applicants)?

[para 141] Section 10(1) of the FOIP Act states:

> *10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.*

[para 142] What section 10(1) of the FOIP Act requires of the Public Body was recently summarized by the adjudicator in Order F2024-12. At paragraph 12, the adjudicator stated:

> [para 12] The duty to assist includes responding openly, accurately and completely, as well as conducting an adequate search. The Public Body bears the burden of proof with respect to its obligations under section 10(1), as it is in the best position to describe the steps taken to assist the applicant (see Order 97-006, at para. 7). An adequate search has two components in that every reasonable effort must be made to search for the actual records requested, and the applicant must be informed in a timely fashion about what has been done to search for the requested records (Orders 96-022 at para. 14; 2001-016 at para. 13; and F2007-029 at para. 50).

[para 143] The Notice of Inquiry instructed the Applicant to set out in his initial submission his reasons for believing more records existed than were located and provided to him, and to describe as precisely as possible the records or kinds of records he believed should have been located and provided.

[para 144] The Applicant did not provide any explanation as to why he thought the Public Body did not conduct an adequate search for responsive records. He provided no information as to what records or kinds of records he believed the Public Body should have located and provided.

[para 145] At paragraph 66 in Order F2007-029, former Commissioner Work described the kind of evidence that assists a decision-maker to determine whether a public body has made reasonable efforts to search for records:

> [para 66] In general, evidence as to the adequacy of a search should cover the following points:
>
> - The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
> - The scope of the search conducted – for example: physical sites, program areas, specific databases, off-site storage areas, etc.
> - The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
> - Who did the search
> - Why the Public Body believes no more responsive records exist that what has been found or produced

[para 146] In its initial submission, the Public Body addressed the points set out by former Commissioner Work. For example, it set out what program areas were searched, why those locations were searched, and who did the search.

[para 147] The Public Body submitted that given that all staff on the list were required to conduct a search for records and individually notify their FOIP Program Area Contact and

the FOIP Office as to whether any records exist, the Public Body was confident that no further responsive records existed.

[para 148] The Applicant received the Public Body's initial submission and did not provide any reason why the Public Body's search was not adequate. He had the opportunity to say why the Public Body's search was inadequate and he did not make any submissions to support his allegation that it was inadequate.

[para 149] The Public Body has provided a description of the search it conducted for responsive records. There is nothing to suggest there were other responsive records it should have located and did not. I find that the Public Body conducted an adequate search for records and met its duty under section 10(1).

V. ORDER

[para 150] I make this Order under section 72 of the FOIP Act.

[para 151] I find that section 4(1)(a) applies to the information that was in a court file, and copies of transcripts, and the FOIP Act does not apply to this information.

[para 152] I find that the Public Body conducted an adequate search for responsive records and met its duty to assist the Applicant under section 10(1).

[para 153] I confirm the Public Body properly withheld information under section 17(1).

[para 154] With the exception of the few case notes I identified in paragraph 106 that I found section 18(1)(a) did not apply to, I find the Public Body properly withheld the responsive information under section 18(1)(a).

[para 155] I order the Public Body to re-process the case notes it withheld pursuant to section 18(1)(a) where I have identified in paragraph 106 that section 18(1)(a) does not apply, and provide a new response to the Applicant which includes the information required by section 12 of the FOIP Act (i.e. whether it will provide the Applicant access to the information or not and if not, which section of the FOIP Act it was relying on to withhold the information).

[para 156] I order the Public Body to reconsider its exercise of discretion to withhold information under sections 27(1)(b) and 27(1)(c), and to provide the Applicant a written explanation of the considerations it undertakes when reconsidering discretion. Upon reconsideration, the Public Body should also disclose to the Applicant any further information it finds should not be withheld (if any), after applying any mandatory exceptions to disclosure in the FOIP Act.

[para 157] 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 the Order.

_____
Carmen Mann
Adjudicator
/bah