

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER 2001-025

March 8, 2002

ALBERTA HUMAN RESOURCES AND EMPLOYMENT

Review Number 2050

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Summary: The Applicant applied under the *Freedom of Information and Protection of Privacy Act* (the “Act”) to Alberta Human Resources and Employment (the “Public Body”) for access to records of a named care institution. The Adjudicator agreed with the Public Body that some of the records and information contained in the records should be withheld under various exceptions to disclosure set out in the Act. However, the Adjudicator ordered the Public Body to disclose to the Applicant other information contained in the records.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(n) [previously section 1(1)(n)], 1(n)(i) [previously section 1(1)(n)(i)], 1(n)(vii) [previously section 1(1)(n)(vii)], 1(n)(i) to (ix) [previously section 1(1)(n)(i) to (ix)], 17 [previously section 16], 17(1) [previously section 16(1)], 17(4) [previously section 16(4)], 17(4)(g) [previously section 16(4)(g)], 17(5) [previously section 16(5)], 17(5)(a) to (i) [previously section 16(5)(a) to (i)], 22 [previously section 21], 22(1) [previously section 21(1)], 22(2) [previously section 21(2)], 22(2)(c)(ii) [previously section 21(2)(c)(ii)], 24 [previously section 23], 24(1)(a) [previously section 23(1)(a)], 25 [previously section 24], 25(1)(c)(iii) [previously section 24(1)(c)(iii)], 27 [previously section 26], 27(1)(a) [previously section 26(1)(a)], 30 [previously section 29], 71(2) [previously section 67(2)], 72 [previously section 68].

Authorities Cited: **AB:** Orders 96-003, 96-006, 96-015, 96-016, 96-017, 97-010, 98-017, 98-020, 99-001, 99-013, 99-020.

Cases Cited: *Waugh v. British Railway Board*, [1979] 2 All E.R. 1169 (H.L.).

I. BACKGROUND

[para 1] On January 12, 2000, the Applicant applied under the *Freedom of Information and Protection of Privacy Act* (the “Act”) to Alberta Human Resources and Employment (the “Public Body”) for access to the following:

- (i) briefing notes addressing why and what steps the Department took to close [a named care institution] and briefing notes providing department plans for residents affected by the closure of [the named care institution] for the period from January 1, 1993 to February 28, 1993, and from February 29, 1993 to November 19, 1999.
- (ii) ministerial correspondence involving agreements with [the named care institution] and decisions to close [the named care institution] for the period from January 1, 1993 to the present.
- (iii) the [dated] settlement of litigation between [the named care institution] and the Department and all records created in responding to [the Applicant’s] earlier FOIP request...

[para 2] The Public Body disclosed several records to the Applicant, but withheld certain records and information from the Applicant under a number of exceptions to disclosure contained in the Act. By letter received by this Office on October 24, 2000, the Applicant asked for a review of the Public Body’s decision to withhold records and information. Mediation was authorized but ultimately was not successful. The matters were set down for a written inquiry. The Public Body and an affected party provided written submissions. The Applicant did not.

[para 3] One of the records the Public Body provided for the inquiry contained personal information withheld under section 17 [previously section 16]. In its written submission, the Public Body raised section 17 [previously section 16] for the first time.

[para 4] Section 17 [previously section 16] had not been raised as an issue for the inquiry. However, since the Public Body raised it, and since it is a mandatory (“must”) provision under which a public body must withhold personal information if the provision applies, I decided to consider it in this inquiry. I therefore requested that the parties provide me with further written submissions on the applicability of section 17 [previously section 16]. The Public Body and an affected party provided written submissions. The Applicant did not.

[para 5] The revised *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, came into force on January 1, 2002. Most of the section numbers of the Act changed, but not the substance of the sections. Consequently, in this Order, I have

set out the new section numbers. In general, the previous section numbers appear in square brackets after the new section numbers.

II. RECORDS AT ISSUE

[para 6] For the inquiry, the Public Body provided the following unnumbered records and records consisting of numbered pages: two unnumbered records, and pages 6, 7, 8, 9, 11, 13, 14, 16, 17, 18, 22, 25, 26, 27, 28, 41, 43, 44 and 49. Those records contain the information the Public Body withheld from the Applicant in whole or in part.

[para 7] I note that, with some minor differences, the following pages of the records contain essentially the same information: pages 6 and 17, 7 and 18, 13 and 25, and 14 and 26.

[para 8] In this Order, I will refer to the pages by number, where there is a number, and will refer to all the pages collectively as the “Records”.

III. ISSUES

[para 9] Four issues were initially set out for the inquiry:

- A. Does section 22 [previously section 21] apply to the Records?
- B. Did the Public Body properly apply section 24 [previously section 23] to the Records?
- C. Did the Public Body properly apply section 25 [previously section 24] to the Records?
- D. Did the Public Body properly apply section 27 [previously section 26] to the Records?

[para 10] I added one further issue:

- E. Does section 17 [previously section 16] apply to the Records?

IV. DISCUSSION OF THE ISSUES

ISSUE A: Does section 22 [previously section 21] apply to the Records?

1. Application of section 22 [previously section 21]

[para 11] The Public Body submits that section 22(1) [previously section 21(1)] applies to the information on the following pages of the Records, which would reveal the substance of deliberations of the Treasury Board: pages 6, 8, 13, 14, 16, 17, 18, 22, 25, 26, 27 and 28.

[para 12] Section 22 [previously section 21] reads:

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.

(2) Subsection (1) does not apply to

(a) information in a record that has been in existence for 15 years or more,

(b) information in a record of a decision made by the Executive Council or any of its committees on an appeal under an Act, or

(c) information in a record the purpose of which is to present background facts to the Executive Council or any of its committees or to the Treasury Board or any of its committees for consideration in making a decision if

(i) the decision has been made public,

(ii) the decision has been implemented, or

(iii) 5 years or more have passed since the decision was made or considered.

[para 13] The Public Body did not apply section 22(1) [previously section 21(1)] to page 7 of the Records. Page 7 contains essentially the same information as page 18, to

which the Public Body says that section 22(1) applies [previously section 21(1)]. I intend to consider section 22(1) [previously section 21(1)] for page 7 on the basis that section 22(1) [previously section 21(1)] is a mandatory (“must”) provision. It would appear to be an oversight on the part of the Public Body in not applying section 22(1) [previously section 21(1)] to the same information as on page 18.

[para 14] The Public Body is of the opinion that the foregoing Records contain advice and recommendations made to the Treasury Board for deliberation in contemplation of litigation. The disclosure of the information would reveal the substance of deliberations.

[para 15] In Order 97-010, the Commissioner discussed the meaning of “substance of deliberations”. He said:

I take the term “substance” to have its normal dictionary meaning of essence, the material or essential part of a thing. “Deliberation” is taken to mean the act of deliberating, the act of weighing and examining the reasons for and against a contemplated action or course of conduct or a choice of acts or means.

[para 16] Furthermore, the Commissioner said that information would “reveal” the substance of deliberations if its release would permit the drawing of accurate inferences with respect to the substance of deliberations.

[para 17] Based on Order 97-010, I find that the information on the following pages of the Records would reveal the substance of deliberations of the Treasury Board:

6 (2nd sentence in the 19th to 20th lines; 30th line; 39th to 43rd lines), 7 (1st and 2nd lines; 14th to 30th lines), 8 (9th to 12th lines), 16, 17 (21st line; 30th to 35th lines), 18 (1st to 16th lines), 27 (24th to 28th lines), 28 (11th to 17th lines)

[para 18] Therefore, section 22(1) [previously section 21(1)] applies to the foregoing information.

[para 19] I find that the remainder of the information on pages 6, 7, 8, 17, 18, 27 and 28, and all the information on page 22, would not reveal the substance of deliberations of the Treasury Board or Executive Council or any of their committees. Consequently, section 22(1) [previously section 21(1)] does not apply to that information. I must therefore consider whether the Public Body properly applied any other exceptions under the Act to that information.

[para 20] The preamble to section 22(2) [previously section 21(2)] and section 22(2)(c)(ii) [previously section 21(2)(c)(ii)] says that section 22(1) [previously section 21(1)] does not apply to “information in a record the purpose of which is to present background facts [emphasis added] to the... Treasury Board...for consideration in making a decision if...the decision has been implemented”.

[para 21] In my view, pages 13, 14, 25 and 26 of the Records contain information, the purpose of which is to present background facts to the Treasury Board for consideration in making a decision. The evidence is that the decision has been implemented. Since the requirements of section 21(2)(c)(ii) have been met, in the normal course section 22(1) [previously section 21(1)] would not apply to that information.

[para 22] However, in Order 99-013, the Commissioner held that background facts nevertheless must not be disclosed if the background facts would reveal the substance of deliberations, as set out in section 22(1) [previously section 21(1)]. I find that the background facts on pages 13, 14, 25 and 26 would reveal the substance of deliberations of the Treasury Board. Therefore, section 22(1) [previously section 21(1)] applies to the information on pages 13, 14, 25 and 26.

2. Conclusion under section 22 [previously section 21]

[para 23] Section 22(1) [previously section 21(1)] applies to the information on the following pages of the Records:

6 (2nd sentence in the 19th to 20th lines; 30th line; 39th to 43rd lines), 7 (1st and 2nd lines; 14th to 30th lines), 8 (9th to 12th lines), 13, 14, 16, 17 (21st line; 30th to 35th lines), 18 (1st to 16th lines), 25, 26, 27 (24th to 28th lines), 28 (11th to 17th lines)

[para 24] I uphold the Public Body's decision to refuse to disclose the foregoing information to the Applicant.

[para 25] Section 22(1) [previously section 21(1)] does not apply to the remainder of the information on pages 6, 7, 8, 17, 18, 27 and 28, and all the information on page 22. I must therefore consider whether the Public Body properly applied any other exceptions under the Act to that information.

ISSUE B: Did the Public Body properly apply section 24 [previously section 23] to the Records?

1. Application of section 24(1)(a) [previously section 23(1)(a)]

[para 26] The Public Body's submission says that section 24(1)(a) [previously section 23(1)(a)] applies to the information on the following unnumbered Records and numbered pages of the Records: two unnumbered records, and pages 8, 13, 14, 22, 25, 26 and 27. The Public Body also says that section 24(1)(a) [previously section 23(1)(a)] applies to the information on the following pages of the Records: pages 41 (2nd last and 3rd last paragraphs) and 43 (last 7 paragraphs). The Public Body disclosed to the Applicant the remainder of the information on pages 41 and 43.

[para 27] Section 24(1)(a) [previously section 23(1)(a)] reads:

24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal

(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council...

[para 28] I have already found that section 22(1) [previously section 21(1)] applies to all the information on pages 13, 14, 25 and 26. Therefore, I do not find it necessary to consider whether section 24(1)(a) [previously section 23(1)(a)] also applies to that same information.

[para 29] Page 27 of the Public Body's records does not have section 24(1)(a) [previously section 23(1)(a)] written on it, but page 28 does. I have decided to consider both pages 27 and 28 under section 24(1)(a) [previously section 23(1)(a)].

[para 30] I have already found that section 22(1) [previously section 21(1)] applies to certain information on pages 27 and 28. Therefore, I will consider section 24(1)(a) [previously section 23(1)(a)] only for the information to which I have found that section 22(1) [previously section 21(1)] does not apply on pages 27 and 28. I will also consider section 24(1)(a) [previously section 23(1)(a)] only for that information to which I have found that section 22(1) [previously section 21(1)] does not apply on page 8.

[para 31] In numerous Orders, the Commissioner has said that "advice" (which includes advice, proposals, recommendations, analyses or policy options) should:

- (a) be sought or expected, or be part of the responsibility of a person by virtue of that person's position,
- (b) be directed toward taking an action, and
- (c) be made to someone who can take or implement the action.

[para 32] I find that the information on the following unnumbered Records and numbered pages of the Records meets the criteria of section 24(1)(a) [previously section 23(1)(a)]:

First unnumbered record (everything after the subject line on the first page to the end of the last paragraph on the second page); second unnumbered record (everything except the fax markings and footers on all the pages, and the name at the top of the first page); pages 22 (12th to 16th lines); 41 (2nd last and 3rd last paragraphs)

[para 33] Page 43 (last 7 paragraphs) contains background facts. In Order 96-006, the Commissioner said that a record must contain more than a bare recitation of facts or

summaries of information to be “advice”. However, in Order 99-001, the Commissioner said that a public body could withhold assertions of fact under section 24(1)(a) [previously section 23(1)(a)] if the factual information were sufficiently interwoven with the “advice” so that it could not be considered separate and distinct.

[para 34] I find that the factual information on page 43 (last 7 paragraphs) is sufficiently interwoven with the “advice” so that it cannot be considered separate and distinct. Therefore, I find that the information the Public Body withheld on page 43 (last 7 paragraphs) meets the criteria of section 24(1)(a) [previously section 23(1)(a)].

[para 35] Section 24(1)(a) [previously section 23(1)(a)] is a discretionary (“may”) provision. Even if it applies, a public body may nevertheless exercise its discretion to disclose the information.

[para 36] I have reviewed the Public Body’s exercise of discretion under section 24(1)(a) [previously section 23(1)(a)]. I note that the Public Body has disclosed information to the Applicant and, on certain pages, withheld only some of the information from the Applicant. I am satisfied that the Public Body exercised its discretion properly in withholding the information.

[para 37] I find that the information on the following unnumbered Records and numbered page of the Records does not meet the criteria of section 24(1)(a) [previously section 23(1)(a)]:

First unnumbered record (the information preceding the subject line on the first page, and the information after the last paragraph on the last page); second unnumbered record (fax markings and footers on all the pages, and the name at the top of the first page); page 22 (everything except the 12th to 16th lines)

[para 38] The Public Body did not properly apply section 24(1)(a) [previously section 23(1)(a)] to the foregoing information. Since the Public Body did not apply any other exceptions under the Act to that information, I intend to order the Public Body to give the Applicant access to that information.

[para 39] I also find that the remainder of the information on pages 8, 27 and 28 does not meet the criteria for “advice”. Consequently, I find that the Public Body did not properly apply section 24(1)(a) [previously section 23(1)(a)] to that information. I must therefore consider whether the Public Body properly applied any other exceptions under the Act to that information.

2. Conclusion under section 24(1)(a) [previously section 23(1)(a)]

[para 40] I find that the Public Body properly applied section 24(1)(a) [previously section 23(1)(a)] to the information on the following unnumbered Records and numbered pages of the Records:

First unnumbered record (everything after the subject line on the first page to the end of the last paragraph on the second page); second unnumbered record (everything except the fax markings and footers on all the pages, and the name at the top of the first page); pages 22 (12th to 16th lines), 41 (2nd last and 3rd last paragraphs), 43 (last 7 paragraphs)

[para 41] I uphold the Public Body's decision to refuse to disclose the foregoing information to the Applicant.

[para 42] I find that the Public Body did not properly apply section 24(1)(a) [previously section 23(1)(a)] to the information on the following unnumbered Records and numbered page of the Records:

First unnumbered record (the information preceding the subject line on the first page, and the information after the last paragraph on the last page); second unnumbered record (fax markings and footers on all the pages, and the name at the top of the first page); page 22 (everything except the 12th to 16th lines)

[para 43] I do not uphold the Public Body's decision to refuse to disclose the foregoing information. Since the Public Body did not apply any other exceptions under the Act to that information, I intend to order the Public Body to give the Applicant access to that information.

[para 44] I find that the Public Body did not properly apply section 24(1)(a) [previously section 23(1)(a)] to the remainder of the information on pages 8, 27 and 28. I must therefore consider whether the Public Body properly applied any other exceptions under the Act to that information.

ISSUE C: Did the Public Body properly apply section 25 [previously section 24] to the Records?

[para 45] The Public Body applied section 25(1)(c)(iii) [previously section 24(1)(c)(iii)] to the information on the following page of the Records: 49 (1st, 3rd and 5th items withheld in clause 8.2). Except for the other information withheld under section 17 [previously section 16] on page 49 (2nd and 4th items withheld in clause 8.2), the Public Body disclosed to the Applicant the remainder of the information on page 49.

[para 46] Section 25(1)(c)(iii) [previously section 24(1)(c)(iii)] reads:

25(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to harm the economic interest of a public body or the Government of Alberta or the ability of the Government to manage the economy, including the following information:

...

(c) information the disclosure of which could reasonably be expected to

*...
(iii) interfere with contractual or other negotiations of,*

the Government of Alberta or a public body...

[para 47] In previous Orders, such as Order 99-020, the Commissioner has said that information withheld under section 25(1) [previously section 24(1)] must meet the general rule: disclosure of the information could reasonably be expected to harm the economic interest of a public body or the Government of Alberta. Section 25(1)(c)(iii) [previously section 24(1)(c)(iii)] is a specific example that may or may not meet the general rule.

[para 48] In Order 96-003, the Commissioner said that the test to determine a reasonable expectation of harm is three-fold: (i) there must be a clear cause and effect relationship between the disclosure and the harm; (ii) the disclosure must cause harm and not simply interference or inconvenience; and (iii) the likelihood of harm must be genuine and conceivable.

[para 49] In Order 96-016, the Commissioner also said that there must be direct harm, meaning that (i) a public body must show a clear and direct linkage between the disclosure of the specific information and the harm alleged, and (ii) the public body must explain how or why the harm alleged would result from the disclosure of the specific information. It is not reasonable to expect harm will result from disclosure of information already in the public domain.

[para 50] The Public Body says:

The Public Body released 8 pages of the contractual agreement and only severed specific financial information from one record. The Public Body considered the release of financial information would interfere with other negotiations of the Public Body when negotiating funding agreements with other organizations. The programs and services that are funded through external organizations number well over a thousand. The disclosure of the information could limit the future negotiations and relationships with these organizations.

[para 51] Given the Public Body's dealings with external organizations and the number of contracts the Public Body negotiates, I find that the Public Body has met the criteria of section 25(1)(c)(iii) [previously section 24(1)(c)(iii)]. I also find that the Public Body has met the general rule that disclosure of the information could reasonably be expected to harm the economic interest of the Public Body.

[para 52] I further find that the Public Body exercised its discretion properly in withholding the information under section 25(1)(c)(iii) [previously section 24(1)(c)(iii)], as the Public Body disclosed the remainder of the eight-page contract to the Applicant.

[para 53] I find that the Public Body properly applied section 25(1)(c)(iii) to the information on the following page of the Records: 49 (1st, 3rd and 5th items withheld in clause 8.2). I uphold the Public Body's decision to refuse to disclose the foregoing information to the Applicant.

ISSUE D: Did the Public Body properly apply section 27 [previously section 26] to the Records?

1. Application of section 27(1)(a) [previously section 26(1)(a)]

[para 54] The Public Body says that section 27(1)(a) [previously section 26(1)(a)] applies to the information on the following pages of the Records: 6, 7, 8, 9, 11, 16, 17, 18, 27, 28, 41 and 44.

[para 55] Section 27(1)(a) [previously section 26(1)(a)] reads:

27(1) The head of a public body may refuse to disclose to an applicant

(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege...

[para 56] I have already found that section 22(1) [previously section 21(1)] and section 24(1)(a) [previously section 23(1)(a)] apply to the information on pages 16 and 41 (2nd last and 3rd last paragraphs) of the Records, respectively. Therefore, I do not find it necessary to consider whether section 27(1)(a) [previously section 26(1)(a)] also applies to that same information.

[para 57] The Public Body has considered all the foregoing pages under the "litigation privilege" exception of section 27(1)(a) [previously section 26(1)(a)]. It is not entirely clear whether the Public Body has also considered all the foregoing pages of the records under the "solicitor-client privilege" exception of section 27(1)(a) [previously section 26(1)(a)].

[para 58] However, on page 10 of the Public Body's submission, the Public Body refers generally to "legal privilege" and specifically to "privileged legal advice", which is a reference to solicitor-client privilege under section 27(1)(a) [previously section 26(1)(a)]. Therefore, except for pages 16 and 41, I intend to consider the foregoing pages of the records under both the "litigation privilege" and "solicitor-client privilege" exceptions of section 27(1)(a) [previously section 26(1)(a)].

a. Litigation privilege

[para 59] In Order 96-015, the Commissioner discussed litigation privilege. He said that the privilege applies to papers and materials created or obtained by the client for the lawyer's use in existing or contemplated litigation, or created by a third party or obtained from a third party on behalf of the client for the lawyer's use in existing or contemplated litigation: *Waugh v. British Railway Board*, [1979] 2 All E.R. 1169 (H.L.).

[para 60] I have reviewed all the foregoing pages of the Records. None are papers or materials created or obtained by the client for the lawyer's use in existing or contemplated litigation. Furthermore, none are papers or materials created by a third party or obtained from a third party on behalf of the client for the lawyer's use in existing or contemplated litigation. The Public Body has misapplied litigation privilege.

[para 61] Furthermore, there is no existing or contemplated litigation. The litigation has been settled. Litigation privilege ends with the litigation: see Order 98-017.

[para 62] Therefore, none of the Records or the information in the Records meets the criteria for litigation privilege. Consequently, although section 27(1)(a) [previously section 26(1)(a)] is a discretionary ("may") exception, there is no need to consider the Public Body's exercise of discretion under that section.

b. Solicitor-client privilege

[para 63] I have found that section 22(1) [previously section 21(1)] applies to certain information on the following pages of the Records: 6, 7, 8, 17, 18, 27 and 28. Therefore, I intend to consider section 27(1)(a) (solicitor-client privilege) [previously section 26(1)(a)] only for the information on the foregoing pages to which I have found that section 22(1) [previously section 21(1)] does not apply.

[para 64] I intend to consider section 27(1)(a) (solicitor-client privilege) [previously section 26(1)(a)] for all the information withheld on pages 9, 11 and 44 of the Records.

[para 65] In Order 96-017, the Commissioner considered whether solicitor-client privilege applied to an entire document. He said that each document must meet the following criteria:

- (i) it is a communication between a solicitor and client;
- (ii) which entails the seeking or giving of legal advice; and
- (iii) which is intended to be confidential by the parties.

[para 66] I find that only the document that is page 9 of the Records meets the criteria for solicitor-client privilege for the entire document. The remainder of the documents (pages of the Records) do not meet the criteria.

[para 67] In Order 99-013, the Commissioner said that solicitor-client privilege also applies to information in written communications between officials or employees of a public body, in which the officials or employees quote or discuss the legal advice given by the public body's solicitor.

[para 68] Consequently, I find that that the information on the following pages of the Records meets the criteria for solicitor-client privilege because it is legal advice that has been communicated between the Public Body's officials: 11 (7th and 8th words in the 11th line), and 44 (11th and 12th lines).

[para 69] I further find that the Public Body exercised its discretion properly in withholding the information on the following pages of the Records: 9, 11 (7th and 8th words in the 11th line), and 44 (11th and 12th lines). Therefore, I find that the Public Body properly applied section 27(1)(a) [previously section 26(1)(a)] to the foregoing information.

[para 70] The remainder of the information on pages 6, 7, 8, 11, 17, 18, 27, 28 and 44 does not meet the criteria for solicitor-client privilege. Consequently, I find that the Public Body did not properly apply solicitor-client privilege to the remainder of the information on those pages.

[para 71] The Public Body did not apply any other exceptions under the Act to the information on pages 7, 8, 17, 18, 27, 28 and 44. Therefore, except for that information for which I have found that other exceptions of the Act apply, I intend to order the Public Body to give the Applicant access to the remainder of the information on pages 7, 8, 17, 18, 27, 28 and 44.

[para 72] I must consider whether section 17 [previously section 16] applies to the information the Public Body withheld on page 11 of the Records. I also intend to consider whether section 17 [previously section 16] applies to certain information on page 6 of the Records.

2. Conclusion under section 27(1)(a) [previously section 26(1)(a)]

[para 73] I find that the Public Body properly applied section 27(1)(a) [previously section 26(1)(a)] to the information on the following pages of the Records: 9, 11 (7th and 8th words in the 11th line), and 44 (11th and 12th lines). I uphold the Public Body's decision to refuse to disclose the foregoing information to the Applicant.

[para 74] I find that the Public Body did not properly apply section 27(1)(a) [previously section 26(1)(a)] to the remainder of the information on the following pages of the Records: 6, 7, 8, 11 (except the 7th and 8th words in the 11th line), 17, 18, 27, 28 and 44 (except the 11th and 12th lines).

[para 75] The Public Body did not apply any other exceptions under the Act to the remainder of the information on pages 7, 8, 17, 18, 27, 28 and 44. Therefore, except for that information for which I have found that other exceptions under the Act apply, I intend to order the Public Body to give the Applicant access to the remainder of the information on pages 7, 8, 17, 18, 27, 28 and 44.

[para 76] I must consider whether section 17 [previously section 16] applies to the information the Public Body withheld on page 11 of the Records. I also intend to consider whether section 17 [previously section 16] applies to certain information on page 6 of the Records.

ISSUE E: Does section 17 [previously section 16] apply to the Records?

1. Preliminary matter

[para 77] Section 17 [previously section 16] (personal information) was not an issue set out in the Notice of Inquiry.

[para 78] In conducting this inquiry, I noticed that the Public Body's written submission raised section 17 [previously section 16] as an issue for the first time. In its written submission, the Public Body said:

If it is ruled that the records at issue be released, the Public Body reserves the right to apply section 16 [now section 17] to the personal information contained in the records.

[para 79] Page 49 of the Records contains personal information that the Public Body withheld under section 17 [previously section 16]. However, the Public Body did not provide a submission under section 17 [previously section 16].

[para 80] Section 17 [previously section 16] is a mandatory ("must") provision, requiring that a public body withhold personal information if disclosure would be an unreasonable invasion of a third party's personal privacy. Since the Public Body raised section 17 [previously section 16] both in its submission and in one of the records provided for the inquiry, I decided that it was necessary to deal with section 17 [previously section 16] in this inquiry.

[para 81] Consequently, I asked the parties to provide further written submissions on the applicability of section 17 [previously section 16]. I also asked the Public Body to provide me with a further copy of the Records, showing the personal information it intended to withhold under section 17 [previously section 16].

[para 82] The Public Body questioned my considering the application of section 17 [previously section 16] in this inquiry. The Public Body complained that, in doing so, I was preventing it from giving notice to third parties under section 30 [previously section 29].

[para 83] I intend to consider section 17 [previously section 16], for several reasons.

[para 84] First, the Public Body raised it, and I cannot ignore it, regardless of whether or not it was included as an issue in the Notice of Inquiry.

[para 85] Second, section 17 [previously section 16] is a mandatory (“must”) provision that requires a public body to withhold personal information if the provision applies. Because section 17 [previously section 16] is mandatory, a public body has a duty to consider it.

[para 86] Third, a public body has a duty to inform an applicant of all the grounds on which it is refusing access, particularly section 17 [previously section 16] for which an applicant bears a burden of proof. While it may be administratively convenient to rely on other exceptions and hope that I will find that those other exceptions apply, a public body that does so is not complying with its duty to inform an applicant about all the reasons for refusing access. Consequently, in an inquiry, a public body must make its case on all exceptions, particularly mandatory exceptions such as section 17 [previously section 16].

[para 87] Fourth, a public body has a duty to notify a third party under section 30 [previously section 29] if it considers that disclosure of personal information would be an unreasonable invasion of the third party’s personal privacy. Here, the Public Body decided to withhold the personal information of a third party, so it had no duty to notify the third party under section 30 [previously section 29]. Therefore, the Public Body cannot complain that I interfered with its duty.

[para 88] Fifth, an attempt to reserve section 17 [previously section 16] until after an initial inquiry on the applicability of other exceptions would make the inquiry a two-stage process, result in delay, and adversely affect the applicant’s rights. The application of a mandatory exception is a duty that must be performed, not a right to be reserved.

[para 89] Finally, in Order 98-020, the Commissioner considered a case in which the public body asked the Commissioner to make a decision on the exceptions the public body had applied and, having made that decision, asked the Commissioner to return the records so that the public body could apply other exceptions.

[para 90] The Commissioner said that a public body’s decision to refuse access to a record must, of necessity, deal with all the public body’s reasons for refusing access. If a public body could demand that the Commissioner decide one exception, then return a record for the public body’s consideration under another exception, the intent of the legislation that his decision be final would be frustrated. Consequently, the public body did not get to apply further exceptions once the Commissioner had made his decision regarding the exceptions the public body had applied to the records.

[para 91] In Order 98-020, the Commissioner also said that he would consider mandatory (“must”) exceptions such as section 17 [previously section 16] and would apply them himself, if necessary. While I may occasionally apply section 17 [previously

section 16] myself, I do not intend to make that my regular practice. That is a public body's duty.

[para 92] It would be only in the most extraordinary circumstances that I would make a decision on the exceptions that a public body applies, then send the records back for further severing if I find that the exceptions do not apply. This is not one of those circumstances.

[para 93] In this inquiry, as I had not yet made a decision on the exceptions the Public Body applied to the Records, I decided instead to adjourn the inquiry, to require the Public Body to provide me with a copy of the records showing the personal information it intended to withhold under section 17 [previously section 16], and to provide an additional submission on the applicability of section 17 [previously section 16]. That will generally be my practice in cases in which either a public body or I raise mandatory exceptions in an inquiry.

2. Is there personal information of a third party?

[para 94] The Public Body says it withheld the personal information of a third party on the following pages of the records: second unnumbered record; and pages 7, 8, 9, 11, 13, 14, 18, 25, 26, 43 and 49. I find it necessary to consider only the personal information withheld on pages 11 (item withheld in the 11th line) and 49 (2nd and 4th items withheld in clause 8.2), as I have already found that other exceptions of the Act apply to the information containing the personal information withheld on the other pages. In addition, I intend to consider some personal information on page 6 (21st and 22nd lines).

[para 95] For section 17 [previously section 16] to apply, there must be personal information of a third party.

[para 96] "Personal information" is defined in section 1(n) [previously section 1(1)(n)] of the Act to mean recorded information about an identifiable individual, including the personal information listed in section 1(n)(i) to (ix) [previously section 1(1)(n)(i) to (ix)].

[para 97] The Public Body withheld the name of a third party on the following pages: 11 (item withheld in the 11th line) and 49 (2nd and 4th items withheld in clause 8.2). In addition, there is information about the third party's financial history on page 6 (21st and 22nd lines). Consequently, there is personal information for the purposes of section 1(n)(i) and (vii) [previously section 1(1)(n)(i) and (vii)], respectively.

3. Would disclosure of the personal information be an unreasonable invasion of a third party's personal privacy?

[para 98] For section 17 [previously section 16] to apply, disclosure of the personal information must be an unreasonable invasion of a third party's personal privacy.

[para 99] Section 17(1) [previously section 16(1)] reads:

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

[para 100] The Public Body says that section 17(4)(g) [previously section 16(4)(g)] applies to the personal information it withheld. Section 17(4)(g) [previously section 16(4)(g)] reads:

17(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

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

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

(ii) the disclosure of the name itself would reveal personal information about the third party...

[para 101] I agree that the personal information the Public Body withheld on pages 11 (item withheld in the 11th line) and 49 (2nd and 4th items withheld in clause 8.2), and also the personal information I have identified on page 6 (21st and 22nd lines), meets the criteria of section 17(4)(g) [previously section 16(4)(g)].

[para 102] Section 17(5) [previously section 16(5)] provides that, in determining under section 17(1) and (4) [previously section 16(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 those listed in section 17(5)(a) to (i) [previously section 16(5)(a) to (i)].

[para 103] The Public Body says:

...[I]t should be identified that there has [sic] not been any areas identified within section 16(2) or (5) [now section 17(2) and (5)] that would support the notion that disclosure would not be an unreasonable invasion. There has been no consent provided by any individuals identified within the documentation, nor has there been any notice provided to those individuals asking if they would consent to the information being disclosed. Section 29(1) [now section 30(1)] requires that proper notice be provided to any third party where there is potential for disclosure of information that may be an unreasonable invasion of their personal privacy under section 16 [now section 17]...

The Public Body submits that the decision to apply section 16 [now section 17] was applied properly and is consistent with the severing performed on the records already released to the applicant.

[para 104] I take the Public Body to mean that I have cut the process off under section 30 [previously section 29] by requiring the Public Body to deal with section 17 [previously section 16] in this inquiry and, in doing so, left the Public Body with no arguments to make under section 17(2) or (5) [previously section 16(2) and (5)].

[para 105] I reject that contention. I have already said that the Public Body decided to withhold the personal information, so it had no duty to notify under section 30 [previously section 29].

[para 106] An affected party (third party) provided me with reasons, which I accepted *in camera*, as to why it would be an unreasonable invasion of personal privacy to disclose the personal information. Therefore, on balance, I find that disclosure of the personal information would be an unreasonable invasion of the third party's personal privacy under section 17(1) [previously section 16(1)] for the personal information the Public Body withheld on pages 11 (item withheld in the 11th line), and 49 (2nd and 4th items withheld in clause 8.2), and for the personal information I have identified on page 6 (21st and 22nd lines).

4. Applicant's burden of proof under section 71(2) [previously section 67(2)]

[para 107] Under section 71(2) [previously section 67(2)], the Applicant must show that disclosure of personal information would not be an unreasonable invasion of a third party's personal privacy.

[para 108] The Applicant chose not to provide a submission under section 17 [previously section 16]. Therefore, the Applicant did not meet the burden of proving that disclosure of personal information would not be an unreasonable invasion of a third party's personal privacy.

5. Conclusion under section 17 [previously section 16]

[para 109] I find that section 17 [previously section 16] applies to the personal information the Public Body withheld on the following pages of the Records: 11 (item withheld in the 11th line) and 49 (2nd and 4th items withheld in clause 8.2). I also find that section 17 [previously section 16] applies to the personal information I have identified on page 6 (21st and 22nd lines). I intend to order the Public Body to refuse to disclose the foregoing personal information to the Applicant.

[para 110] The Public Body did not apply any other exceptions under the Act to the remainder of the information on pages 6 and 11. Therefore, except for that information for which I have found that other exceptions under the Act apply, I intend to order the Public Body to give the Applicant access to the remainder of the information on pages 6 and 11.

V. ORDER

[para 111] I make the following Order under section 72 [previously section 68] of the Act.

A. Application of section 22 [previously section 21] (Cabinet confidences)

[para 112] Section 22(1) [previously section 21(1)] applies to the information on the following pages of the Records:

6 (2nd sentence in the 19th and 20th lines; 30th line; 39th to 43rd lines), 7 (1st and 2nd lines; 14th to 30th lines), 8 (9th to 12th lines), 13, 14, 16, 17 (21st line; 30th to 35th lines), 18 (1st to 16th lines), 25, 26, 27 (24th to 28th lines), 28 (11th to 17th lines)

[para 113] I uphold the Public Body's decision to refuse to disclose the foregoing information. I order the Public Body not to disclose that information to the Applicant.

[para 114] Section 22(1) [previously section 21(1)] does not apply to the remainder of the information on pages 6, 7, 8, 17, 18, 27 and 28, and all the information on page 22. I have therefore considered whether the Public Body properly applied any other exceptions under the Act to that information.

B. Application of section 24 [previously section 23] ("advice")

[para 115] The Public Body properly applied section 24(1)(a) [previously section 23(1)(a)] to the information on the following unnumbered Records and numbered pages of the Records:

First unnumbered record (everything after the subject line on the first page to the end of the last paragraph on the second page); second unnumbered record (everything except the fax markings and footers on all the pages, and the name at the top of the first page); pages 22 (12th to 16th lines); 41 (2nd last and 3rd last paragraphs), 43 (last 7 paragraphs)

[para 116] I uphold the Public Body's decision to refuse to disclose the foregoing information. I order the Public Body not to disclose that information to the Applicant.

[para 117] The Public Body did not properly apply section 24(1)(a) [previously section 23(1)(a)] to the information on the following unnumbered Records and numbered page of the Records:

First unnumbered record (the information preceding the subject line on the first page, and the information after the last paragraph on the last page); second

unnumbered record (fax markings and footers on all the pages, and the name at the top of the first page); page 22 (everything except the 12th to 16th lines).

[para 118] I do not uphold the Public Body's decision to refuse to disclose the foregoing information. Since the Public Body did not apply any other exceptions under the Act to that information, I order the Public Body to give the Applicant access to that information.

[para 119] The Public Body did not properly apply section 24(1)(a) [previously section 23(1)(a)] to the remainder of the information on pages 8, 27 and 28. I have therefore considered whether the Public Body properly applied any other exceptions under the Act to that information.

C. Application of section 25 [previously section 24] (economic harm to public body)

[para 120] The Public Body properly applied section 25(1)(c)(iii) [previously section 24(1)(c)(iii)] to the information on the following page of the Records:

49 (1st, 3rd and 5th items withheld in clause 8.2)

[para 121] I uphold the Public Body's decision to refuse to disclose the foregoing information. I order the Public Body not to disclose that information to the Applicant.

D. Application of section 27 [previously section 26] (legal privilege)

[para 122] The Public Body properly applied section 27(1)(a) [previously section 26(1)(a)] to the information on the following pages of the Records:

9, 11 (7th and 8th words in the 11th line), 44 (11th and 12th lines)

[para 123] I uphold the Public Body's decision to refuse to disclose the foregoing information. I order the Public Body not to disclose that information to the Applicant.

[para 124] The Public Body did not properly apply section 27(1)(a) [previously section 26(1)(a)] to the remainder of the information on the following pages of the Records:

6, 7, 8, 11 (except the 7th and 8th words in the 11th line), 17, 18, 27, 28, 44 (except the 11th and 12th lines)

[para 125] I do not uphold the Public Body's decision to refuse to disclose the remainder of the foregoing information.

[para 126] I have found that section 22(1) [previously section 21(1)] applies to certain information on pages 7, 8, 17, 18, 27 and 28, and that section 27(1)(a) [previously

section 26(1)(a)] applies to certain information on page 44. I have ordered the Public Body not to disclose that information to the Applicant.

[para 127] However, as to the remainder of the information on those pages, the Public Body did not apply any other exceptions to disclosure. Therefore, I order the Public Body to disclose to the Applicant the remainder of the information on pages 7, 8, 17, 18, 27, 28 and 44.

[para 128] I have considered whether section 17 [previously section 16] applies to certain information on pages 6 and 11.

E. Application of section 17 [previously section 16] (personal information)

[para 129] Section 17 [previously section 16] applies to personal information on the following pages of the Records:

6 (21st and 22nd lines), 11 (item withheld in the 11th line), 49 (2nd and 4th items withheld in clause 8.2)

[para 130] I order the Public Body not to disclose the foregoing personal information to the Applicant.

[para 131] I have found that section 22(1) [previously section 21(1)] applies to certain information on page 6, and that section 27(1)(a) [previously section 26(1)(a)] applies to certain information on page 11. I have ordered the Public Body not to disclose that information to the Applicant.

[para 132] However, as to the remainder of the information on those pages, the Public Body did not apply any other exceptions to disclosure. Therefore, I order the Public Body to disclose to the Applicant the remainder of the information on pages 6 and 11.

[para 133] Along with this Order, I have provided the Public Body with a highlighted copy of the Records, showing the information that the Public Body must not disclose to the Applicant. The Public Body must give the Applicant access to the information that I have not highlighted.

[para 134] I further order the Public Body to notify me in writing, within 50 days of being given a copy of this Order, that the Public Body has complied with this Order.

Dave Bell
Adjudicator