ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER FOIP2026-18

MAY 29, 2026

PUBLIC SAFETY AND EMERGENCY SERVICES

Case File Number 011713

Office URL: www.oipc.ab.ca

Summary: On behalf of a company (the Applicant), an individual representing the Applicant, made an access request under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to Justice and Solicitor General (now Public Safety and Emergency Services) (the Public Body) for ". . . all records in the possession of the Director of Law Enforcement with respect to the SCAN unit members' observations of any activities and any complaints of activities taking place on or near the property ".

The Applicant's representative made the access request after the Applicant received a letter from the Public Body informing it that the Public Body had received complaints regarding activities occurring on or near the Applicant's property, and that the SCAN Unit had conducted an investigation and reached certain conclusions with respect to the complaints.

The Public Body responded and informed the Applicant that in accordance with section 12(2)(a) of the FOIP Act, it could neither confirm nor deny whether records existed within the Public Body containing information described in section 18 or 20 of the FOIP Act.

The Applicant's representative requested a review of the Public Body's response and subsequently an inquiry.

During the inquiry, the Public Body advised that the investigation was complete and it was prepared to conduct a search for responsive records and respond to the Applicant.

The Adjudicator found that the Public Body improperly used section 12(2)(a), as it used section 12(2)(a) to refuse to confirm or deny the existence of records responsive to the Applicant's access request when it had already disclosed to the Applicant that it had received complaints about activities occurring on or near the property; had conducted an investigation into those complaints; and had reached certain conclusions based on its investigation.

The Adjudicator ordered the Public Body to conduct a search for responsive records and provide a response to the Applicant under the FOIP Act without relying on section 12(2)(a).

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 12, 18, 20, 72, *Access to Information Act*, S.A. 2024, A-1.4.

Orders Cited: AB: F2006-012, F2009-029, F2014-06, F2024-13, F2025-09.

Cases Cited: *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner*), 2014 SCC 31.

I. BACKGROUND

[para 1] On November 5, 2018, the Director of the Investigation and Enforcement Operations, Safer Communities and Neighbourhoods (SCAN) Unit, sent a letter (the Letter) to a company (the Applicant) stating:

> This is to advise you that the Safer Communities and Neighbourhoods Unit, Investigation and Enforcement Operations, has received complaints in relation to a specified use activity, to wit: the possession, growth, use consumption, sale, transfer or exchange of a controlled substance, as defined in the Controlled Drugs and Substances Act (Canada), as defined in the Criminal Code (Canada), taking place in and around your property located at:
>
> [Address]
>
> The complaint was made under The Safer Communities and Neighbourhoods Act.
>
> The Director has proceeded with an investigation of the complaint in relation to your property and is satisfied that activities have been occurring on or near your property that give rise to a reasonable inference that your property is being habitually used for a specified use in contravention of the Act, and that the community or neighbourhood has been adversely affected.
>
> Immediate action must be taken by you to prevent any further use of the property for these activities, or any other activity specified under the Alberta *Safer Communities and Neighbourhoods Act*.
>
> If you do not take immediate action to prevent these activities, the Director may pursue an application to the Court of Queen's Bench for a Community Safety Order, which may include an order to terminate tenancies, remove residents and/or close the property for up to 90 days; and/or take any other action the Director considers appropriate.
>
> You are requested to immediately contact the Safer Communities and Neighbourhoods Unit Investigator at [phone number], to discuss the situation and/or advise what action(s) you have

taken to ensure that the above noted activities will no longer occur on the aforementioned property.

[para 2] On November 9, 2018, the Applicant's representative wrote to the SCAN Unit, requesting additional information in support of the Director's allegations. The Applicant's representative stated, in part:

> . . .
>
> [The company] is fully prepared to work with your unit in order to ensure that the property is not habitually used for a specified use as that term is defined in the *Safer Communities and Neighbourhood Act* (hereinafter, a "Specified Use").
>
> That being said, [the company] also has legal obligations under the *Residential Tenancies Act* and the *Alberta Human Rights Act*, and the information provided in your letter dated November 5, 2018 does not provide the requisite legal grounds for [the company] to evict the current tenants of the Subject Property. I trust you will understand that [the company] cannot lawfully evict a person on the basis of vague allegations on the part of an unidentified source.
>
> As a result of having received your letter, [the company] has undertaken its own inquiries in an effort to determine whether the current tenants have used the Subject Property for a Specified Use, and such inquiries have failed to yield any evidence that the property has in fact been habitually used for a Specified Use by the current tenants.
>
> If you have information that you are prepared to share with [the company] with respect to the allegations that the property is being habitually used for a Specified Use in contravention of the *Safer Communities and Neighbourhood Act*, then we would appreciate receiving such further, specific information in order that [the company] may reassess whether or not it has the requisite grounds to evict the tenants.
>
> You have demanded that "immediate action" be taken to prevent any further use of the property for these activities. The Subject Property is currently monitored on a regular basis within the boundaries of the law. Kindly advise as to what specific action you are demanding to be taken in the circumstances so that [the company] may continue to provide its full cooperation with your unit.
>
> . . .

[para 3] On November 29, 2018, legal counsel for Justice and Solicitor General (now Public Safety and Emergency Services) (the Public Body), responded to the Applicant's representative and stated in part:

> Thank you for your correspondence dated November 9, 2018 and addressed to my client, the Safer Communities and Neighbourhoods ("SCAN") Unit. In response to your correspondence, I confirm that since or about [date], when [the company] became the registered owner of the Property:
>
> 1. Complainants have expressed serious concern about the continuation of activities taking place at or near the property which adversely affect the community; and
>
> 2. SCAN Unit members have observed a continuation of activities giving rise to a reasonable inference that the Property is being habitually used for a specified use,

> namely the possession, growth, use, consumption, sale, transfer or exchange of a controlled substance.
>
> [The company], as the current owner of the Property, is reasonably required to prevent all persons from causing, contributing to, permitting, or acquiescing in illegal activities by any and all lawful steps available to the Property owner.
>
> I am not in a position to provide legal advice to [the company] and therefore will not advise of any avenues available or unavailable to it in order to prevent the habitual specified use from occurring on or near the Property. [The company] has a positive obligation to prevent these activities from occurring. Your letter does not advise what inquiries [the company] made in an effort to meet its positive obligation; however, the community complaints and SCAN Unit members have reported a contrary conclusion. It is open to [the company] to decide how to meet its positive obligation and what consequences stem therefrom.
>
> Should [the company] choose to pursue an avenue which results in the Property, and/or occupation thereof, being addressed by the Court of a Residential Tenancy Dispute Resolution Services Officer, my client may be prepared to consider the particular avenue chosen by [the company] and may provide additional insight to the proper forum at that time. In these circumstances, kindly contact our office and I will seek instructions.
>
> I confirm that if the Property owner does not prevent the habitual specified use from occurring, my client reserves its right to ask the Court to close the Property and to take any other steps which are appropriate in order to ensure that the community is kept safe.
>
> . . .

[para 4] On December 11, 2018, the Applicant's representative submitted an access request under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (the FOIP Act) to the Public Body. The Applicant's representative stated in part:

> . . .
>
> I understand that since [date], complainants have expressed serious concern about the activities taking place on or near the property, and that SCAN unit members have observed a continuation of activities giving rise to a reasonable inference that the property is being habitually used for a specific use, namely the possession, growth, use, consumption, sale, transfer, or exchange of controlled substances.
>
> Please provide me with all records in the possession of the Director of Law Enforcement with respect to the SCAN unit members' observations of such activities and any complaints of activities taking place on or near the property.

[para 5] On January 24, 2019, the Public Body responded to the Applicant's representative's access request stating, "in accordance with section 12(2)(a) of the FOIP Act, our office can neither confirm nor deny whether records exist within JSG containing information described in section 18 or 20 of the FOIP Act".

[para 6] On February 14, 2019, the Applicant's representative submitted a Request for Review to this Office, asking the Commissioner to review the Public Body's response to the access request.

[para 7] The Commissioner authorized a Senior Information and Privacy Manager to investigate and attempt to settle the matter.

[para 8] Subsequently, on May 21, 2020, the Applicant's representative requested the Commissioner conduct an inquiry into the Public Body's response to the access request.

[para 9] The Commissioner agreed to conduct an inquiry and delegated her authority to conduct the inquiry to me.

II. ISSUE

[para 10] The Notice of Inquiry, dated September 24, 2025, sets out the following issue:

1. Did the Public Body properly refuse to confirm or deny the existence of a record, as authorized by section 12(2)(a) of the Act?

III. DISCUSSION OF ISSUE

1. Did the Public Body properly refuse to confirm or deny the existence of a record, as authorized by section 12(2)(a) of the Act?

[para 11] In the Letter to the Applicant, the Public Body disclosed to the Applicant and its representative that the Public Body had received complaints about the Applicant's property, the nature of the complaints, that the SCAN Unit had conducted an investigation into those complaints, and the conclusions it had reached with respect to those complaints as a result of the investigation.

[para 12] In response to the Applicant's representative letter of November 9, 2018 to the Public Body, requesting further information regarding the allegations and instructions in the Public Body's Letter, legal counsel for the Public Body reiterated the information in the Letter and stated "my client may be prepared to consider the particular avenue chosen by [the Company] and may provide additional insight to the proper forum at that time. In these circumstances, kindly contact our office and I will seek instructions".

[para 13] The Applicant's representative then submitted an access request to the Public Body under the FOIP Act for all records in the possession of the Director of Law Enforcement with respect to the SCAN unit members' observations of such activities (the alleged possession, growth, use, consumption, sale, transfer, or exchange of controlled substances) and any complaints of activities taking place on or near the property.

[para 14] The Public Body responded by refusing to confirm or deny the existence of any records responsive to the Applicant's access request under section 12(2).

[para 15] Section 12 of the FOIP Act states:

> *12(1) In a response under section 11, the applicant must be told*
>
> *(a) whether access to the record or part of it is granted or refused,*

(b) if access to the record or part of it is granted, where, when and how access will be given, and hat is supplied, explicitly or implicitly, in confidence, and

(c) if access to the record or to part of it is refused,

(i) the reason for the refusal and the provision of this Act on which the refusal is based,

(ii) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and,

(iii) that the applicant may ask for a review of that decision by the Commissioner or an adjudicator, as the case may be.

(2) Despite subsection (1)(c)(i), the head of a public body may, in a response, refuse to confirm or deny the existence of

(a) a record containing information described in section 18 or 20, or

(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 16] Section 18 of the FOIP Act states:

18(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to

(a) threaten anyone else's safety or mental or physical health, or

(b) interfere with public safety.

(*2) The head of a public body may refuse to disclose to an applicant personal information about the applicant if, in the opinion of a physician, a regulated member of the College of Alberta Psychologists or a psychiatrist or any other appropriate expert depending on the circumstances of the case, the disclosure could reasonably be expected to result in immediate and grave harm to the applicant's health or safety.*

(3) The head of a public body may refuse to disclose to an applicant information in a record that reveals the identity of an individual who has provided information to a public body in confidence about a threat to an individual's safety or mental or physical health.

[para 17] Section 20 permits the head of a public body to refuse to disclose information to an applicant if the disclosure could reasonably be expected to be a harm to law enforcement. It states:

20(1) The head of a public body may refuse to disclose information to an if the disclosure could reasonably be expected to

(a) harm a law enforcement matter;

(b) prejudice the defence of Canada or of any foreign state allied to or associated with Canada,

(b.1) disclose activities suspected of constituting threats to the security of Canada within the meaning of the Canadian Security Intelligence Service Act (Canada),

(c) harm the effectiveness of techniques and procedures currently used, or likely to be used, in law enforcement,

(d) reveal the identity of a confidential source of law enforcement information,

(e) reveal criminal intelligence that has a reasonable connection with the detection, prevention or suppression of organized criminal activities or of serious and repetitive criminal activities.

(f) Interfere with or harm an ongoing or unsolved law enforcement investigation, including a police investigation,

(g) reveal any information relating to or used in the exercise of prosecutorial discretion,

(h) deprive a person of the right to a fair trial or impartial adjudication,

(i) reveal a record that has been confiscated from a person by a peace officer in accordance with a law,

(j) facilitate the escape from custody of an individual who is being lawfully detained,

(k) facilitate the commission of an unlawful act or hamper the control of crime,

(l) reveal technical information relating to weapons or potential weapons,

(m) harm the security of any property or system, including a building, a vehicle, a computer system or a communications system, or

(n) reveal information in a correctional record supplied, explicitly or implicitly, in confidence.

(2) Subsection (1)(g) does not apply to information that has been in existence for 10 years or more.

(3) The head of a public body may refuse to disclose information to an applicant if the information

(a) is in a law enforcement record and the disclosure could reasonably be expected to expose to civil liability the author of the record or an individual who has been quoted or paraphrased in the record, or

(b) is about the history, supervision or release of an individual who is under the control or supervision of a correctional authority and the disclosure could reasonably be expected to harm the proper custody or supervision of that person.

(4) The head of a public body must refuse to disclose information to an applicant if the information is in a law enforcement record and the disclosure would be an offence under an Act of Canada.

(5) Subsections (1) and (3) do not apply to

(a) a report prepared in the course of routine inspections by an agency that is authorized to enforce compliance with an Act of Alberta, or

(b) a report, including statistical analysis, on the degree of success achieved in a law enforcement program unless disclosure of the report could reasonably be expected to interfere with or harm any of the matters referred to in subsection (1) or (3).

(6) After a police investigation is completed, the head of a public body may disclose under this section the reasons for a decision not to prosecute

(a) to a person who knew of and was significantly interested in the investigation, including a victim or a relative or friend of a victim, or

(b) to any other member of the public, if the fact of the investigation was made public.

Public Body's Submission

[para 18] With respect to whether the Public Body properly refused to confirm or deny the existence of a record, as authorized by section 12(2)(a) of the FOIP Act, the Public Body stated the following in its submission provided to me and to the Applicant's representative:

> During the location of records, SCAN advised that any information related to the scope of this request was part of an active investigation.
>
> SCAN further advised that the disclosure of the existence of the investigation file could put the investigators at risk. As per section 18(1) of the FOIP Act, the head of a public body may refuse to disclose to an applicant information if the disclosure could reasonably be expected to (a) threaten anyone else's safety or mental health, or (b) interfere with public safety. In this case, the disclosure of any information within an active investigation could interfere with public safety as well as potentially threaten the safety of the investigators involved in the investigation.
>
> In reference to section 20(1) of the FOIP act, the disclosure of the information of an active investigation is harmful to law enforcement as any information disclosed prior to the conclusion of the case could risk the integrity of the investigation.
>
> In accordance with the FOIP Act, section 12(1) states that in response under section 11, the applicant must be told (c) if access to the record or to part of it is refused, (i) the reasons for the refusal and the provision of this Act on which the refusal is based. Section 12(2) further states that despite subsection (1)(c)(i), the head of a public body may, in a response, refuse to confirm or deny the existence of (a) a record containing information described in section 18 or 20.
>
> Given the information from SCAN, the FOIP office on behalf of Alberta Justice and Solicitor General considered all the subsections of section 18(1) and 20(1) to refuse to confirm or deny the existence of the records under section 12(2)(a) of the FOIP act.
>
> On November 5, 2018, SCAN provided a letter to the business regarding complaints received. Furthermore, on November 29, 2018, Alberta Justice and Solicitor General provided a letter to the Applicant in response to [a] letter provided to SCAN on November 9, 2018.

In response to how section 12(2)(a) of the FOIP Act applies to the records, given the abovementioned correspondence provided to the applicant, the Public Body offers the following explanations:

This Access to Information request under *the Freedom and Information and Protection of Privacy (FOIP) Act* was received from the Applicant on December 11, 2018. From a FOIP perspective, it is irrelevant whether the business owner received a letter from the public body. The letter was a mere warning to the owner of the property based on complaints received as stated in the letter.

When it comes to the application of section 12(2)(a) of the FOIP Act to the records responsive to a FOIP request, the only consideration is whether the records requested contain information described in section 18 or 20 of the FOIP Act. The records which were the subject of this request [were] part of an active investigation. SCAN confirmed that the investigation was active at the time of the request and that any disclosure of the records would compromise the integrity of the investigation as well as threaten the safety of the investigators involved. Therefore, both sections 18 and 20 of the FOIP Act are applicable to the records.

Conclusions

The public body submits that section 12(2)(a) was properly used to refuse to confirm or deny the existence of records at the time the request was made. The public body provided a response to the applicant based on the status of the investigation at the time of the request.

The Public Body notes that the Applicant's request was made years ago when the investigation was still active. However, it has now been confirmed that the investigation is closed. The public body is prepared to conduct a search and provide the responsive records for review subject to the Access to Information Act, should there be any responsive records based on the original scope of the request.

Applicant's Submission

[para 19] After setting out the background facts preceding the Applicant's access request, which are included in the Background section above, the Applicant's representative made the following submission, in part:

8. By way of the above, SCAN put the Applicant in an impossible position. SCAN demanded that the Applicant put a stop to the activities of the tenant (which activities the Applicant's own investigation had failed to corroborate) but refused to supply the Applicant with sufficient information to enable [to] it to present a case to the Court or the Residential Tenancy Dispute Resolution Services for eviction. It suggested that if, and only if, the Applicant were to take steps to evict the tenants, then it "may provide additional insight".

9. The Applicant, as the Landlord, owed duties to its tenant, including an obligation not to disturb the tenant's possession or peaceful enjoyment of the Premises.[1] The Applicant could not reasonably evict the tenant based on the vague information provided by SCAN in the hope that SCAN may ultimately agree to provide further information once a hearing date had been set. Not only would such action be unfair to the tenant, but it could result in an award of costs made against the Applicant if the attempt to evict proved unsuccessful (which would almost certainly be the case unless SCAN later exercised its discretion to provide concrete information in support of its conclusions).

[1] S. 16 of the *Residential Tenancies Act*, SA 2004 c R-17.1

. . .

11. The Applicant's position in this inquiry is that s. 12(2)(a) of the *Freedom of Information and Protection of Privacy Act*, RSA 2000, c. F-25 (hereinafter, the "*FOIP Act*") was improperly invoked in the circumstances of this case.

LEGAL PRINCIPLES

12. Section 12(2)(a) of the Act states as follows:

> Despite subsection (1)(c)(i), the head of a public body may, in a response, refuse to confirm or deny the existence of a record containing information described in section 18 or 20.

13. Section 18 pertains to disclosure which would be harmful to individual or public safety and section 20 pertains to disclosure which would be harmful to law enforcement.

14. Adjudicator Amanda Swanek recently confirmed in Order F2025-09 that the Public Body has the burden of proving that it properly relied on section 12(2), citing Order F2009-029 at para 10-11.

15. Section 12(2)(a) was considered by Commissioner Frank Work Q.C. in Order F2006-012 wherein it was determined by the Public Body must demonstrate that disclosure of whether records or information exist would itself have one of the negative consequences described in section 18 or 20.[2]

[2] See in particular the analysis at paragraph 21.

16. In these circumstances, it was disingenuous for the Public Body to suggest that the mere confirmation that it had responsive records would result in the mischief which sections 18 and 20 seek to guard against when the Public Body had already acknowledged that it had undertaken an investigation. If such disclosure in and of itself, created a risk of harm to law enforcement, then it stands to reason that the letters sent on behalf of SCAN on November 5 and November 29, 2018 would not have been sent at all.

17. The Public Body's initial submission gives rise to the impression that it incorrectly reasoned that any time it is determined that the disclosure of information may be refused based on sections 18 or 20, the Public Body is automatically entitled to rely on s. 12(2)(a) instead of specifically making reference to those sections. Indeed, the Public Body argues at p. 5 of its initial submission that "when it comes to the application of section 12(2)(a) of the FOIP Act to the records responsive to a FOIP request, the only consideration is whether the records requested contain information described in section 18 or 20 of the FOIP Act." The decision in Order F2006-012 makes it clear that such reasoning is improper. Even where section 18 or 20 may serve to limit the amount of disclosure to which an applicant is entitled, it does not necessarily follow that reference to s. 12(2)(a) will be properly invoked. Rather, the Public Body must further consider whether the mere disclosure of whether or not records or information exists would also harm the interests protected by those sections. If it does not, the Public Body must instead rely on the specific section said to justify the non-disclosure.

18. The Public Body asserts that "due to safety concerns of the SCAN Investigators and to safeguard the integrity of the investigation that no information should be provided to the requester". The Applicant has not seen any evidence to support the proposition that SCAN Investigators in fact had safety concerns or that those safety concerns were well founded

and does not accept that the provision of information with respect to the facts that led SCAN Investigators to conclude that a "specified use" was occurring on the property would present any risk to the safety of the SCAN Investigators.

19. While the only specified issue in this inquiry is whether or not the Public Body properly refused to confirm or deny the existence of a record as authorized by section 12(2)(a), the Applicant notes that the Commissioner retains jurisdiction to consider further issues during the inquiry and respectfully submits that it would be appropriate to assess whether there was a reasonable basis for withholding of information due to "safety concerns" in the circumstances of this case.

CONCLUSION

20. The Public Body improperly relied upon s. 12(2)(a) in refusing to confirm or deny the existence of a record.

Analysis

[para 20] While I acknowledge the Public Body has said that the investigation is now closed and it is prepared to conduct a search for records responsive to the Applicant's access request and provide a response to the Applicant's access request, it is still necessary to address whether the Public Body properly refused to confirm or deny the existence of responsive records to the Applicant's access under section 12(2)(a) in the first place.

para 21] Prior Orders of this Office have determined that the public body has the burden of proving that it properly relied on section 12(2) (see, for example, Orders F2009-029 at para. 10 – 11 and F2025-09 at para. 6).

[para 22] In Order F2006-012, former Commissioner Work discussed how section 12(2)(a) was to be interpreted. At paragraphs 17, 18 and 21, he stated in part (my emphasis):

> [para 17] Except for the requirement that the records requested contain information described in section 18 and 20, section 12(2) does not provide guidance as to when it should be used. Sections 18 and 20 address situations in which records may be withheld, but when these sections (only) are applied, the applicant is told that records exist. Section 12(2)(a) provides the Public Body with an additional tool that it may not only withhold these particular classes of records, but also whether they exist. This absence of guidance as to when the provision should be used is in contrast to section 12(2)(b). The latter permits withholding whether records about a third party exist, but only if the disclosure of the existence of this information would itself be an unreasonable invasion of the privacy of the third party. There is, therefore, a question of whether a similar restriction should be imposed for the use of section 12(2)(a), such that it is to be relied on only when its use would protect the same interest as non-disclosure of the records would protect.
>
> [para 18] 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. <u>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</u> . . .

. . .

> [para 21] . . . The sensible purpose for both provisions is that it 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. Despite the difference in wording between sections 12(2)(a) and 12(2)(b), this restriction makes the same sense for both sections; therefore, in my view, it was intended for both, and I interpret section 20(1)(a) as implicitly containing it. The discretion to refuse to confirm or deny is available only if the condition is met that it is being used to protect the same interest as non-disclosure of information. This interpretation is also in accordance with the general principle in the Act of permitting access subject only to limited and specific exceptions.

[para 23] In other words, a public body can only use section 12(2)(a) to confirm or deny the existence of records if confirming or denying the existence of records could reasonably be expected to cause harm to individual or public safety (s. 18) or cause harm to law enforcement (s. 20).

[para 24] This approach has been adopted and followed in numerous subsequent Orders of this Office (See, for example, Orders F2024-13 at paragraph 115 and F2025-09 at paragraph 7).

[para 25] As noted above, the Public Body argued that:

> . . . In this case, the disclosure of any information within an active investigation could interfere with public safety as well as potentially threaten the safety of the investigators involved in the investigation.
>
> . . .
>
> When it comes to the application of section 12(2)(a) of the FOIP Act to the records responsive to a FOIP request, the only consideration is whether the records requested contain information described in section 18 or 20 of the FOIP Act. The records which were the subject of this request [were] part of an active investigation. SCAN confirmed that the investigation was active at the time of the request and that any disclosure of the records would compromise the integrity of the investigation as well as threaten the safety of the investigators involved. Therefore, both sections 18 and 20 of the FOIP Act are applicable to the records.

[para 26] There are a number of problems with the Public Body's argument and use of section 12(2)(a) in this case.

[para 27] First, there is a difference between the disclosure of any actual records that were responsive to the access request, and the disclosure that records that were responsive to the access request *existed or did not exist*.

[para 28] As noted above, section 12(2)(a) can be used to refuse to confirm or deny the existence of responsive records if disclosure of the fact that responsive records exist or do not exist could reasonably be expected to cause the harm specified in either section 18 or section 20.

[para 29] In this case, the Public Body did not argue that disclosure *of the existence or non-existence* of responsive records would compromise the integrity of the investigation as well as threaten the safety of the investigators involved, which is what is required in order to rely on section 12(2)(a).

[para 30] Rather, the Public Body argued that because the investigation was ongoing when the Applicant's representative made the access request, *disclosure of any of the records* would compromise the integrity of the investigation (s. 20) as well as threaten the safety of the investigators involved and interfere with public safety (s. 18).

[para 31] This argument is one that would be made if the Public Body had conducted a search, located responsive records, and informed the Applicant that it was withholding them or information in them pursuant to section 18 and/or section 20. It is not an argument that supports the use of section 12(2)(a).

[para 32] Second, the Public Body applied section 12(2)(a) to refuse to confirm or deny the existence of *any* responsive records without taking into account that it had *already disclosed* to the Applicant in the Letter that the Public Body had received complaints about activities occurring on or near the property; that the SCAN Unit had conducted an investigation; that the Director was satisfied that activities had been occurring on or near the Applicant's property that gave rise to a reasonable inference that the Applicant's property was being habitually used for a specified use in contravention of the Controlled Drugs and Substances Act (Canada); and that the community or neighbourhood had been adversely affected. This information was then subsequently confirmed by the Public Body's legal counsel in their letter to the Applicant's representative.

[[para 33] As the Public Body *had already* disclosed in the Letter the existence of the complaints and that it had conducted an investigation into the complaints, it could not then use section 12(2)(a) to refuse to confirm or deny the existence of responsive records to the Applicant's access request on the basis that such disclosure could reasonably be expected to cause harm to law enforcement or the safety of the investigators.

[para 34] Additionally, the Public Body failed to provide arguments or evidence in this inquiry that persuade me that disclosure of the existence or non-existence of responsive records could reasonably be expected to harm a law enforcement matter such that the requirements of section 20(1) are met, or threaten anyone else's safety or mental or physical health, or interfere with public safety, such that the requirements of section 18(1)(a) are met.

[para 35] The evidentiary standard on a public body where the legislation includes the phrase "could reasonably be expected to" as is found in section 18 and section 20 of the FOIP Act was addressed by the Supreme Court of Canada in *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner*), 2014 SCC 31. At paragraphs 53 – 54, the Court stated:

> [53] . . . Given that the statutory tests are expressed in identical language in provincial and federal access to information statutes, it is preferable to have one further elaboration of that language; *Merck Frosst*, at para. 195:
>
> > I am not persuaded that we should change the way this test has been expressed by the Federal Courts for such an extended period of time. Such a change would also affect other provisions because similar language to that in s. 20(1)(c) is employed in several other exemptions under the Act, including those relating to federal-provincial affairs (s. 14), international affairs and defence (s. 15), law enforcement and investigations (s. 16), safety of individuals (s. 17), and economic interest of Canada (s.

> 18). In addition, as the respondent points out, the "reasonable expectation of probable harm" test has been followed with respect to a number of similarly worded provincial access to information statutes. Accordingly, the legislative interpretation of this expression is of importance both to the application of many exemptions in the federal Act and to similarly worded provisions in various provincial statutes. [Emphasis added].
>
> [54] This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could be reasonably expected to" language is used in access to information statutes. As the Court in Merck Frosst emphasized, the statute tries to make out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences": *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53, [1008] 3 S.C.R. 41, at para. 40.

[para 36] Previous Orders of this Office have adopted this evidentiary standard with respect to a public body's application of section 12(2)(a) (See, for example, Order F2024-13 at paragraphs 113 – 137).

[para 37] The Public Body argued that all it needed to establish in order to apply section 12(2)(a) was that any responsive records would contain information that could reasonably be expected to result in the harm contemplated by section 18 or one of the harmful outcomes set out in section 20(1).

[para 38] In Order F2014-06, the adjudicator specifically rejected this same argument, stating at paragraph 9:

> [para 9] . . . However, I disagree with the position that a public body need only establish that any responsive records would contain information that could reasonably be expected to result in the harm contemplated by section 18 or one of the harmful outcomes set out in section 20(1), before it may rely on section 12(2)(a) to refuse to confirm or deny the existence of a record.

[para 39] The Public Body did not provide any arguments or evidence to me to establish how the Applicant knowing that the investigation was ongoing could reasonably be expected to threaten the safety of the investigators, interfere with public safety, or risk the integrity of the investigation.

[para 40] In the absence of such arguments and evidence, I find the Public Body could not rely on section 12(2)(a) in refusing to confirm or deny the existence of responsive records. I will order the Public Body to conduct a search for responsive records and respond under the FOIP Act to the Applicant's access request without relying on section 12(2)(a) of the FOIP Act.

[para 41] I note that the Public Body has advised that the investigation has now concluded, and it "is prepared to conduct a search and provide the responsive records for review subject to the Access to Information Act, should there be any responsive records based on the original scope of the request". On June 11, 2025, the *Access to Information Act*, S.A. 2024, A-1.4 (ATIA) repealed and replaced the FOIP Act; however, as the Applicant's access request was made under the FOIP Act, the FOIP Act continues to apply in this case and the Public Body's response must be made under the FOIP Act.

IV. ORDER

[para 42] I make this Order under section 72 of the FOIP Act.

[para 43] I order the Public Body to conduct a search for responsive records and respond to the Applicant under the FOIP Act without relying on section 12(2)(a) of the FOIP Act.

[para 44] I further order the Public Body to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

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Carmen Mann
Adjudicator