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OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER FOIP2025-33

November 24, 2025

CALGARY POLICE SERVICE

Case File Number 019363

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request to the Calgary Police Service (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for "any and all reports, documents, or mentions of my name in your records since the period of the last request." The timeframe for the request is 2015 to the date of the request (August 12, 2020).

The Public Body responded to the request, providing 272 pages of records, with some information withheld under sections 17(1), 20(1), 21(1), 24(1), and 27(1) of the FOIP Act.

The Applicant requested a review into the Public Body's response. Following the settlement phase of the review, the Applicant requested an inquiry into the Public Body's application of sections 17(1) and 20(1)(g).

The Adjudicator found that section 17(1) applied to some, but not all of the information withheld under that provision.

The Adjudicator determined that section 20(1)(g) applied to the information withheld under that provision, but ordered the Public Body to re-exercise its discretion to withhold the information.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 17, 20, 71, 72

Authorities Cited: AB: Orders 98-007, F2007-021, F2008-012, F2008-020, F2008-031, F2009-027, F2010-002, F2010-036, F2018-14, F2022-40; **BC**: Order F21-19

Cases Cited: *Edmonton Police Service v Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (CanLII), *Haight v. R.B.*, 2017 ONSC 5359 (CanLII), *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23 (CanLII), *Tuharksy* v. *O'Chiese First Nation* 2024 ABKB 511

I. BACKGROUND

[para 1] The Applicant made an access request to the Calgary Police Service (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for "any and all reports, documents, or mentions of my name in your records since the period of the last request." The timeframe for the request is 2015 to the date of the request (August 12, 2020). This request was subsequently narrowed to include only records relating to "domestic matters", as opposed to other police records such as those related to traffic violations.

[para 2] The Public Body responded to the request, providing 272 pages of records, with some information withheld under sections 17(1), 20(1), 21(1), 24(1), and 27(1) of the FOIP Act.

[para 3] The Applicant requested a review into the Public Body's response. The settlement phase addressed the Public Body's duty to assist under section 10 of the Act, as well as the Public Body's application of sections 17(1), 20(1), 21(1), 24(1), and 27(1) of the Act.

[para 4] The Applicant's concerns were not entirely satisfied following the settlement phase of the review. The Applicant requested an inquiry into the Public Body's application of sections 17(1) and 20(1)(g). The Applicant is primarily interested in witness statements of a particular individual, which the Applicant argues ought to be provided to them, due to the circumstances in which they were made. The Applicant is also interested in records relating to any investigation that resulted from the witness statements.

[para 5] The Applicant and Public Body were each invited to provide one submission to the inquiry.

II. RECORDS AT ISSUE

[para 6] The records at issue consist of the withheld portions of the responsive records, including video and audio recordings withheld in their entirety.

III. ISSUES

[para 7] The issues set out in the Notice of Inquiry dated March 25, 2025, are:

1. Does section 17(1) of the Act (disclosure an invasion of personal privacy) apply to the information?

2. Does section 20(1)(g) of the (information relating to or used in the exercise of prosecutorial discretion) apply to the information to which the Public Body applied this provision?

IV. DISCUSSION OF ISSUES

Preliminary issue – one responsive record unreadable

[para 8] The Public Body provided electronic copies of written records responsive to the Applicant's access request, as well as several audio and video recordings of interviews with third parties. However, I was unable to view one audio or video recording. The Public Body was asked to provide a new copy of that record but it was unable to do so. The Public Body advised that it was also unable to open its copy of the record; it further advised that it spoke with the primary officer on the file and that officer did not have another copy of this record.

[para 9] I have considered whether to order the Public Body to search for another copy of the record, or to take steps to try to produce a readable copy. Ultimately, I decided against this approach, given the likelihood that I would have determined that the Public Body was required to withhold the record from the Applicant in any event.

[para 10] From the Public Body's submissions, I understand that the audio and video files contain third party personal information. It is not unreasonable to conclude that I would have made the same finding regarding this record as I have made for the other audio and video recordings; specifically, I would have found that the Public Body is required to withhold this record from the Applicant. Given this, I have decided not to order any further action from the Public Body regarding this record.

[para 11] To be clear, there is no reason to believe that the Public Body has another copy of this record, or that the record was intentionally corrupted. It simply seems to have been saved in a format that is no longer readable with the usual software or programs, or has been inexplicably corrupted in the years since it was created.

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

[para 12] The Public Body applied section 17(1) to withhold information on pages 1-102,108, 110-112, 114-118, 120-127, 129, 130, 132-142, 145-148, 150, 151, 162-164, 166, 167, 170,171,

173, 174, 176, 177, 179, 180, 183-186, 227, 229-235, 238-242, 244, 245, 248, 249-251, 253, 269-271.

[para 13] In some cases, the Public Body applied other exceptions to withhold information in conjunction with section 17(1). All of these exceptions were addressed at the settlement phase of the review; following that, the Applicant requested an inquiry only into the Public Body's application of sections 17(1) and 20(1)(g). I note that the information the Applicant is particularly interested in, based on the request for inquiry, was often withheld under section 17(1) alone.

[para 14] Where the Public Body has applied other exceptions that the Applicant has not asked to be reviewed in this inquiry, I will not consider whether section 17(1) was properly applied. This is because even if I find that the Public Body is not required to withhold the relevant information under section 17(1), the Public Body has also withheld that same information under other exceptions that are not at issue in this inquiry such that I cannot order the Public Body to disclose the information to the Applicant in any event.

[para 15] 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 16] Section 17 is a mandatory exception to disclosure: if the information falls within the scope of the exception, it must be withheld.

[para 17] Under section 17, if a record contains personal information of a third party, section 71(2) states that it is then up to the applicant to prove that the disclosure would not be an unreasonable invasion of a third party's personal privacy. While the Applicant has the burden of proving that it would not be an unreasonable invasion of privacy to disclose personal information to which section 17(1) applies, the Public Body has the burden of establishing that the information withheld under section 17(1) is personal information to which that provision can apply (Order F2010-002, at para. 9).

[para 18] Section 1(n) defines personal information under the Act:

> *1 In this Act,*
>
> *…*
>
> *(n) "personal information" means recorded information about an identifiable individual, including*

(i) the individual's name, home or business address or home or business telephone number,

(ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,

(iii) the individual's age, sex, marital status or family status,

(iv) an identifying number, symbol or other particular assigned to the individual,

(v) the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,

(vi) information about the individual's health and health care history, including information about a physical or mental disability,

(vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,

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

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

[para 19] With respect to this issue, the Notice of Inquiry states:

> *Under section 71(2) of the Act, the Applicant bears the burden of showing that disclosure of third party personal information in the records would not be an unreasonable invasion of the third party's privacy under section 17(1).*
>
> *In their submissions, the Public Body and Applicant should explain which factors set out in sections 17(2)-(5) apply to the third party personal information in the records at issue and how those factors weigh in favour of, or against, disclosure. The Public Body and Applicant should also address any other factors they believe are relevant, that are not specified in sections 17(2)-(5). The Public Body and Applicant might wish to review past Orders regarding the application of section 17(1); Orders are available on the OIPC website and CanLii.org.*

Public Body's arguments

[para 20] The Public Body's submission to this inquiry is sparse. It states that the information withheld under section 17 includes "names, contact information, age, gender, identifying numbers, information about an individual's health, financial history, personal views and image".

[para 21] The Public Body states that sections 17(2) and (3) are not applicable. It argues that sections 17(4)(b) applies to all of the information withheld under section 17, as all of the information is contained in a law enforcement record. The Public Body states that "as the investigation is not ongoing there is no need to disclose it."

[para 22] The Public Body further argues that section 17(4)(g), also applies to all of the information withheld under section 17; it states that "[i]n some instances, for example the videos, it would reveal the third party if we provided the personal information to the Applicant".

[para 23] Regarding the factors in section 17(5), the Public Body argues only that section 17(5)(f) is relevant. It states:

> 17(5)(f) was considered a relevant factor as most individuals, when speaking to police officers, expect a level of confidentiality with the information they share. There is an understanding that they may have to testify in court and some of the details of that information may be presented in court. However, not all details of an individual's involvement or statement is guaranteed to be presented in court, especially if a plea is undertaken. In this case, as charges were not laid the information was not presented in court. While the Applicant may want to know what was shared with police officers, revealing that information could identify who provided it along with personal information of the third parties.

Applicant's arguments

[para 24] The Applicant had provided arguments when they requested a review of the Public Body's response to their access request, and further arguments with their request for inquiry. These arguments were attached to the Notice of Inquiry, and the Applicant indicated that they were relying on them as well as the additional information provided in their submission.

[para 25] In their request for review, the Applicant cites sections 17(2)(b) (compelling circumstances affecting anyone's health or safety), 17(5)(c) (information is relevant to a fair determination of the applicant's rights) and 17(5)(g) (information likely to be inaccurate or unreliable) as applicable factors.

[para 26] The Applicant states that in 2015 their former spouse made serious allegations against them. In 2019, these allegations were found by a court to be false. The Applicant states that after this judgement, their former spouse continued to make false allegations against them to police, none of which resulted in charges.

[para 27] The Applicant states that they are seeking witness statements made by their former spouse to the Public Body. The Applicant cites *Haight v. R.B.*, 2017 ONSC 5359 (CanLII) (*Haight*), in support of the argument that witness statements are not protected by absolute privilege but only qualified privilege. The Applicant further argues that *Haight* "confirms that an action in

defamation can be raised where malice can be shown in witness statements", and that "[t]here is no competing case that is contrary to this principle which obliges the production of these witness statements."

[para 28] The Applicant argues that a more recent decision in *Tuharksy* v. *O'Chiese First Nation* 2024 ABKB 511 (*Tuharksy*) "also establishes that privilege is not attracted – even where absolute privilege is the norm – where malice can be shown."

[para 29] The Applicant further states:

> The statements in question occurred in 2016 and 2017 and, therefore, the 10 year absolute limitation period pursuant to the *Limitations Act* (Alberta) will expire in the near horizon. I respectfully submit that these documents should be released before this time period as, failing same, I will be denied access to justice by a Court.

[para 30] The Applicant argues that the FOIP Act "favors disclosure as a default" and

> if access to witness statements (and related information) is denied to those wrongfully accused, this will allow for such false accusations to continue unabated without lawful reprisal: literal victims will be denied access to justice.

Analysis

Is the information personal information to which section 17(1) can apply?

[para 31] The information withheld under section 17(1) is information about third party individuals, including witnesses and complainants. In some cases, the Public Body has applied section 17(1) to entire emails or other documents, including information about Public Body employees who were named in those documents as having sent, received, or authored them, or who were otherwise performing work duties.

[para 32] It is clear from the submissions that the Applicant is seeking information relating to them, and the records contain personal information of the Applicant. Section 17(1) applies to third party personal information; generally, it does not apply to permit the Public Body to withhold personal information about the Applicant. The exception is where the personal information of the Applicant is inextricably intertwined with personal information of a third party and the Public Body is required to withhold the information of the third party.

[para 33] The Public Body has provided the Applicant with much of the information about them appearing in the records. However, the Public Body has applied section 17(1) to some information in statements made by third parties about the Applicant. Statements made about the Applicant contain the Applicant's personal information. Where the Public Body has applied

section 17(1) to information about the Applicant, that information also reveals the identity and other personal information about a third party providing the statement, such that the personal information of the third party is inextricably intertwined with the Applicant's personal information. Therefore, I must consider whether section 17(1) requires the Public Body to withhold the personal information of the third party even where it is also information about the Applicant.

[para 34] Much of the information described by the Public Body as being withheld under section 17(1) is personal information to which that provision applies. However, the Public Body has withheld some information about employees that relates only to their work duties.

[para 35] Past Orders of this Office state that the disclosure of the names, contact information and other information about public body employees, that relates only to the employees acting in their professional capacities is not an unreasonable invasion of personal privacy under section 17(1) (see Orders 2001-013 at paras. 89-90, F2003-002 at para. 62, F2008-028 at para. 53) unless that information has a personal dimension in the circumstances. In other words, in the absence of a personal dimension, information cannot be withheld under section 17(1).

[para 36] For the reasons below, I find that most, but not all, of the personal information withheld under section 17(1) is information to which that provision can apply.

[para 37] As stated, most of the information is personal information about third party witnesses or complainants. In some instances, the Public Body has withheld only names or other identifiers; in other instances, the Public Body has withheld large portions of a page or pages in their entirety under section 17(1).

[para 38] Where names or other identifiers can be withheld in a manner such that the remaining information is no longer about an identifiable individual, the Public Body has an obligation to sever the information under section 6(2) of the Act, which states:

> *6(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.*

[para 39] In this case, the Applicant has named the person whose statements they are primarily interested in obtaining. Where the Public Body withheld large portions of a page, or entire pages under section 17(1), I agree that merely severing the names or obvious identifiers would not render the remaining information de-identified. In these instances, it would still be clear from the remaining information whom it is about, even without a name. For example, information relating to actions taken by a Public Body officer could reveal the content of a complaint that individual made to the Public Body.

[para 40] Further, any person with sufficient knowledge of the Applicant's relationship with their former spouse and the incidents that have occurred or alleged, would likely be able to identify various third parties from information about them, even with identifiers removed. As stated in Order F2008-020, "[a]n individual does not have to be identifiable by every person reviewing a particular record in order for there to be personal information about that individual; the individual needs only to be identifiable by someone."

[para 41] Therefore, with respect to many of the records withheld in their entirety, it is not possible to separate out identifiers to render the remaining information non-identifiable in this particular case.

[para 42] With respect to work-related information about Public Body employees, or employees of other bodies, section 17(1) can apply to some of that information but not all.

[para 43] In some cases, such as pages 5 and 6 of the records, disclosing the names of employees acting on behalf of other public bodies would reveal actions that complainants or witnesses have taken involving those employees. The information relates to these employees only insofar as they are acting in a professional capacity such that it is not an unreasonable invasion of the *employees'* privacy to disclose that information. However, if disclosing the involvement of these employees would reveal personal information of other third parties, such as witnesses and complainants, section 17(1) can nevertheless apply to this information.

[para 44] As stated above, the Public Body has withheld only names or discrete items of information in some pages, including email chains, but has withheld other pages in their entirety, including email chains. It is not clear why the Public Body has withheld some email chains involving specific Public Body employees in their entirety when it has disclosed other emails involving the same Public Body employees, with only discrete items of information withheld. The Public Body has not explained this apparent discrepancy in its submissions, nor do the records indicate any reason for this discrepancy.

[para 45] I find that section 17(1) does not apply to the information about Public Body employees appearing following pages 62, 68-70, 75-84, 97, 123-127 and 183-184; this information relates only to Public Body employees acting in their professional capacity.

[para 46] With respect to the video footage of interviews, these videos contain the personal information of the individual's being interviewed. The same can be said of the phone call between a Public Body employee and a complainant. There is another call between a Public Body employee and an employee of a business; whether the employee of the business is acting in a professional capacity, the call reveals personal information of a complainant and therefore section 17(1) can apply.

[para 47] The remaining information withheld under section 17(1) is information to which that provision can apply. The analysis below applies only to the information to which I found section 17(1) can apply.

Application of sections 17(2) – 17(5)

[para 48] Sections 17(2) and (3) refer to circumstances in which disclosure of personal information is not an unreasonable invasion of privacy. In their request for review (letter dated December 14, 2020), the Applicant has argued that section 17(2)(b) is applicable. None of the parties have argued that other provisions of sections 17(2) or (3) are relevant and, from the face of the records, none appear to apply.

[para 49] With respect to section 17(2)(b), this provision states:

> *17(2) A disclosure of personal information is not an unreasonable invasion of a third party's privacy if*
>
> *…*
>
> *(b) there are compelling circumstances affecting anyone's health or safety and written notice of the disclosure is given to the third party.*
>
> *…*

[para 50] The test for determining whether section 17(2)(b) applies consists of two parts:

a) There are compelling circumstances affecting anyone's health and safety; and,

b) There is a causal connection between disclosing the personal information and the compelling circumstances affecting anyone's health and safety. (Order 98-007 at para. 47)

[para 51] The Applicant has not explained what compelling circumstances arise in this case, and none are apparent to me. I find this provision does not apply.

[para 52] Section 17(4) lists circumstances in which disclosure is presumed to be an unreasonable invasion of privacy. The Public Body has argued sections 17(4)(b) and (g) apply to the information withheld under section 17(1).

[para 53] The relevant portions of this provision state:

> *17(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

[para 54] I agree that sections 17(4)(b) and (g) apply to all of the third party personal information withheld under section 17(1).

[para 55] Section 17(5) is a non-exhaustive list of factors to consider in determining whether disclosing personal information would be an unreasonable invasion of privacy. The Public Body argues that sections 17(5)(f) applies to some information, weighing against disclosure of that information. The Applicant argues that sections 17(5)(c) and (g) are applicable.

[para 56] These provisions state:

17(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

…

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

…

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

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

…

Section 17(5)(c)

[para 57] Section 17(5)(c) weighs in favour of disclosure where the personal information is relevant to a fair determination of the Applicant's rights. Four criteria must be fulfilled for this section to apply:

(a) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds;

(b) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed;

(c) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and

(d) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing. (Order F2008-012 at para. 55, Order F2008-031 at para. 112)

[para 58] The Applicant indicates that they are requesting the information in order to bring an action for defamation against their former spouse. The Applicant states that the former spouse had made public accusations against the Applicant several years ago, which received media attention. The Applicant provided a copy of a judgement of the Court of Queen's Bench (as it was then called), finding that the former spouse filed false statements with police and committed acts of defamation, injurious falsehood, malicious prosecution, and abuse of process.

[para 59] The Applicant states that the former spouse has continued to make false allegations about the Applicant to police (emphasis in original):

> In support thereof, I refer you to the decision of *Haight* v. *R.B.* 2017 ONSC 5359 (a copy of which being attached hereto for your ease of reference). In this instance, the complainant faced false allegations of sexual assault and while he was initially charged (which did not happen in this instance), the Crown withdraw the charge. **The principle that permitted this successful action as against the Plaintiff is that witness statements (unlike testimony at trial) do not carry absolute privilege but *qualified privilege*. Further, this case Affirms that an action can lie as against a person who provides false information to the police and/or lies to the police (specifically about a sexual assault) where it can be proven that "actual or express malice" was intended.** There is no competing case that is contrary to this principle which obliges the production of these witness statements.
>
> …
>
> I submit that the case in *Haight, supra,* is directly relevant to this matter and that the witness statements (at a bare minimum) should be produced – but also the resulting investigation and analysis. It is up to a Court to decide whether or not these statements are actionable under the foregoing enumerated grounds and failure to produce same is beyond the role of this process and could verily result in a miscarriage of justice in the denial of a right to a lawful civil action. There is also a very important public policy issue to be considered in this Inquiry: if access to witness statements (and related information) is denied to those wrongfully accused, this will allow for such false accusations to continue unabated without lawful reprisal: literal victims will

> be denied access to justice. I respectfully submit that this is a serious issue for consideration and one that creates a *prima facie* case for an Inquiry.

[para 60] In *Haight*, a defendant appealed a judgement for defamation made against them. An individual, R, had made a complaint to police that H had sexually assaulted her. H was arrested. At a preliminary inquiry, R testified. Following that testimony, the Crown withdrew the charges against H.

[para 61] H later filed a statement of claim against R with respect to several torts, including defamation. The judge found for H on the defamation claim. R later appealed to the Ontario Divisional Court. In its decision on the appeal, the Court noted at paragraph 31, that

> [t]he judge recognized that the Appellant had the benefit of qualified privilege as a person reporting a crime to the police. He said that she could not be held liable in the absence of malice.

[para 62] The other case raised by the Applicant is *Tuharsky*, cited above. This case also relates to an action brought for defamation. The Court discussed the application of absolute privilege over communications made in the furtherance of a judicial or quasi-judicial proceeding, including whether absolute privilege extends to malicious statements.

[para 63] As I understand, the doctrine of privilege discussed in the cases above is a defense that can be raised in a defamation proceeding. The Applicant seems to argue that their former spouse would not be able to rely on that privilege in a defamation proceeding based on the case law cited. However, section 17(5)(c) is not dependent on the strengths or weaknesses of a case that an applicant is seeking to bring before a court. It asks only whether the third party personal information is relevant to a fair determination of an applicant's right. The applicant has to show

- that the third party personal information is relevant to a legal right that relates to an existing or contemplating proceeding, and
- that the personal information is required in order to prepare for the proceeding.

Whether or not the Applicant in this case is likely to be successful in a defamation proceeding for the reason that their former spouse cannot cite privilege as a defense is not relevant to my determination.

[para 64] BC Order F21-19 addressed the application of section 22(2)(c) of the BC Act, which is equivalent to section 17(5)(c) of the FOIP Act, to a situation similar to the facts here. In that case, an applicant sought witness statements from the Vancouver Police Department (VPD) in order to bring a defamation action against the witness. The adjudicator concluded that section 22(2)(c) of the BC Act, did not apply:

> 31 [The applicant] argued that s. 22(2)(c) favours disclosure because his right to sue relates to a proceeding which is contemplated and the personal information he seeks is relevant to a fair determination of his rights, that is, his legal right to sue the victim for defamation in making her statements to the police. The applicant argued that, under defamation law, he needs to know precisely what the victim said as part of filing his claim and thus needs the statements she and others made to the VPD. Despite this, the applicant acknowledged that he can file a notice of claim without pleading the precise accusations (i.e., without providing the statements).
>
> 32 The VPD argued that the applicant does not need the information in dispute to commence a civil claim for defamation as, under the BC Supreme Court Rules, the applicant can apply for disclosure of documents once he has commenced a civil claim and can then apply to the Courts to amend his claim. The VPD also pointed out that, under the Rules of Court, there is an implied undertaking of confidentiality as to the use or publication of such information, whereas under FIPPA there is no such restriction.
>
> 33 I accept that the applicant has a legal right to sue the victim for defamation respecting her statements to the VPD and that he is contemplating such a proceeding. I also accept that the information in dispute would have a bearing on determining the applicant's legal rights in a suit for defamation. The applicant has not, however, persuaded me that he needs the information in dispute to prepare for any such proceeding or to ensure a fair hearing. As the VPD argued and the applicant himself admitted, the applicant can begin a civil claim without the information in dispute and apply to the Courts for disclosure later. I find, therefore, that s. 22(2)(c) does not apply here.

[para 65] I find this analysis persuasive. The Applicant in this case has not provided sufficient information for me to find that the third party personal information in the records at issue is required to prepare or initiate a proceeding. The Applicant has not addressed why they could not have initiated an action and obtained the records through the discovery process.

[para 66] Further, the Applicant has indicated that the window to bring an action is 10 years; however, under the *Limitations Act* it seems possible that the 2-year limitation period applies, if the Applicant knew or ought to have known about the alleged injury. The Applicant appears to have some knowledge of the statements they are seeking that they believe are defamatory, including the date range they were made. The Applicant states that the statements were made in 2016 and 2017; the Applicant has not explained why they did not seek to bring defamation proceeding before now. Based on the information before me, it is not clear that the Applicant can now initiate an action for defamation; if not, section 17(5)(c) is not applicable.

[para 67] Given the brevity of the Applicant's arguments as to how section 17(5)(c) applies in this case, I find that the Applicant has not satisfied me that this factor weighs in favour of disclosing the personal information of any or all complainants or witnesses in the records.

Section 17(5)(f)

[para 68] The Public Body has argued that section 17(5)(f) is a relevant factor. This provision weighs against disclosure of personal information that was supplied in confidence. The Public Body argues:

> 17(5)(f) was considered a relevant factor as most individuals, when speaking to police officers, expect a level of confidentiality with the information they share. There is an understanding that they may have to testify in court and some of the details of that information may be presented in court. However, not all details of an individual's involvement or statement is guaranteed to be presented in court, especially if a plea is undertaken. In this case, as charges were not laid the information was not presented in court. While the Applicant may want to know what was shared with police officers, revealing that information could identify who provided it along with personal information of the third parties.

[para 69] Merely speaking to the police as part of an investigation does not necessarily mean that the information was provided in confidence. This seems particularly the case with respect to a complainant, who may expect the police to follow up on the complaints, which may require the complainant's identity and other personal information to be provided to the subject of the complaint. The fact that information was not ultimately disclosed in court does not address whether it was *supplied* in confidence.

[para 70] I find that this factor does not apply.

Section 17(5)(g)

[para 71] In their request for review, the Applicant listed section 17(5)(g) as a relevant provision; however, the Applicant did not provide any arguments as to how it applies in this case. This provision usually weighs against the disclosure of personal information if that personal information is likely to be unreliable or inaccurate (Order F2018-14).

[para 72] In this case, the Applicant seems to argue that the statements made about them are likely to be inaccurate or unreliable and for that reason the Applicant should be granted access to them.

[para 73] The Applicant has shown that statements made about them by their former spouse to police have been inaccurate in the past. This may indicate an increased likelihood that subsequent statements made by the former spouse to police are *also* inaccurate. It is also possible that the former spouse would be more careful making any statements to the police following the court decision discussed above. I do not know whether any statements made about the Applicant in the records at issue here are likely to be inaccurate as a matter of fact. Whether or not any statement made by the former spouse about the Applicant that may be contained in the records at issue here are *likely* to be inaccurate, the fact that the former spouse

has made inaccurate statements about the Applicant to police in the past weighs in favour of disclosure of any statements made by the former spouse to police in the records at issue.

Conclusion regarding section 17(1)

[para 74] Two presumptions against disclosure set out in section 17(4) apply to the personal information of third parties in the records. I have found that one factor weighs in favour of disclosing statements made about the Applicant by their former spouse.

[para 75] Weighing these factors, the possibility that statements made by the former spouse are inaccurate is not sufficient to overcome the presumptions against disclosure of the third-party personal information in the records, including the video and audio records. Information provided by complainants and witnesses to police can be sensitive information. I understand that the Applicant's former spouse has made false allegations against them in the past; however, the mere possibility that the former spouse has continued to make inaccurate statements is not sufficient to outweigh the factors against disclosure discussed above.

[para 76] I find that the factors set out in sections 17(4) and (5) weigh against disclosure and that the Public Body is required to withhold this information.

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

[para 77] The Public Body applied section 20(1)(g) to information on pages 166, 169, 173, 180, 186-226, 234, 250, 255-268. This provision states:

> *20(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*
>
> *…*
>
> > *(g) reveal any information relating to or used in the exercise of prosecutorial discretion,*
>
> *…*
>
> *(2) Subsection (1)(g) does not apply to information that has been in existence for 10 years or more.*

[para 78] Section 71(1) of the Act states:

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

[para 79] The Public Body has the burden of showing that disclosure of the information could reasonably be expected to lead to the outcome set out in section 20(1)(g).

[para 80] Section 20(1)(g) does not include a harms test; in other words, the Public Body does not have to show that disclosure of the information relating to or used in the exercise of prosecutorial discretion would lead to harm. It only has to show that the information is related to or was used in the exercise of prosecutorial discretion.

[para 81] Order F2009-027 provides a clear explanation of the test for applying this provision and is directly on point here. In that Order, the adjudicator said (at para. 14):

> Section 20(1)(g) does not state that information need only be reasonably expected to have been used in, or relate to, the exercise of prosecutorial discretion. Rather, section 20(1)(g) states that it applies to information that would *reasonably be expected to reveal* any information relating to or used in the exercise of prosecutorial discretion. The phrase "could reasonably be expected," in section 20(1), modifies the verb "reveal" in clause (g), and not the phrases "used in" or "relating to". Consequently, a public body seeking to withhold information under this provision must establish the following facts on the balance of probabilities: (1) prosecutorial discretion was exercised, (2) there is information that relates to or was used in this exercise of that discretion, and (3) disclosure of the information in the records withheld under section 20(1)(g) could reasonably be expected to reveal this information.

[para 82] In Order F2007-021 the adjudicator concluded that section 20(1)(g) cannot be applied to information for the sole reason that it is located in a Crown prosecutor file. He stated (at paras. 51-53):

> However, I do not accept the Public Body's statements that "any information in a Crown prosecutor's file may reasonably be expected to relate to the exercise of prosecutorial discretion and therefore may be protected from disclosure" and that "the simple presence of records in the file that may contain such information engages the provisions of this exception." To accept these assertions would be to judge information by its location rather than its substance. While it may be the case that most or all information in a Crown prosecutor's file usually falls under section 20(1)(g) of the Act, information must still be reviewed on a record-by-record basis.
>
> The present inquiry illustrates the need to review records individually. Some of the documents (pages 622-638) are not ones routinely found in a Crown prosecutor's file. They are a letter of complaint, internal memoranda about that letter, and a briefing note. On review of the records, I agree with the Public Body that the records fall within the scope of section 20(1)(g) – but this is due to their content and not the fact that they are on the file. I can envisage the possibility of records making their way onto a Crown prosecutor's file but having nothing to do with prosecutorial discretion.

> In deciding that pages 622-638 of the Crown prosecutor's file fall within section 20(1)(g) of the Act, I have borne in mind the breadth of the section, in that information needs only to "relate to" the exercise of prosecutorial discretion. I have also borne in mind the B.C. definition cited above, which indicates that, in the context of access legislation, the exercise of prosecutorial discretion extends to the duty or power to conduct a hearing or trial.

[para 83] Order F2022-40 summarizes past Orders on this exception as follows (at para. 21):

> Previous orders of this office have held that information need only be reasonably expected to *relate* to the exercise of prosecutorial discretion for section 20(1)(g) to apply. Order F2007-021 holds that if information was available to the Crown prosecutor when making the decision to exercise prosecutorial discretion, and is not extraneous, there is a relationship between the information and the exercise of prosecutorial discretion such that the information relates to the exercise of prosecutorial discretion.

[para 84] The Public Body argues

> All of the redactions made under section 20(1)(g) relate to the information reviewed by the Crown in exercising its discretion. The redactions are also in relation to the discussion that the officer had with the Crown in providing further clarification or information for the Crown to consider. The Crown also advises in these emails what their initial thoughts are in deciding to exercise their discretion. We would like to further point out that the information removed as per 20(1)(g) as attachments is also provided elsewhere within the records albeit with 17(1) redactions in some cases.

[para 85] The Public Body also states that the relevant emails are dated from 2019 and 2020; therefore, section 20(2) does not apply. That provision, reproduced above, states that section 20(1)(g) cannot be applied to withhold information that has been in existence for 10 years or more.

[para 86] Pages 166, 169, 173, and 250 contain copies of a single email from a Crown Prosecutor. One paragraph of the email on each page has been withheld under section 20(1)(g). In that paragraph, the Prosecutor is providing an opinion regarding the strengths or weaknesses of a particular matter. I find that section 20(1)(g) applies to this information.

[para 87] The information on page 180 and repeated on page 234 is a portion of an email from a Public Body officer to an officer of another police service. The withheld portion of the email discusses particular information that will be provided to the Crown Prosecutor for the purpose of the Prosecutor making a decision about how to proceed. In the context of the information in the surrounding records, I find that section 20(1)(g) applies.

[para 88] The information on pages 187-226, and 255-268 was withheld in its entirety under section 20(1)(g). These records consist of two packages provided to the Crown Prosecutor by the

Public Body. It is clear that this information was available to the prosecutor when making a decision regarding the exercise of prosecutorial discretion. I have reviewed each package, and conclude that none of the information is extraneous, such that section 20(1)(g) could not apply. I find that section 20(1)(g) applies to the information in pages 187-226, and 255-268.

[para 89] The information withheld under section 20(1)(g) on page 186 is the name of attachments emailed to a Crown Prosecutor; these attachments comprise the package of information in pages 187-226. The names of the attachments are sufficiently descriptive as to reveal contents of those attachments; I find that section 20(1)(g) applies.

Exercise of Discretion

[para 90] Section 20(1) is a discretionary exception to disclosure. In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23 (CanLII), the Supreme Court of Canada commented on the authority of Ontario's Information and Privacy Commissioner to review a public body's exercise of discretion.

[para 91] 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. The Court also considered the following factors to be relevant to the review of 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 92] In Order F2010-036 the adjudicator considered the application of the above decision of the Court to Alberta's FOIP Act, and also considered how a public body's exercise of discretion had been treated in past orders of this Office. She concluded (at para. 104):

> In my view, these approaches to review of the exercise of discretion are similar to that approved by the Supreme Court of Canada in relation to information not subject to solicitor-client privilege in *Ontario (Public Safety and Security)*.

[para 93] In *Edmonton Police Service v Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (CanLII), the Court provided detailed instructions for public bodies exercising discretion to withhold information under the Act. The Court said (at para. 416):

> What *Ontario Public Safety and Security* requires is the weighing of considerations "for and against disclosure, including the public interest in disclosure:" at para 46. The relevant interests supported by non-disclosure and disclosure must be identified, and the effects of the particular

> proposed disclosure must be assessed. Disclosure or non-disclosure may support, enhance, or promote some interests but not support, enhance, or promote other interests. Not only the "quantitative" effects of disclosure or non-disclosure need be assessed (how much good or ill would be caused) but the relative importance of interests should be assessed (significant promotion of a lesser interest may be outweighed by moderate promotion of a more important interest). There may be no issue of "harm" in the sense of damage caused by disclosure or non-disclosure, although disclosure or non-disclosure may have greater or lesser benefits. A reason for not disclosing, for example, would be that the benefit for an important interest would exceed any benefit for other interests. That is, discretion may turn on a balancing of benefits, as opposed to a harm assessment.

[para 94] It further explained the weighing of factors at paragraph 419:

> …If disclosure would enhance or improve the public body's interests, there would be no reason not to disclose. If non-disclosure would benefit the public body's interests beyond any benefits of disclosure, the public body should not disclose. If disclosure would neither enhance nor degrade the public body's interests, given the "encouragement" of disclosure, disclosure should occur. Information should not be disclosed only if it would run counter to, or degrade, or impair, that is, if it would "harm" identified interests of the public body.

[para 95] Lastly, the Court described the burden of showing that discretion was properly exercised (at para. 421):

> I accept that a public body is "in the best position" to identify its interests at stake, and to identify how disclosure would "potentially affect the operations of the public body" or third parties that work with the public body: EPS Brief at para 199. But that does not mean that its decision is necessarily reasonable, only that it has access to the best evidence (there's a difference between having all the evidence and making an appropriate decision on the evidence). The Adjudicator was right that the burden of showing the appropriate exercise of discretion lies on the public body. It is obligated to show that it has properly refrained from disclosure. Its reasons are subject to review by the IPC. The public body's exercise of discretion must be established; the exercise of discretion is not presumptively valid. The public body must establish proper non-disclosure. The IPC does not have the burden of showing improper non-disclosure.

[para 96] The Applicant has provided detailed reasons they believe the information at issue should be disclosed to them. The Public Body has not provided any information about how it exercised its discretion when it applied section 20(1)(g). Therefore, I will order the Public Body to re-exercise its discretion; the Public Body should use the discussion above as guidance and ensure it considers the arguments made by the Applicant in coming to its determination.

V. ORDER

[para 97] I make this Order under section 72 of the Act.

[para 98] I find that section 17(1) does not apply to some information withheld under that provision. I order the Public Body to disclose the information to which that provision does not apply, as set out this Order.

[para 99] I find that the Public Body properly withheld personal information to which section 17(1) applies.

[para 100] I find that section 20(1)(g) applies to the information withheld under that provision. I order the Public Body to re-exercise its discretion to withhold information under this provision as discussed at paragraphs 90-96 of this Order. If the Public Body decides to continue to apply that provision to some or all of the information in the records, the Public Body is to provide a detailed explanation to the Applicant as to its exercise of discretion.

[para 101] I further order the Public Body to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

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Amanda Swanek
Adjudicator