ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2024-21

July 9, 2024

JUSTICE

Case File Number 008394

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request to Justice (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for all records relating to a prosecution in which he was the accused. The Public Body conducted a search for responsive records and responded to the Applicant. In its response, the Public Body stated:

> We are pleased to provide access to 144 pages you requested; copies of which are enclosed. There were a total of 584 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 20(1)(g) - Disclosure harmful to law enforcement,
> • Section 21(1)(b) - Disclosure harmful to intergovernmental relations,
> • Section 29(1)(a) - Information that is or will be available to the public.
>
> […]
>
> Certain pages of the records were severed in their entirety pursuant to Section 21(1)(b) of the FOIP Act, as the disclosure of the information therein could reasonably be expected to reveal information supplied by the Royal Canadian Mounted police. If you require access to these records, please submit a request to [the RCMP].

The Commissioner agreed to conduct an inquiry at the Applicant's request. The inquiry addressed the Public Body's decisions to sever information under sections 20(1)(g) (disclosure harmful to law enforcement), 21(1)(b) (disclosure harmful to intergovernmental relations), and 17(1) (disclosure harmful to personal privacy).

The Adjudicator determined that the burden of establishing that either section 20(1)(g) or 21(1)(b) applied to any of the records was not met. The Adjudicator found that section 17(1) of the FOIP Act applied to the personally identifying information of witnesses in the records, and that there were no factors weighing in favor of disclosure; however, the Public Body had not turned its mind to the question of whether it could reasonably sever the personally identifying information of witnesses and provide the remainder to the Applicant. The Adjudicator directed the Public Body to meet its duty to determine whether it could reasonably sever the personally identifying information of witnesses under section 6(2) of the FOIP Act.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, RSA 2000 c. F-25. ss. 1, 6, 12, 17, 20, 21, 71, 72

Authorities Cited: AB: Orders 96-017, 99-018, F2004-026, F2007-021, F2013-51, F2023-18; **NS:** Review Report 21-04

Cases Cited: *Alberta Energy v Alberta (Information and Privacy Commissioner)*, 2024 ABKB 198 (CanLII), *Krieger v. Law Society of Alberta*, 2002 SCC 65 (CanLII), [2002] 3 SCR 372; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23; *Edmonton Police Service v Alberta (Information and Privacy Commissioner)*, 2022 ABCA 397

I. BACKGROUND

[para 1] The Applicant made an access request to Justice (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for all records relating to a prosecution in which he was the accused. The Public Body conducted a search for responsive records and responded to the Applicant. In its response, the Public Body stated:

> We are pleased to provide access to 144 pages you requested; copies of which are enclosed. There were a total of 584 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 20(1)(g) - Disclosure harmful to law enforcement,
> • Section 21(1)(b) - Disclosure harmful to intergovernmental relations,
> • Section 29(1)(a) - Information that is or will be available to the public.

> Certain pages of the records were severed in their entirety pursuant to Section 4(1)(a) of the FOIP Act, as these records consist of court documents, that fall outside of the FOIP Act. Should you require this documentation, copies may be obtained directly from the relevant court.
>
> Certain pages of the records were severed in their entirety pursuant to Section 21(1)(b) of the FOIP Act, as the disclosure of the information therein could reasonably be expected to reveal information supplied by the Royal Canadian Mounted police. If you require access to these records, please submit a request to:
>
> Royal Canadian Mounted Police
> Access to Information and Privacy Coordinator
> RCMP MAILSTOP #61
> 73 Leikin Drive
> Ottawa. Ontario K1A OR2
> Telephone: 1-855-629-5877
> Facsimile: 613-825-8221
>
> Certain pages of the records were severed in their entirety pursuant to Section 29(1)(a) of the FOIP Act as these records consist of information that is or will be available to the public. This information may be accessed through the links below […]

[para 2] The Applicant requested that the Commissioner review the Public Body's severing decisions. The Commissioner authorized a senior information and privacy manager to investigate and attempt to settle the matter. At the conclusion of this process, the Complainant requested an inquiry in relation to the Public Body's application of sections 20(1)(g) (disclosure harmful to law enforcement) and 21(1)(b) (disclosure harmful to intergovernmental relations).

[para 3] The Commissioner agreed to hold an inquiry and delegated the authority to conduct it to me.

[para 4] The Public Body subsequently clarified that it had also applied section 17(1) to the same information to which it had applied section 20(1)(g) and/or section 21(1)(b). I added the issue of whether the Public Body is required to withhold the records under section 17(1), as it became clear that the issue had not been resolved.

[para 5] The RCMP was invited to participate but did not respond.

II. ISSUES

ISSUE A: Did the Public Body properly apply section 20(1)(g) (disclosure harmful to law enforcement) to the information in the records?

ISSUE B: Did the Public Body properly apply section 21(1)(b) (disclosure harmful to intergovernmental relations) to the information in the records?

ISSUE C: Does section 17(1) (disclosure harmful to personal privacy) require the Public Body to withhold information in the records from the Applicant?

III. DISCUSSION OF ISSUES

ISSUE A: Did the Public Body properly apply section 20(1)(g) (disclosure harmful to law enforcement) to the information in the records?

[para 6] The Public Body severed information records under section 20(1)(g) from records 4-7, 15-16, 28-29, 31, 34, 82-117, 119-124, 127-129, 131-183, 185-265, 267-273, 275-276, 286-287, 292-296, 299-300, 302-306, 312-313, 316-323, 325, 327-329, 331, 335, 339-340, 343-349, 352-360, 363-376, 380-381, 446-447, 450, 451, 471-472, 474-476, and 480-582.

[para 7] Section 20 states, in part:

> *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,*
>
> *[...]*
>
> *(2) Subsection (1)(g) does not apply to information that has been in existence for 10 years or more.*
>
> *[...]*
>
> *(6) After a police investigation is completed, the head of a public body may disclose under this section the reasons for a decision not to prosecute*
>
> *(a) to a person who knew of and was significantly interested in the investigation, including a victim or a relative or friend of a victim, or*
>
> *(b) to any other member of the public, if the fact of the investigation was made public.*

[para 8] Prosecutorial discretion refers to the power of the Attorney General to bring, manage, and terminate prosecutions. In *Krieger v. Law Society of Alberta*, 2002 SCC 65 (CanLII), [2002] 3 SCR 372 the Supreme Court of Canada said the following regarding prosecutorial discretion:

> Without being exhaustive, we believe the core elements of prosecutorial discretion encompass the following: (a) the discretion whether to bring the prosecution of a charge laid by police; (b) the discretion to enter a stay of proceedings in either a private or public prosecution, as codified in the *Criminal Code*, R.S.C. 1985, c. C-46, ss. 579 and 579.1; (c) the discretion to accept a guilty plea to a lesser charge; (d) the discretion to withdraw from criminal proceedings altogether: *R. v. Osborne* (1975), 1975 CanLII 1357 (NB CA), 25 C.C.C. (2d) 405 (N.B.C.A.); and (e) the

> discretion to take control of a private prosecution: *R. v. Osiowy* (1989), 1989 CanLII 4780 (SK CA), 50 C.C.C. (3d) 189 (Sask. C.A.). While there are other discretionary decisions, these are the core of the delegated sovereign authority peculiar to the office of the Attorney General.

[para 9] Section 20(1)(g) authorizes the head of a public body to withhold information relating to, or used in, the exercise of prosecutorial discretion, provided the information has not been in existence for 10 years or more. Section 20(6) authorizes the head of a public body to disclose the reasons for a decision not to prosecute once a police investigation has been concluded.

[para 10] The mere fact that information is located in a Crown Prosecutor's file does not mean that the information relates to the exercise of prosecutorial discretion. In Order F2007-021, the Adjudicator determined that it is the substance of information, not its location, that determines whether information falls within the terms of section 20(1)(g).

[para 11] In *Alberta Energy v Alberta (Information and Privacy Commissioner)*, 2024 ABKB 198 (CanLII), Teskey J., in denying the Department of Energy's judicial review application said the following regarding the burden of proof in an inquiry:

> Third, the public body must justify each denial on its own merits. No blanket privilege accompanies the statutory exceptions under *FOIPP*. Each decision to withhold specific information must be made individually. Where a public body chooses to apply a heavy hand to redacting records, it is required to justify these redactions line by line. One would hope that this would imbue an attitude of practicality and proportionality into the vetting process.
>
> There is strong public policy justification for these obligations. The requesting party seeking the withheld record must argue for its production without the benefit of the impugned record itself. It is reasonable to expect the public body to put its best foot forward with evidence to support its denials precisely and individually for each part of a record.
>
> This principle is clearly articulated in the guidance provided to parties on inquiries by the OIPC:
>
> > Parties may not succeed in an inquiry if they do not provide evidence to support their arguments. If the success of an argument depends on underlying facts, providing the argument alone is not sufficient. The underlying facts must be established by evidence. As well, evidence should not be provided in the form of unattributed assertions made in the context of an argument. If a fact is being put forward, it must be shown how this fact is known to be true (e.g., by way of a statement, preferably sworn, of someone who knows the fact, or by other objective evidence, such as documents).
> >
> > It is not sufficient to provide the Commissioner with records and leave it up to the Commissioner to try to draw from the records the facts on which the decisions will be based. The Commissioner requires that persons representing the public body, custodian or organization provide evidence speaking to the contents of the records, for example by explaining how each part of a record for which an exception to disclosure is claimed falls within the exception. If the explanation depends on certain facts being true, the public body, custodian or organization must provide evidence of these facts.

[para 12] In the foregoing case, Teskey J. confirmed that public bodies have the burden in an inquiry of establishing that they properly applied exceptions to disclosure. The Public Body must establish the facts necessary to support the application of the exceptions it has applied to the information it has withheld from an applicant.

[para 13] The Public Body states the following regarding its application of section 20(1)(g):

> Most of the records to which section 20(1)(g) was applied in this file include information provided by the RCMP to the Crown such as case notes, photographs, transcribed statements from the accused or witnesses, records related to setting up meetings for witnesses and correspondence to or from the Crown.
>
> The disclosure of these records would interfere with law enforcement by prohibiting the Crown from providing candid views about decisions surrounding the charging of a suspect/accused and the prosecution to follow. The Crown must be able to make these types of analysis and decisions without the threat of disclosure.
>
> If these records were disclosed to the public, future dealings with police agencies witnesses, victims and suspects would be compromised and may prevent these parties from coming forward with pertinent information about a case.

[para 14] The Public Body did not explain how the content of the records relates to, or was used in, the exercise of prosecutorial discretion in its submissions. While it cited the Supreme Court of Canada's discussion of the aspects of prosecutorial discretion, it did not explain why it considered the information to which it applied section 20(1)(g) to meet the terms of this provision. It notes that it applied section 20(1)(g) to information provided by the RCMP, but does not explain why the fact that information was provided by the RCMP led the Public Body to conclude that the records meet the requirements of section 20(1)(g). The Public Body did not supply the identities of those who created the records in cases where the author's name does not appear on the record. I am left uncertain, with respect to those records, as to whether a Crown prosecutor created the records or a member of the RCMP did. If it is the latter, it is unclear how those records relate to or were used in the exercise of prosecutorial discretion.

[para 15] The Public Body severed communications written by the Applicant's then counsel, acting on behalf of the Applicant, and the Crown prosecutor, in which a peace bond is mentioned. A peace bond is ordered by a Court if the Court is satisfied that a complainant has reasonable grounds to fear an accused. A peace bond restricts the ability of an accused to contact a complainant and may include additional conditions the Court decides to impose. It is unknown on the evidence before me what role the peace bond had in relation to the Crown prosecutor's decisions to exercise discretion in relation to continuing a prosecution, staying it, or withdrawing charges.

[para 16] Section 71 of the FOIP Act sets out the burden of proof in the FOIP Act. It states, in part:

> *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 17] The foregoing provision means that the Public Body must prove, on the balance of probabilities, that the exception on which it relies to refuse access, applies.

[para 18] To establish that section 20(1)(g) applies, it must be established that disclosure would reasonably be expected to reveal information relating to, or used in, the exercise of discretion. It is therefore necessary for the Public Body to establish what role the information to which it applied section 20(1)(g) served in a Crown prosecutor's exercise of discretion. Some questions the Public Body should have answered in its submissions are the following: Was the information available to the Crown prosecutor when deciding to bring or terminate a prosecution? If it was available to the Crown, why does the Public Body believe the information was used to make particular decisions to bring or terminate a prosecution? Does the information reveal the Crown prosecutor's considerations in deciding to bring or terminate a prosecution or is it reasonably likely to do so? What evidence leads the Public Body to believe that the records either relate to the exercise of prosecutorial discretion or were used in that exercise? If a public body does not address these questions in its submissions, unless the records themselves answer these questions, the public body will not meet the burden of proof in the inquiry. There may be other pertinent factors, but for this inquiry, the lack of evidence on these points is determinative.

[para 19] The Public Body has left the records to speak for themselves. While doing is sufficient in some cases, in this case, there is insufficient evidence in the records themselves to establish that section 20(1)(g) applies. The records do not speak to prosecutorial discretion at all or reveal how it was exercised or what considerations went into the exercise. The lack of discussion or evidence regarding the records and their use in the Public Body's submissions prevents me from finding that the records reasonably relate to or were used in the exercise of prosecutorial discretion.

[para 20] If a public body does establish the facts necessary to support its application of section 20(1)(g), it must then establish that it exercised its discretion appropriately when it made the decision to withhold information from a requestor. While it is not strictly necessary that I address exercise of discretion in this case, given that I have found that the Public Body has not established that section 20(1)(g) applies, its explanation of its exercise of discretion requires some comment.

[para 21] The Public Body states the following regarding its exercise of discretion:

> The disclosure of these records would interfere with law enforcement by prohibiting the Crown from providing candid views about decisions surrounding the charging of a suspect/accused and the prosecution to follow. The Crown must be able to make these types of analysis and decisions without the threat of disclosure.
>
> If these records were disclosed to the public, future dealings with police agencies witnesses, victims and suspects would be compromised and may prevent these parties from coming forward with pertinent information about a case.

[para 22] Both sections 20(1)(g) and 20(6) of the FOIP Act, cited above, are discretionary provisions. In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, the Supreme Court of Canada commented on the authority of

Ontario's Information and Privacy Commissioner to review a head's exercise of discretion. The Court noted:

> The Commissioner's review, like the head's exercise of discretion, involves two steps. First, the Commissioner determines whether the exemption was properly claimed. If so, the Commissioner determines whether the head's exercise of discretion was reasonable.
>
> In IPC Order P-58/May 16, 1989, Information and Privacy Commissioner Linden explained the scope of his authority in reviewing this exercise of discretion:
>
> In my view, the head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. It is my responsibility as Commissioner to ensure that the head has exercised the discretion he/she has under the Act. While it may be that I do not have the authority to substitute my discretion for that of the head, I can and, in the appropriate circumstances, I will order a head to reconsider the exercise of his/her discretion if I feel it has not been done properly. I believe that it is our responsibility as the reviewing agency and mine as the administrative decision-maker to ensure that the concepts of fairness and natural justice are followed. [Emphasis in original]
>
> Decisions of the Assistant Commissioner regarding the interpretation and application of the FIPPA are generally subject to review on a standard of reasonableness (see Ontario (Minister of Finance) v. Higgins (1999), 1999 CanLII 1104 (ON CA), 118 O.A.C. 108, at para. 3, leave to appeal refused, [2000] 1 S.C.R. xvi; Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor) (1999), 1999 CanLII 19925 (ON CA), 46 O.R. (3d) 395 (C.A.), at paras. 15-18; Ontario (Attorney General) v. Ontario (Freedom of Information and Protection of Privacy Act Adjudicator) (2002), 2002 CanLII 30891 (ON CA), 22 C.P.R. (4th) 447 (Ont. C.A.), at para. 3).
>
> 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).
>
> In the case before us, the Commissioner concluded that since s. 23 was inapplicable to ss. 14 and 19, he was bound to uphold the Minister's decision under those sections. Had he interpreted ss. 14 and 19 as set out earlier in these reasons, he would have recognized that the Minister had a residual discretion under ss. 14 and 19 to consider all relevant matters and that it was open to him, as Commissioner, to review the Minister's exercise of his discretion.
>
> The Commissioner's interpretation of the statutory scheme led him not to review the Minister's exercise of discretion under s. 14, in accordance with the review principles discussed above.
>
> Without pronouncing on the propriety of the Minister's decision, we would remit the s. 14 claim under the law enforcement exemption to the Commissioner for reconsideration. The absence of reasons and the failure of the Minister to order disclosure of any part of the voluminous documents sought at the very least raise concerns that should have been investigated by the Commissioner. We are satisfied that had the Commissioner conducted an appropriate review of the Minister's decision, he might well have reached a different conclusion as to whether the Minister's discretion under s. 14 was properly exercised.

[para 23] The Supreme Court of Canada confirmed the authority of the Information and Privacy Commissioner of Ontario to quash a decision not to disclose information pursuant to a discretionary exception and to return the matter for reconsideration by the head of a public body.

[para 24] While this case was decided under Ontario's legislation, in my view, it has equal application to Alberta's legislation. Section 72(2)(b) of Alberta's FOIP Act establishes that the Commissioner may require the head to reconsider a decision to refuse access in situations when the head is authorized to refuse access. A head is authorized to withhold information if a discretionary exception applies to information. Section 72(2)(b) provision states:

> *72(2) If the inquiry relates to a decision to give or to refuse to give access to all or part of a record, the Commissioner may, by order, do the following:*
>
> > *(b) 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 25] In Order 96-017, former Commissioner Clark reviewed the law regarding the Commissioner's authority to review the head of a public body's exercise of discretion and concluded that section 72(2)(b), (then section 68(2)(b)), was the source of that authority. He commented on appropriate applications of discretion and described the evidence necessary to establish that discretion has been applied appropriately:

> A discretionary decision must be exercised for a reason rationally connected to the purpose for which it's granted. The court in *Rubin* stated that "Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act..."
>
> The court rejected the notion that if a record falls squarely within an exception to access, the applicant's right to disclosure becomes solely subject to the public body's discretion to disclose it. The court stated that such a conclusion fails to have regard to the objects and purposes of the legislation: (i) that government information should be available to the public, and (ii) that exceptions to the right of access should be limited and specific.
>
> In the court's view, the discretion given by the legislation to a public body is not unfettered, but must be exercised in a manner that conforms with the principles mentioned above. The court concluded that a public body exercises its discretion properly when its decision promotes the policy and objects of the legislation.
>
> The Information and Privacy Commissioners in both British Columbia and Ontario have also considered the issue of a public body's proper exercise of discretion, both in the context of the solicitor-client exception and otherwise. In British Columbia, the Commissioner has stated that the fundamental goal of the information and privacy legislation, which is to promote the accountability of public bodies to the public by creating a more open society, should be supported whenever possible, especially if the head is applying a discretionary exception (see Order No. 5-1994, [1994] B.C.I.P.C.D. No. 5).
>
> […]
>
> In Ontario Order 58, [1989] O.I.P.C. No. 22, the Commissioner stated that a head's exercise of discretion must be made in full appreciation of the facts of the case and upon proper application of the applicable principles of law. In Ontario Order P-344, [1992] O.I.P.C. No. 109, the Assistant Commissioner has further stated that a "blanket" approach to the application of an exception in all cases involving a particular type of record would represent an improper exercise of discretion.

> I have considered all the foregoing cases which discuss the limits on how a public body may exercise its discretion. In this case, I accept that a public body must consider the objects and purposes of the Act when exercising its discretion to refuse disclosure of information. It follows that a public body must provide evidence about what it considered.

[para 26] In that case, the Commissioner found that the Public Body had not made any representations or provided any evidence in relation to its exercise of discretion. Further, he determined that the head must consider the purpose of the exception in the context of the public interest in disclosing information when exercising discretion. As the head of the public body had not provided any explanation for withholding information, the Commissioner ordered the head to reconsider its exercise of discretion to withhold information under a discretionary exception.

[para 27] In Order F2004-026, former Commissioner Work said:

> In my view a Public Body exercising its discretion relative to a particular provision of the Act should do more than consider the Act's very broad and general purposes; it should consider the purpose of the particular provisions on which it is relying, and whether withholding the records would meet those purposes in the circumstances of the particular case. I find support for this position in orders of the British Columbia Information and Privacy Commissioner. Orders 325-1999 and 02-38 include a list of factors relevant to the exercise of discretion by a public body. In addition to "the general purposes of the legislation (of making information available to the public) the list includes "the wording of the discretionary exception and the interests which the section attempts to balance". It strikes me as a sound approach that the public body must have regard to why the exception was included, and whether withholding the information in a given case would meet that goal.

[para 28] Section 12(1) of the FOIP Act requires the Public Body to communicate its reasons for withholding information from the Applicant. It states:

> *12(1) In a response under section 11, the applicant must be told*
>
> *(a) whether access to the record or part of it is granted or refused,*
>
> *(b) if access to the record or part of it is granted, where, when and how access will be given, and*
>
> *(c) if access to the record or to part of it is refused,*
>
> *(i) the reasons for the refusal and the provision of this Act on which the refusal is based,*
>
> *(ii) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and*
>
> *(iii) that the applicant may ask for a review of that decision by the Commissioner or an adjudicator, as the case may be.*

[para 29] Once it is determined that a discretionary exception to disclosure applies, a public body must determine whether it will withhold the information or release it to the applicant. In making this decision, the public body will weigh any applicable public and private interests, including the purpose of the provision, in withholding or disclosing the information. In cases where the purpose of a provision is obvious from the language of a provision, less explanation is required regarding the exercise of discretion; however, where a provision, such as section 20(1)(g) does not indicate its purpose, more explanation is required. Further, where section 20(6) authorizes disclosure, as in this case, the Public Body should state, in its response, its reasons for not providing information under this provision.

[para 30] 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.

[para 31] It is unclear how disclosure of the records, many of which the Public Body claims were provided by the RCMP, would "prohibit" the Crown from "providing candid views about decisions surrounding the charging of a suspect/accused and the prosecution to follow." I am also unable to identify any content in the records that could be described as "candid views about decisions surrounding the charging of a suspect / accused and the prosecution to follow".

[para 32] It should be noted that many of the records to which the Public Body applied section 20(1)(g) are records that could be disclosed to an accused as part of the Crown's disclosure obligations. In criminal proceedings, the Crown must disclose all relevant information to an accused, such as records of a police investigation. It is therefore unclear why the Public Body anticipates the mere act of disclosure to the Applicant could result in the harm it projects.

[para 33] The Public Body also argues that it withheld information under section 20(1)(g) for the reason that future dealings with police witnesses, victims, and suspects would be compromised. Not only is there no evidence to establish the likelihood of that outcome resulting from disclosure, but such a harm is not relevant to the application of section 20(1)(g), which is intended to protect exercises of prosecutorial discretion from interference for a period of up to 10 years.

[para 34] The Public Body appears to take the position that disclosing any information relating to a prosecution is, in and of itself, harmful; however, the Legislature enacted section 20(6) in addition to section 20(1)(g). The Legislature did not consider that prosecutorial discretion should be an absolute bar to access, as the Legislature has also authorized public bodies to give access to information regarding decisions not to prosecute to persons affected by the decision. An accused is a person affected by such a decision. Further, a public body may not withhold information under section 20(1)(g) if the information has been in existence for 10 years or more. This indicates that the age of

information is relevant to the exercise of discretion. The Public Body does not appear to have considered section 20(6) or the age of the information in its decision.

[para 35] To summarize, in addition to finding that section 20(1)(g) has not been demonstrated to apply, I find that the Public Body did not properly exercise its discretion when it withheld information under section 20(1)(g).

ISSUE B: Did the Public Body properly apply section 21(1)(b) to the information in the records?

[para 36] Under the heading, "Disclosure harmful to intergovernmental relations", section 21 of the FOIP Act states:

> *21(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*
>
> *(a) harm relations between the Government of Alberta or its agencies and any of the following or their agencies*
>
> *(i) the Government of Canada or a province or territory of Canada,*
>
> *(ii) a local government body,*
>
> *(iii) an aboriginal organization that exercises government functions, including*
>
> *(A) the council of a band as defined in the Indian Act (Canada), and*
>
> *(B) an organization established to negotiate or implement, on behalf of aboriginal people, a treaty or land claim agreement with the Government of Canada*
>
> *(iv) the government of a foreign state, or*
>
> *(v) an international organization of states,*
>
> *or*
>
> *(b) reveal information supplied, explicitly or implicitly, in confidence by a government, local government body or an organization listed in clause (a) or its agencies.*
>
> *(2) The head of a public body may disclose information referred to in subsection (1)(a) only with the consent of the Minister in consultation with the Executive Council.*

(3) The head of a public body may disclose information referred to in subsection (1)(b) only with the consent of the government, local government body or organization that supplies the information, or its agency.

(4) This section does not apply to information that has been in existence in a record for 15 years or more.

[para 37] The Public Body applied section 21(1)(b) to withhold information from records 82-117, 119-124, 127-129, 131-134, 139-183, 185-188, 191-265, 267-273, 292, 295-296, 311, 324-325, 327- 334, 339-340, 344-346, 352-354, 357-360, 365-376, 382-383, 450-451, 471, 474, 476-477, and 480-582.

[para 38] The Public Body argues:

> The information redacted under section 21(1)(b) was provided by the Royal Canadian Mounted Police (RCMP) which is an agency of the Federal Government of Canada. […] RCMP detachment was the investigative police agency in this matter and was in possession of the materials the Crown required in order to use their prosecutorial discretion. The information was supplied by the RCMP implicitly in confidence as the records were provided to the Crown solely for the purpose of prosecution. The types of records provided by the police to the Crown include statements from witnesses, victims and suspects, photographs, police investigation notes and other evidence. By nature, many of these records contain sensitive and personal information concerning individuals who have committed, witnessed or been victimized by a crime.
>
> […]
>
> The Public Body submits the RCMP's functions and duties under the RCMP Act and the supporting federal legislation meet the requirements of information supplied… by a government, local government body or an organization listed in clause (a) or its agencies. The records responsive to the Applicant's request where section 21(1)(b) was applied, are records provided by the RCMP to the Public Body for the sole purpose of prosecution. For these reasons, the Public Body submits it has met this requirement under section 21(1) of the FOIP Act.
>
> *Was the information supplied explicitly or implicitly in confidence?*
>
> Public Body submits that part of the role of police is to prepare and submit a complete prosecution package to the Crown and other documentation to support an accurate prosecution. The type of material that police provide to the Crown may contain items such as statements from witnesses, victims and suspects; photographic or other scientific evidence; documentary evidence; and the notes and observations of the police investigators. Much of this material is very sensitive and contains private and personal details about people who have committed, witnessed or been victimized by a crime.
>
> Part of the criminal process/relationship between Crown and police, in this case RCMP, is for the law enforcement agency to provide the Crown with all relevant information surrounding the investigation of a criminal act. It is implied that this information is provided in confidence to the prosecution and will only be shared as necessary to the accused or their lawyer through the Disclosure process.
>
> In general, through the Disclosure process, Crown Counsel will disclose all information to defence counsel or the accused if they are self-represented that is relevant to the prosecution of the accused.

> Victims are not entitled to the Crown file through Disclosure, as this process is limited to the accused and doing so may taint the victim's evidence, thereby putting the prosecution of the accused at risk.
>
> As these records are under the control of the RCMP, Applicants should request all records directly from the appropriate law enforcement agency, in this case RCMP. The Applicant was notified of this in the Public Body's response dated February 16, 2018 […]

[para 39] Past orders of this office held that section 21(1)(b) of the FOIP Act is restricted to intergovernmental relations and does not apply to information exchanges between a provincial RCMP detachment and the Crown as part of its provincial policing duties. It was thought that the reference in section 21(1)(b) to "a government, local government body or an organization listed in clause (a)" meant that such entities were not part of the Government of Alberta, but were government entities, rather than public bodies, whose relationships with the Government of Alberta were to be protected by the provision.

[para 40] In *Edmonton Police Service v Alberta (Information and Privacy Commissioner)*, 2022 ABCA 397 (CanLII), the Court overturned past orders of the Commissioner addressing section 21(1)(b). The Court determined that section 21(1)(a) did not lend context to section 21(1)(b) and there is no relationship between the two clauses. The Court also rejected the notion that the heading of section 21 provided evidence of legislative intent.

> If one ignores the heading "Disclosure harmful to intergovernmental relations", s 21(1)(b) is concerned with a different subject – whether information provided in confidence to a public body is exempt from disclosure. There is nothing in the language to suggest the identified entities (government, local government body or an organization listed in clause (a)) are a subset of public bodies representing the Government of Alberta onl]y. Moreover, the suggestion is contrary to the overall scheme of the Act. There are 17 different provisions across six different sections of the Act that distinguish between the Government of Alberta and public bodies. It is inconsistent and illogical for a public body to be treated as merely an extension of the Government of Alberta for the purposes of section 21 of the Act, but to be considered as a distinct entity everywhere else. The distinction drawn between the Government of Alberta and a public body throughout the Act clearly indicates that these are separate entities. No other interpretation is reasonable in a statutory context.
>
> Given the clear and unambiguous statutory language, punctuated by the disjunctive "or" between 21(1)(a) and 21(1)(b), it is unreasonable to conflate the subsections to interpret s 21(1)(b) to mean that a public body can only refuse to disclose information supplied by a non-Government of Alberta entity. It is equally unreasonable to ignore the balance of the statutory language by not considering how a "local government body" is statutorily defined or by characterizing the RCMP as an agent of the Government of Alberta such that a public body cannot refuse to disclose information provided to it by the RCMP in confidence.

[para 41] The Court further determined that an RCMP detachment is a local government body within the terms of section 1 of the FOIP Act, stating:

> Moreover, "local government body' is a defined term under the *Act* which includes "any police service … as defined in the *Police Act*" (s 1(1)(i)(x)). If one reads that definition with ss 1(l)(iii), 1(n) and 21(1) of the *Police Act,* the RCMP is a "police service" and clearly falls within the definition of a "local government body" to which the exemption from disclosure under s 21(1)(b)

> would apply. Section 13 of the *Interpretation Act*, RSA 2000, c I-8, provides that: "[d]efinitions … in an enactment … (a) are applicable to the whole enactment … *except to the extent that a contrary intention appears in the enactment*." The resulting question is whether there is a contrary intention in the *Act* which prevents finding that the RCMP is a local government body. In our view, there is not.
>
> […]
>
> We recognize that "local government body" is included in the definition of "public body" and therefore, by extension, the RCMP may be subject to the entirety of the Act. However, our conclusion, that the RCMP is a "local government body", is limited to holding that the RCMP has been defined as such and is therefore an entity that can supply information for the purposes of s 21(1)(b).

[para 42] The Court found that there was a clear intention on the part of the Legislature to make the RCMP a "local government body" for the purposes of section 21(1)(b). The Court acknowledged that this conclusion could necessitate finding that an RCMP detachment is a public body with full duties and obligations under the FOIP Act, but limited the scope of its conclusion to section 21(1)(b) of the FOIP Act.

[para 43] I understand the foregoing case to mean that the Public Body is not precluded from applying section 21(1)(b) to records supplied to it for a prosecution by an RCMP detachment when the detachment is providing policing services in the province, if the records were supplied to it in confidence. I turn now to the question of whether the RCMP detachment supplied the records at issue to the Public Body "in confidence".

[para 44] In Order 99-018, former Commissioner Clark decided that the following factors should be considered in determining whether information has been supplied in confidence:

> In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:
>
> (1) Communicated to the [public body] on the basis that it was confidential and that it was to be kept confidential.
>
> (2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the Third Party prior to being communicated to the government organization.
>
> (3) Not otherwise disclosed or available from sources to which the public has access.
>
> (4) Prepared for a purpose which would not entail disclosure.

[para 45] The test set out in Order 99-018 assists in assessing whether an expectation of confidentiality on the part of the supplier of information is based on reasonable and objective grounds. I am unable to say, based on the evidence before me, including the records at issue, that the RCMP detachment had any expectation of confidentiality at all when it supplied the records or that it imposed conditions of confidentiality, implicitly or expressly, on the Public Body when it did so. It is therefore unclear that the test set out in Order 99-018 is of assistance in case.

[para 46] The Public Body has cited the test set out in Order 99-018 in its submissions. The questions in Order 99-018 primarily relate to the understanding and operations of the entity supplying the information to determine whether its understanding that records are being supplied in confidence is objectively reasonable. The entity supplying the information is in the best position to answer the questions about the information it created and provided and what its understanding when it supplied the information was. As noted in the background, above, the RCMP was invited to participate at the inquiry but did not respond. I do not have any indication from the RCMP that it supplied the information to which the Public Body applied section 21(1)(b) with the understanding that it would not be disclosed without its consent. The records do not indicate its understanding either. I have no evidence from the RCMP detachment as to how it treated the records prior to providing them to the Public Body.

[para 47] There is no evidence before me that the records were entrusted to the Public Body on terms of implied or express confidence. The Public Body reasons that because the records police services provide to the Crown may contain sensitive personal information, it is implicit that the information is supplied "in confidence". The Public Body then acknowledges that records of police investigations supplied by police services in relation to a prosecution are normally provided to an accused and may form part of proceedings in open Court and that fact is understood by the police service supplying the records. It is unclear from the Public Body's submissions how police services expect the Public Body to hold records in confidence in such circumstances.

[para 48] The Public Body may be arguing that records are "supplied in confidence" because the records contain sensitive personal information. The fact that some portions of records contain sensitive personal information only means that the Public Body must consider severing that information under section 17(1) of the FOIP Act should it receive an access request for the information. The presence of personal information in records exchanged by public bodies or government entities does not mean that section 21(1)(b) applies.

[para 49] The Public Body also states the RCMP detachment provided the records to the Public Body for the sole purpose of prosecution. While I agree with the Public Body that prosecution is likely the only reason the RCMP detachment provided the records of its investigation to the Public Body, I am unable to conclude from this fact, as the Public body appears to, that the records were supplied in confidence. The RCMP provided records of an investigation to the Public Body as part of its public law enforcement function to the Public Body. It did so in order that the Public Body could then perform its public role in relation to bringing, managing, or terminating public prosecutions. The exchange of information was done in the performance of public duties. It is unclear, on the Public Body's argument, how the RCMP detachment could impose conditions of confidentiality on the Public Body when it provides records of investigations to it. If the Public Body is of the view that there is legislative or common law authority for an RCMP detachment to impose conditions of confidentiality on the Public Body in relation to records of police investigations it provides, it has not pointed to any. If the Public Body

believes an RCMP detachment has such authority pursuant to a contract or agreement, it has not pointed to the relevant term or provided the contract or agreement for the inquiry.

[para 50] The Public Body describes the records at issue as "under the control of the RCMP" but does not elaborate as to the control it considers the RCMP to exert. By implication, the Public Body is arguing that an RCMP detachment has the power to impose conditions of confidentiality on the Public Body and its Crown prosecutors. If it were the case that the RCMP detachment (or police service) that supplies the records has control over the records, such that the Public Body requires its permission to use them or disclose their contents, and cannot use them for purposes other than prosecuting an accused, it is unclear how prosecutorial discretion as envisioned by the Public Body in its discussion of section 20(1)(g), could exist. A Crown prosecutor would not make the decision to prosecute as the decision would require the permission of the RCMP detachment (or police service) to use the evidence to do so. The RCMP would not be required to provide the records of its investigation to the Public Body in such circumstances. The notion that the RCMP detachment maintains control over the records it provides Crown prosecutors suggests that the RCMP detachment (or police service) decides what the Crown prosecutor may use and how the Crown prosecutor may use it. If the Crown requires a police service's permission to use records and the evidence they contain to bring a prosecution and the attendant disclosure of information, it is the police service making the decision to prosecute and to what extent, and not the Crown prosecutor. Such a circumstance runs counter to the Attorney General's constitutional role, described in *Krieger*, above, in managing prosecutions.

[para 51] The Public Body's argument does not adequately address the Crown's duty to disclose records to an accused in a prosecution. The Crown is under a duty to disclose all records in its custody to an accused relevant to a prosecution. This duty is not subject to terms of confidentiality imposed by a police service. It is unclear on the Public Body's arguments how the duty to disclose records to an accused can co-exist with a duty to keep the same records confidential.

[para 52] The Public Body also asserts that an RCMP detachment provides records to the Public Body for the sole purpose of prosecution; on this basis it reasons that the Public Body received records of police investigations in confidence and may not do anything else with the records without the RCMP's approval. The Public Body did not provide a source for this legal theory. While I agree that the RCMP, when carrying out policing duties in Alberta, also has a duty like any other police service, to provide records of investigations to the Public Body so that the Public Body may fulfill its constitutional function in relation to prosecutions, it does not follow from this that the Public Body is bound to use the records only for prosecutions and not its other statutory obligations, such as those under the FOIP Act. That records are supplied for the purposes of a prosecution does not mean they were supplied in confidence.

[para 53] I note that the Public Body's severing is inconsistent. For example, record 193 is severed under section 17 and section 20(1)(g), while record 194, which is the concluding page of the document and prepared by the same person, is severed under

section 20(1)(g) and section 21(1)(b). I am unable to say from reviewing the record why the Public Body determined the first page was not submitted in confidence while the concluding page was.

[para 54] I also note that the Public Body severed an email from record 383 under section 21(1)(b) that simply refers to the RCMP, generally. Section 21(1)(b) does not apply to information *about* another public body or entity, only to information supplied *by* an entity listed in section 21(1)(a) in confidence.

[para 55] I find that the Public Body has not established that section 21(1)(b) applies to the information to which it applied this provision in the records.

ISSUE C: Does section 17(1) of the FOIP Act require the Public Body to withhold the information in the records from the Applicant?

[para 56] Section 17 requires a public body to withhold the personal information of an identifiable individual when it would be an unreasonable invasion of the individual's personal privacy to disclose his or her personal information.

[para 57] Section 1(n) of the FOIP Act defines personal information. It states:

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

(viii) anyone else's opinions about the individual, and

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

[para 58] Information is personal information within the terms of the FOIP Act if it is recorded and is about an identifiable individual.

[para 59] Section 17 sets out the circumstances in which a public body may or must not disclose the personal information of a third party in response to an access request. It states, in part:

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

[…]

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

[…]

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

[…]

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

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

or

(ii) the disclosure of the name itself would reveal personal information about the third party […]

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

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

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

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

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

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

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

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

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

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

[para 60] Section 17 does not say that a public body must *never* disclose third party personal information. It is only when the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy that a public body must refuse to disclose the information to an applicant (such as the Applicant in this case) under section 17(1). Section 17(2) (not reproduced) establishes that disclosing certain kinds of personal information is not an unreasonable invasion of personal privacy.

[para 61] When the specific types of personal information set out in section 17(4) are involved, disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. To determine whether disclosure of personal information would be an unreasonable invasion of the personal privacy of a third party, a public body must consider and weigh all relevant circumstances under section 17(5) (unless section 17(3), which is restricted in its application, applies). Section 17(5) is not an exhaustive list and any other relevant circumstances must be considered.

[para 62] Section 6 of the FOIP Act imposes a duty on a public body to sever information that is subject to an exception if it can reasonably do so. Section 6 states, in part:

6(1) An applicant has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.

(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be

severed from a record, an applicant has a right of access to the remainder of the record.

[…]

The foregoing provision establishes that an applicant has a right of access to records including records containing the applicant's personal information. The right of access is subject to exceptions to disclosure, but if a public body can reasonably sever information subject to an exception, such as the personally identifying information of a third party, and provide the remainder to the applicant, it must do so.

[para 63] As section 17(1) may be applied only to the personal information of third parties where it appears in the records requested by an applicant, and as the Public Body has applied section 17(1) to withhold information about the applicant, and to information that is not obviously personal information in many cases, I will first review the kinds of information severed by the Public Body to determine whether it is personal information.

Information in witness statements about the Applicant

[para 64] The Public Body has withheld information in the records about the Applicant under section 17(1). Statements about the Applicant appear in witness statements, including in paper records, the audio record, and the six video records. Under section 1(n) of the FOIP Act, opinions about an individual are the personal information of the individual the information is about. The fact that an individual holds an opinion about another individual remains the personal information of the holder of the opinion.

Information in witness statements not about an identifiable individual

[para 65] The Public Body has severed information from witness statements under section 17(1) that is not clearly about anyone. I infer that the Public Body has done so because the fact that the witness made the statement is the witness's personal information. Presumably, it reasons that all information in the statement reveals the fact that the witness made the statement.

Information in photographs

[para 66] From my review of the photographs, which the records indicate may have been given to the Applicant as part of the Crown prosecutor's duty to provide disclosure, I am unable to say that they contain the personal information of anyone. In some pictures an RCMP officer in the course of conducting policing duties is visible. Otherwise, the pictures reveal only furniture, structures, and forest.

[para 67] It is possible that the Public Body considers the image of the RCMP officer to be personal information and severed the photograph in its entirety for this reason. Past orders of this office have held that the personal information of individuals

carrying out duties in a representative capacity is not personal information that may be withheld under section 17(1).

[para 68] In Order F2013-51, the Director of Adjudication distinguished personal information from information about a third party acting as a representative. She said:

> As well, the Public Body has severed information, partly in reliance on section 17, that may be properly characterized as 'work product'. For example, it has severed the questions asked by an investigator, in addition to the answers of those interviewed. It has also withheld what is possibly a line of inquiry which the investigator means to follow (the note severed from record 1-151). While some of the questions and notes may reveal the personal information of witnesses, it does not appear that it is always the case that they do, and it appears possible that the Public Body withheld information on the basis that it may reveal something about the investigator performing duties on its behalf, rather than personal information about third parties.
>
> The Public Body has also withheld notes of an interview by the Public Body's investigator of the University of Calgary's legal counsel, in part in reliance on section 17. Information about the legal counsel's participation in the events surrounding the Applicant's complaint to the University is not her personal information unless it has a personal aspect, which was not shown.
>
> As well, it may be that some of the information of persons interviewed in the third volume relating to the Applicant's 'retaliation' complaint, which was withheld in reliance on section 17, may be information about events in which these persons participated in a representative rather than a personal capacity. Again, to be personal in such a context, information must be shown to have a personal dimension.
>
> In Order F2009-026, the Adjudicator said:
>
> > 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.
>
> In that case, the Adjudicator found that information solely about an employee acting as a representative of a public body was information about the public body, and not information about the employee as an identifiable individual. In *Mount Royal University v. Carter*, 2011 ABQB 28 (CanLII), Wilson J. denied judicial review of Order F2009-026.
>
> In Order F2011-014, the Adjudicator concluded that the name and signature of a Commissioner for Oaths acting in that capacity was not personal information, as it was not information about the Commissioner for Oaths acting in her personal capacity. She said:

> Personal information under the FOIP Act is information about an identifiable individual that is recorded in some form.
>
> However, individuals do not always act on their own behalf. Sometimes individuals may act on behalf of others, as an employee does when carrying out work duties for an employer. In other cases, an individual may hold a statutory office, and the actions of the individual may fulfill the functions of that statutory office. In such circumstances, information generated in performance of these roles may not necessarily be about the individual who performs them, but about the public body for whom the individual acts, or about the fulfillment of a statutory function.
>
> I find that the names and other information about employees of the Public Body and the University of Calgary acting in the course of their duties, as representatives of their employers, cannot be withheld as personal information, unless the information is at the same time that of an individual acting in the individual's personal capacity.

[para 69] From the foregoing, I conclude that information about a third party acting in a representative capacity will not be personal information, unless the information has a personal dimension. In cases where it is unclear from the context that information has a personal dimension, it must be proven, with evidence, that the information has this quality. The Public Body has not explained its decision to apply section 17(1) to the specific information to which it applied section 17(1). In the case of the photographs, I am unable to find that there is a personal dimension to the content.

Personal information

[para 70] The personally identifying information of a witness is clearly personal information about an identifiable individual within the terms of section 17(4). I am unable to say that there are any factors present that weigh in favor of disclosing their personal information.

[para 71] I acknowledge that the Applicant is seeking records for the purposes of a lawsuit. The Applicant provided details of the lawsuit in his final rebuttal submissions. The Applicant states that he has most of the records at issue through the disclosure process and through an affidavit of records. The Applicant is seeking records that he does not have.

[para 72] The Applicant argues that section 17(5)(c) applies and weighs in favor of disclosing the personal information in the records. Cited above, section 17(5)(c) establishes that when personal information is relevant to the fair determination of an applicant's rights this factor should be considered when deciding whether to grant access to the information. I am unable to find that any of the information in the records would be relevant to the legal action brought by the Applicant. It was open to the Applicant to tell me what kind of information would be relevant, including providing *in camera* submissions, if he were concerned about disclosing litigation strategies to the Public Body. As it stands, I am unable to say that any of the records before me contain personal information relevant to the Applicant's case.

Severing

[para 73] I find that the names of individual witnesses and personally identifying information about them in the records, and the fact that they hold opinions or expressed opinions, are the personal information of the individual witnesses. I have found that information about the RCMP officers is not personal information to which section 17(1) may be applied, as they acted in a representative capacity.

[para 74] As discussed above, a public body has the duty to sever information that is subject to an exception and to provide the remainder to an applicant if this can reasonably be done. In many cases, especially with regard to the video and audio interviews, which the Public Body severed in their entirety, it is unclear that the Public Body turned its mind to the question of whether personally identifying information could be severed from the records and the remainder provided to the Applicant.

[para 75] In Review Report 21-04, the Information and Privacy Commissioner of Nova Scotia made the following comment with regard to a decision to withhold an entire video rather than to sever information thought to be subject to exceptions and to provide the remainder of the video to an applicant:

> Just as a paper record requires a line-by-line analysis, a video record requires a frame-by-frame analysis. To suggest that it is unreasonable to sever a video file is not adequate. Video surveillance is not new technology. It is reasonable to expect a public body collecting personal information in the form of a video record would also have a process by which to sever that record to ensure it can comply with the access to information legislation.

[para 76] In Order F2023-18, I agreed with this reasoning, stating:

> I agree with the foregoing discussion. Section 6(1) of the FOIP Act states, in part:
>
> > *6(1) An applicant has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.*
> >
> > *(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record.*
> >
> > *[…]*
>
> The Public Body could have edited the video to obscure things such as the extent of blind spots, or the locking mechanisms of doors, as well as the technique it says was attempted to control the Applicant. It could then, in accordance with section 6(2), have provided the remainder of the video to the Applicant in response to his access request in a timely way.

In many instances, in addition to the videos and audio recording, the Public Body has withheld entire records on the basis of section 17 where it appears likely that it could remove the name of the witness and any identifying details, such as an address, and provide the remainder of the information to the Applicant. For example, the Public Body severed records 483 and 484 in their entirety under section 17(1) without turning its mind

to the question of whether the name and/or personally identifying information of a witness could be severed from them.

[para 77] As there are many instances of severing under section 17(1) where more information appears to have been severed than the FOIP Act requires, and as the Public Body has not explained its decisions in relation to all the information it has severed, I have decided that I must direct it to meet its duty under section 6(2) of the FOIP Act to redo the severing of the personally identifying information of witnesses in the records. When doing so, the Public Body must not sever information about individuals who were acting in representative capacities, information that is solely about the Applicant, or information that lacks a personal dimension. In addition, if a record has been withheld because a witness has provided information or an opinion about the Applicant, the Public Body must consider whether it can reasonably sever personally identifying information about the witness and provide the opinion or information about the Applicant, to the Applicant.

IV. ORDER

[para 78] I make this Order under section 72 of the Act.

[para 79] I confirm that the Public Body is required to withhold the names and personally identifying information of witnesses from the Applicant where these appear in the records.

[para 80] I order the Public Body to meet its duty under section 6(2) of the FOIP Act by severing the personally identifying information of witnesses from the records and providing the remainder to the Applicant as set out in paragraph 77 of this Order, if this can reasonably be done.

[para 81] I order the Public Body to give the Applicant the remaining information in the records.

[para 82] I further order the Public Body to inform me within 50 days of receiving this Order that it has complied with it.

Teresa Cunningham
Adjudicator
/kh