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OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER FOIP2026-17

May 6, 2026

EDMONTON POLICE SERVICE

Case File Number 002866

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request to the Edmonton Police Service (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act). The request was for records about an incident that was reported in the media about a police officer parking a marked police vehicle in a parking spot designated for persons with disabilities.

The Public Body responded to the request, informing the Applicant that it located responsive records relating to part of the request. Specifically, the Public Body stated that file PSB2015-0453 is responsive to the Applicant's request. The Public Body withheld these records in their entirety under sections 17, 20, 23, 24, and 27 of the FOIP Act.

The Public Body further stated that it was refusing to confirm or deny the existence of records relating to another part of the request, under section 12(2) of the Act.

The Applicant requested a review into the Public Body's response.

The Adjudicator found that the Public Body properly relied on section 12(2) to refuse to confirm or deny the existence of records responsive part of the Applicant's request.

The Adjudicator found that section 17(1) requires the Public Body to continue to withhold some, but not all, of the information in the records.

The Adjudicator found that neither section 23(1) nor section 24(1) applies to information in the records.

The Adjudicator found that the Public Body properly asserted solicitor-client privilege over information in the records but ordered the Public Body to review the relevant pages to ensure it has applied section 27(1)(a) only to the privileged information in the records. The Adjudicator also found that section 27(2) required the Public Body to withhold some information.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 12, 17, 20, 23, 24, 27, 71, 72; Rules of Court, Alta Reg 124/2010, ss. 5.6-5.8

Authorities Cited: AB: Decision F2014-D-01; Orders 96-012, 96-020, 2001-040, F2002-007, F2004-026, F2007-013, F2008-009, F2009-040, F2009-044, F2010-002, F2023-02, F2013-13, F2013-23, F2014-29, F2015-29, F2015-30, F2015-32, F2018-14, F2019-07, F2021-12, F2023-05; **BC**: Order No. 326-1999

Cases Cited: *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 112 (CanLII); *Canadian Natural Resources Limited v. ShawCor Ltd.*, 2014 ABCA 289 (CanLII) (*ShawCor*); *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII); *Dikranian v. Quebec (Attorney General)*, 2005 SCC 73 (CanLII); *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10; *R v. Nedelcu*, 2012 SCC 59; *Rysdyk v. Slaney*, 2022 ABQB 538; *Solosky v. The Queen*, 1979 CanLII 9 [1980] 1 S.C.R. 821; *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*, 1933 CanLII 86 (SCC)

I. BACKGROUND

[para 1] The Applicant made an access request to the Edmonton Police Service (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for records "about an incident that occurred that was widely reported in the media about a police officer parking a marked police vehicle in a handicap parking spot."

[para 2] The Applicant's request further elaborated:

> I am informed by a confidential, reliable source that when the EPS identified the officer, the EPS issued him a ticket and he was taken by a Sergeant to quickly pay it at the Law Courts. The officer's name is [A]. The Sergeant, [B], who drove [A] to pay the ticket is under investigation.

Further, Deputy Chief [X] sent an e-mail to Acting Chief [Y] in relation to how he was going to handle the matter which resulted in Acting Chief [Y] making a *Police Act* complaint against Deputy Chief [X]. Deputy Chief [X] was disciplined for insubordination and was penalized 30 or 40 hours.

[para 3] The Public Body responded on February 10, 2016. The Public Body informed the Applicant that it located responsive records "relating to an EPS member parking in a stall designated as handicap parking; the subsequent issuing of a ticket, and the ensuing PSB investigation." Specifically, the Public Body stated that PSB2015-0453 is responsive to the Applicant's request. The Public Body withheld these records in their entirety under sections 17, 20, 23, 24, and 27 of the FOIP Act.

[para 4] The Public Body further stated that it was refusing to confirm or deny the existence of "any additional records that may be responsive to your request." The Public Body later clarified that it was refusing to confirm or deny the existence of records responsive to the last part of the Applicant's request, relating to Deputy Chief X, under section 12(2) of the Act.

[para 5] On April 1, 2016, the Applicant submitted a Request for Review to this office. During the settlement phase of the review, the Public Body clarified that it had applied section 20(1) in error. Mediation did not resolve the remaining issues between the parties and on September 18, 2017, the Applicant requested an inquiry.

[para 6] The Applicant and Public Body were each invited to provide one submission to the inquiry.

II. RECORDS AT ISSUE

[para 7] The records at issue consist of the 171 pages of records the Public Body has acknowledged exist, which were withheld from the Applicant in their entirety under sections 17, 23, 24, and 27.

III. ISSUES

[para 8] The issues set out in the Notice of Inquiry dated February 20, 2026, are:

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

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

3. Does section 23(1) of the Act (local public body confidences) authorize the head of the Public Body to refuse access to information in the records at issue?

4. Does section 24(1) of the Act (advice from officials) authorize the head of the Public Body to refuse access to information in the records at issue?

5. Does section 27(1) of the Act (privileged information) authorize the head of the Public Body to refuse access to information in the records at issue?

IV. DISCUSSION OF ISSUES

Preliminary issue – scope of inquiry

[para 9] In its submission to the inquiry, the Applicant states with respect to the Public Body's refusal to confirm or deny the existence of records responsive to the last part of the Applicant's request (emphasis in original):

> 10. Paragraph 6 [of the affidavit provided with the Public Body's submission] states that her search for responsive records did not include the second part of the request referring to [Acting Chief Y]'s complaint against [Deputy Chief X]. That was not stated in her February 10, 2016, letter to the CTLA. This is completely unacceptable and should also be condemned by the OIPC. The CTLA requests that s. 10 of the *Act* (duty to assist) be added to the Inquiry.

[para 10] However, paragraph 6 of the affidavit sworn by a Supervisor with the Information and Privacy Unit with the Public Body, provided with the Public Body's submission, does not say this. Paragraph 6 of the affidavit states:

> 6. My searches for Responsive Records identified one EPS Professional Standards Branch (PSB) file as being responsive to the first part of the Request. I personally reviewed every page of the Responsive Records to determine the applicability of each FOIPP Act exception.

[para 11] Indeed, paragraph 12 of the affidavit specifically confirms that the affiant conducted a search for records responsive to all parts of the Applicant's request:

> 12. The records being sought by the Applicant relate to an alleged PSB investigation of allegations against an EPS member. PSB investigations are law enforcement investigations that contain personal information including employment information. The EPS conducted a thorough search for records responsive to the Request but determined that confirmation or denial of their existence would create a legitimate privacy concern. I refer to these, therefore, as the Theoretical Records.

[para 12] Given the above, there is no basis on which to add section 10 to the inquiry, as requested by the Applicant.

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

[para 13] The Public Body relies on section 12(2)(b) to refuse to confirm or deny the existence of records responsive to the last part of the Applicant's request, which states:

> Further, Deputy Chief [X] sent an e-mail to Acting Chief [Y] in relation to how he was going to handle the matter which resulted in Acting Chief [Y] making a *Police Act* complaint against Deputy Chief [X]. Deputy Chief [X] was disciplined for insubordination and was penalized 30 or 40 hours.

[para 14] Section 12(2)(b) states:

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

[para 15] The Public Body has the burden of proving that it properly relied on section 12(2), as stated in Order F2009-029 at para. 10-11:

> Section 71(1) does not apply in this inquiry – and neither does section 71(2), as further explained below. A public body's decision to refuse to confirm or deny the existence of a record is not a decision to refuse an applicant access to a record. Section 71 of the Act therefore does not set out the burden of proof under section 12(2).
>
> Still, a public body has the burden of proving that it properly relied on section 12(2). Previous orders of this Office have said that where the Act is silent on the burden of proof, the burden should be allocated to the party that is in the best position to provide evidence on the particular issue (Order 2000-021 at para. 13). As public bodies are in the best position to explain why they have refused to confirm or deny the existence of a record requested by an applicant – and moreover, public bodies relying on section 12(2) often submit argument and evidence *in camera* to which an applicant is not able to respond – they have the burden of proof under section 12(2). Having said this, it is in an applicant's best interest to also provide argument and evidence, even where the other party has the burden of proof (Order 99-014 at para. 11).

[para 16] In Order F2006-012, former Commissioner Work applied a purposive interpretation to section 12(2)(a) (at paras. 18 and 21):

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

[para 17] The test for properly applying section 12(2)(b) is set out in Order F2011-010, which states (at paras. 9-10):

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

[para 18] The question to be answered is therefore whether it would be an unreasonable invasion of Deputy Chief X's privacy to confirm whether responsive records exist.

[para 19] 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 20] Many 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 21] Past Orders have also said that information relating to disciplinary actions does have a personal dimension.

[para 22] Past Orders have concluded that the factors outlined in section 17(2)-(5) are appropriate to use in determining whether confirming or denying the existence of responsive records is an unreasonable invasion of the named employee's privacy (see Order F2016-24).

[para 23] As stated in Order F2022-31 (at paras. 12-13):

> Section 17 does not say that a public body is never allowed to disclose third party personal information. It is only when the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy that a public body must refuse to disclose the information to an applicant (such as the Applicant in this case) under section 17(1). Section 17(2)

(not reproduced) establishes that disclosing certain kinds of personal information is not an unreasonable invasion of personal privacy.

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

[para 24] This same applies where the section 17 analysis is conducted in relation to a public body's refusal to confirm or deny the existence of records under section 12(2)(b).

[para 25] The relevant portions of section 17 state:

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

…

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

…

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

…

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

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

…

(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

…

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

…

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

Parties' arguments

[para 26] The Public Body states that confirming the existence of any responsive records could confirm that Deputy Chief X was the subject of a PSB investigation. This would reveal law enforcement information under section 17(4)(b), and employment history under section 17(4)(d). The Public Body states that no factors weigh in favour of disclosing the personal information that could be revealed if the Public Body confirmed or denied the existence of responsive records.

[para 27] The Public Body also provided additional arguments that were accepted *in camera*.

[para 28] The Applicant's arguments with respect to the Public Body's reliance on section 12(2)(b) is as follows:

> 6. If the CTLA's information is correct, [X] was disciplined for the insubordination. That must be disobeying an order from Acting Chief [Y].
>
> 7. To the CTLA, [it] is unheard of for an Acting Chief (whose normal rank was a Deputy Chief) to initiate a *Police Act* complaint against another Deputy Chief. It must have been a very serious complaint and the EPS decided to adopt a process that would be hidden from the public. It also indicates a fractured relationship in the highest ranks of the EPS.
>
> 8. This whole process is clearly a matter that should be subjected to public scrutiny under s. 17(5)(a) of the Act.

Analysis

[para 29] Disclosing whether responsive records exist would disclose whether a complaint was made against Deputy Chief X as alleged by the Applicant. I agree that this information has a personal dimension such that it would be the type of personal information to which section 17(1) can apply.

[para 30] I also agree that confirming or denying the existence of records would reveal information about the Deputy Chief X's employment history, such that both sections 17(4)(d) and (g) apply, weighing against disclosing the existence of records.

[para 31] Section 17(5)(a) weighs in favour of disclosure where the disclosure is desirable to subject the Public Body's activities to public scrutiny. For the desirability of public scrutiny to be

a relevant factor, there must be evidence that the activities of the public body have been called into question, such that the disclosure of personal information is desirable to subject the activities of the public body to public scrutiny. (See Order 97-002, at para. 94; Order F2004-015, at para. 88; Order F2014-16, at para. 34.)

[para 32] In Order F2014-16, the Director of Adjudication discussed appropriate factors to consider in determining whether public scrutiny is desirable. She said (at paras. 35-36):

> In determining whether public scrutiny is desirable, I may consider factors such as:
>
> 1. whether more than one person has suggested public scrutiny is necessary;
> 2. whether the applicant's concerns are about the actions of more than one person within the public body; and
> 3. whether the public body has not previously disclosed sufficient information or investigated the matter in question.
>
> (Order 97-002, paras 94 and 95; Order F2004-015, para 88).
>
> It is not necessary to meet all three of the foregoing criteria in order to establish there is a need for public scrutiny. (See *University of Alberta v. Pylypiuk* (cited above) at para 49.) For example, in Order F2006-030, former Commissioner Work said (at para 23) that the first of these factor "is less significant where the activity that has been called into question, though arising from a specific event and known only to those immediately involved, is such that it would be of concern to a broader community had its attention been brought to the matter", commenting that "[i]f an allegation of impropriety that has a credible basis were to be made in this case, this reasoning would apply".

[para 33] Past Orders of this office have made the distinction between allegations of wrongdoing by a public body employee, and allegations of a more systemic nature against a public body. For example, in Order F2015-30, I discussed the application of section 17(5)(a) to allegations made against a police officer in a disciplinary decision. I said (at para. 43):

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

[para 34] In this case, the Applicant has made allegations of insubordination against [X] and argued that such insubordination indicates "a fractured relationship in the highest ranks of the EPS."

[para 35] I find the Applicant's allegations to be speculative. Even if the Applicant's allegations are true, the matter would involve one officer possibly disobeying a direct order, albeit an order of the Acting Chief. In my view, this would not be sufficiently significant or systemic to engage section 17(5)(a).

[para 36] The Applicant has not argued that any other factor weighs in favour of disclosure, and I have also not identified any other such factor.

Conclusions regarding sections 17(1) and 12(2)(b)

[para 37] Applying the factors under section 17, at least one presumption weighs against confirming or denying the existence of responsive records, and no factors weigh in favour. Therefore, I uphold the Public Body's decision to refuse to confirm or deny the existence of records relating to the last part of the Applicant's access request.

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

[para 38] 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.*

[para 39] Section 17 is a mandatory exception to disclosure: if the information falls within the scope of the exception, it must be withheld.

[para 40] 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 41] The definition of personal information under section 1 of the FOIP Act is cited in the discussion of section 12(2) above.

[para 42] The first step is to determine whether the information is personal information to which section 17(1) can apply. As stated above, section 17(1) does not apply to information about individuals that relates only to the individuals acting in their professional capacities, unless that information has a personal dimension in the circumstances.

[para 43] The next step with respect to the application of section 17(1) to that information, is to determine whether disclosing this personal information would be an unreasonable invasion of the third parties' privacy. Section 17 is a mandatory exception: if the information falls within the scope of the exception, it must be withheld. In Order F2019-07 the adjudicator described how section 17(1) operates as follows (at paras. 22-23):

> Section 17 does not say that a public body is *never* allowed to disclose third party personal information. It is only when the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy that a public body must refuse to disclose the information to an applicant (such as the Applicant in this case) under section 17(1). Section 17(2) (not reproduced) establishes that disclosing certain kinds of personal information is not an unreasonable invasion of personal privacy.
>
> When the specific types of personal information set out in section 17(4) are involved, disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. To determine whether disclosure of personal information would be an unreasonable invasion of the personal privacy of a third party, a public body must consider and weigh all relevant circumstances under section 17(5), (unless section 17(3), which is restricted in its application, applies). Section 17(5) is not an exhaustive list and any other relevant circumstances must be considered.

[para 44] The Public Body argues that sections 17(4)(b), (d), and (g) apply to this information, as well as sections 17(5)(e) and (h).

[para 45] The Applicant argues that section 17(5)(a) applies to the information.

[para 46] The relevant portions of section 17 are as follows:

> *17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.*
>
> *…*
>
> *(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*

…

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

…

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

…

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

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

…

(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

…

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

…

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

…

Analysis

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

[para 47] The information withheld under section 17(1) includes information about EPS officers who are the subject of a PSB investigation file, including their names, ages, years of employment, and information regarding allegations of wrongdoing made against them. This is personal information to which section 17(1) can apply.

[para 48] The Public Body has not addressed whether the information relating to EPS employees, other than the subject officers, appearing in the records is personal information that must be withheld under section 17(1); the Public Body's submission addresses only the officers who are being investigated.

[para 49] The records contain information about "witness officers". As discussed in Order F2023-05, the question is whether personal information of an employee appears in relation to that employee's job duties. Where employees provide statements during an investigation of a co-worker's conduct, such statements are sometimes professional statements lacking a personal dimension while in other instances, the statements may have a personal dimension, such as when the employee giving the statement offers a personal opinion. In that Order, I concluded (at para. 36):

> From my review of the records, I conclude that when a complaint is made about an employee in the Applicant's position, other employees may be asked to provide a statement regarding the incident, as part of the investigation. This appears to be part of these employees' job duties. Therefore, for the most part, these statements do not contain information to which section 17(1) can apply. There are exceptions however, for statements that have a personal dimension; for example, statements about personal relationships between officers, complaints initiated by an employee that have a personal aspect, or where the employee providing the statement is involved in the incident in such a manner as it has a disciplinary aspect for that employee as well as the Applicant.

[para 50] This analysis also applies to the records responsive here. I have reviewed the records to determine whether any information about the officers who are not the subject of the investigation has a personal dimension. Information about the conduct of the witness officers merely describes how they performed their work duties, which are not under investigation. Statements provided by the witness officers are presented in a factual manner, outlining their observations of the incident. The officers have not offered personal observations or made other remarks that might have a personal dimension (for example, remarks about a difficult work relationship with another officer might have a personal dimension). Therefore, the information about witness officers is not information to which section 17(1) can apply.

[para 51] Other employees were involved in the investigation; the information relating to these employees appears only with respect to the performance of their job duties. Nothing in the records indicates that information about other employees in the records has a personal dimension; therefore, section 17(1) cannot apply to that information.

[para 52] Information about civilian witnesses is personal information to which section 17(1) can apply. This information occurs only a few times in the records; once the names have been redacted, the remaining information is no longer about an identifiable individual and section 17(1) cannot apply.

[para 53] The Public Body has withheld the records in their entirety under section 17(1), arguing that that "[t]he PSB investigation materials cannot be meaningfully severed to remove

identifying elements, as doing so would either fail to anonymize the individuals or leave the records without substantive content" (at para. 13).

[para 54] From my review of the records, this is not the case. I agree that the personal information of the officers cannot be rendered non-identifiable by redacting the names of the officers because the Applicant identified the officers in the access request. However, the mere fact that the records relate to an investigation into the officers' conduct does not mean that all the information is thereby the officers' personal information.

[para 55] For example, the names of the Public Body employees who conducted the investigation are not about the subject officers. Nor are the investigative steps taken, once the identifying information is removed. Details of the officers' conduct are their personal information, as is the outcome of the investigation, including whether any disciplinary measures were recommended or taken. But information that only reveals procedural steps, such as whether the investigation included obtaining a certain type of report, is not about the officer being investigated. For example, a memo on pages 7-9 provides instructions for an officer to provide a particular type of report. The instructions appear to be part of a standard-form letter and contain directions of a general nature that do not refer to the officer or the particulars of the conduct in question. Such information cannot be withheld under section 17(1). The only information on these pages to which section 17(1) can apply are the officer's name on page 7; and the details of the allegation, which comprise the second half of page 7 and the first half of page 8. The same analysis applies to a similar document on pages 10-12.

[para 56] Similar to pages 7-9 and 10-12, pages 13-14 contain instructions for a witness officer to provide a particular type of report. That officer's information cannot be withheld under section 17(1); however, section 17(1) can apply to the information about the subject officers in the two indented paragraphs on page 13.

[para 57] Pages 15-18 consist of forms containing information about the investigation. A large amount of information on these forms is information about the subject officers, to which section 17(1) can apply; however, the forms also contain a non-trivial amount of information that is not about these officers. This includes dates, steps that were taken, and EPS employees involved in conducting the investigation. Even after all the information to which section 17(1) can apply is severed from these pages, the remainder would still provide meaningful information about the investigation.

[para 58] Several pages in the records do not contain any personal information about either officer at all, for example, pages 2, 3, and 4 contain only procedural information about the investigation without naming the subject of the investigation. Pages 143-154 consists of pictures and a map of the parking lot and surrounding businesses where the incident occurred, and pages 155-157 consist of photos of the trailer that was attached to the officer's vehicle at the

time of the incident. No individuals appear in these photos and they contain no personal information at all.

[para 59] The head of a public body has a duty under section 6(2) to consider whether information may be severed from a record and to provide the remainder to an applicant; that provision 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 60] From the discussion above it is clear that the records contain a significant amount of information that is not information that can be withheld under section 17(1).

[para 61] 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 62] Sections 17(2) and (3) do not apply in this case and I do not need to discuss them.

[para 63] Sections 17(2) and (3) refer to circumstances in which disclosure of personal information is not an unreasonable invasion of privacy. Neither party argued that any provisions of sections 17(2) or (3) are relevant and, from the face of the records, none appear to apply.

[para 64] 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), (d), and (g) apply to the information withheld under section 17(1). These provisions are reproduced above.

[para 65] Section 17(4)(b) applies where the personal information is an identifiable part of a law enforcement record. Law enforcement is defined in section 1(h) of the Act:

> *(h) "law enforcement" means*
>
> *(i) policing, including criminal intelligence operations,*
>
> *(ii) a police, security or administrative investigation, including the complaint giving rise to the investigation, that leads or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the investigation or by another body to which the results of the investigation are referred, or*

(iii) proceedings that lead or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the proceedings or by another body to which the results of the proceeding are referred;

[para 66] The records relate to an internal investigation that could lead to a penalty or sanction under the Police Service Regulation, and the information to which section 17(1) can apply is all identifiable as part of the investigation. Therefore, section 17(4)(b) applies.

[para 67] Past Orders have also found that similar disciplinary records relate to employment history for the purposes of section 17(4)(d) (see Orders F2008-009, F2009-044). I agree that this provision applies to the information to which section 17(1) can apply, as does section 17(4)(g).

[para 68] 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.

[para 69] The only factor raised by the Applicant is section 17(5)(a). This factor was referenced in the Applicant's request for review and request for inquiry, without additional detail. The Applicant's submission addresses the application of this factor only to the Public Body's decision to refuse to confirm or deny the existence of records responsive to the last part of the Applicant's request, discussed above. The Applicant did not make any arguments regarding the application of this factor to the records at issue.

[para 70] This provision weighs in favour of disclosure where the disclosure is desirable to subject the Public Body's activities to public scrutiny. The standard to be met for this provision to apply is set out in the discussion of section 12(2) above, at paragraphs 31-33.

[para 71] The records at issue relate to the first part of the Applicant's request, which in turn refers to a parking ticket being issued to Officer A, and Sergeant B driving Officer A to pay the parking ticket. The Applicant has not explained how this calls into question the activities of the Public Body such that public scrutiny is desirable. I find that section 17(5)(a) does not apply.

[para 72] The Applicant has not argued any other factors weighing in favour of disclosure and none appear to me to apply. Given this, I do not also need to consider the Public Body's arguments that sections 17(5)(e) or (h) weigh against disclosure.

Conclusion regarding section 17(1)

[para 73] Three presumptions against disclosure set out in section 17(4) apply to the personal information of third parties in the records. No factors weigh in favour of disclosure. Therefore, I find that the Public Body is required to withhold the personal information in the records to which section 17(1) can apply.

[para 74] As stated above, much of the information withheld under section 17(1) is not information to which that provision applies. For the reasons discussed later in this Order, only pages 40, 42, 54, 56, 104, 135-142 and 159-162 contain information that can be withheld under other provisions (specifically, section 27). I will order the Public Body to review the information withheld under section 17(1) and sever only that to which that provision properly applies, as discussed above. The remainder must be disclosed to the Applicant, subject to my findings regarding section 27(1) and (2).

1. Does section 23(1) of the Act (local public body confidences) authorize the head of the Public Body to refuse access to information in the records at issue?

[para 75] 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 76] The Public Body applied section 23(1)(b) to pages 1 and 67 in their entirety. This provision states:

> *23(1) The head of a local public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*
>
> *…*
>
> *(b) the substance of deliberations of a meeting of its elected officials or of its governing body or a committee of its governing body, if an Act or a regulation under this Act authorizes the holding of that meeting in the absence of the public.*

[para 77] In order to apply this section, each of the following questions must be answered in the affirmative:

> (i) Was there a meeting of elected officials, a governing body or a committee of a governing body of a local public body?
>
> (ii) Does an Act, or a regulation under the FOIP Act, authorize the holding of that meeting in the absence of the public?
>
> (iii) Could disclosure of the information reasonably be expected to reveal the substance of deliberations of that meeting? (Order F2009-040 at para. 38, citing Order 2001-040 at para. 9)

[para 78] The Public Body states that pages 1 and 67 are "PSB extension requests whereby the Chief of Police sought an extension of the statutory timeline to investigate *Police Act* and/or *Police Service Regulation* complaints" (at para. 38). The Public Body states:

> Extension requests are first considered at a meeting of a Committee of the Police Commission (the Professional Standards Committee). Both Commissioners and members of the EPS are present, but the meeting is not open to the public. The Committee then sends the extension requests, along with its recommendations as to whether or not to grant the extension requests, to a closed meeting of the Commission of the Whole for consideration and to make the ultimate decision on whether or not to grant them.

[para 79] The Public Body argues that the Edmonton Police Commissioner is a local public body under the FOIP Act, and is also the governing body of the EPS, under the *Police Act*. It further states that section 18(1)(b) of the FOIP Regulation permits the Edmonton Police Commission to hold meetings in the absence of the public.

[para 80] The Public Body argues that the information on pages 1 and 67 "would reveal the nature of and the substance of at least some of the deliberations of the meetings" (at para. 39).

Analysis

[para 81] Several past Orders have considered the application of section 23(1)(b) to information in a report or similar document prepared for elected officials, governing body or committee of a local public body. In Order F2013-23, the adjudicator cited *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 112 (CanLII), in which the Court found that the mere indication of the topics and issues discussed do not form part of the substance of deliberations (at para. 97).

[para 82] The adjudicator in Order F2013-23 adopted this approach endorsed by the BC Supreme Court. He stated (at paras. 61-64):

> The *British Columbia (Attorney General)* decision approves an approach by which mere indications of topics and issues discussed may not be withheld as part of deliberations unless their disclosure would permit a reader to draw an accurate inference about the substance of the deliberations. For the purpose of Alberta's legislation, I prefer this approach. In my view, the "substance" of deliberations refers to more than merely a topic or issue being discussed, in that it refers to the views, advice, recommendations, pros and cons, reasons, rationales, etc. that were conveyed and considered in relation to the topic or issue.

[para 83] Orders F2014-29 considered the application of this provision to a report provided to a city council to consider at an *in camera* meeting. I considered the analysis of former BC Information and Privacy Commissioner Loukidelis in Order No. 326-1999, which considered whether section 12(3)(b) of the BC Act (equivalent to section 23(1)(b) of the FOIP Act) applies to

a report that had been commissioned by a city council and considered in an *in camera* meeting of that council. Commissioner Loukidelis stated:

> … Still, disclosure of the report would not reveal anything about those discussions. Council members may have debated the IAO Report vigorously, with many different views being expressed and various possible courses of actions being suggested. The IAO Report itself is silent about this. Its disclosure tells us nothing about what was said at the council table, much less what was decided. We simply do not know, and cannot tell from the IAO Report – which was prepared by outside consultants - what the deliberations of council were. The most that can be said is that disclosure of the report would disclose one subject of such meetings. We already know the IAO Report was one of the subjects addressed at the meeting or meetings discussed above, of course, from the Montain Affidavit and the City's submissions in this inquiry.
> …
> … As was said in Order No. 113-1996, at p. 4, one can – in cases such as this one – release the source documents without disclosing the substance of deliberations about them.

[para 84] As I noted in Order F2014-29, a comparison of sections 22(1) and 23(1) of the FOIP Act support the application of the former BC Commissioner's approach to the equivalent of section 23(1)(b). Section 22(1) applies to Cabinet and Treasury Board confidences; it states (in part, emphasis added):

> *22(1) The head of a public body must refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees or of the Treasury Board or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees or to the Treasury Board or any of its committees.*

[para 85] This provision specifically encompasses advice etc. that has been prepared for or submitted to Cabinet or Treasury Board.

[para 86] In contrast, section 23(1)(b) applies only to the substance of deliberations. Had the Legislature intended to include advice etc. prepared for or submitted to an *in camera* meeting of a local public body, it would have included language similar to that in section 22(1).

[para 87] This same analysis was followed in Order F2018-14.

[para 88] In Order F2023-02, the above analysis was applied where the public body (also the EPS in that case) had withheld reports under section 23(1)(b) that were prepared by EPS for the Edmonton Police Commission in relation to requests made to the Commission for extensions to probationary periods. I found that section 23(1)(b) did not apply because the records themselves did not reveal whether any deliberations occurred (at para. 50).

[para 89] In this case, the Public Body cited Order F2023-02 as authority for the three-part test for applying section 23(1)(b), reproduced above, but did not address the discussion regarding whether a report or other document provided for a meeting reveals the substance of deliberations that occurred in the meeting. The Public Body merely states that "[d]isclosure of the requests would reveal the nature of and the substance of at least some of the deliberations of the meetings. As such, disclosure of the requests would in effect be disclosure of what was discussed during the meetings" (at para. 39).

[para 90] Section 23(1)(b) does not apply to information that would merely reveal the "nature" or topic of deliberations. It is not at all clear from the records how disclosing either pages 1 or 67 could reveal the substance of deliberations of the Commission or a committee of the Commission. The report on page 1 does indicate that an extension is being requested. However, it only reveals what may have been provided to the Commission or committee. At the bottom of the page there is indication that someone didn't have anything to add to the matter, but I don't know who that someone is and the Public Body has not given me any information about who it could be. In any event, from the information on page 1 I cannot conclude that a deliberation even occurred, nor can I conclude that disclosure of the information on this page could reasonably be expected to reveal the substance of any deliberation. I find that section 23(1)(b) does not apply. However, some of the information in these pages is information that I have found the Public Body must withhold under section 17(1). I will order the Public Body to review this page, sever only the information to which section 17(1) applies as discussed earlier in this Order, and provide the remainder to the Applicant.

[para 91] Page 67 appears to comprise a partial report of the same nature as the report on page 1. Only the first part of the report is filled out; the remainder consists of headings with blank bullet points. Not only is there no indication in this page of the substance of any deliberation, but there is also not enough information on this page for the Commission or a committee to deliberate on. I find that section 23(1)(b) does not apply. However, some of the information in these pages is information that I have found the Public Body must withhold under section 17(1). I will order the Public Body to review this page, sever only the information to which section 17(1) applies as discussed earlier in this Order, and provide the remainder to the Applicant.

2. Does section 24(1) of the Act (advice from officials) authorize the head of the Public Body to refuse access to information in the records at issue?

[para 92] The Public Body applied section 24(1)(a) to pages 17-18, 22-30, 126-134, and 168-169, in their entirety.

[para 93] Pages 22-30 and 126-134 each comprise a single record. These records consist almost entirely of personal information to which section 17(1) can apply, as discussed above. I have found that all the personal information to which that provision can apply is information

that must be withheld. After this information is severed, only the header and date on the first page, and the signature line on the last page of each record will remain. I cannot say that this is meaningless information, as it will tell the Applicant what type of record it is, when it was created and by whom, which in turn may provide insight into the investigation process. Therefore, I will consider whether section 24(1)(a) applies to that information.

[para 94] Pages 168-169 are duplicates of pages 17-18. I have found above that the information about the subject officers in these pages is information that the Public Body must withhold under section 17(1). Therefore, I will consider the application of section 24(1)(a) only to the remaining information on these pages.

[para 95] Section 24(1)(a) states:

> *24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*
>
> *(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,*

[para 96] Under section 71(1) of the Act, the Public Body has the burden of proving that the Applicant has no right of access to the information that it refused to disclose under section 24.

[para 97] The test for sections 24(1)(a) and (b), as stated in past Orders, is that the advice, recommendations etc. should:

1. be sought or expected, or be part of the responsibility of a person by virtue of that person's position,
2. be directed toward taking an action,
3. be created for the benefit of someone who can take or implement the action (see Order F2013-13).

[para 98] In Order F2015-29, the Director of Adjudication interpreted sections 24(1)(a) and (b) of the FOIP Act and described the kinds of information that fall within the terms of these provisions. She said:

> The intent of section 24(1)(a) is to ensure that internal advice and like information may be *developed* for the use of a decision maker without interference. So long as the information described in section 24(1)(a) is developed by a public body, or for the benefit or use of a public body or a member of the Executive Counsel, by someone whose responsibility it is to do so, then the information falls under section 24(1)(a).
>
> A consultation within the terms of section 24(1)(b) takes place when one of the persons enumerated in that provision solicits information of the kind subject to section 24(1)(a) regarding

> that decision or action. A deliberation for the purposes of section 24(1)(b) takes place when a decision maker (or decision makers) weighs the reasons for or against a particular decision or action. Section 24(1)(b) protects the decision maker's request for advice or views to assist him or her in making the decision, and any information that would otherwise reveal the considerations involved in making the decision. Moreover, like section 24(1)(a), section 24(1)(b) does not apply so as to protect the final decision, but rather, the process by which a decision maker makes a decision.

[para 99] Sections 24(1)(a) and (b) apply only to the records (or parts thereof) that reveal substantive information about which advice was sought or consultations or deliberations were being held. Information such as the names of individuals involved in the advice or consultations, or dates, and information that reveals only the fact that advice is being sought or consultations held on a particular topic (and not the *substance* of the advice or consultations) cannot generally be withheld under section 24(1) (see Order F2004-026, at para. 71).

[para 100] Bare recitation of facts or summaries of information also cannot be withheld under section 24(1)(a) unless the facts are interwoven with the advice, proposals, recommendations etc. such that they cannot be separated (Order F2007-013 at para. 108, Decision F2014-D-01 at para. 48). As well, section 24(1)(a) does not apply to a decision itself (Order 96-012, at para. 31).

[para 101] The first step in determining whether section 24(1)(a) was properly applied is to consider whether a record would reveal advice, proposals, recommendations, analyses, or policy options (which I will refer to as "advice" (section 24(1)(a)).

Parties' arguments

[para 102] The Public Body's submission regarding section 24(1)(a) is minimal:

> The advice and recommendations on the Section 24 Pages related to whether a service investigation should be pursued, and the appropriate disposition of the allegations. The advice and recommendations were provided through the normal chain of command to superiors (the Staff Sergeant to Inspector to the Chief of Police) who sought or expected the advice and recommendations. There was an expectation by the reporting EPS members that the advice and recommendations would be taken and acted upon, and action would be implemented (which occurred in this instance). There was also an expectation that the advice and recommendations would be kept confidential.

[para 103] The Applicant did not provide submissions on the application of section 24(1).

Analysis

[para 104] As stated above, much of the information to which section 24(1)(a) was applied is information I have found must be withheld under section 17(1).

[para 105] Pages 17-18 and 168-169 are duplicates, and consist of forms that have been filled in. Once the information to which section 17(1) applies has been severed, the remaining information consists only of headers, dates, and names of EPS employees involved in the investigation. None of this information consists of advice or recommendations within the terms of section 24(1)(a) discussed above. The same applies to the header on pages 22 and 126, and the signature line on pages 30 and 134. Therefore, I will order the Public Body to review these pages, sever only the information to which section 17(1) applies as discussed earlier in this Order, and provide the remainder to the Applicant.

3. Does section 27(1) of the Act (privileged information) authorize the head of the Public Body to refuse access to information in the records at issue?

[para 106] The Public Body applied section 27(1)(a), citing solicitor-client privilege, over the information on pages 42, 54, 56 and 104. The Public Body applied this provision citing statutory privilege over pages 135-142 and 159-162. Section 17(1) was also applied to these records in their entirety. I have found above that the Public Body is required to withhold some of the information in the records under that provision.

Solicitor-client privilege

[para 107] The test to establish whether communications are subject to solicitor-client privilege is set out by the Supreme Court of Canada in *Solosky v. The Queen*, 1979 CanLII 9 [1980] 1 S.C.R. 821. The Court said:

> … privilege can only be claimed document by document, with each document being required to meet the criteria for the privilege--(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties.

[para 108] The requirements of this privilege are met if information is a communication between a solicitor and a client, which was made for the purpose of seeking or giving of legal advice and intended to be kept confidential by the parties.

[para 109] The Court in *Alberta (Municipal Affairs) v Alberta (Information and Privacy Commissioner)*, 2019 ABQB 274 found (at paras. 17-18):

> There are emails in "chains" that are not directly between lawyer and client, or lawyer and lawyer, but have been sent by and received from members of the client group or department. Communications in this category request and give information, make inquiries, answer questions and otherwise relate topically to those in which legal counsel are directly involved.

> Those emails form part of a discrete body of communications that includes clearly privileged material. I must take a holistic approach to this question. In these instances, they are "part of a continuum in which legal advice is given": ***Calgary (Police Service)*** at para 6. What all of them have in common is that they essentially "transmit or comment" on the work products that, I find, are privileged: ***Bank of Montreal v Tortora***, 2010 BCSC 1430 at paras 11-12, 14 BCLR (5th) 386.

[para 110] Where a public body elects not to provide a copy of the records over which solicitor-client or litigation privilege is claimed, the public body must provide sufficient information about the records, in compliance with the civil standards set out in the *Rules of Court* (Alta Reg 124/2010, ss. 5.6-5.8). These standards were clarified in *Canadian Natural Resources Limited v. ShawCor Ltd.*, 2014 ABCA 289 (CanLII) (*ShawCor*). *ShawCor* states that a party claiming privilege must, for each record, state the particular privilege claimed and provide a brief description that indicates how the record fits within that privilege (at para. 36 of *ShawCor*).

[para 111] The role of this Office in reviewing claims of privilege was discussed in *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (*EPS*), at paras. 77-112. In Order F2021-12, the adjudicator summarized the Court's conclusion as follows (at para. 210):

> My understanding, then, in light of *EPS*, *ShawCor*, and rule 5.8, is that I am to consider whether the description of a record enables me to recognize that the elements of solicitor-client privilege set out in *Solosky* are present. At that point, the Public Body will have satisfied the *ShawCor* standard and established a rebuttable presumption that the records are subject to solicitor-client privilege. Absent evidence to rebut the presumption, I must find that the records were properly withheld under section 27(1)(a). Where the standard is not met, in the absence of other evidence that would establish that the records are subject to solicitor-client privilege, I must find that the records were not properly withheld under section 27(1)(a).

[para 112] I agree with this summary.

[para 113] In this case, the Public Body did not provide an unredacted copy of records containing information over which solicitor-client privilege was claimed.

[para 114] In the affidavit provided with the Public Body's submission, the affiant states:

> Pages 42, 54, 56 and 104 contain information relating to a legal opinion provided by a Crown to the EPS. This type of legal opinion involves the Office of the Chie Crown Prosecutor providing the EPS with a legal opinion based on a legal issue, including advice regarding a recommended course of action based on legal considerations. The Crown is acting in a solicitor capacity and not in the role of a prosecutor managing a charge that had already been laid. The opinion was provided for the purpose of the Crown delivering its opinion and for no other purpose.

[para 115] By itself, the affidavit it not particularly compelling, as it refers only to the information "relating to" a legal opinion, and not actually consisting of or revealing a legal opinion sought or given. Solicitor-client privilege does not necessarily apply to information that merely "relates to" a legal opinion. However, as discussed below, I have a copy of one of the pages withheld as privileged which provides additional context for the Public Body's claim.

[para 116] Page 42 is part of a report comprising pages 39-52. Pages 54 and 56 are part of an identical copy of the same report, comprising pages 53-66. The information withheld on page 54 citing solicitor-client privilege was withheld only under section 17(1) on page 40. Therefore, I have an unredacted version of the information appearing on page 54. The page includes one sentence that discusses a question that was asked of counsel, as well as counsel's response.

[para 117] As none of the information on page 40 was disclosed to the Applicant, any privilege claimed over information on page 54, which is identical to page 40, was not waived by failing to claim privilege over any information in page 40. Further, as will be discussed below, the information on page 40 that relates to legal advice comprises only one sentence in the page; I am not drawing an adverse inference regarding the Public Body's claim of privilege from the fact that this sentence was missed by the Public Body on page 40 when processing the records, especially as the Public Body had decided to withhold this page in its entirety under section 17(1).

[para 118] Past Orders have accepted that where a public body has obtained legal advice on a matter, solicitor-client privilege extends to communications between public body employees quoting or discussing the legal advice given by the public body's counsel (see Orders 96-020, F2015-32). This follows the principle set out by courts regarding the discussion of legal advice within a public body or organization (see *Alberta (Municipal Affairs) v Alberta (Information and Privacy Commissioner)*, 2019 ABQB 274, at paras. 17-18, *Edmonton Police Service v Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10, (*EPS*) at para. 271).

[para 119] In this case, I agree that the sentence on pages 40 and 54 reveal information that is subject to solicitor-client privilege. However, the remaining information on those pages does not refer to or otherwise reveal the privileged information.

[para 120] The Public Body argued that if solicitor-client privilege applies to a record, it applies to an entire record and the Commissioner does not have authority to order that the record be severed. It cites Order F2002-007 in support of this argument.

[para 121] I agree that past Orders have found that a public body is not required by section 6(2) of the Act to sever the "substantive" advice in a privileged communication in order to provide factual or seemingly innocuous information to an applicant. Rather, where a communication is subject to solicitor-client privilege, that privilege applies to the whole document.

[para 122] Those Orders are discussing the communications in which legal advice is sought or given or other situation in which solicitor-client privilege clearly applies to the record in its entirety. For example, Order F2002-007 cited by the Public Body is discussing a lawyers' bills of accounts.

[para 123] This is not the case for pages 40 and 54; these pages are part of a record that it not itself subject to privilege. Rather, a small portion of each record reveals legal advice that was sought or given – it is that legal advice that is *revealed* that section 27(1)(a) can apply to. This was discussed in *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII), in which the BC Court of Appeal discussed the duty to sever information under BC's FOIP Act and how it applies to solicitor-client privilege:

> [63] In *British Columbia (Minister of Environment, Lands and Parks) v. British Columbia (Information and Privacy Commissioner)* (1995), 1995 CanLII 634 (BC SC), 16 B.C.L.R. (3d) 64 (S.C.), Thackray J. (as he then was) held that a document that is subject to solicitor client privilege cannot be subject to severance. He overturned an order of the Commissioner that required factual information in two privileged documents be disclosed to the applicant. The College argues that this case is authority that s. 4(2) cannot apply to a document any part of which is subject to solicitor client privilege and thus exempt from disclosure under s. 14 of the *Act*.
>
> [64] The documents in question in *British Columbia (Minister of Environment, Lands and Parks)* were an opinion prepared by a lawyer and minutes of a meeting attended by the lawyer during which he provided legal advice. Both documents contained communications between the lawyer and the client. As in *Gower*, the entire documents were found to be privileged.
>
> [65] The application of the severance provision of the Ontario *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. c. F.31 as am., to documents subject to solicitor client privilege was considered in *Ontario (Ministry of Finance) v. Ontario (Assistant Information and Privacy Commissioner)*, [1997] O.J. No. 1465 (Ont.Div.Ct.)(QL). The Court held that the Commissioner wrongly interpreted the scope of solicitor client privilege as narrowed under the *Act.* Sharpe J. (as he then was) said (at para. 17):
>
> > Once it is established that a record constitutes a communication to legal counsel for advice, it is my view that the communication in its entirety is subject to privilege.
>
> [66] He continued, however, (at para. 18):
>
> > I would hasten to add that this interpretation does not exclude the application of s. 10(2), the severance provision, for there may be records which combine communications to counsel for the purpose of obtaining legal advice with communications for other purposes which are clearly unrelated to legal advice. I would also emphasize that the privilege protects only the communication to legal counsel. ...documents authored by third parties and communicated to counsel for the purpose of

> obtaining legal advice do not gain immunity from disclosure unless the dominant purpose for their preparation was obtaining legal advice: Ontario (Attorney General) v. Hale (1995), 85 O.A.C. 299 (Div.Ct.).
>
> [67] In my view, that part of Document 3 that records the communications of the expert to the lawyer and other representatives of the College, and Document 4, are the same as Documents 1, 2 and 5. They are communications by third parties, who were not agents or representatives of the client to obtain legal advice, but provided information used by the lawyer to render legal advice. They are not subject to legal advice privilege.
>
> [68] The two parts of Document 3 are not intertwined. The part of Document 3 that records the lawyer's comments is privileged. I am of the view that the severance provision of the *Act* may be applied where, as here, part of the document is not subject to legal advice privilege and a separate part is privileged. In such a case, the non-privileged part can "reasonably be severed".

[para 124] In *EPS*, the Court followed the test set out in *Alberta (Minister of Municipal Affairs) v Alberta (Information and Privacy Commissioner),* 2019 ABQB 274 (*Municipal Affairs*) and *Edmonton (City) Police Service v Alberta (Information and Privacy Commissioner),* 2020 ABQB 207 (*CPS*), both of which are judicial review decisions of Orders of this office that considered a public body's assertion of solicitor-client privilege over records responsive to an access request. The Court in *EPS* said (emphasis added):

> 228 Following the path broken by Justices Hall and Mandziuk, to assess whether solicitor-client privilege applied to the records, I have considered the following questions:
>
> (1) Is there a communication between a solicitor and a client?
>
> (2) Does the communication entail the seeking, giving or receiving of legal advice?
>
> (3) Is the communication intended by the parties to be confidential?
>
> (4) Is the lawyer acting as a lawyer?
>
> (5) What was the purpose for which the record came into existence?
>
> (6) Is the particular communication part of a continuum in which legal advice is given?
>
> (7) Does the particular communication reveal that legal advice has been sought or given?
>
> <u>(8) If there is any privileged information, can it be reasonably severed from the rest of the record, without revealing the privilege?</u>
>
> See 2019 CPS(QB) at para 6; Alberta Municipal Affairs at para 11.

[para 125] In *CPS*, the Court found *portions of some pages* of records to be privileged, with the remainder being producible (see para. 9).

[para 126] It is clear that there are at least some circumstances in which it is appropriate to consider whether information subject to solicitor-client privilege can be severed from a record. In my view, the information in pages 40 and 54 that reveals privileged information can be severed from the remaining information without revealing the privileged information.

[para 127] However, as page 40 was provided to me in its entirety, it is also clear that the remaining information is personal information of a third party to which section 17(1) can apply. As I have found that the Public Body is required to withhold this information from the Applicant, there is nothing in this page – or in page 54 – that can be provided to the Applicant.

[para 128] Pages 42 and 56 are also part of the same records comprising pages 39-52 and 53-66. Both pages were withheld in their entirety and neither page was provided for the inquiry. I accept that the same (or similar) legal advice appearing on pages 40 and 54 also appears on pages 42 and 56. As these are part of the same report as pages 40 and 54, and given the content of that report, it seems reasonably likely that any privileged information in pages 42 and 54 does not comprise the entirety of those pages. Rather, it seems likely that any privileged information is a reference to advice comprising only part of each page, similar to the references to advice appearing in pages 40 and 54.

[para 129] Given the information appearing in the pages immediately before and after pages 42 and 56, it also seems likely that those pages are comprised mostly, or possibly even entirely, of third party personal information to which section 17(1) can apply. For the reasons above, the Public Body would not be required to provide any of this information to the Applicant. However, as I cannot review the information on pages 42 and 56 to verify this, I will order the Public Body to review pages 42 and 56 to ensure it has applied section 27(1)(a) and section 17(1) appropriately, as discussed above, and to determine whether any remaining information can be provided to the Applicant.

[para 130] Page 104 appears to be part of a three-page report comprising pages 103-105. The Public Body has not provided any description of the information on page 104. However, given the content of this report, I accept the same (or similar) legal advice appearing on pages 40, 42, 54 and 56 also appears on this page. However, as with those pages, the content of this report indicates that the legal advice was likely referenced only in a portion of the record, such that it could be severed. As above, given the information in the preceding page, and the information contained in a similar report at pages 106-107, which was provided to me in full, it is also likely that page 104 is comprised mostly, or possibly even entirely, of third party personal information to which section 17(1) can apply. For the reasons above, the Public Body would not be required to provide any of this information to the Applicant. However, as I cannot review the information on page 104 to verify this, I will order the Public Body to review this page to ensure it has

applied section 27(1)(a) and section 17(1) appropriately, as discussed above, and to determine whether any remaining information can be provided to the Applicant.

Statutory privilege

[para 131] The Public Body has claimed statutory privilege over the information on pages 135-142 and 159-162. The Public Body has provided a copy of these pages for the inquiry.

[para 132] The Public Body states that pages 135-142 and 158-162 are comprised of explanatory reports of officers they were compelled to make in a PSB investigation. The Public Body states that in *Rysdyk v. Slaney*, 2022 ABQB 538 (*Rysdyk*), the Court found that section 51 of the *Police Act* creates a "statutory evidentiary privilege" over explanatory reports and that this privilege falls within the scope of section 27(1)(a) of the FOIP Act. *Rysdyk* states:

> [130] Taking the above into account, I conclude the legislature imposed a statutory evidentiary privilege over hearing evidence and explanatory reports under s 51. This privilege applies to a police officer's inculpatory hearing evidence or explanatory report in civil actions and provincial offence proceedings against the officer, but does not limit regulatory disclosure or use for regulatory purposes, and is subject to the statutory exceptions relating to perjury or giving inconsistent evidence. Section 51 is aimed at proceedings against an officer. It follows that the privilege has no potential application in offence proceedings against other accused persons.
>
> [131] Although this evidentiary privilege has limitations in scope and duration, it appears to fall within "any type of legal privilege" under s 27(1) of the *FOIP Act*.

[para 133] Section 51 of the *Police Act*, in force at the time the officers' statements were made in summer 2015, stated:

> *51 Where a police officer or peace officer appointed under the Peace Officer Act gives evidence during*
>
> *(a) a hearing under this Act, or*
>
> *(b) an appeal under this Act arising out of a hearing referred to in clause (a),*
>
> *that evidence, or an explanatory report made to an investigator on a voluntary or involuntary basis by a police officer in respect of whom an investigation is being carried out, if it tends to incriminate him or her, subject him or her to punishment or establish his or her liability, shall not be used or received against the police officer or peace officer appointed under the Peace Officer Act in any civil proceeding or in any proceeding under any other Act, except in a prosecution for or proceedings in respect of perjury or the giving of contradictory evidence.*

[para 134] Section 10(3) of the Police Service Regulation, in force at the time the statements were made, said:

> *10(3) Where*
>
> *(a) a police officer in respect of whom an investigation is being carried out is directed by the investigator to provide an explanatory report referred to in subsection (2) setting out the police officer's version of the subject-matter of the complaint, and*
>
> *(b) pursuant to that direction the police officer provides an explanatory report, that explanatory report shall be regarded as an involuntary statement and shall not be admissible in evidence in any proceedings carried out under the Act, except to prove that the statement is false.*

[para 135] In this case, it is clear from the records that pages 135-143 and 159-162 are comprised of explanatory reports. There is no indication that a hearing was conducted under section 51 of the *Police Act*. Nevertheless, the Court in *Rysdyk* found that section 51 applies to explanatory reports that are not provided in a disciplinary hearing (at para. 71).

[para 136] As discussed in *Ryskyk*, section 51 of the *Police Act* only applies to inculpatory statements, where inculpatory means "tending to incriminate him or her, subject him or her to punishment or establish his or her liability" (at para. 21).

[para 137] The Public Body did not make any submissions on this point, or reference this requirement at all.

[para 138] One of the statements relates to the officer who parked in a stall designated for persons with disabilities and was issued a ticket. The officer's explanatory statement at pages 135-143 is inculpatory.

[para 139] The statement at pages 159-162 is less clear on that point. The Court in *Rysdyk* referred to *R v. Nedelcu*, 2012 SCC 59, at paragraphs 16-30, as providing a useful discussion on this point. I find the following points made by the Supreme Court in that latter case to be helpful:

> [16] The law is clear and I accept it to be so, that the time for determining whether the evidence given at the prior proceeding may properly be characterized as "incriminating evidence" is the time when the Crown seeks to use it at the subsequent hearing. (See *Dubois v. The Queen*, 1985 CanLII 10 (SCC), [1985] 2 S.C.R. 350, at pp. 363-64.) That, however, does not detract from my contention that the evidence to which s. 13 is directed is not "any evidence" the witness may have been compelled to give at the prior proceeding, but evidence that the Crown could use at the subsequent proceeding, if permitted to do so, to prove the witness's guilt on the charge for which he or she is being tried.

> [17] In so concluding, I recognize that there will be instances where evidence given at the prior proceeding, though seemingly innocuous or exculpatory at the time, may become "incriminating evidence" at the subsequent proceeding, thereby triggering the application of s. 13.
>
> [18] Take for example, the witness who, at the trial of a third party for robbery, admits to having been present at the scene of the crime but denies any involvement in it. If the witness is subsequently charged with the same robbery and testifies that he was not present when the robbery occurred, his evidence from the prior proceeding, though innocuous at the time, will have taken on new meaning. For purposes of s. 13, it would now be treated as "incriminating evidence" because it is evidence that the Crown could use at the witness's robbery trial, if permitted to do so, to prove the essential element of identity. And that is where s. 13 comes in. It precludes the Crown from introducing it for any purpose, whether as part of its case to prove identity or as a means of impeaching the witness's testimony.
>
> [19] Manifestly, I take a different view where the evidence given by the witness at the prior proceeding could not be used by the Crown at the subsequent proceeding to prove the witness's guilt on the charge for which he or she is being tried. In such circumstances, because the prior evidence is not "incriminating evidence", there can be no "*quid*" for purposes of s. 13 — and because there is no "*quid*", no "*quo*" is owed in return. The case at hand provides a classic example of this.

[para 140] Applying this analysis to the statement at pages 159-162, I am satisfied that it can be characterized as inculpatory for the purposes of section 51 of the *Police Act*.

[para 141] Given the above, following the Court's decision in *Rysdyk* leads me to conclude that the explanatory statements at pages 135-142 and 159-162 of the records fall within the scope of section 51 of the *Police Act* as it read at the time the statements were made. The Court in *Rysdyk* made it clear that the privilege belongs to (or also belongs to) the officers making the statements (see especially paragraphs 143-145).

[para 142] The *Police Act* has since been amended and the Police Service Regulation repealed and replaced. The Public Body states that these amendments are not relevant. For the following reasons, I agree.

[para 143] Either the amendment does not affect the privilege set out in the previous iteration of section 51 of the *Police Act* or it does. In the former case, the analysis in *Rysdyk* continues to apply and my finding would be the same as above. In the latter case, even if the amendments changed section 51 such that section 51 no longer amounts to a statutory privilege, this does not affect the privilege belonging to the officers over the explanatory reports that were made in 2015. I say this for two main reasons.

[para 144] First, section 52.2 of the amended *Police Act* is a transitional provision, which states:

> *52.2 If an investigation into a complaint began prior to the coming into force of this section, the complaint must be investigated and administered under the Act as it read immediately before the coming into force of this section.*

[para 145] The two explanatory reports in the records related to the investigation of complaints that occurred prior to the amendments. Although the investigation had ended prior to the amendment, such that it was no longer being conducted or 'administered' in an ongoing manner, I understand this transitional provision to maintain the status quo of the process for investigating complaints for all investigations that began before the amendment was in force. Section 51 relates to the investigation process, and therefore, any protections afforded by section 51 at the time the investigation began will continue to apply.

[para 146] The second reason is the presumption against interference with vested rights. This presumption was discussed by the Supreme Court of Canada in *Dikranian v. Quebec (Attorney General)*, 2005 SCC 73 (CanLII), citing as a leading case *Spooner Oils Ltd. v. Turner Valley Gas Conservation Board*, 1933 CanLII 86 (SCC), which states (at p. 638):

> A legislative enactment is not to be read as prejudicially affecting accrued rights, or "an existing status" (*Main* v. *Stark*[4]), unless the language in which it is expressed requires such a construction. The rule is described by Coke as a "law of Parliament" (2 Inst. 292), meaning, no doubt, that it is a rule based on the practice of Parliament; the underlying assumption being that, when Parliament intends prejudicially to affect such rights or such a status, it declares its intention expressly, unless, at all events, that intention is plainly manifested by unavoidable inference.

[para 147] The Court in *Dikranian* noted that this principle had been codified in interpretation statues. The relevant portion of section 35 of Alberta's *Interpretation Act* states in part:

> *35(1) When an enactment is repealed in whole or in part, the repeal does not*
>
> *…*
>
> *(c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed,*
>
> *(d) affect any offence committed against or a contravention of the enactment so repealed, or any penalty, forfeiture or punishment incurred in respect of or under the enactment so repealed, or*
>
> *(e) affect any investigation, proceeding or remedy in respect of the right, privilege, obligation, liability, penalty, forfeiture or punishment.*

[para 148] The Court went on to explain the criteria for recognizing vested rights as follows:

> 37 Few authors have tried to define the concept of "vested rights". The appellant cites Professor Côté in support of his arguments. Côté maintains that an individual must meet two criteria to have a vested right: (1) the individual's legal (juridical) situation must be tangible and concrete rather than general and abstract; and (2) this legal situation must have been sufficiently constituted at the time of the new statute's commencement (Côté, at pp. 160-61). This analytical approach was used by, *inter alia*, the Saskatchewan Court of Appeal in *Scott v. College of Physicians and Surgeons of Saskatchewan* (1992), 1992 CanLII 2751 (SK CA), 95 D.L.R. (4th) 706, at p. 727.
>
> 38 I am satisfied from a review of the case law of this Court and the courts of the other provinces that the analytical framework proposed by the appellant is the correct one.
>
> 39 A court cannot therefore find that a vested right exists if the juridical situation under consideration is not tangible, concrete and distinctive. The mere possibility of availing oneself of a specific statute is not a basis for arguing that a vested right exists: Côté, at p. 161. As Dickson J. (as he then was) clearly stated in *Gustavson Drilling*, at p. 283, the mere right existing in the members of the community or any class of them at the date of the repeal of a statute to take advantage of the repealed statute is not a right accrued (see also *Abbott v. Minister for Lands*, [1895] A.C. 425, at p. 431; *Attorney General of Quebec*, at p. 743; *Massey-Ferguson Finance Co. of Canada v. Kluz*, 1973 CanLII 150 (SCC), [1974] S.C.R. 474; *Scott*, at pp. 727-28). In other words, the right must be vested in a specific individual.
>
> 40 But there is more. The situation must also have materialized (Côté, at p. 163). When does a right become sufficiently concrete? This will vary depending on the juridical situation in question. I will come back to this point later. Suffice it to say for now that, just as the hopes or expectations of a person's heirs become rights the instant the person dies (see, for example, *Marchand v. Duval*, [1973] C.A. 635, at p. 637, and art. 625 *C.C.Q.*), and just as a tort or delict instantaneously gives rise to the right to compensation (see, for example, *Holomis v. Dubuc* (1974), 1974 CanLII 1254 (BC SC), 56 D.L.R. (3d) 351 (B.C.S.C.); *Ishida v. Itterman*, 1974 CanLII 1787 (BC SC), [1975] 2 W.W.R. 142 (B.C.S.C.); and arts. 1372 and 1457 *C.C.Q.*), rights and obligations resulting from a contract are usually created at the same time as the contract itself (see Côté, at p. 163).

[para 149] In this case, the statutory privilege being claimed by the Public Body belongs to the particular officers who provided the explanatory statements. From the records before me, it is clear that the officers had intended to rely on the protections afforded when providing an explanatory statement under the *Police Act*. Therefore, the circumstances are such that there is a presumption against applying the amended provisions of the *Police Act* in a manner that would interfere with the privilege.

[para 150] I am satisfied that the explanatory statements at pages 135-142 and 159-162 are privileged under section 27(1)(a) and 27(2) of the FOIP Act.

Exercise of discretion

[para 151] Past Orders have consistently held that once it has been established that solicitor-client privilege applies, it is not necessary to further assess the exercise of discretion by the public body, at least in the absence of a compelling public interest (see *EPS* at para. 115). The Applicant has not provided support for finding any such compelling public interest.

[para 96] I find that the Public Body's exercise of discretion to withhold the information subject to solicitor-client privilege is presumed to be appropriate without the need to inquire further into whether the Public Body considered the Applicant's arguments regarding public interest.

[para 152] With respect to the Public Body's claim of statutory privilege, as that privilege belongs to the officers who provide the explanatory reports, the Public Body is required to withhold them under section 27(2).

V. ORDER

[para 153] I make this Order under section 72 of the Act.

[para 154] I find that the Public Body properly relied on section 12(2) to refuse to confirm or deny the existence of records responsive to the last part of the Applicant's request.

[para 155] I find that section 17(1) requires the Public Body to continue to withhold some, but not all, of the information in the records. I order the Public Body to review the records in accordance with the findings in this Order, and provide further information to the Applicant.

[para 156] I find that section 23(1) does not apply to information in the records. I order the Public Body to provide this information to the Applicant after reviewing the records and applying section 17(1) following the guidance in this Order.

[para 157] I find that section 24(1) does not apply to the information in the records that is not also information that must be withheld under section 17(1). I order the Public Body to provide this information to the Applicant after reviewing the record and applying section 17(1) following the guidance in this Order.

[para 158] I find that the Public Body has properly asserted solicitor-client privilege over some information on pages 54 (with the same information appearing in page 40), 42, 56 and 104. However, for the reasons set out at paragraphs 119-130, I order the Public Body to review these pages to ensure it has applied section 27(1)(a) and section 17(1) appropriately, as discussed above, and to determine whether any remaining information can be provided to the Applicant.

[para 159] I find that the Public Body is required to withhold the information on pages 135-142 and 159-162 under section 27(2).

[para 160] 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.

_____

Amanda Swanek
Adjudicator