OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
Prince Edward Island

Order No. FI-22-009
Re: Health PEI

November 29, 2022

Maria MacDonald, Adjudicator

Summary:

The Public Body investigated a complaint of sexual harassment, and the accused person requested access to the investigation records. The Public Body withheld all the responsive records, claiming that disclosure of most of the records could interfere with a law enforcement matter under clause 18(1)(a) of the *FOIPP Act*. The Public Body withheld the remaining 7 pages, claiming that they were solicitor-client privileged under clause 25(1)(a) of the *FOIPP Act*. The Adjudicator found that the Public Body did not properly apply clause 18(1)(a) of the *FOIPP Act*, and properly applied clause 25(1)(a) of the *FOIPP Act*.

The Adjudicator considered whether the Public Body properly applied subsection 6(2) of the *FOIPP Act* which requires public bodies, if it is reasonable, to sever information and disclose the rest of the information. As the Adjudicator found that the Public Body did not properly apply section 18, severing is not applicable. The Adjudicator did not review the records over which the Public Body claimed solicitor-client privilege but has no reason to believe that it would be reasonable for the Public Body to sever these records.

Part of the Applicant's request was for the audio recording of their interview, but the Public Body advised that the investigator did not keep these recordings. The Public Body indicated

these recordings were never in their custody or control. The Adjudicator found that the records were in the Public Body's control.

The Adjudicator confirms the decision of the Public Body with respect to clause 25(1)(a) of the *FOIPP Act* and orders the Public Body to process the records withheld under clause 18(1)(a) of the *FOIPP Act* and consider whether disclosure of other people's personal information would be an unreasonable invasion of their personal privacy under section 15 of the *FOIPP Act*.

Statutes Cited: *Freedom of Information and Protection of Privacy Act*, RSPEI 1988, C F-15.01, ss. 4, 6(2), 7, 15, 18, 25, and 65

Employment Standards Act, RSPEI 1988, C E-6.2, s 28.6(2)

Decisions Cited:

Order FI-19-012, *Re: Department of Justice and Public Safety*, 2019 CanLII 93498 (PE IPC)

Order FI-14-001, *Re: Department of Transportation and Infrastructure Renewal*, 2014 CanLII 6410 (PE IPC)

Alberta Information and Privacy Commissioner v. *University of Calgary*, 2016 SCC 53 (CanLII)

Order F2021-24, *Re: Justice and Solicitor General*, 2021 CanLII 62588 (AB OIPC)

Solosky v. The Queen, 1979 CanLII 9 (SCC), [1980] 1 SCR 821

Order FI-19-005, *Re: Department of Workforce and Advanced Learning*, 2019 CanLII 32855 (PE IPC)

Order No. 08-05, *Re: Department of Transportation and Public Works*, 2008 CanLII 67686 (PE IPC), relying on *Canada v. Blank (Minister of Justice),* 2007 FCA 87 (CanLII)

Order FI-21-004, *Re: Department of Economic Growth, Tourism and Culture*, 2021 CanLII 82504 (PE IPC)

Review report 19-01, *Re: Department of Intergovernmental Affairs*, 2019 NSOIPC 19 (CanLII)

David v. *Information and Privacy Commissioner Ontario*, 2006 CanLII 36618 (ON SCDC)

Report 21-188, *Re: Department of Health*, 2021 NUIPC 7 (CanLII)

Order 04-19, *Re: The Board of School Trustees of School District No.63 (Saanich)*, 2004 CanLII 45529 (BC IPC)

Report P-2020-001, *Re: City of Mount Pearl*, 2020 CanLII 65811 (NL IPC)

Order FI-16-005, *Re: Health PEI*, 2016 CanLII 48837 (PE IPC), (relying on the Supreme Court of Canada decision, *Canada (Information Commissioner)* v. *Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 SCR 306)

I. BACKGROUND:

[1] An employee complained to Health PEI (the "Public Body") about a coworker harassing them. The Public Body hired an external investigator, who investigated and told the Public Body that the accused coworker admitted that they made a specific statement, which the accused coworker denies.

[2] The accused coworker (the "Applicant") made an access to information request, pursuant to section 7 of the *Freedom of Information and Protection of Privacy Act* (the "*FOIPP Act*"), for the following records:

> Any correspondence, e-mails, statements, complaint, report and recordings (including [the investigator's] recorded interview of me) related to a harassment complaint filed against me by [name of an individual].

[3] The Public Body located and retrieved 81 pages of responsive records, which they withheld relying on two provisions of the *FOIPP Act*:

- clause 18(1)(a) – disclosure could reasonably be expected to interfere with a law enforcement matter – 74 pages[1]; and
- clause 25(1)(a) – solicitor-client privilege – 7 pages.

[1] Our office had earlier advised the applicant that there were 104 pages (97+7), but this sum included several blank pages.

[4] Part of the Applicant's request was for the audio recordings of the interviews. The Public Body requested a copy of these recordings from the investigator, but the investigator had destroyed them when they completed the investigation and report. The Public Body advised that, in any event, the recorded interviews were never in the custody or control of the Public Body.

[5] The Applicant asked the Information and Privacy Commissioner to review the Public Body's "blanket refusal to provide any requested information", the fact that the investigator deleted the recordings, and the applications of section 18 and 25 of the *FOIPP Act*. Former Commissioner Karen Rose received submissions from the Public Body and the Applicant but had not completed the review before the end of her term. She delegated her authority to complete the inquiry to me.

II. THE ISSUES

[6] I will consider the following issues:

> Issue 1: Did the head of the Public Body properly apply clause 18(1)(a) of the *FOIPP Act,* that is, could anyone reasonably expect disclosure to interfere with a law enforcement matter?
>
> Issue 2: Did the head of the Public Body properly apply clause 25(1)(a) of the *FOIPP Act,* that is, are the records protected by solicitor-client privilege?
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> Issue 3: If the head of the Public Body properly applied clauses 18(1)(a) and 25(1)(a), can this information reasonably be severed from the records so that the Applicant may have access to the remainder of the record under subsection 6(2) of the *FOIPP Act*?
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> Issue 4: Were the audio recordings under the control of the Public Body?

III. RECORDS AT ISSUE

[7] This is not exactly how the Public Body organized the records, but the records at issue include:

- A copy of the complaint;
- Letters from the Public Body to the Applicant and to the harassment complainant about the investigation process;
- The investigator's report, appendices (a copy of the complaint, and a copy of a human resource employee's interview notes), the investigator's cover letter to the human resources manager of the Public Body, and a cover email;
- A letter from the Public Body to the Applicant summarizing the investigation findings and the Public Body's discipline decisions; and
- Emails between employees of Health PEI throughout and after the investigation.

[8] Although I do not have copies of the audio recordings, they are also at issue with respect to whether they were under the control of the Public Body.

IV. BURDEN OF PROOF

[9] Parties should always provide evidence and argument to support their positions. We consider all evidence and submissions, but in most instances one of the parties will have the burden of proof which is the responsibility to convince us of their position.

[10] Section 65 of the *FOIPP Act* sets out the burden of proof for the exceptions to disclosure. Under subsection 65(1) of the *FOIPP Act*, the Public Body has the burden to prove they properly applied sections 18 and 25 of the *FOIPP Act*. Subsection 65(1) of the *FOIPP Act* states:

> 65.(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.

[11] The *FOIPP Act* does not say which party bears the burden of proof on the other two issues of this review; whether the Public Body complied with subsection 6(2) of the *FOIPP Act* and whether the audio recordings were under the control of the Public Body. When there are no guidelines in the legislation about the burden of proof, we look at logical factors such as which party raised the issue and which party is best able to provide evidence.

[12] Order FI-19-012, *Re: Department of Justice and Public Safety*, 2019 CanLII 93498 (PE IPC), addressed the burden of proof with respect to the duty to sever under subsection 6(2) of the *FOIPP Act*. The public body in that matter had the burden of proof because the public body knew the content of the records and the Applicant did not (Order FI-19-012, *supra*, at paragraph 13). The circumstances are similar here. If the Public Body has properly withheld information from the Applicant under clause 18(1)(a) and clause 25(1)(a) of the *FOIPP Act*, I find that the Public Body has the burden to show that this information cannot reasonably be severed under subsection 6(2) of the *FOIPP Act*.

[13] The Public Body's position is that the audio recordings were never under their control. The Public Body raised the issue and is best able to provide evidence. I find that the Public Body has the burden of proof to show that the audio recordings were not under their control.

V. ANALYSIS

Issue 1: Did the head of the Public Body properly apply clause 18(1)(a) of the *FOIPP Act*, that is, could one reasonably expect disclosure to interfere with a law enforcement matter?

[14] Section 18 of the *FOIPP Act* lists several discretionary exceptions to disclosure related to law enforcement. There are two steps to analyzing discretionary provisions. The first is to

consider whether the exception to disclosure applies. If not, the matter does not proceed further, and the public body may not withhold the information under this provision. If the exception applies, the head of the public body can choose to either withhold the information from the Applicant or disclose it to them. The second step of the analysis is to assess whether the head of the public body exercised their discretion reasonably.

Step 1: Does clause 18(1)(a) apply?

[15] Clause 18(1)(a) of the *FOIPP Act* states:

> 18. (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> (a) interfere with or harm a law enforcement matter, including an ongoing or unsolved law enforcement matter;
>
> . . .

[16] In their request for review, the Applicant says the investigation is finished, so there would be no interference with or harm to the law enforcement matter. In their submissions, the Public Body clarifies that they are not concerned about the investigation that is the subject of the access request but believes that disclosing the records at issue to the Applicant could interfere with or harm future complaints of sexual harassment. The Public Body believes that disclosing the records at issue to the Applicant could have a chilling effect and make other employees who are the targets of harassment unwilling to come forward to make a complaint. The Public Body states:

> Given that some victims of sexual harassment may already be afraid to come forward with their complaints, Health PEI submits that providing all of the details of this sexual harassment investigation to the Applicant, who also happens to be the perpetrator of the sexual harassment in this case, works against Health PEI's obligation to foster a safe and trustworthy workplace where complainants feel comfortable and supported to bring forward their complaints of sexual harassment.

[17] I will consider (a) whether a future complaint is part of a law enforcement matter, and if so, (b) could disclosure reasonably be expected to interfere with future complaints.

(a) Is a future complaint part of a law enforcement matter?

[18] Previous orders of our office including Order FI-14-001, *Re: Department of Transportation and Infrastructure Renewal*, 2014 CanLII 6410 (PE IPC) accepted that a workplace harassment investigation is a law enforcement matter.

[19] I considered whether clause 18(1)(a) of the *FOIPP Act* could apply to complaints that do not exist yet. The definition of law enforcement at subsection 1(e) of the *FOIPP Act* specifically includes the complaint giving rise to an investigation. Order FI-14-001, *supra*, at paragraph 12, accepted that clause 18(1)(a) of the *FOIPP Act* is not limited to ongoing law enforcement matters. I find that future complaints are a part of a law enforcement matter as contemplated in clause 18(1)(a) of the *FOIPP Act*.

(b) Could disclosure reasonably be expected to interfere with future complaints?

[20] As a preliminary remark, the responsive records include personal information of people other than the Applicant. Section 15 of the *FOIPP Act* requires public bodies to refuse to disclose personal information if the disclosure would be an unreasonable invasion of their personal privacy. This is not a finding, but it is foreseeable that this mandatory exception to disclosure would apply to some of the other people's personal information. It might cause a chilling effect if a public body disclosed personal information that was an unreasonable invasion of personal privacy, that is, if a public body did not comply with the *FOIPP Act*, but that is not the issue before me. In the following analysis, my focus is on the Applicant's personal information and the non-personal information.

[21] The Public Body claims that disclosure will interfere with future law enforcement matters, specifically that disclosure will cause a chilling effect on future complaints. The *FOIPP Act* does not define the expression 'interfere with', but Order FI-14-001, *supra*, accepts the following definition, at paragraph 13:

> *Interfere with* includes hindering or hampering a law enforcement matter and anything that would detract from an investigator's ability to pursue the investigation.

[22] The Public Body does not have to prove that disclosure will interfere with future complaints but must show that there is a reasonable likelihood that this would occur.

[23] The Public Body cites a 2017 document entitled "Harassment and Sexual Violence in the Workplace – Public Consultations What We Heard"[2], which is a summary of public consultations by Employment and Social Development Canada (a department of the Government of Canada). Of the survey respondents who had experienced harassment, sexual harassment or violence, 25 percent advised that they did not report their most recent experience. It is not among the main reasons, but one of the reasons for not reporting is a concern about the complaint process, including confidentiality. The report comments that it is important that the issue does not spread beyond the accuser and the accused. The consultation report is silent on a chilling effect or any other potential impacts of disclosing records like the records at issue to an accused person.

[24] The Applicant says that the investigator showed them a copy of the complaint. The Public Body says that they gave the Applicant an opportunity to view the complaint to ensure they had a reasonable opportunity to respond to the allegations. The Public Body states: "This is not the same as providing the Applicant with a copy of the complaint to keep in [their possession], which [they] may then further distribute." I have no reason to believe that the Applicant intends to distribute the responsive records. For example, I am not

[2] https://www.canada.ca/content/dam/canada/employment-social-development/services/health-safety/reports/workplace-harassment-sexual-violence-EN.pdf (last retrieved November 10, 2022)

aware of the Applicant having distributed the letters that the Public Body wrote to them. But I acknowledge that this is a relevant consideration. I cannot comment on whether the Applicant is subject to any confidentiality requirements through their employment, but the *FOIPP Act* does not impose any restrictions on what an applicant may do with the information they receive in an access request. Access under the *FOIPP Act* is often considered disclosure to the world.

[25] The Public Body has not persuaded me that disclosure of information in the complaint, other than information protected by section 15 of the *FOIPP Act,* could reasonably be expected to interfere with future complaints or law enforcement matters.

[26] The Public Body withheld two letters that they wrote to the Applicant. One was to notify them of the complaint and explain the investigation process, and the other summarized their conclusion and their discipline measures. The Public Body has not persuaded me that disclosure of two letters that were already given to the Applicant could reasonably be expected to interfere with future complaints or law enforcement matters.

[27] The Public Body wrote to the Complainant about the investigation process. The Public Body has not persuaded me that disclosure of the Public Body's letter to the Complainant about the investigation process, other than personal information protected by section 15 of the *FOIPP Act,* could reasonably be expected to interfere with any future complaints or law enforcement matters.

[28] The investigator prepared an investigation report. Among other things, this report includes procedural information, a list of the documents the investigator reviewed, and the policy and legal framework. The Public Body has not persuaded me that disclosure of these parts of the investigation report could reasonably be expected to interfere with any future complaints or law enforcement matters.

[29] The report includes quotes from statements of the Applicant, and notes of a human resource employee's earlier interview with the Applicant. The Public Body has not persuaded me that disclosure of information taken from the Applicant's own words, other than personal information protected by section 15 of the *FOIPP Act,* could reasonably be expected to interfere with any future complaints or law enforcement matters.

[30] With respect to the other content of the report and appendices, the Public Body has already disclosed to the Applicant some, but not all, of the information in these records. The Public Body has not persuaded me that disclosure of the other information, other than information protected by section 15 of the *FOIPP Act,* could reasonably be expected to interfere with any future complaints or law enforcement matters.

[31] The investigator emailed their report to the Public Body with a cover letter. The Public Body withheld the cover email and cover letter. The Public Body has not persuaded me that disclosure of this information could reasonably be expected to interfere with any future complaints or law enforcement matters.

[32] The Public Body withheld email exchanges between employees who were not involved in the investigation, but who received and responded to the complaint and the investigation report. Most of the information is logistical and about the Applicant. The Public Body has not persuaded me that disclosing the information in these records, other than any personal information protected by section 15 of the *FOIPP Act*, could reasonably be expected to interfere with any future complaints or law enforcement matters.

[33] The Public Body did not address any specific content of the records in their submissions. In my view, clause 18(1)(a) of the *FOIPP Act* should be based on the content of the responsive records and may not be relied on to refuse access only because the access request was for records that relate to an investigation of sexual harassment.

Summary

[34] The Public Body claims that the disclosure to the accused person will cause a chilling effect on future complaints. I understand the Public Body's cautious approach, but if under section 15 of the *FOIPP Act*, the Public Body severs other people's personal information that would be an unreasonable invasion of personal privacy to disclose, I am not persuaded that disclosure of the rest of the information could reasonably be expected to result in the chilling effect claimed by the Public Body. I find that the Public Body has not properly applied clause 18(1)(a) of the *FOIPP Act*.

Step 2: Exercise of Discretion

[35] As I find that the Public Body has not properly applied clause 18(1)(a) of the *FOIPP Act*, it is not necessary for me to consider whether the head of the Public Body exercised their discretion properly.

[36] I will not order the Public Body to disclose all the responsive records. As noted above, the responsive records include personal information of people other than the Applicant. Section 15 of the *FOIPP Act* requires public bodies to refuse to disclose any personal information if the disclosure would be an unreasonable invasion of personal privacy. The Public Body did not claim section 15 of the *FOIPP Act* applies but it is a mandatory exception to disclosure. Although I have held that section 18 does not apply to information the Public Body withheld, the Public Body still needs to consider whether disclosure of personal information of these other people would be an unreasonable invasion of the complainant's personal privacy under section 15 of the *FOIPP Act*.

[37] When discussing the exercise of their discretion, the Public Body refers to clause 27(2)(f) of the *Employment Standards Act,* which states:

> 27. (1) Every employer shall, after consultation with employees or their representatives, if any, issue a policy statement concerning sexual harassment.
>
> (2) The policy statement required by subsection (1) may contain any term consistent with the intent of sections 24 to 28 the employer considers appropriate, but must contain the following:
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> . . .
>
> (f) a statement to the effect that the employer will not disclose the name of a complainant or the circumstances related to the complaint to any person except were disclosure is necessary for the purposes of investigating the complaint or taking disciplinary measures in relation hereto;
>
> . . .

[38] The Public Body acknowledges that this provision does not prevail over the *FOIPP Act*, and they do not claim this provision requires them to withhold all the information in the responsive records. However, it may be a relevant consideration when assessing whether section 15 applies to the personal information of other individuals.

Issue 2: Did the head of the Public Body properly apply clause 25(1)(a) of the *FOIPP Act,* that is, are the records protected by solicitor-client privilege?

[39] The Public Body did not give us copies of the seven pages over which they claim solicitor-client privilege. They are guided by the Supreme Court of Canada decisions including, *Alberta Information and Privacy Commissioner* v. *University of Calgary*, 2016 SCC 53 (CanLII), which held that the Commissioner does not have authority to compel a public body to give the Commissioner such records. However, the Public Body provided affidavit evidence and further information in their submissions.

[40] Our office has accepted that our role on a review of a public body's claim of solicitor-client privilege is to assess whether a public body has provided enough information to enable us to recognize that the elements of solicitor-client privilege. Our role is summarized in Order F2021-24, *Re: Justice and Solicitor General*, 2021 CanLII 62588 (AB OIPC), at paragraph 71.

Section 27 of Alberta's *Freedom of Information and Protection of Privacy Act* is nearly identical to PEI's section 25 of the *FOIPP Act*:

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

[41] I will consider the three requirements for solicitor-client privilege from the Supreme Court of Canada case of *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 SCR 821.

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

(i) Was the communication between a solicitor and their client?

[42] The Applicant believed that the Public Body had claimed solicitor-client privilege over records involving the investigator who is a lawyer. In their submissions, the Public Body clarified that the records they withheld under section 25 of the *FOIPP Act* were not communications to or from the investigator. The Public Body identified the law firm involved in the withheld pages, which is different than the investigator's firm.

[43] I am satisfied that I have enough information to recognize that the records are a communication between a solicitor and their client and that the first part of the *Solosky* test is met.

ii) Did the withheld information entail the seeking or giving of legal advice?

[44] The Public Body described the role of the employee of the Public Body seeking advice, a brief description of the legal issue(s), and the dates of the communications. This additional information appears to correspond with the circumstances of the investigation and thereafter.

[45] I am satisfied that I have enough information to recognize that the records exchanged between the Public Body and their lawyer entails the seeking or giving of legal advice and that the second part of the *Solosky* test is met.

iii) Are the records intended to be confidential by the parties?

[46] The third part of the *Solosky* test requires that the lawyer and the client intended the communication to be confidential. Order FI-19-005, *Re: Department of Workforce and Advanced Learning*, 2019 CanLII 32855 (PE IPC), at paragraph 93, notes that confidentiality may be implied by the circumstances of the communication.

[47] At the time of these communications there was a harassment investigation and discipline arising therefrom. In these circumstances, it is reasonable to conclude that the advice relating to these issues was intended to be confidential between the lawyer and their client.

[48] The Applicant does not claim it, and I have no evidence or other reason to believe that the Public Body waived their privilege.

[49] I have enough information to recognize that the records were intended to be confidential, and that the third part of the *Solosky* test has been met.

[50] In summary, the affidavit evidence, considered together with the supplementary details and submissions, is consistent with the tests for solicitor-client privilege.

[51] Our office has held that, once solicitor-client privilege has been established, withholding the information is usually justified for that reason alone, and it is not necessary to review whether a public body properly exercised their discretion. I confirm the decision of the Public Body that section 25(1)(a) of the *FOIPP Act* applies, and that the Public Body was authorized to withhold these seven pages.

Issue 3: If the head of the Public Body properly applied clauses 18(1)(a) and 25(1)(a), can this information reasonably be severed from the records so that the Applicant may have access to the remainder of the record under subsection 6(2) of the *FOIPP Act*?

[52] Section 6 of the *FOIPP Act* states, in part:

> 6. (1) An applicant has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.
>
> (2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but **if that information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record.** [bolded emphasis added]
> . . .

[53] As I did not accept that the Public Body properly applied clause 18(1)(a) of the *FOIPP Act*, it is not necessary to consider whether the Public Body could reasonably sever this information under subsection 6(2) of the *FOIPP Act*.

[54] With respect to severing solicitor-client privileged information, our office has approached this cautiously. Order No. 08-05, *Re: Department of Transportation and Public Works*, 2008 CanLII 67686 (PE IPC), states that a public body does not need to sever material that forms part of the privileged communication. This approach was based on comments in *Canada (Minister of Justice) v. Blank,* 2007 FCA 87 (CanLII) at paragraph 13:

> ... section 25 must be applied to solicitor-client communications in a manner that recognizes the full extent of the privilege. It is not Parliament's intention to require the severance of material that forms a part of the privileged communication by, for example, requiring the disclosure of material that would reveal the precise subject of the communication or the factual assumptions of the legal advice given or sought.

[55] Our office has stated that a public body may withhold the entirety of records over which solicitor-client privilege is properly applied (e.g. Order FI-21-004, *Re: Department of Economic Growth, Tourism and Culture*, 2021 CanLII 82504 (PE IPC), at paragraph 56).

[56] Nova Scotia Review Report 19-01, *Re: Department of Intergovernmental Affairs*, 2019 NSOIPC 19 (CanLII), at paragraph 42, remarks that the majority of the other Canadian jurisdictions require that severing be considered even when the record has been found to be subject to solicitor-client privilege. This approach recognizes that a record could have both information protected by privilege, and information not protected by privilege. For example, the minutes of a meeting may include privileged information and information about other, completely unrelated matters. I believe that this approach more closely reflects the intention of *Canada (Minister of Justice) v. Blank, supra.*

[57] Although I have not reviewed the responsive records, I have no reason to believe that the records at issue contain any information that is not protected by solicitor-client privilege, or that information could reasonably be severed from the records.

Issue 4: Were the audio recordings under the control of the Public Body?

[58] Section 4 of the *FOIPP Act* states that the Act applies to all records in the custody or under the control of a public body (except those records enumerated at subsection 4(1) of the *FOIPP Act)*. The Public Body advises that they did not have physical possession of the audio recordings. They requested the records from the investigator, but the investigator had already destroyed them. The records are no longer available, but the Public Body claims that in any event, they were never in their custody or under their control. Although the records have been destroyed, I will nevertheless consider the Public Body's position that the records were never under their control, as it may impact other public bodies if they happen to find themselves in similar circumstances.

[59] The Public Body relies on a decision of the Superior Court of Justice of Ontario, *David* v. *Information and Privacy Commissioner Ontario*, 2006 CanLII 36618 (ON SCDC). The Ontario Divisional Court held that the City of Toronto did not have control over the notes of an individual retained to independently review whether a request for proposals for a renovation was fair. I have also reviewed decisions from other jurisdictions relating to the custody or control of records of external investigators of workplace investigations, including, Report 21-188, *Re: Department of Health*, 2021 NUIPC 7 (CanLII), Order 04-19, *Re: The Board of School Trustees of School District No.63 (Saanich)*, 2004 CanLII 45529 (BC IPC), and Report P-2020-001, *Re: City of Mount Pearl*, 2020 CanLII 65811 (NL IPC). In each of these decisions the applicant was the accused person of a workplace investigation and the Commissioners held that the notes of the external investigator were under the control of the public body.

[60] In Order FI-16-005, *Re: Health PEI*, 2016 CanLII 48837 (PE IPC), at para 11, our office accepted the approach of the Supreme Court of Canada decision, *Canada (Information Commissioner)* v. *Canada (Minister of National Defence)*, 2011 SCC 25, [2011] 2 SCR 306. The Supreme Court of Canada set out a two-question test to assess whether records are "under the control" of a public body: (1) do the contents of the document relate to a

departmental matter? and (2) could the government institution reasonably expect to obtain a copy of the document upon request?

(1) Do the audio recordings relate to a departmental matter?

[61] The audio recordings relate to a workplace investigation which is a human resources matter. I am satisfied that human resource matters are a core administrative function of public bodies as employers, and that part one of the test is met.

(2) Could the public body reasonably expect to obtain a copy of the document upon request?

[62] Paragraph 56 of *Minister of National Defence, supra*, states that to determine whether the public body could reasonably expect to obtain a copy upon request, one must consider all relevant factors. These factors include the substantive content of the record, the circumstances in which it was created, and the legal relationship between the government institution and the record holder. Report 21-188, *supra,* addresses each of these three factors:

> [33] The second step of the test requires me to look at all relevant factors. A non-exhaustive list includes the following:
>
> a. The substantive content of the notes: I have not seen the investigator's notes, but it is reasonable to assume that they relate to observations made in the course of the harassment investigation undertaken at the request of the GN. The notes would then form the basis for the investigator's final report. There is no other reason for the notes to exist and they should not include any material extraneous to the investigation.
>
> b. The circumstances in which the notes were created: The investigator carried out their investigation over the course of three days. The investigation appears to have consisted largely of interviewing a number of GN employees. Unless the interviews were recorded—and I have seen no indication they were—the written notes would be the only record of the interviews. The investigator also reviewed relevant documents such as GN policy. The investigator took care to ensure fairness in the process.

> c. The legal relationship between the GN and the investigator: The investigator was hired as a contractor by the GN, and presumably was paid for their work. It was a business relationship, consisting of a one-time engagement, in which the GN needed a service and a contractor offered to provide the service.
>
> [34] Considering all of the relevant factors, I conclude that the second part of the "control" test is met. To paraphrase the words of Justice Charron, a senior official of the GN reasonably should be able to obtain a copy of the investigator's notes.

[63] I adopt these same reasons and find that a senior official of the Public Body could reasonably expect to obtain a copy of the document upon request. I accept that both questions of the *Minister of Defence* test of whether a record is under the control of a public body are answered in the affirmative, and that the audio recordings of the independent investigator were under the control of the Public Body.

[64] I have not requested or received submissions or evidence about whether the Public Body should have retained the audio recordings. As such, I make no determination about whether the Public Body ought to have retained the audio recordings.

VI. SUMMARY OF FINDINGS

[65] I find that the head of the Public Body did not properly apply clause 18(1)(a) of the *FOIPP Act,* that is, it is not reasonable to expect disclosure to interfere with a law enforcement matter. I find that the head of the Public Body was not authorized to withhold 74 pages under clause 18(1)(a) of the *FOIPP Act*.

[66] I find that the head of the Public Body properly applied clause 25(1)(a) of the *FOIPP Act*, that is, the records are protected by solicitor-client privilege.

[67] As I found that the Public Body had not properly applied clause 18(1)(a) of the *FOIPP Act*, I did not consider the issue of severing under subsection 6(2) of the *FOIPP Act*. I found that the Public Body properly applied clause 25(1)(a) of the *FOIPP Act*. I did not review the records over which the Public Body claimed solicitor-client privilege but I have no reason to believe that it would be reasonable for the Public Body to sever these records under subsection 6(2) of the *FOIPP Act*.

[68] I find that the audio recordings were under the control of the Public Body, under section 4 of the *FOIPP Act*.

VII. ORDER

[69] Based on the above findings, I am not confirming the decision of the head of the Public Body that they were authorized to withhold records under clause 18(1)(a) of the *FOIPP Act.* Because the records contain personal information of people other than the Applicant. I order the Public Body to re-process the 74 pages over which they had claimed clause 18(1)(a) of the *FOIPP Act* and consider whether section 15 of the *FOIPP Act* applies to the personal information of other individuals. I order the Public Body to issue another decision in response to the access request in relation to these 74 pages.

[70] I confirm the decision of the Public Body to withhold 7 pages under clause 25(1)(a) of the *FOIPP Act*.

[71] In accordance with subsection 68(1.1) of the *FOIPP Act*, the Public Body shall not take any steps to comply with this order until the end of the time period for bringing an application for judicial review of the order under section 3 of the *Judicial Review Act*, RSPEI 1988, c J-3.

[72] I thank both parties for their submissions. I am mindful that the order for the Public Body to re-process the access request may seem like returning to the starting point of the

process. This may be frustrating for the Applicant but, in my opinion, it is the most appropriate remedy in the circumstances.

SGD MARIA MACDONALD

Maria MacDonald, Adjudicator