ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER FOIP2026-22

July 2, 2026

EDMONTON POLICE COMMISSION

Case File Number 009841

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Summary: The Applicant made an access request to the Edmonton Police Commission (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act or Act). The request was for records that "relate to any concerns raised by [former EPS Chief] about the Police Commission or vice versa and about the negotiations in regard to the renewal or extension of his present contract."

The Public Body responded to the request, refusing to confirm or deny the existence of records. The Public Body subsequently provided records responsive to part of the request, with information withheld under section 17(1), 23 and 24 of the Act.

The Public Body continued to refuse to confirm or deny the existence of records relating to other parts of the Applicant's request.

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

The Adjudicator found that the Public Body did not properly rely on section 12(2) to refuse to confirm or deny the existence of records responsive to part of the Applicant's request. The Adjudicator ordered the Public Body to respond to the Applicant without relying on that provision.

The Adjudicator found that section 17(1) required the Public Body to continue to withhold most of the information withheld under that provision. The Public Body was ordered to disclose a small amount of information withheld under section 17(1) to the Applicant.

The Adjudicator found that section 23(1) applied to some, but not all, of the information withheld under that provision. The Adjudicator ordered the Public Body to disclose some additional information to the Applicant.

The Adjudicator found that section 24(1) applied to some, but not all, of the information withheld under that provision. The Adjudicator ordered the Public Body to disclose some additional information to the Applicant.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 12, 17, 23, 24, 69, 71, 72

Authorities Cited: AB: Decision F2014-D-01, Orders 96-006, 96-012, 97-002, 99-013, 2001-040, F2004-026, F2007-013, F2007-021, F2018-14, F2008-015, F2009-040, F2010-036, F2012-06, F2013-13, F2013-23, F2014-29, F2015-29, F2018-14, F2019-07, P2012-09, **BC:** Order No. 326-1999

Cases Cited: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 (CanLII), [2011] 3 SCR 654, *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 112 (CanLII), *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (CanLII), *Leon's Furniture Limited v Alberta (Information and Privacy Commissioner)*, 2011 ABCA 94, *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23 (CanLII)

I. BACKGROUND

[para 1] The Applicant made an access request to the Edmonton Police Commission (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act or Act) for records that "relate to any concerns raised by [former EPS Chief] about the Police Commission or vice versa and about the negotiations in regard to the renewal or extension of his present contract."

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

> As is notorious, the issue of the relationship between the Edmonton Police Commission and [former EPS Chief] and his contract negotiations have been the subject of public debate and controversy. There has been a very high degree of public interest in these matters and the media has covered them closely.

> There have been conflicts among Edmonton Police Commission Commissioners, [former EPS Chief] and former Commissioners regarding what they have said about the relationship between the Commission and the Chief and the contract negotiations.

[para 3] The Public Body responded on August 18, 2018. The Public Body refused to confirm or deny the existence of responsive records, under section 12(2)(b) of the Act.

[para 4] The Applicant requested a review of the Public Body's decision. In the course of, or as a result of, the settlement phase of the review by this office, the Public Body made new decisions regarding access to the records.

[para 5] By letter dated April 30, 2019, the Public Body reiterated its decision to refuse to confirm or deny the existence of records responsive to the first part of the Applicant's request for records that relate to any concerns raised by the former EPS Chief about the Edmonton Police Commission or vice versa.

[para 6] With respect to the second part of the Applicant's request, which was for records relating to the negotiations in regard to the renewal or extension of the former EPS Chief's (then) present contract, the Public Body informed the Applicant that it was no longer relying on section 12(2). The Public Body informed the Applicant that it located responsive records and that it decided to withhold those pages in their entirety under sections 17(1), 23(1)(b) and 24(1)(b) of the Act.

[para 7] On May 30, 2019, the Applicant requested an inquiry into the matter.

[para 8] By letter dated September 16, 2019, the Public Body informed the Applicant that it made new decisions regarding the second part of the Applicant's request. It provided some responsive records to the Applicant with some information withheld under sections 17(1), 23(1)(b) and 24(1)(b) of the Act.

[para 9] An undisclosed Affected Party was invited to participate in the inquiry in relation to the records that the Public Body confirmed exist. This party agreed to participate but didn't make a submission.

II. RECORDS AT ISSUE

[para 10] The records at issue consist of 31 pages of records the Public Body has acknowledged exist. The Public Body withheld information from all but seven pages, under sections 17, 23, and 24 of the Act.

III. ISSUES

[para 11] The issues set out in the Notice of Inquiry dated February 3, 2026, are:

1. Is the Head of the Public Body authorized to refuse to confirm or deny the existence of a record under section 12(2) of the FOIP Act (contents of response)?

2. Does section 17(1) of the Act (disclosure an invasion of personal privacy) require the head of the Public Body to refuse access?

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

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

IV. DISCUSSION OF ISSUES

Preliminary issue – undue delay

[para 12] In its submission, the Public Body asks that the Commissioner exercise her discretion to refuse to conduct this inquiry due to the amount of time that has passed since the Applicant requested a review of the Public Body's decisions.

[para 13] The Applicant requested a review of the Public Body's decisions on August 22, 2018, and subsequently requested a review on May 31, 2019.

[para 14] In making this request, the Public Body states:

> In that time, the entire make-up of the Commission has changed. It has had multiple panels of new Commissioners, new Privacy Officers and new legal counsel. None of the deciding minds of the public body who made the decisions responding to the original information request at issue, or the updated responses, are part of the public body any longer. Nor are any of the Commissioners whose correspondence is contained in the record. The Commission has done its best to respond to the issues in this inquiry but notes that the delay has significantly prejudiced and frustrated the Commission's ability to respond, as those with the actual decision-making knowledge are absent. Even if located and asked to provide information, the amount of time passed undoubtedly means memories have faded. Further, the Commission has had uncertainty for the last six years as to whether this inquiry would ever proceed, in addition to the obvious uncertainty as to whether it correctly administered the Act and whether or when it might receive guidance regarding its procedures.

[para 15] Former Commissioner Clayton exercised her discretion to conduct an inquiry into this matter; that decision was communicated to the parties by letter dated August 21, 2019. The Notice of Inquiry has been issued and this inquiry is now underway. The time to refuse to conduct an inquiry has passed.

[para 16] The Public Body also cites section 69(6) of the FOIP Act, which states that an inquiry is to be completed within 90 days after receiving the request for review, unless the Commissioner notifies the parties that this time has been extended and provides an anticipated date for completion.

[para 17] In *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 (CanLII), [2011] 3 SCR 654 the Supreme Court of Canada found that the Commissioner's interpretation of a provision of the *Personal Information Protection Act* (PIPA) similar to section 69(6) of the FOIP Act was reasonable. The Commissioner interpreted these provisions as authorizing the Commissioner to extend the time for completing an inquiry, regardless of whether the extension was made within 90 days of receiving the request for review. In other words, the time for completing the inquiry could be extended outside the 90-day period.

[para 18] In this case, the parties have been informed in writing of the extensions to the anticipated completion date for the inquiry.

[para 19] Further, an applicant has a right to request an independent review by this office of a public body's decision to refuse access in response to an access request under the Act. Refusing to conduct an inquiry due to delay that the Applicant bore no responsibility for would be to deny the Applicant the right of review for reasons entirely beyond the Applicant's control.

[para 20] While I agree with the Public Body that there has been a lengthy delay in commencing this inquiry, the prejudice identified in the Public Body's submission, cited above, does not persuade me that the answer is to deny the Applicant the right of review.

[para 21] The Public Body has asked that, in the alternative to refusing to conduct the inquiry, that the delay in the process be taken into account as relevant considerations when coming to my decision regarding the issues in the inquiry.

1. Is the Head of the Public Body authorized to refuse to confirm or deny the existence of a record under section 12(2) of the FOIP Act (contents of response)?

[para 22] The Public Body relies on section 12(2)(b) to refuse to confirm or deny the existence of records responsive to the first part of the Applicant's request, which is for records related to "any concerns raised by [former EPS Chief] about the Police Commission or vice versa".

[para 23] 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 24] 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 25] 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 26] 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 27] I agree that this is an appropriate test. The question to be answered is therefore whether it would be an unreasonable invasion of the former EPS Chief's privacy to confirm whether responsive records exist.

[para 28] 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 29] 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 30] Past Orders have also said that information relating to disciplinary actions does have a personal dimension.

[para 31] 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 32] Order F2022-31 summarizes how sections 17(2) – (5) work together (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 33] 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 34] 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,

…

(f) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations,

(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 35] The Public Body states that the context of the Applicant's request was the former EPS Chief's employment as Chief and contractual employment negotiations with the Public Body. It states that if any responsive records exist, confirming their existence would reveal that the former EPS Chief criticized the Public Body on this topic, or vice versa.

[para 36] The Public Body argued that sections 17(4)(d), (f), and (g) apply to this information. Specifically, the Public Body states that disclosing whether responsive records exist would disclose information about the former EPS Chief's employment history, citing sections 17(4)(d) and (g). The Public Body also states that

> …records that contain concerns raised by the Commission or individual Commissioners about former [Chief] would constitute other's opinions about him which in the circumstances would amount to personal/personnel recommendations or evaluations, and therefore both subsections 17(4)(f) and (g) also apply.

[para 37] The Public Body also argued that disclosing the existence of records would lead to the inference that negative comments were made by members of the Public Body about the former EPS Chief.

[para 38] Regarding section 17(5)(a), the Public Body argued that disclosure is not desirable to subject the activities of the Public Body to public scrutiny, given the age of the records, the fact that none of the Public Body members at the relevant time are Public Body members now, and the fact that the former EPS Chief retired in 2018.

[para 39] Lastly, the Public Body argues that the information was supplied in confidence (section 17(5)(f)), which weighs against disclosure. The Public Body states that any concerns raised by Public Body members about the former EPS Chief would have been provided with an expectation of confidentiality.

[para 40] The Applicant argues that if records do not exist, confirming this would indicate that the Public Body did not criticize the former EPS Chief, which would not be an unreasonable invasion of the former EPS Chief's privacy. The Applicant also argues that because the Public Body does not have privacy rights, whether or not the former EPS Chief criticized the Public Body is not an unreasonable invasion of privacy.

[para 41] The Applicant argued that the former EPS Chief had made public comments regarding the relationship between himself and the Public Body. The Applicant states:

> d. If there are records of the EPC criticizing the Chief, then that would merely confirm what has been reported, with quotes by the former Chief himself, that he found the relationships between him and the Public Body was "more than just tension" and that he thought that "sometimes the relationship was caustic, and that was troublesome...I think a lot of the conversation was around trust". In addition a commissioner who served during the former Chief's time is quoted in the press as saying that former chief and commission chairwoman who served during the period in question "didn't get along too well, and things deteriorated as a consequence".
>
> e. It was also reported in the press that a member of the commission said it was "totally inappropriate" for the Chief to publicly discuss his contract and private commission matters and also said, "This is a serious breach".

[para 42] The Applicant states that it is already publicly known that the former EPS Chief and Public Body have made critical comments regarding the other. The Applicant further argues that "[i]n any event, merely responding without relying upon section 12(2) does not disclose the direction of the criticism nor the criticism itself (should there be any)."

[para 43] The Applicant further argues:

> 26. This is not to say that all information about criticisms, should any exist, ought to be wholly disclosed[.] The analysis above only determines that circumstances weigh in favour of disclosing whether records exist or not. No analysis was done on whether the content of any record should or should not be disclosed (should any exist).
>
> 27. As for the records that relate to "concerns raised by [the former Chief] …about the negotiations in regard to the renewal or extension of his present contract", many of the above circumstances also apply. The fact the negotiations were strained and critical, particularly in regards to the length of the former Chief's appointment extension, were well publicized at the time.

[para 44] The Applicant also argues that section 17(5)(a) weighs in favour of disclosure as the former EPS Chief "was a public figure and his and the EPC's thoughts, if in any record, would have relevance to how the Public Body deals with police governance and the selection of the Chief of Police".

Analysis

[para 45] The Public Body argues that disclosing whether responsive records exist would disclose that the former EPS Chief criticized the Public Body on this topic, or vice versa. However, the Applicant's request is for records related to *any concerns* raised by the former EPS Chief about the Police Commission or vice versa. Having concerns about a topic, individual, or body is not the same as criticizing that topic, individual, or body.

[para 46] In my view, disclosing whether records responsive to this part of the Applicant's request exist would disclose whether the former EPS Chief or the Public Body raised concerns about the other. As the context of the request is the former EPS Chief's employment, this information has a personal dimension such that it would be the type of personal information to which section 17(1) can apply.

[para 47] I will first address the Applicant's argument that if records do not exist, confirming this would indicate that the Public Body did not criticize the former EPS Chief, which would not be an unreasonable invasion of the former EPS Chief's privacy. Speaking only of situations in which a public body could properly rely on section 12(2)(b) in response to an access request, if a public body routinely informed applicants when records do not exist, and relied on section 12(2)(b) only where records do exist, this would create a predictable pattern that could undermine the purpose of section 12(2)(b). Instead, a public body is permitted to rely on this provision whether or not records exist, even if only confirming the existence of records would be an unreasonable invasion of privacy and denying the existence of records would not.

[para 48] I will now turn to the application of section 12(2)(b) to the particular facts of this case.

[para 49] I agree with the Public Body that confirming or denying the existence of records would reveal information about the former EPS Chief 's employment history, such that both sections 17(4)(d) and (g) apply, weighing against disclosing the existence of records.

[para 50] With respect to section 17(4)(f), which applies to personal recommendations or evaluations, I find this is not applicable. If responsive records exist, whether they contain information that can be characterized as personal recommendations or evaluations is not relevant to the question here. Disclosing whether responsive records exist could reveal concerns raised by the former EPS Chief or the Public Body about the other; this information is not a personal recommendation or evaluation by itself.

[para 51] Section 17(5)(a) weighs in favour of disclosure where the disclosure is desirable to subject the Public Body's activities to public scrutiny.

[para 52] 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 53] The Applicant has argued that the former EPS Chief is a public figure, and disclosure may be relevant to how the Public Body deals with police governance and the selection of the Chief of Police. I agree that how the Public Body approaches the contract for the Chief of Police is a matter that may be of interest to the public, especially where the Public Body's approach may be at odds with the goals of the Chief for the police service (as may or may not be the case here). That said, it is also significant that the members of the Public Body at the relevant time are no longer current members of the Public Body,

and that the former EPS Chief has also not been in that position for many years. This diminishes the value of the information for the purpose of public scrutiny. I find that section 17(5)(a) does not apply.

[para 54] With respect to section 17(5)(f), the Public Body argues that any concerns raised by members of the Public Body would have been provided in confidence. This factor may be relevant to the content of any responsive records but is not relevant with respect to section 12(2). This is because revealing the existence of records (if any exist) would not reveal any particular opinion given by any member of the Public Body. I find this factor does not apply.

[para 55] The last factor I will consider is the public availability of information. The Applicant argues that the former EPS Chief had raised concerns about the Public Body publicly. The Applicant quoted from public sources but did not cite where these quotes were from or provide copies of the public documents being quoted.

[para 56] Nevertheless, I am not restricted to considering only the materials provided by the parties (see *Edmonton Police Service v Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (*EPS*) at para. 174, citing *Leon's Furniture Limited v Alberta (Information and Privacy Commissioner)*, 2011 ABCA 94 at para. 30). The sources quoted in the Applicant's submission were easily located. One of the Applicant's quotes is from a CBC article dated May 29, 2018, titled "Relationship with commission became 'caustic,' Edmonton police chief says", and subtitled "[Chief…] says he's still uncertain why his contract was not renewed."[1]

[para 57] Another CBC article[2], dated May 25, 2018 and titled "Three months separated Edmonton's police chief from contract extension he wanted" quotes the former EPS Chief's rationale for requesting a specific contract extension from the Public Body. A public statement made by the former EPS Chief was embedded in that article, which states in part:

> I calculated that to best advance these initiatives, and assist with the selection of a new Chief, it would take until the end of June 2019. This date was initially accepted by the Chair and Vice-Chair of the EPC, the week of March 26,2018. Following a Commission meeting a few weeks later, they came back with a proposed contract extension to the end of March 2019. While my preference would have been to stay to progress these initiatives sufficiently, I didn't believe that a five-month extension was enough time to adequately address them. I also felt it wouldn't be in the best interests of the organization or the community to leave in the midst of such significant organizational change given that adjusted time frame. No other options were provided by the EPC, and as a result, I will be completing my existing contract, which concludes at the end of October, 2018.

[1] https://www.cbc.ca/news/canada/edmonton/relationship-with-commission-became-caustic-edmonton-police-chief-says-1.4683263
[2] https://www.cbc.ca/news/canada/edmonton/edmonton-police-chief-rod-knecht-police-commission-contract-extension-1.4678404

[para 58] That article also quotes former and (then) current Public Body commission members who spoke about the character of the relationship between the former EPS Chief and the Public Body; it states:

> Retired physician John Lilley, who resigned from the police commission in mid-February, said he watched as the relationship between the chief and commission deteriorated.
>
> "The chief and the prior chair didn't get along too well, and things deteriorated as a consequence," said Lilley, who ran to be commission chair in January 2018 and lost to O'Brien. "The fault lies on both sides, no doubt. But that's when I say he was treated unfairly. I think it stems from that. It's hard to be objective when you're mired in the midst of some interpersonal conflict."
>
> Lilley, who had been a member of the commission since 2013, described the relationship as "toxic."
>
> O'Brien strongly disagreed, calling that observation "incorrect."
>
> "The relationship we have with the chief is professional and correct," O'Brien said. "Part of the role of the commission is to challenge the ideas that come from the service and to make sure that we stress test them. And when you have that kind of challenge going back and forth, sometimes that creates a natural tension.
>
> "Would I call that toxic? No."
>
> But Lilley said "interpersonal stuff" likely played a significant role in the chief's departure.

[para 59] It seems clear from these media articles that the former EPS Chief has made public comments about his contract extension, including concerns regarding the amount of time proposed by the Public Body and the reasons he chose not to accept them. This does not mean that the former EPS Chief criticized the Public Body publicly, but that is not what the Applicant's request is for.

[para 60] As stated in Order F2015-28, at paragraph 21, information in the public domain does not cease to be personal information simply because it's in the public domain; however, it is a factor that weighs in favour of disclosure.

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

[para 61] I have found that two presumptions weigh against disclosing whether responsive records exist: the presumption against disclosure of personal information relating to employment history and the presumption against disclosure of personal information consisting of the third party's name in conjunction with other personal information of that third party.

[para 62] I find that these factors are outweighed by the public availability of the same information that would be revealed by confirming the existence of any responsive records. It is significant in this case

that the information in the media articles was expressly made public by the third party by way of a written public statement. In my view, it is nonsensical now to refuse to confirm or deny the existence of any records to protect the personal information of the very party who already made such information public.

[para 63] I will order the Public Body to respond to this part of the Applicant's request without relying on section 12(2).

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

[para 64] 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 65] Section 17 is a mandatory exception to disclosure: if the information falls within the scope of the exception, it must be withheld.

[para 66] 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 67] The definition of personal information under section 1 of the FOIP Act is cited in the discussion of section 12(2) above.

[para 68] 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 69] 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 70] 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 71] The Applicant argues that section 17(5)(a) applies to the information.

[para 72] The Applicant also noted that the Public Body had stated in an April 30, 2019 letter to the Applicant that the Public Body had not consulted with the affected individual. The Applicant argues that the individual was likely to have consented to disclosure had the Public Body consulted with them.

[para 73] 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*
>
> *…*
>
> *(d) the personal information relates to employment or educational history,*
>
> *…*
>
> *(f) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations,*
>
> *(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 74] In this case, the responsive records relate the negotiations regarding the renewal or extension of the former EPS Chief's contract. The personal information includes the former EPS Chief's opinions on the matter, as well as the opinions of various Public Body members.

[para 75] As stated above, information about employees acting in the course of their job duties is normally not considered information *about* those individuals; however, there may be circumstances that give that information a "personal dimension", such as disciplinary issues or performance evaluations (see Orders F2004-026 and P2012-09). Much of the information withheld under section 17(1), while not strictly speaking about a disciplinary issue or a performance evaluation, has a similar character. The information is not merely about the performance of job duties; it is about whether a particular individual should continue on in a particular role. This has a personal dimension such that section 17(1) can apply.

[para 76] That said, there are a few items of information that are not *about* the former EPS Chief such that section 17(1) can apply. On page 14, the third paragraph mentions the former EPS Chief but is not *about* the former EPS Chief. Rather, it is about the Public Body. Therefore, section 17(1) cannot apply. This same information also appears in the bottom half of page 22. I also make the same finding with respect to the first paragraph withheld on page 22. The Public Body also applied section 24(1)(b) to this information, which I will consider in the relevant section of this order.

[para 77] Page 24 consists of two emails. The first paragraph of each email contains some personal information to which section 17(1) can apply; specifically, the second sentence of the first paragraph in the first email, and the last sentence of the first paragraph in the second email. The remainder of those paragraphs are about the Public Body and not the former EPS Chief. Similarly, section 17(1) can apply to the first half of the first paragraph of the first email on page 26 but not the last three lines, which is not about the former EPS Chief. The Public Body also applied section 24(1)(b) to this information, which I will consider in the relevant section of this order.

[para 78] The Public Body has withheld information relating to a Public Body member in the first email on page 24. The Public Body did not address this information in its submission. The Public Body member was performing their job duties with respect to the email and it is not clear why the Public Body believes this information has a personal dimension. I find that it does not and section 17(1) cannot apply. As the Public Body did not apply any other exception, I will order the Public Body to disclose it to the Applicant.

[para 79] On page 27, the last item of information withheld from the first indented email refers to information that another individual believes the former EPS Chief may or may not want at some time in the future; this is not *about* the former EPS Chief and cannot be withheld under section 17(1). The Public Body also applied section 23(1)(b) to this information, which I will consider in the next section of this Order.

[para 80] With respect to the remaining information withheld under section 17(1), I agree that provision can apply and will consider whether the relevant factors weigh in favour of, or against, disclosure.

Application of sections 17(2) – 17(5)

[para 81] Sections 17(2) and (3) refer to circumstances in which disclosure of personal information is not an unreasonable invasion of privacy. The Applicant argues that had the third party been consulted, they would likely have consented to the disclosure of their information. The Applicant has not indicated any reason they believe this to be the case. Having reviewed the records, I do not believe this is a likely outcome.

[para 82] Neither party argued that any other provisions of sections 17(2) or (3) are relevant and, from the face of the records, none appear to apply.

[para 83] 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) (d), (f), and (g) apply to the information withheld under section 17(1).

[para 84] The Public Body argues that section 17(4)(d), which creates a presumption against disclosure for personal information that relates to employment or educational history, is relevant to all the former

EPS Chief's personal information in the records. I disagree. The Public Body seems to have applied this factor to all information that reveals that the former EPS Chief was employed as the Chief. This is an overly broad application of this provision. Further, this provision does not apply to information about future employment. Only a small portion of the information about the former EPS Chief is about employment history, such as information that relates to work that the former EPS Chief had done in that role, such that section 17(4)(d) applies.

[para 85] Section 17(4)(f) creates a presumption against disclosure of personal information that consists of personal recommendations or evaluations, character references or personnel evaluations. In Order 97-002, former Commissioner Clark considered the dictionary meanings of "evaluate" and determined that the following criteria were relevant in determining whether personal information constitutes "personal evaluations" or "personnel evaluations":

i. Was an assessment either made according to measurable standards or based upon professional judgment?

ii. Was the particular evaluation done by a person who had the authority to do the evaluation?

[para 86] These criteria were followed in Order F2008-015 (at para. 39) and Order F2018-14 (at para 122). In this case, the third party personal information does not meet the above criteria. While the information includes opinions about the former EPS Chief, they are not the sort of opinions that can be characterized an evaluation of the sort described above. The opinions in the records that are about the former EPS Chief are about how the opinion-giver believes the former EPS Chief has responded or may respond to certain situations. This type of information is not encompassed by section 17(4)(f) and I find that factor does not apply.

[para 87] Section 17(4)(g) applies to all the third party personal information to which section 17(1) can apply.

[para 88] 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 89] The only factor raised by the Applicant is section 17(5)(a). The Public Body states that section 17(5)(f) applies.

[para 90] Section 17(5)(a) 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 paragraph 52.

[para 91] The Public Body argues that the information is outdated, that the former EPS Chief is no longer in that role and has not been for quite some time, and that the members of the Public Body have

all been replaced since the records were created. Therefore, there is no public discourse or interest in this matter.

[para 92] The Applicant argues:

> Amongst those persons and organizations concerned with the oversight of policing, which includes the CTLA Policing Committee, there remains grave concern about how [the Chief], an excellent chief of police, came to have his request to extend his contract rejected by the EPC.

[para 93] I agree with the Applicant that section 17(5)(a) is an applicable factor. The role of the EPS Chief is an important one, and has an impact on the community. The Public Body's approach to extending or not extending the contract for the incumbent is likewise a matter that can affect the public. The media articles discussed above show the public interest in the matter. Further, disclosure of at least some of the personal information in the records could shed light on how the Public Body approached this decision.

[para 94] That said, the scrutiny is of the activities of the Public Body, and I agree with the Public Body that the fact that the members of the Public Body who were involved in the decision regarding the former EPS Chief have all been replaced diminishes the value of disclosure.

[para 95] With respect to section 17(5)(f), the Public Body argues that discussions about the former EPS Chief were undertaken with an expectation of confidentiality. I agree that the personal information provided to the Public Body by the former EPS Chief was provided with an expectation of confidentiality, given the context. However, this factor does not apply to personal information about the former EPS Chief that was not provided by the Chief.

Conclusion regarding section 17(1)

[para 96] At least one presumption against disclosure set out in section 17(4) applies to all the personal information of the third party in the records, specifically section 17(4)(g). Section 17(4)(d) also applies to some of the personal information, and section 17(5)(f) weighs against disclosing some information.

[para 97] Section 17(5)(a) weighs in favour of disclosure. For the reasons discussed above, this factor does not outweigh the factors against disclosure. This is because the makeup of the Public Body has changed such that any scrutiny would no longer be relevant to the current makeup of the Public Body, diminishing the value of disclosure.

[para 98] I find that the Public Body must continue to withhold the personal information to which section 17(1) applies.

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?

[para 99] Much of the information to which section 23(1)(b) was applied is information that I have found must be withheld under section 17(1). As such, I need only consider the application of section 23(1)(b) to the information withheld under that provision on pages 14, 15, 18, 22-23, and 27-31.

[para 100] 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 101] The Public Body applied section 23(1)(b) to pages 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 102] 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 103] The Public Body argues that the Edmonton Police Commission 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 104] The Public Body states that all of the information to which section 23 was applied is contained in correspondence, except the information on pages 30-31. With respect to the information contained in correspondence, the Public Body states that "it is made apparent on a reading of the withheld information that the information pertains to deliberations at an *in camera* meeting". The Public Body asserts that the correspondence notes the specific meetings during which the discussions occurred and "in some cases directly references that the information being shared is the contents of deliberations" (Public Body submission, at para. 60).

[para 105] With respect to pages 30-31, the Public Body states that these pages are minutes of an *in camera* meeting of the Public Body. It states that "it was reasonable for it to expect that disclosing the information would reveal the substance of its *in camera* deliberations at those meetings as the information itself is explicit" (at para. 60).

[para 106] The Applicant did not provide submissions on the application of section 23(1).

Analysis

[para 107] Section 23(1)(b) does not apply to merely *any* kind of meeting involving the elected officials, governing body, or committee of a governing body of a local public body. Rather, this exception applies only to those types of meetings for which there is an Act or regulation under the FOIP Act that authorizes that meeting to be held *in camera*. This provision does not apply to informal meetings that happen to involve the elected officials, governing body, or committee. In applying this exception, the Public Body must be prepared to show that the information relates to the particular kind of meeting identified in section 23(1)(b).

[para 108] Some of the relevant emails refer to the relevant meeting as an "HRC meeting". The Public Body did not state in its submission what an HRC meeting is. However, I was able to locate, on the Public Body's website, information about its Human Resources Committee (HRC). One of the duties of this Committee is to "review and recommend to the Commission for approval, contracts with respect to the employment of the Executive Director of the Commission and the Chief of Police for the Service."

[para 109] Section 18(1)(d) of the FOIP Regulation permits a committee of the governing body of a local public body to hold *in camera* meetings if the meeting concerns labour relations or employee negotiations. I agree that meetings of the HRC that relate to the former EPS Chief's employment contract negotiations are the type of meeting encompassed by section 23(1)(b). Meetings of the governing body of the Public Body discussing the former EPS Chief's contract are similarly the type of meeting encompassed by section 23(1)(b).

[para 110] 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 111] The Public Body cites Order F2013-23 as stating that the substance of deliberations includes views, advice, recommendations etc. that were conveyed to and by the local public body in relation to a particular topic.

[para 112] The Public Body's characterization of Order F2013-23 is not wholly accurate. In adopting the approach endorsed by the BC Supreme Court, the adjudicator in Order F2013-23 stated (at paras. 61-64, emphasis added):

> 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 113] The excerpt above holds that information merely presented to the relevant body does not thereby fall within the scope of "substance of deliberations".

[para 114] This is further explained in Order F2014-29, which 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 115] As I noted in Order F2014-29, a comparison of sections 22(1) and 23(1) of the FOIP Act supports 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 116] This provision specifically encompasses advice etc. that has been prepared for or submitted to Cabinet or Treasury Board.

[para 117] 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 118] This same analysis was followed in Order F2018-14.

[para 119] From the above, it is clear that section 23(1)(b) does not apply to information that would merely reveal the "nature" or topic of deliberations.

[para 120] The information withheld on pages 14 and 15 under section 23(1)(b) is information in emails between Public Body members. Portions of the emails discuss Public Body meetings that fall within the scope of section 23(1)(b). Some of the information withheld under section 23(1)(b) reveals only the topic of a discussion, while other information does reveal the substance of deliberations that took place during the meetings. On page 14, the Public Body applied section 23(1)(b) to the first two paragraphs of the email. The first paragraph does not reveal the substance of deliberations and section 23(1)(b) does not apply. The Public Body also applies section 24(1)(b) to that information, which I will address below. The second paragraph on page 14 reveals discussions that occurred during an *in camera* meeting; I agree that section 23(1)(b) applies.

[para 121] On page 15, the Public Body applied section 23(1)(b) to the second and third of five paragraphs. I have found above that section 17(1) requires the Public Body to withhold the third paragraph. The second paragraph reveals the substance of deliberations that occurred during an *in camera* meeting; I agree that section 23(1)(b) applies.

[para 122] Page 18 consists of an email from a Public Body member to the former EPS Chief. The Public Body withheld portions of the first, second and fourth of five paragraphs under section 23(1)(b). I agree that section 23(1)(b) applies to the information withheld in the first and second paragraphs.

However, it is not clear that the fourth paragraph contains information that relates to the substance of deliberations. It clearly relates to an action or activity the Public Body has decided to undertake; however, nothing in the email suggests that the information in the email referring to this plan or activity was subject to deliberations of an *in camera* meeting. Without more information to support that claim, I cannot uphold it. The Public Body did not apply any other exception to this information so I will order the Public Body to disclose this fourth paragraph to the Applicant.

[para 123] The information on page 22 consists of 2 emails between Public Body members. In the first email, the author was reiterating a point made at an HRC meeting. I agree that section 23(1)(b) applies. The second email on page 22 is the same email that appears on page 14. My findings with respect to the Public Body's application of section 23(1) to page 14 also apply here.

[para 124] Pages 27-28 and 29 all consist of emails between Public Body members or between Public Body members and employees of the EPS. The Public Body withheld portions of each of three emails appearing on page 27, under section 23(1)(b). With respect to the first withheld item of information in the first email, there is no indication that this relates to deliberations at a meeting. Therefore, section 23 does not apply; the Public Body has also applied section 24(1)(b), which I will discuss below.

[para 125] With respect to the second item of information withheld on page 27, there is an indication that the information was said in "a meeting". However, it is not clear what sort of meeting this might have been. The information was said by a person who, from the information in the records before me, does not appear to attend the meetings that I have accepted take place *in camera* for the purposes of section 23(1)(b). While this person likely attends some meetings of the Public Body, nothing indicates that those meetings would be the type of meeting held *in camera*. Therefore, I cannot find that section 23(1)(b) applies to this information. The Public Body has also applied section 24(1)(b), which I will discuss below.

[para 126] The last item of information on page 27 does not reveal the substance of deliberations of any meeting. Rather, it opines on one possible outcome of at meeting that had not yet occurred at the time the email was drafted. The contents of the email cannot reveal the substance of deliberations that had not yet occurred. Therefore, section 23(1)(b) cannot apply. The Public Body had also applied section 17(1) to this information but I found above that section 17(1) does not apply to the information. Therefore, I will order the Public Body to disclose this information to the Applicant.

[para 127] Page 29 consists of an email between Public Body members. Although this email references an HRC meeting, only a small portion of the email reveals the substance of any deliberations. Other withheld information refers to discussions that will or are anticipated to occur outside of that meeting (the first paragraph), or the topic of an upcoming meeting that cannot reveal deliberations that hadn't occurred at the time the email was drafted (third paragraph). As the Public Body did not apply any other exception to this information, I will order the Public Body to disclose it to the Applicant.

[para 128] In contrast, the second paragraph in the email reveals the substance of deliberations that had taken place at an HRC meeting. I agree that section 23(1)(b) applies to that information.

[para 129] Pages 30-31 are meeting minutes of an HRC meeting. I agree that the information in these pages to which the Public Body has applied section 23(1)(b) would reveal deliberations that occurred during the meeting; I find that section 23(1)(b) applies.

Exercise of Discretion

[para 130] Section 23(1) is a discretionary exception to disclosure. In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23 (CanLII), the Supreme Court of Canada commented on the authority of Ontario's Information and Privacy Commissioner to review a Public Body's exercise of discretion.

[para 131] The Supreme Court of Canada confirmed the authority of the Information and Privacy Commissioner of Ontario to quash a decision not to disclose information pursuant to a discretionary exception and to return the matter for reconsideration by the head of a public body. The Court also considered the following factors to be relevant to the review of discretion:

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

[para 132] In Order F2010-036 the adjudicator considered the application of the above decision of the Court to Alberta's FOIP Act, as well as considered how a public body's exercise of discretion had been treated in past orders of this Office. She concluded (at para. 104):

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

[para 133] In *EPS*, cited above, the Court provided detailed instructions for public bodies exercising discretion to withhold information under the Act. The Court said (at para. 416):

> What *Ontario Public Safety and Security* requires is the weighing of considerations "for and against disclosure, including the public interest in disclosure:" at para 46. The relevant interests supported by non-disclosure and disclosure must be identified, and the effects of the particular proposed disclosure must be assessed. Disclosure or non-disclosure may support, enhance, or promote some interests but not support, enhance, or promote other interests. Not only the "quantitative" effects of disclosure or non-disclosure need be assessed (how much good or ill would be caused) but the relative importance of interests should be assessed (significant promotion of a lesser interest may be outweighed by moderate

promotion of a more important interest). There may be no issue of "harm" in the sense of damage caused by disclosure or non-disclosure, although disclosure or non-disclosure may have greater or lesser benefits. A reason for not disclosing, for example, would be that the benefit for an important interest would exceed any benefit for other interests. That is, discretion may turn on a balancing of benefits, as opposed to a harm assessment.

[para 134] It further explained the weighing of factors at paragraph 419:

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

[para 135] Lastly, the Court described burden of showing that discretion was properly exercised (at para. 421):

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

[para 136] The Public Body explains its exercise of discretion as follows:

> 61. The Commission submits it has demonstrated it exercised its discretion appropriately when it reviewed its initial response to the Applicant. Along with the objectives and purposes of the Act, the Commission considered the Applicant's right of access and subsequently decided to provide records in a new response to the Applicant on September 16, 2019. The fact that the deliberations at issue are in relation to employment matters involving the Chief, the hiring of whom is a foremost function of the Commission which requires considerable thought and discussion, was a key consideration for the Commission in exercising its discretion to withhold the information. The Commission also considered its ability to carry out similar decision-making processes and deliberations in future with regards to hiring a Chief of Police, and that to disclose the information could make future deliberations less frank and open. Further, given these are matters permitted to be considered *in camera*, the Commission had a reasonable expectation that deliberations would be kept confidential. Finally, the Commission does not believe there is any public benefit to releasing the withheld information, given the passage of time and its immateriality to any current public discourse.

[para 137] The Public Body has listed relevant factors in favour of and against disclosure. I accept that the Public Body has exercised its discretion appropriately.

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?

[para 138] Much of the information to which section 24(1)(b) was applied is information that I have found must be withheld under section 17(1) or 23(1)(b). As such, I need only consider the application of section 24(1)(b) to the information withheld on pages 14, 22, 24, 25, 26, and 27.

[para 139] Section 24(1)(b) 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*
>
> *(b) consultations or deliberations involving*
>
> *(i) officers or employees of a public body,*
>
> *(ii) a member of the Executive Council, or*
>
> *(iii) the staff of a member of the Executive Council,*

[para 140] 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 141] The test for section 24(1)(b), as stated in past Orders, is that the consultations and deliberations 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 142] A "consultation" occurs when the views of one or more officers or employees are sought as to the appropriateness of particular proposals or suggested actions; a "deliberation" is a discussion or consideration, by persons described in section 24(1)(b), of the reasons for and/or against an action (Orders 96-006 at p. 10 or para. 48; Order 99-013 at para. 48, F2007-021, at para. 66).

[para 143] In Order F2012-06, the adjudicator stated, citing former Commissioner Clark's interpretation of "consultations and deliberations", that

> It is not enough that records record discussions or communications between employees of a public body; rather, a consultation takes place only when the individuals listed in section 24(1)(b) are asked for their views regarding a potential course of action, and a deliberation occurs when those individuals discuss a decision that they are responsible for, and are in the process of, making.

[para 144] 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 145] Section 24(1)(b) applies only to the records (or parts thereof) that reveal substantive information about which consultations or deliberations were being held. Information such as the names of individuals involved in the consultations, or dates, and information that reveals only the fact that consultations were held on a particular topic (and not the *substance* of the consultations) cannot generally be withheld under section 24(1) (see Order F2004-026, at para. 71).

[para 146] Bare recitation of facts or summaries of information also cannot be withheld under section 24(1) (b) unless the facts are interwoven with the consultations or deliberations 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) and (b) do not apply to a decision itself (Order 96-012, at para. 31).

[para 147] The first step in determining whether section 24(1)(b) was properly applied is to consider whether a record would reveal consultations or deliberations.

Parties' arguments

[para 148] The Public Body's submission regarding section 24(1)(b) states that all the participants in the consultations are members of the Public Body or the former EPS Chief. The Public Body states that the Chief is an employee of the Public Body "for the purposes of section 24(1)(b)".

[para 149] With respect to the pages 14, 22, and 24-27, the Public Body states that these pages all consist of correspondence between Public Body members providing opinions on a suggested course of action, or advice that had been provided to the former EPS Chief.

[para 150] The Applicant did not provide submissions on the application of section 24(1).

Analysis

[para 151] As stated above, much of the information to which section 24(1)(b) was applied is information I have found was properly withheld under section 17(1) or 23(1)(b).

[para 152] The first paragraph of the email on page 14 contains reference to Public Body meetings; I found above that it does not reveal the substance of any deliberations in meetings and therefore section 23(1)(b) does not apply. Similarly, this paragraph also does not reveal the substance of any consultations or deliberations. Rather, it reveals only that a consultation took place or was intended, and the topic of the consultation. I find that section 24(1)(b) does not apply and will order the Public Body to disclose this information to the Applicant. This same finding applies to the duplicated email on page 22.

[para 153] I found that the third paragraph of the email on page 14 could not be withheld under section 17(1). This paragraph provides relevant factors in a deliberations between Public Body members; I agree that section 24(1)(b) applies. This same finding applies to the duplicated email on page 22.

[para 154] Pages 22 and 24-27 consist of emails between Public Body members discussing a particular course of action. The Public Body has applied section 24(1)(b) to portions of these emails. I agree that the withheld portions of the emails contain discussions about a particular course of action that the Public Body members were tasked with deciding, and that section 24(1)(b) applies.

Exercise of Discretion

[para 155] Section 24(1) is a discretionary exception to disclosure, and the discussion set out with respect to section 23(1) also applies.

[para 156] With respect to its exercise of discretion, the Public Body states:

> 70. The Commission's exercise of discretion is similar to that explained above under section 23(1)(b). The Commission has demonstrated it exercised its discretion when it reviewed its initial response to the Applicant. Along with the objectives and purposes of the Act, the Commission considered the Applicant's right of access and decided to provide records in a new response to the Applicant on September 16, 2019. The Commission believes in protecting the integrity of its decision-making process, particularly for deliberations and decisions that are permitted to be made *in camera*. The Commissioners involved in the communications at issue had a reasonable expectation that their consultations and advice would be kept

> confidential and could be freely sought and provided. There is no public benefit to releasing the records as there is no advantage to the public scrutinizing the process that led to the ultimate related decisions. Hiring a Chief of Police is not a trivial matter, and the Commission is entitled to communicate its decisions and what ultimately occurred in a manner it deems appropriate, without having to reveal every consideration and discussion that contributed to the decision.

[para 157] The Public Body has listed relevant factors in favour of and against disclosure. I accept that the Public Body has exercised its discretion appropriately.

V. ORDER

[para 158] I make this Order under section 72 of the Act.

[para 159] I find that the Public Body did not properly rely on section 12(2) to refuse to confirm or deny the existence of records responsive to the first part of the Applicant's request. I order the Public Body to respond to the Applicant without relying on that provision.

[para 160] I find that section 17(1) requires the Public Body to continue to withhold most of the information withheld under that provision, except the information about the Public Body member withheld on page 24, as discussed in paragraph 78 of this Order. I order the Public Body to disclose that latter information to the Applicant.

[para 161] I find that section 23(1) applies to some, but not all, of the information withheld under that provision. I order the Public Body to disclose to the Applicant the information in the fourth paragraph of page 18 (described in paragraph 122 of this Order), the last item of information withheld under section 23(1) on page 27 (as described in paragraph 126 of this Order), and information in the first and third paragraphs of the email on page 29 (as described in paragraph 127 of this Order).

[para 162] I find that section 24(1) applies to some, but not all, of the information withheld under that provision. I order the Public Body to disclose the information withheld in the first paragraph of the email on page 14 and the duplicate email on page 22 (as described in paragraph 152 of this Order).

[para 163] I further order the Public Body to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

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Amanda Swanek
Adjudicator