# ALBERTA

# OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

# ORDER F2024-31

October 4, 2024

## CALGARY POLICE SERVICE

Case File Number 027551

**Office URL:** www.oipc.ab.ca

**Summary:** The Applicant made an access to information request under the *Freedom of Information and Protection of Privacy Act* (the Act) to the Calgary Police Service (the Public Body) seeking video of an interview with her daughter (the Recording). The Public Body withheld the entire Recording under section 20(1)(c) of the Act (harm to law enforcement techniques and procedures).

The Adjudicator found that the Public Body did not establish that disclosing the Recording would harm its investigative techniques or procedures. The Adjudicator also ordered the Public Body to consider or reconsider (as the case may be) whether or not section 17(1) required it to withhold any personal information in the Recording, and whether or not section 84(1)(e) applied in the circumstances of the access request.

The Adjudicator ordered the Public Body to disclose information improperly withheld under section 20(1)(c) to the Applicant, subject to the requirement to withhold information under section 17(1).

**Statutes Cited: AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 ss. 1(b), 1(r), 6(1), 17, 17(1), 17(2), 17(4), 17(5), 20(1)(c), 72, 84(1)(e), 85

**Authorities Cited: AB:** Orders F2007-005, F2008-031, F2020-22

**Cases Cited:** *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23

## I. BACKGROUND

[para 1] Under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (the Act), the Applicant made an access to information request to Calgary Police Services (the Public Body). The Applicant sought the following information:

> X – Husband under Police investigation, re sexual abuse of our daughters.
>
> Ca. [File Number] – Det Paul Ralstin
> Ca. [File Number] ┐
> Ca. [File Number] > Det. Dave Palmer
> Ca. [File Number] ┘

[para 2] The Public Body provided a response to the access request on May 13, 2022. The Public Body withheld information under numerous sections of the Act, including sections 17(1) and 20(1)(c). The Applicant observed that the records provided in response to her access request referenced video recording (the Recording) of an interview with her daughter, which had not been provided.

[para 3] The Applicant made a second request for information to the Public Body on June 2, 2022, seeking the Recording. The Public Body responded to the Applicant on the same day, informing the Applicant that it had withheld the entire Recording under section 20(1)(c) of the Act.

[para 4] The Applicant sought a review of the Public Body's response to her access request.

[para 5] Investigation and mediation did not resolve the issue of whether or not the Public Body had properly withheld the Recording; that matter proceeded to inquiry.

## II. RECORDS AT ISSUE

[para 6] The record at issue consists of the Recording.

## III. ISSUES

**A. Did the Public Body properly apply section 20(1)(c) of the Act (disclosure harmful to law enforcement) to the information/record(s)?**

## IV. DISCUSSION OF ISSUE

*Preliminary Matter – Order written in generalized manner*

[para 7] In order to protect the privacy of the Applicant, her daughter, various third parties to the access request, and the sanctity of confidential information present in the Public Body's submission, this order has been written in a generalized manner,

particularly with regard to describing what is referred to as "sensitive personal information" as well as the circumstances surrounding the Recording.

*Preliminary Matter – In Camera Submission*

[para 8] The Public Body's submission in this inquiry was accepted on an *in camera* basis.

*Preliminary Matter – Public Body's duties under section 17(1) and 84(1)(e) of the Act.*

[para 9] Section 17(1) of the Act requires public bodies to withhold personal information of third parties where disclosing it would be an unreasonable invasion of a third party's personal privacy. It is a mandatory exception to disclosure under the Act, which the serves the public interest in maintaining personal privacy of third parties to access requests. Where personal information must be withheld pursuant to section 17(1), it is a public body's duty to do so. I note that section 17(1) applies to *any* personal information disclosure of which is an unreasonable invasion of third party personal privacy, and is not limited to personal information of third parties themselves. Section 17(1) 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 10] Third party is defined in section 1(r) of the Act, and excludes applicants:

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

[para 11] Applicants are those who exercise their right to make an access request, as defined in section 1(b):

> *(b) "applicant" means a person who makes a request for access to a record under section 7(1);*

[para 12] That access right includes a right to one's own personal information per section 6(1):

> *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.*

[para 13] Whether or not personal information must be withheld under section 17(1) depends upon whether any exceptions under section 17(2) apply, whether any presumptions under section 17(4) apply, and whether considerations of factors under section 17(5) weigh in favour or against disclosure.

[para 14] The Public Body turned its mind to its duty under section 17(1) and withheld some information under section 17(1) in its response to the initial access request. However, it is not clear that it did so with respect to the Applicant's follow-up request specifically for the Recording.

[para 15] Upon reviewing the Recording it is evident that it contains large amounts of sensitive third party personal information of those whose conduct or alleged conduct the Applicant's daughter describes. The Public Body, as a police service, will be familiar with the gravity of the alleged conduct.

[para 16] The video also contains large amounts of sensitive personal information of the Applicant's daughter in the form of her descriptions of her own experiences, and her appearance in the Recording. As discussed further on, the application of section 17(1) to the personal information of the Applicant's daughter may be affected by the possible application of section 84(1)(e). If that section applies, the personal information of the Applicant's daughter may not be *third party* personal information in the context of the access request, and thus invite different considerations under section 17(1) when evaluating whether or not disclosing it is an unreasonable invasion of any *third party's* personal privacy.

[para 17] Despite the presence of personal information in the video, the Public Body did not withhold any of it under section 17(1). It is possible that the Public Body determined that disclosing all of the personal information would not be an unreasonable invasion of any third party's personal privacy after considering sections 17(4) and 17(5), but that is unclear. Given that withholding information under section 17(1) is mandatory and the personal information in the video is particularly sensitive, I will order the Public Body to reconsider its decisions regarding withholding information under section 17(1), if any were made. Disclosing the Recording and removing the Public Body's control over it raises the possibility that it may find its way into the public realm and do serious harm to the privacy and reputations of numerous people. In my view, the possible harm is so high that in the absence of an explanation of how, if at all, the public body considered whether information must be withheld under section 17(1), second thoughts are in order.

[para 18] In the event that the Public Body did not consider section 17(1) in respect of the Recording, I remind the Public Body that since section 17(1) is a mandatory exception to disclosure public bodies *must* turn their mind to it when preparing a response to an access request, and withhold information to which it properly applies.

[para 19] Though it seems likely that if the Public Body did not consider section 17(1) it was simply an oversight, I also address the possibility that the Public Body may have considered that applying section 17(1) to the Recording was unnecessary or redundant in light of its decision to withhold it (and personal information in it) entirely under section 20(1)(c). This approach is improper and not permitted for the following reasons.

[para 20] Section 20(1)(c) is a discretionary exception to disclosure. The proper exercise of discretion was considered in *Ontario (Public Safety and Security) v. Criminal*

*Lawyers' Association*, 2010 SCC 23 (*Ontario Public Safety and Security*). Numerous orders of this office have confirmed that the reasoning therein is applicable to the exercise of discretion under the Act. At paragraph 71 of *Ontario Public Safety and Security,* the following factors were identified as relevant to the question of whether or not a public body has properly exercised its discretion:

- the decision was made in bad faith
- the decision was made for an improper purpose
- the decision took into account irrelevant considerations
- the decision failed to take into account relevant considerations.

[para 21] The proper purpose to withhold information under any section of the Act is the purpose that withholding information under a particular section is meant to serve. Section 20(1)(c) does not serve the same purpose or invite the same consideration as section 17; it serves the public interest in preserving the effectiveness of law enforcement techniques. Withholding information under section 20(1)(c) to serve the purpose served by section 17(1) is, therefore, an improper use of discretion. Similarly, exercising discretion under section 20(1)(c) to "relieve" the duty under section 17(1) to withhold third party personal information by withholding it under section 20(1)(c) is also an improper purpose to exercise discretion. Section 17(1), as a mandatory exception to disclosure must be applied in service to its own purpose, in its own right.

[para 22] Just as it is not clear whether the Public Body applied section 17(1) to the video, it is also not clear whether the circumstances of this case engage section 84(1)(e) of the Act. Section 84(1)(e) states,

> *84(1) Any right or power conferred on an individual by this Act may be exercised*
>
> *...*
>
> *(e) if the individual is a minor, by a guardian of the minor in circumstances where, in the opinion of the head of the public body concerned, the exercise of the right or power by the guardian would not constitute an unreasonable invasion of the personal privacy of the minor, or*
>
> *...*

[para 23] The Applicant seeks a video of an interview with her minor daughter. It is unclear whether the Public Body regarded the Applicant as exercising her own access right, or that of her daughter, on behalf of her daughter. If it understood that the Applicant was exercising her daughter's access right, that may have affected the Public Body's application of section 17(1) with respect to the personal information of the Applicant's daughter. The Applicant's daughter would not be a third party in respect of the exercise of her own access right to her own personal information.

[para 24] As well, in the event that section 84(1)(e) applies in this case, the head of the Public Body (or a person with delegated authority under section 85(1)) is required to

consider whether the exercise of the access right of the Applicant's daughter by the Applicant is, in the opinion of the head (or delegate), an unreasonable invasion of the privacy of the Applicant's daughter. If the Public Body's understanding was that section 84(1)(e) applied with respect to the request for the Recording, whether the requisite opining took place has not been made clear.

## A. Did the Public Body properly apply section 20(1)(c) of the Act (disclosure harmful to law enforcement) to the information/record(s)?

[para 25] Section 20(1)(c) 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*
>
> ...
>
> *(c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement,*
>
> ...

[para 26] The Public Body explains the techniques and procedures it wishes to protect in its *in camera* submission. It is perhaps debatable that the techniques and procedures are those that may be protected under section 20(1)(c). Section 20(1)(c) does not protect well-known investigation techniques and procedures (Order F2007-005 at para. 9; F2008-031 at para. 52). The investigation techniques and procedures identified by the Public Body are those that are utilized in the interview conducted with the Applicant's daughter, and interviews conducted under similar circumstances. As such, they are displayed to anyone undergoing an interview wherein they are utilized, and are disclosed to members of the public in that way. I do not consider this matter further since, while it is debatable that the techniques and processes identified by the Public Body could be protected by section 20(1)(c), it is clear that the Public Body has failed to establish that disclosing the Recording will harm those techniques or procedures.

[para 27] The harm test applicable where information is withheld under section 20(1)(c) has been set out in numerous orders of this Office. Order F2020-22 sets out the test and the evidence required to establish the harm at paras. 50 - 54:

> Both section 20(1)(c) and (m) require the Public Body to satisfy the same 'harms test': that disclosure could reasonably be expected to result in the harm described in the provision.
>
> The Supreme Court of Canada has clearly enunciated the test to be used in access-to-information legislation wherever the phrase "could reasonably be expected to" is found (such as in section 20(1)(c)). The Supreme Court of Canada stated in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, stated (at para. 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 *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences": *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 40.

The Supreme Court of Canada has made it clear that there is one evidentiary standard to be used wherever the phrase "could reasonably be expected to" appears in access-to-information legislation. There must be a reasonable expectation of probable harm, and the Public Body must provide sufficient evidence to show that the likelihood of any of the above scenarios is "considerably above" a mere possibility.

In *Canada (Information Commissioner) v. Canada (Prime Minister)*, 1992 CanLII 2414 (FC), [1992] F.C.J. No. 1054, Rothstein J., as he then was, made the following observations in relation to the evidence a party must introduce in order to establish that harm will result from disclosure of information. He said (emphasis added):

> While no general rules as to the sufficiency of evidence in a section 14 case can be laid down, what the Court is looking for is support for the honestly held but perhaps subjective opinions of the Government witnesses based on general references to the record. Descriptions of possible harm, even in substantial detail, are insufficient in themselves. At the least, there must be a clear and direct linkage between the disclosure of specific information and the harm alleged. The Court must be given an explanation of how or why the harm alleged would result from disclosure of specific information. If it is self-evident as to how and why harm would result from disclosure, little explanation need be given. Where inferences must be drawn, or it is not clear, more explanation would be required. The more specific and substantiated the evidence, the stronger the case for confidentiality. The more general the evidence, the more difficult it would be for a court to be satisfied as to the linkage between disclosure of particular documents and the harm alleged.

The "harm test" must be applied on a record-by-record basis (Orders F2002- 024, at para. 36, F2009-009, at para. 91).

[para 28] The Public Body's position on the possibility of harm to the effectiveness of its techniques and procedures is that disclosing the Recording would enable a person to observe the techniques and procedures and coach anyone who may undergo similar interviews in the future.

[para 29] The Public Body does not explain how the techniques or processes may be identified from merely viewing the Recording. The Recording shows the interview being conducted, but there are no prompts or explanations to identify what, if any, technique is being used, whether at a particular time, throughout the interview process, or at all. The

Recording displays the interview for what it is, an interview with the police where questions are asked and answers given. No part of it stands out as explicitly demonstrating technique or procedures.

[para 30] Perhaps it is possible that techniques or procedures may be deduced or guessed at by someone reviewing the footage, but the Public Body has not provided any evidence as to how that may occur, or with any appreciable degree of accuracy if so. It only makes the bald assertion that it *could* happen. Similarly, while the Public Body has asserted that future interview subjects may be coached, it makes no suggestion of whether or not that actually poses a threat to the effectiveness of its techniques or procedures. It is not self-evident from reviewing the Recording that this harm is probable.

[para 31] For the foregoing reasons, I find that the Public Body has failed to establish that section 20(1)(c) applies to the information in the Recording.

[para 32] Since section 20(1)(c) is a discretionary exception to disclosure, a public body must also demonstrate that it properly exercised discretion to withhold information under it. I do not need to consider the Public Body's exercise of discretion in this case since section 20(1)(c) does not apply to the interview in the first place.

## V. ORDER

[para 33] I find that the Public Body improperly withheld any information in the video under section 20(1)(c). Subject to possible considerations under section 84(1)(e) and the application of section 17(1) described below, I order the Public Body to disclose the Recording to the Applicant.

[para 34] I order the Public Body to consider whether section 84(1)(e) applies in this case. As discussed in paragraph 16 of this order, if the Applicant is exercising her daughter's access right on her daughter's behalf, then the personal information of the Applicant's daughter is not considered third party personal information. This may affect the Public Body's decision on applying section 17(1) to it as it relates to third party personal privacy.

[para 35] If section 84(1)(e) does apply, I order the Public Body (either the head or a delegate) to consider whether, in their opinion, allowing the Applicant access to the Recording via exercising her daughter's access right is an unreasonable invasion the privacy of the Applicant's daughter. If the head of the Public Body (or delegate) finds that allowing the Applicant to exercise her daughter's access right would be an unreasonable invasion of the personal privacy of the Applicant's daughter, the Public Body shall refuse to process the access right as though it were an exercise of the access right of the Applicant's daughter. In that case, it may consider the access request as an exercise of the Applicant's own access right, on the understanding that the personal information of the Applicant's daughter is third party personal information for the purposes of section 17(1), in those circumstances.

[para 36] I order the Public Body to consider or reconsider (as the case may be) the application of section 17(1) to the information in the Recording, and to withhold personal information that it finds it is required to withhold.

[para 37] I order the Public Body to provide to the Applicant and me written confirmation that it has complied with this order within 50 days of receiving a copy of it.

_____
John Gabriele
Adjudicator
/ah