

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2019-07

March 15, 2019

ALBERTA HEALTH SERVICES

Case File Numbers 000112, 000113, 000114, 000115, 000116

Office URL: www.oipc.ab.ca

Summary: The Applicant made 5 requests for access to information under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to Alberta Health Services (the Public Body). She requested emails and communications among specified individuals related to an employment issue concerning her. The first four of the requests were for similar information, with minor modifications to the wording and some changes to the names of the senders/recipients of the requested communications. The final request specifically referenced photographs, related to a specific matter, and named only two individuals as senders/recipients of the communications. All of the requests were for the same time frame.

The Public Body provided one response to all requests. It provided some documents, but also withheld information on the basis that some of it was unresponsive, as well as in reliance on sections 17 (disclosure harmful to personal privacy), 19 (confidential evaluations), and 24(1) (advice from officials) of the FOIP Act. The Applicant requested a review of the response. She also questioned the adequacy of the search for responsive records.

The Adjudicator found that the Public Body had met its duty to assist the Applicant and had conducted an adequate search for responsive records. The Adjudicator directed the Public Body to give the Applicant access to some of the records to which it had applied section 17, on the basis that there was insufficient evidence that the severed information was personal information. The Adjudicator did not support the Public Body's application of section 19. The Adjudicator found that section 24(1) did not apply to all the

information to which it had applied this provision. She directed the Public Body to reconsider its application of section 24(1) for those records she found were subject to this provision, by considering factors relevant to the application of section 24(1).

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 10, 11, 17, 19, 24, 71, 72

Authorities Cited: AB: Orders 2000-029, F2002-008, F2007-029, F2008-16, F2010-037, F2013-51, F2014-18, F2015-29, F2017-65,

Cases Cited: *University of Alberta v. Alberta (Information and Privacy Commissioner)* 2010 ABQB 89 (CanLII); *John Doe v. Ontario (Finance)*, 2014 SCC 36 (CanLII); *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* 2010 SCC 23 (CanLII), [2010] 1 SCR 815; *Carey v. Ontario*, 1986 CanLII 7 (SCC), [1986] 2 SCR 637

I. BACKGROUND

[para 1] The Applicant made 5 requests for access to information from the Public Body that consisted of emails and communications among specified individuals related to an employment issue concerning her. The first four of the requests were for similar information, with minor modifications to the wording and some changes to the names of the senders/recipients of the requested communications. The final request specifically referenced photographs, related to a specific matter, and named only two individuals as senders/recipients of the communications. All of the requests were for the same time frame.

[para 2] The Public Body provided one response to all requests. It provided some documents, but also withheld information on the basis that some of it was unresponsive, as well as in reliance on sections 17, 19, and 24(1) of the FOIP Act. The Applicant requested a review of the response. She also questioned the adequacy of the search for responsive records.

[para 3] The Commissioner assigned a senior information and privacy manager to investigate and attempt to settle the matter. Following this process, the Applicant requested an inquiry.

II. INFORMATION AT ISSUE

[para 4] Information severed from the records is at issue.

III. ISSUES

Issue A: Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act?

Issue B: Did the Public Body properly apply section 19 of the Act (confidential evaluations) to the information in the records?

Issue C: Does section 17 of the Act (disclosure an unreasonable invasion of personal privacy) apply to the information in the records?

Issue D: Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information in the records?

Issue E: Did the Public Body comply with section 11 of the Act (time limit for responding)?

IV. DISCUSSION OF ISSUES

Issue A: Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act?

[para 5] Section 10 of the FOIP Act states, in part:

10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.

[para 6] Prior orders of this office have determined that the duty to make every reasonable effort to assist applicants includes the duty to conduct a reasonable search for responsive records. In Order F2007-029, the Commissioner noted:

In general, evidence as to the adequacy of a search should cover the following points:

- The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
- The scope of the search conducted – for example: physical sites, program areas, specific databases, off-site storage areas, etc.
- The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
- Who did the search
- Why the Public Body believes no more responsive records exist than what has been found or produced

[para 7] In Order F2015-29, the Director of Adjudication reviewed past orders of this office and noted that the duty to assist has an informational component, in the sense that a public body is required to provide explanations of the search it conducts when it is unable to locate responsive records and there is a likelihood that responsive records exist. She said:

Earlier orders of this office provide that a public body's description of its search should include a statement of the reasons why no more records exist than those that have been located. (See, for example, Order F2007-029, in which the former Commissioner included "why the Public Body believes no more responsive records exist than what has been found or produced" in the list of points that evidence as to the adequacy of a search should cover. This requirement is especially important where an applicant provides a credible reason for its belief that additional records exist.

[para 8] In *University of Alberta v. Alberta (Information and Privacy Commissioner)* 2010 ABQB 89 (CanLII), the Alberta Court of Queen's Bench confirmed that the duty to assist has an informational component. Manderscheid J. stated:

The University's submissions set out the information it provided, and argues that it is not necessary in every case to give extensive and detailed information, citing, *Lethbridge Regional Police Commission*, F2009-001 at para. 26. This is not an entirely accurate interpretation as to what the case holds. While the Adjudicator indicated that it was not necessary in every case to give such detailed information to meet the informational component of the duty to assist, it concluded that it was necessary in this case. In particular, the Adjudicator said (at para. 25):

In the circumstances of this case, I also find that this means specifically advising the Applicant of who conducted the search, the scope of the search, the steps taken to identify and locate all records and possible repositories of them, and *why the Public Body believes that no more responsive records exist than what has been found or produced.* [Emphasis added in original]

Similarly here the Adjudicator reasonably concluded that the informational component of the duty to assist included providing the University's rationale, if any, for not including all members of the Department in the search, for not using additional and reasonable keywords, and, if it determined that searching the records of other Department members or expanding the keywords would not lead to responsive records, *its reasons for concluding that no more responsive records existed.* [My emphasis]

[para 9] From the foregoing cases, I conclude that the duty to assist requires a public body to search for responsive records. In addition, the duty to assist has an informational component, which requires the public body both to explain the search it conducted and to provide its reasons for believing that no additional records are likely to exist.

[para 10] The Applicant takes the position that the Public Body has not provided copies of a picture that she had requested. The relevant access request states:

All emails, written forms or memo including but not limited to pictures with regards to [the Applicant] not being allowed on site, property or building of [the Applicant's place of employment] between [an employee of the Public Body] and [another employee].

[para 11] The Public Body provided the affidavit of a senior advisor who conducted the search for responsive records. She documented all the areas she searched and the results of the search in each area and how the search was conducted. She also provided her reasons for believing that responsive records were likely to be located in the areas in which she searched, and not in other areas. The senior advisor states:

Since the Applicant's request was very clear (to the extent specifying the actual search terms), it is my view that the call for records was comprehensive for this request. In addition, the search was supervised by senior employees who were not personally named in the request or the responsive records. The FOIP Coordinator who initially handled the request (who is no longer with AHS) followed up with individuals whose initial searches appeared incomplete or inadequately documented.

[para 12] I find that the Public Body conducted an adequate search for responsive records and provided a satisfactory explanation of the search it conducted. I recognize that the Applicant is concerned that a picture or poster she was told exists has not been produced. However, the Applicant has phrased her access request in such a way that the picture or poster would only be responsive if it were exchanged by two particular employees. If the two employees did not exchange the picture or poster, but other employees did, the picture or poster in the email folders of other employees would not be responsive to the access request, as it has been worded. If the Applicant continues to seek the picture, she may wish to consider framing her access request more broadly.

[para 13] For the reasons above, I find the Public Body met its duty to assist the Applicant.

Issue B: Did the Public Body properly apply section 19 of the Act (confidential evaluations) to the information in the records?

[para 14] The Public Body applied section 19(1) to pages 442, 443, 445, 456, 459, 484, 490, 498, 506, and 726 to withhold information from the Applicant. This provision states:

19(1) The head of a public body may refuse to disclose to an applicant personal information that is evaluative or opinion material compiled for the purpose of determining the applicant's suitability, eligibility or qualifications for employment or for the awarding of contracts or other benefits by a public body when the information is provided, explicitly or implicitly, in confidence.

[para 15] In order for section 19(1) to apply, the information:

- a. must be evaluative or opinion material;
- b. must be compiled for the purpose of determining the applicant's suitability, eligibility or qualifications for:
 - i. employment; or
 - ii. for the awarding of contracts or other benefits by a public body; and
- c. must be provided explicitly, or implicitly in confidence (Orders 2000-029, F2002-008).

[para 16] In Order F2014-18, the Adjudicator confirmed that information must be evaluative or opinion material before section 19 will apply to it. She stated:

The Public Body states that page 89 “consists of a record of a discussion conducted by the [Public Body] and a third party – Alberta Justice, as to the Applicant’s suitability in a competition being conducted by Alberta Justice at a time when she was still employed with the [Public Body].” The Public Body describes the record as an email from the HR area in the Public Body to the HR area in Alberta Justice. It states that it applied section 19(1) to

- a. A reference check done by Alberta Justice on the Applicant in relation to a Alberta Justice competition in which the Applicant had been a candidate; and
- b. A conversation conducted as between Alberta Justice and the Human Resources group of the [Public Body].

The first item of information the Public Body severed from the emails is information *about* a reference check conducted by Alberta Justice; it does not include the comments provided by the referee. Specifically, the information refers to the name of the referee and whether a topic was brought up as part of the reference. In my view, this is not opinion or evaluative information; rather, it is factual information about whether the referee discussed a particular topic (not what was said on the topic). For this reason, section 19(1) does not apply to the first severed item on page 89.

The second severed item on page 89 also does not contain opinion or evaluative information. Rather, it refers to a past conversation between Human Resources areas regarding whether particular documentation existed on the Applicant's human resources file. In my view, this is factual information and not information to which section 19(1) applies.

I will therefore order the Public Body to disclose the information withheld from page 89.

[para 17] In its submissions for the inquiry, the Public Body stated:

The application of section 19(1) was considered in Order F2004-022. At paragraphs 33 and 34 Adjudicator Bell stated:

In Order 98-021, the Commissioner stated that for section 19(1) to apply, all three parts of the following test must be met:

1. The information must be personal information that is evaluative or opinion material;
2. The personal information must be compiled solely in order to determine that applicant's suitability, eligibility or qualification for employment, to award a government contract or to award other benefits; and
3. The personal information must have been provided, explicitly or implicitly, in confidence.

In Order 99-021, the Commissioner defined the term "evaluative" as the adjective for "evaluate", which means to "assist, appraise, to find or state the number of". The Commissioner also defined "opinion" as a belief or assessment based on grounds short of proof: a view held probable". The Commissioner stated that an example of an opinion would be a belief that a person would be a suitable employee, based on that person's employment history. An "opinion" is subjective in nature, and may or may not be based on the facts. [...]

The Public Body redacted portions of pages 442,443,445,456,459,484,490,498,506 and 726, [w]ith regard to pages 442 and 443 (replicated on page 445) it is submitted that section 19 is applicable in that it is opinion material compiled to determine the eligibility of benefits which has been supplied explicitly in confidence.

With regard to the remaining pages it appears that they contain only a recital of facts and not evaluative or opinion material. As such the Public Body concedes that section 19 would not be applicable in this case. However, in those pages (as well as pages 442, 443 and 445) it is submitted that the information must be redacted pursuant to sections 17(1) and 17(4)(g).

[para 18] I understand from its submissions that the Public Body has now decided that section 19(1) does not apply to the information it severed from the records under this provision, except for information severed from records 442, 443, and 445. I will therefore confine my analysis to whether section 19 has been appropriately applied to these three records.

[para 19] I have reviewed the information severed from records 442, 443, and 445. While I do not disagree with the Public Body's discussion of section 19, and prior cases of this office interpreting it, I am unable to identify any information falling within the terms of section 19 in records 442, 443, and 445. There is no information in these records that could reasonably be described as opinion or evaluative material. Rather, the information provided in the email is factual. The author of the severed information does not advance an opinion about the facts or the Applicant, or evaluate the Applicant. While it may be the case that the author collected the information in order to conduct an evaluation, or as part of a process by which the Public Body would conduct an evaluation, section 19(1) requires *the information that is compiled* to be evaluative or to be an opinion. The information severed from records 442, 443, and 445 cannot reasonably be described as evaluative of the Applicant or an opinion; rather, it is "a recitation of facts".

[para 20] For the foregoing reasons, I am unable to support the Public Body's application of section 19 to records 442, 443, and 445.

Issue C: Does section 17 of the Act (disclosure an unreasonable invasion of personal privacy) apply to the information in the records?

[para 21] Section 17 sets out the circumstances in which a public body may or must not disclose the personal information of a third party in response to an access request. It states, in part:

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.

17(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

[...]

(f) the disclosure reveals financial and other details of a contract to supply goods or services to a public body [...]

(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[...]

(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,

(b) the disclosure is likely to promote public health and safety or the protection of the environment,

(c) the personal information is relevant to a fair determination of the applicant's rights,

(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,

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

(f) the personal information has been supplied in confidence,

(g) the personal information is likely to be inaccurate or unreliable,

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

(i) the personal information was originally provided by the applicant.

[para 22] 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 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.

[para 23] When the specific types of personal information set out in section 17(4) are involved, disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. To determine whether disclosure of personal information would be an unreasonable invasion of the personal privacy of a third party, a public body must consider and weigh all relevant circumstances under section 17(5), (unless section 17(3), which is restricted in its application, applies). Section 17(5) is not an exhaustive list and any other relevant circumstances must be considered.

[para 24] Section 17(1) requires a public body to withhold information once all relevant interests in disclosing and withholding information have been weighed under section 17(5) and the conclusion is reached that it would be an unreasonable invasion of the personal privacy of a third party to disclose his or her personal information.

[para 25] Once the decision is made that a presumption set out in section 17(4) applies to information, it is necessary to consider all relevant factors under section 17(5) to determine whether it would, or would not, be an unreasonable invasion of a third party's personal privacy to disclose the information.

[para 26] However, it is important to note that section 17(1) is restricted in its application to personal information. Before a public body may apply section 17(1), it must first determine whether the information in question is personal information or that it is likely to be so. In this case, I must consider whether the information to which the Public Body has applied section 17(1) is personal information.

[para 27] Section 1(n) of the FOIP Act defines "personal information". It states:

I 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 28] In Order F2013-51, the Director of Adjudication reviewed cases of this office addressing the circumstances when information referring to an individual is personal information and when it is not. She said:

From the severing conducted by the Public Body, it appears that it may have relied on section 17 to withhold information about its employees or those of University of Calgary employees acting in the course of their duties. For example, the Public Body withheld records such as the University of Calgary's representative's first name and the business phone and fax number at which she could be contacted, contained in records 3-1, 3-2, and 3-3.

As well, the Public Body has severed information, partly in reliance on section 17, that may be properly characterized as 'work product'. For example, it has severed the questions asked by an investigator, in addition to the answers of those interviewed. It has also withheld what is possibly a line of inquiry which the investigator means to follow (the note severed from record 1-151). While some of the questions and notes may reveal the personal information of witnesses, it does not appear that it is always the case that they do, and it appears possible that the Public Body withheld information on the basis that it may reveal something about the investigator performing duties on its behalf, rather than personal information about third parties.

The Public Body has also withheld notes of an interview by the Public Body's investigator of the University of Calgary's legal counsel, in part in reliance on section 17. Information about the legal counsel's participation in the events surrounding the Applicant's complaint to the University is not her personal information unless it has a personal aspect, which was not shown.

As well, it may be that some of the information of persons interviewed in the third volume relating to the Applicant's 'retaliation' complaint, which was withheld in reliance on section 17, may be information about events in which these persons participated in a representative rather than a personal capacity. Again, to be personal in such a context, information must be shown to have a personal dimension.

In Order F2009-026, the Adjudicator said:

If information is about employees of a public body acting in a representative capacity the information is not personal information, as the employee is acting as an agent of a public body. As noted above, the definition of "third party" under the Act excludes a public body. In Order 99-032, the former Commissioner noted:

The Act applies to public bodies. However, public bodies are comprised of members, employees or officers, who act on behalf of public bodies. A public body can act only through those persons.

In other words, the actions of employees acting as employees are the actions of a public body. Consequently, information about an employee acting on behalf of a public body is not information to which section 17 applies, as it is not the personal information of a third party. If, however, there is information of a personal character about an employee of a public body, then the provisions of section 17 may apply to the information. I must therefore consider whether the information about employees in the records at issue is about them acting on behalf of the Public Body, or is information conveying something personal about the employees.

In that case, the Adjudicator found that information solely about an employee acting as a representative of a public body was information about the public body, and not information about the employee as an identifiable individual. In *Mount Royal University v. Carter*, 2011 ABQB 28 (CanLII) Wilson J. denied judicial review of Order F2009-026.

In Order F2011-014, the Adjudicator concluded that the name and signature of a Commissioner for Oaths acting in that capacity was not personal information, as it was not information about the Commissioner for Oaths acting in her personal capacity. She said:

Personal information under the FOIP Act is information about an identifiable individual that is recorded in some form.

However, individuals do not always act on their own behalf. Sometimes individuals may act on behalf of others, as an employee does when carrying out work duties for an employer. In other cases, an individual may hold a statutory office, and the actions of the individual may fulfill the functions of that statutory office. In such circumstances, information generated in performance of these roles may not necessarily be about the individual who performs them, but about the public body for whom the individual acts, or about the fulfillment of a statutory function.

I find that the names and other information about employees of the Public Body and the University of Calgary acting in the course of their duties, as representatives of their employers, cannot be withheld as personal information, unless the information is at the same time that of an individual acting in the individual's personal capacity.

[para 29] From the foregoing, I conclude that information about individuals acting in a representative capacity is not personal information within the terms of the FOIP Act, unless the information has a personal dimension and can be said to be “about an identifiable individual”. Were it otherwise, a public body could withhold records from an applicant simply because they revealed information regarding the employees that created them, despite the fact that the records were created in a representative capacity. Such an outcome would undermine the purpose of the FOIP Act, which is to create a right of access to public records in the custody or control of the executive branch of government.

[para 30] I turn now to the question of whether the information to which the Public Body has applied section 17 is personal information of third parties.

Record 311

[para 31] The Public Body withheld a sentence from record 311 that refers to the Applicant. The Applicant is not a third party in this context and her personal information cannot be withheld from her under section 17. As section 17(1) does not apply to information about the Applicant, I must direct the Public Body to give the Applicant to the sentence severed from record 311.

Records 433 and 434

[para 32] The Public Body severed the name and business contact information of an employee of a third party from records 433 and 434. I am unable to identify a personal dimension to this information. As a result, I find that section 17(1) cannot apply to it and I will direct the Public Body to give the Applicant access to this information.

Records 442, 443, 445

[para 33] The Public Body severed information from records 442, 443, and 445 under section 17(1). I have reviewed the information severed from these records and am unable to identify a personal dimension to the information. While I accept that it is possible that the information has a personal dimension and that the information reflects the author's experience outside the workplace, it appears at least equally possible that the severed information was created by someone acting in a representative capacity and is work product; i.e., information created as an employee carrying out employment duties and forwarding it in the course of performing these duties.

[para 34] I wrote the Public Body to ask it for evidence to support its position that records 442, 443, and 445 contain personal information. However, the Public Body declined to do so.

[para 35] Section 71 of the FOIP Act sets out the burden of proof in an inquiry. It 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.

(2) Despite subsection (1), if the record or part of the record that the applicant is refused access to contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.

(3) If the inquiry relates to a decision to give an applicant access to all or part of a record containing information about a third party,

(a) in the case of personal information, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy, and

(b) in any other case, it is up to the third party to prove that the applicant has no right of access to the record or part of the record.

[para 36] Sections 71(2) and (3) do not apply in this case, as it is unknown, on the evidence before me, whether the severed information is personal information. Section 71(1) applies, as the Public Body has made a decision to refuse access to information. Based on the evidence before me, I find that the Public Body has not met the burden of proving, on the balance of probabilities, that it appropriately withheld the information it severed from records 442, 443, and 445 from the Applicant.

Records 456, 459, 469, 484, 489, 498, 506, 588, 643

[para 37] The Public Body severed a phrase from records 456, 459, 469, 484, 489, 498, 506, 588, and 643 under section 17. It is my understanding that it considers the phrase would serve to identify an identifiable individual. However, there is no evidence before me to enable me to find that the severed phrase would do so.

[para 38] As I am unable to find, on the evidence before me, that records 456, 459, 469, 484, 489, 498, 506, 588, and 643 contain personal information, I must direct the Public Body to give the Applicant access to this information.

Records 528 and 530

[para 39] Records 528 and 530 contain an email written by a labour relations advisor. The Public Body severed a place name from this email. It may have done so on the basis that it considered the information to be the personal information of a labour relations advisor. However, it is unknown on the evidence before me whether this information has a personal dimension or is simply about the labour relations advisor's work duties. As a result, it has not been demonstrated that section 17 applies to the information severed from the email and I must direct the Public Body to disclose it in its entirety.

Conclusion

[para 40] I am unable to support the Public Body's application of section 17 to information in records 433, 434, 442, 443, 445, 456, 459, 469, 484, 489, 498, 506, 528, 530, 588, and 643, as it has not demonstrated that the information it severed is personal information. I will therefore direct it to give the Applicant access to the information. I find that the remaining information to which the Public Body applied section 17 was appropriately severed.

Issue D: Did the Public Body properly apply section 24(1) of the Act (advice from officials) to the information in the records?

[para 41] The Public Body applied sections 24(1)(a), (b), and (c) to sever information from the records. These provisions state:

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,

(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,

(c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Alberta or a public body, or considerations that relate to those negotiations,

[para 42] 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 Council, 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 43] I agree with the analysis of the Director of Adjudication as to the purpose and interpretation of sections 24(1)(a) and (b), and agree these provisions apply to information generated when a decision maker asks for advice regarding a decision, or evaluates a course of action.

[para 44] In *John Doe v. Ontario (Finance)*, 2014 SCC 36 (CanLII), the Supreme Court of Canada commented on the purpose of the “advice and recommendation” exception in Canada’s various freedom of information regimes. The Court held:

In my opinion, Evans J. (as he then was) in *Canadian Council of Christian Charities v. Canada (Minister of Finance)*, 1999 CanLII 8293 (FC), [1999] 4 F.C. 245, persuasively explained the rationale for the exemption for advice given by public servants. Although written about the equivalent federal exemption, the purpose and function of the federal and Ontario advice and recommendations exemptions are the same. I cannot improve upon the language of Evans J. and his explanation and I adopt them as my own:

To permit or to require the disclosure of advice given by officials, either to other officials or to ministers, and the disclosure of confidential deliberations within the public service on policy options, would erode government's ability to formulate and to justify its policies.

It would be an intolerable burden to force ministers and their advisors to disclose to public scrutiny the internal evolution of the policies ultimately adopted. Disclosure of such material would often reveal that the policy-making process included false starts, blind alleys, wrong turns, changes of mind, the solicitation and rejection of advice, and the re-evaluation of priorities and the re-weighting of the relative importance of the relevant factors as a problem is studied more closely. In the hands of journalists or political opponents this is combustible material liable to fuel a fire that could quickly destroy governmental credibility and effectiveness. [paras. 30-31]

Political neutrality, both actual and perceived, is an essential feature of the civil service in Canada (*Osborne v. Canada (Treasury Board)*, 1991 CanLII 60 (SCC), [1991] 2 S.C.R. 69, at p. 86; *OPSEU v. Ontario (Attorney General)*, 1987 CanLII 71 (SCC), [1987] 2 S.C.R. 2, at pp. 44-45). The advice and recommendations provided by a public servant who knows that his work might one day be subject to public scrutiny is less likely to be full, free and frank, and is more likely to suffer from self-censorship. Similarly, a decision maker might hesitate to even request advice or recommendations in writing concerning a controversial matter if he knows the resulting information might be disclosed. Requiring that such advice or recommendations be disclosed risks introducing actual or perceived partisan considerations into public servants' participation in the decision-making process.

Interpreting "advice" in s. 13(1) as including opinions of a public servant as to the range of alternative policy options accords with the balance struck by the legislature between the goal of preserving an effective public service capable of producing full, free and frank advice and the goal of providing a meaningful right of access.

[para 45] In the foregoing case, the Supreme Court of Canada tied the exceptions for advice and deliberations in FOIP schemes to the need to protect the process by which government makes decisions and evaluates policy options. The advice and recommendations provisions do not apply to discussions of employees taking place outside the decision making or policy development process of government; however, discussions forming part of those processes are captured by these provisions.

[para 46] In Order F2010-037, the Adjudicator reviewed previous decisions of this office and said the following about section 24(1)(c):

For information to fall under section 24(1)(c), it must reveal positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the government or a public body, or considerations that relate to those negotiations (which I will refer to as "positions, etc. for the purpose of negotiations"). A "consideration" is a fact or thing taken into account in deciding or judging something (Order 99-013 at para. 44). Again, the intent of section 24(1)(c) is similar to 24(1)(a) and (b), in that it is to protect

information generated during the decision-making process, but not to protect the decision itself (Order 96-012 at para. 37; Order F2005-030 at paras. 71 and 72).

[para 47] While I do not disagree with the Adjudicator's discussion of the terms "positions", "plans", "procedures", "criteria", "instructions", and considerations in the foregoing order, I do disagree with the position that section 24(1)(c) does not protect the decision itself. In my view, the purpose of section 24(1)(c) is discrete from the purposes of sections 24(1)(a) and (b). Section 24(1)(c) is intended to enable a public body to implement a plan developed for the purpose of contractual obligations without interference. If a public body had to disclose such plans to the other side in negotiations, once it decided on them, it could be prevented from carrying out the course of action it had chosen, or lose any advantage the course of action was intended to provide.

[para 48] I have decided that where the Public Body has applied section 24(1)(b) to information falling within the terms of section 24(1)(a) or 24(1)(c), I will consider whether section 24(1)(a) or any of the other provisions of section 24(1) applies. I have decided to do so, as in some instances, the arguments of the Public Body and the content of the record support applying section 24(1)(a), even though it applied section 24(1)(b).

[para 49] In Order F2008-016, the Adjudicator was faced with a situation where a Public Body withheld information under one provision, but its arguments indicated to her that it had really withheld information in accordance with another provision. She said:

Although sections 27(1)(b) and 27(1)(c) were not explicitly referred to on the responsive documents or in the EPS' submissions, I find that the substance of the EPS submissions allows me to find that it took into consideration all appropriate elements of sections 27(1)(b) and 27(1)(c) when severing the records, even though the EPS ultimately decided to sever under a provision of the Act that was not correct. Since the principle the EPS used to withhold these records (the confidential seeking of advice or consultations with lawyers employed at the Ministry of Justice) fits within section 27(1)(c), I see no reason to deprive the EPS of its ability to apply section 27(1)(c) at this point.

Similarly, I have decided that where section 24(1)(a) applies to the information to which the Public Body applied section 24(1)(b), I will consider it to have applied section 24(1)(a).

[para 50] I turn now to the Public Body's application of section 24(1) to the records. I note that in many cases the records are duplicates; I have decided that it is simpler to address the first instance where the information appears in the Order and for the Public Body to identify the duplicates and apply my decision regarding disclosure to those when it implements the order.

Record 5

[para 51] The Public Body severed information from record 5 that appears to be completely factual. The information does not appear to be intended to guide or influence a decision. In the context in which the severed information appears, it seems that it was

provided to make doing a task easier. However, the task does not appear to be part of a policy adoption or decision making process.

[para 52] As I find that the severed portion of record 5 does not contain information subject to section 24(1), I must direct the Public Body to give the Applicant access to the severed information.

Record 15

[para 53] The Public Body severed a portion of an email under section 24(1)(a). I agree with the Public Body that the severed portion is advice.

Record 17

[para 54] The Public Body withheld portions of an email under section 24(1)(b). I am unable to identify information that entails a consultation or deliberation in the email. Rather, the information severed is purely factual.

[para 55] As I find that the severed portion of record 17 does not contain information subject to section 24(1), I must direct the Public Body to give the Applicant access to the severed information.

Record 31

[para 56] The Public Body severed the body of an email from record 31 under sections 24(1)(a) and (b). I agree the severed information is advice falling within the terms of section 24(1)(a).

Record 87

[para 57] The Public Body severed an email from record 87 under section 24(1)(b). The context created by the email indicates that the author was seeking input in relation to a decision the author was responsible for making. I agree with the Public Body that the severed information falls within the terms of section 24(1)(b).

Record 119

[para 58] The Public Body severed an email from record 119 on the basis of section 24(1)(b) and on the basis that it was nonresponsive. I find that section 24(1)(b) does not apply, as the severed information is purely factual. The information simply answers a question posed in an email at the bottom of record 119. I am unable to find that the answer is advice, or other information subject to section 24(1) intended to influence or guide a decision.

[para 59] I also find that the severed information is responsive, as it relates to the Public Body's classification processes and to the Applicant's own classification. Given

that the Applicant requested all documents relating to her performance, I find that the email on record 119 is responsive.

Record 176

[para 60] The Public Body severed an email from record 176 under section 24(1)(b). The email contains advice as to a course of action. I find that the severed information falls within the terms of section 24(1)(a).

Record 258

[para 61] The Public Body severed information from an email appearing on record 258. The email indicates that it contains a summary of information prepared for a grievance. I am unable to find that any of the information in the email is intended to advise a course of action or to ask for assistance in making a decision about a course of action or policy. The information in the email appears to be factual and to assist the recipient of the email to become familiar with the grievance issues.

[para 62] As I find that the severed portion of record 258 does not contain information subject to section 24(1), I must direct the Public Body to give the Applicant access to the severed information.

Record 279

[para 63] The Public Body severed information from an email appearing on record 279. The information is a recommendation within the terms of section 24(1)(a).

Records 309 and 310

[para 64] The Public Body severed an email from record 309 and 310 on the basis of section 24(1)(a), (b), and (c). I find that the severed information is properly characterized as information falling within the terms of section 24(1)(a) and (b) as the emails contain advice and discussions of advice by the Public Body's employees.

Record 317

[para 65] The Public Body severed an email from record 317 under section 24(1)(b). I agree that section 24(1)(b) applies as the email indicates that its author is deliberating a course of action.

Record 321

[para 66] The Public Body severed an email from record 321. The email contains a recommendation for a future course of action. I find that the email is subject to section 24(1)(a).

Record 323

[para 67] Record 323 is a duplicate of page 311. The Public Body severed a sentence from record 311 under section 17. I have found that section 17 does not apply. The Public Body severed the same sentence from record 323 on the basis that it is subject to section 24(1)(b).

[para 68] I am unable to find that the sentence is subject to section 24(1)(b). The sentence appears to be a statement of fact. It does not appear intended to advise anyone, or to debate a course of action.

[para 69] As I find that the provisions of section 24(1) have not been shown to apply to the sentence, I must direct the Public Body to disclose it.

Record 326

[para 70] Record 326 contains four emails. The Public Body's notations indicate that it initially applied section 24(1)(c) to one email; subsequently it applied section 24(1)(b) to this email and to two others. I have already confirmed that the Public Body appropriately applied section 24(1) to the third email, as it contains a recommendation. With regard to the other two emails, I conclude that section 24(1)(c) applies to the emails, as they contain the Public Body's plans in contractual negotiations.

Record 337

[para 71] The Public Body severed three emails from record 337 under section 24(1). I have already reviewed the first and third emails. The second email has not yet been reviewed.

[para 72] I am unable to determine from the email that the information severed from it is subject to section 24(1). It could be the case that the author of the email was being asked for advice or was providing it; however, I am unable to say that either scenario is the case on the evidence before me.

[para 73] As I find that the provisions of section 24(1) have not been shown to apply to the middle email on record 337, I must direct the Public Body to disclose it.

Record 340

[para 74] The Public Body severed two emails from record 340.

[para 75] The Public Body applied sections 24(1)(b) and (c) to withhold the first email from record 340. I find that the context created by the email and other records supports finding that section 24(1)(c) applies. I say this because the email refers to the Public Body's plans and considerations in relation to contractual negotiations.

[para 76] The Public Body applied section 24(1)(b) to sever the second email from record 340. I am unable to say that the email consists of a consultation or deliberation, as I have not been provided sufficient evidence regarding the context of the email. It appears that the email was intended to provide information; however, in the absence of additional context, such as the relationship between employees and their functions, I am unable to determine that providing the information was for purposes consistent with the provisions of section 24(1).

[para 77] As I find that the provisions of section 24(1) have not been shown to apply to the second email on record 340, I must direct the Public Body to disclose it.

Record 342

[para 78] The Public Body severed an email from record 342 on the basis of sections 24(1)(a) and (b).

[para 79] I find that the email consists of advice within the terms of section 24(1)(a).

Record 387

[para 80] The Public Body applied section 24(1)(b) to sever an email from record 387. The context created by the email does not enable me to find that the author of the email was seeking information falling within the terms of section 24(1)(a), or consulting or deliberating. Rather, it appears that the author of the email wrote the email in order to pass on information and her own opinion on a topic that was not the subject of the Public Body's decision or policy making processes.

[para 81] As I find that the provisions of section 24(1) have not been shown to apply to the email on record 387, I must direct the Public Body to disclose it.

Records 395 – 396

[para 82] The Public Body severed an email from records 395 – 396 .The disclosed portion of the email indicates that its author's intention was to provide a "heads up" to the recipient.

[para 83] I am unable to say that the email is intended to do anything more than to pass on information. In the absence of additional context, I am unable to find that the information severed from records 395 – 396 falls within the terms of section 24(1).

Record 437

[para 84] The Public Body severed an email from record 437 on the basis of section 24(1)(b). I am unable to view the severed information as a consultation or deliberation regarding a decision or policy. Rather, the context created by the email establishes that it

was intended to pass on information and to seek instructions, which is an activity that is different from seeking or giving advice.

[para 85] As I find that the provisions of section 24(1) have not been shown to apply to the email on record 437, I must direct the Public Body to disclose it.

Record 444

[para 86] The Public Body severed an email from record 444 under section 24(1)(b). I find that the email contains the deliberations of an employee in relation to decisions she had to make.

Record 457

[para 87] The Public Body severed a portion of record 457 under sections 24(1)(a) and (b). I find that the severed information is analysis of the Public Body's position and falls within the terms of section 24(1)(a).

Record 493

[para 88] The Public Body severed an email from record 493 on the basis of section 24(1)(b). I find that the email contains advice and that it falls within the terms of section 24(1)(a).

Record 523

[para 89] The Public Body severed a portion of an email from record 523 under sections 24(1)(a) and (b).

[para 90] I find that the severed information is advice falling within the terms of section 24(1)(a).

Records 562 - 564

[para 91] The Public Body's notations indicate that it severed information from records 562 - 564, although it did not use its usual method indicating severed information by drawing a red box around the severed information. I will proceed on the assumption that it withheld the information in the gray boxes from the Applicant, in addition to information appearing in red boxes.

[para 92] I find that the first part of the document (until the middle of record 563) provides only background facts and documents action taken. I am unable to find that section 24(1) applies to the background information; however, I accept that the numbered issues beginning on record 563 describing the Employer's position in the document consist of analysis falling within the terms of section 24(1)(a).

[para 93] I am unable to find that the handwritten notes that appear on record 562 are subject to section 24(1) as I have insufficient information about the circumstances in which they were created.

[para 94] As I find that the Public Body has not demonstrated that anything other than the numbered points documenting the employer's position fall within section 24(1), I will direct the Public Body to give the Applicant access to information in the record other than the numbered points.

Record 587

[para 95] The Public Body severed a portion of an email from record 587 on the basis of section 24(1)(c). I agree that the severed portion contains details of the Public Body's position in a negotiation. I find that section 24(1)(c) applies.

Record 658

[para 96] The Public Body severed part of an email that documents the position it intended to take in negotiations. I find that this information is subject to section 24(1)(c).

Record 676

[para 97] The Public Body severed information from an email appearing on record 676 under section 24(1)(b). I find that the severed information provides facts about something that happened. I am unable to find that the information severed from record 676 falls within the terms of section 24(1).

Record 677

[para 98] The Public Body severed two emails from record 677 on the basis of section 24(1)(b). I find that these emails exchange information regarding the Public Body's information practices, but that they are not consultations or deliberations within the terms of section 24(1)(b), given that the discussions have not been shown to be part of a decision or policy making process. I find that section 24(1) does not apply to the information severed from record 677.

Records 707 - 708

[para 99] The Public Body indicates that it severed information from records 707 – 708, although it is unclear what has been severed, given that it did not follow its usual practice and draw a red line around the severed information. I will assume that it severed the information after the “Articles” heading.

[para 100] Records 707 – 708 are a document entitled “Request to Proceed to Arbitration”. The document was prepared by employees of the Public Body who took particular measures. The records indicate that they are prepared for the ARC, a

committee within the Public Body that makes determinations as to whether matters should proceed to arbitration.

[para 101] The records indicate that the ARC subsequently made a decision regarding the viability of arbitration. The records also indicate that decisions of the ARC may be appealed, with the result that another decision maker within the Public Body will decide whether a matter should proceed to arbitration.

[para 102] However, I note that the ARC is an internal body, and is not created by statute. It appears to me to be likely that despite the references in the records to appeals and decisions, that review by the ARC is part of the process by which the Public Body, not the individual employees who created the records, takes advice. In other words, ARC decisions and appeals of ARC decisions are the means by which AHS takes advice and ensures the quality of the advice on which it acts. Viewed from this lens, the information in records 707 and 708 are analysis, intended to promote a particular course of action. If so, then the information severed from records 707 and 708 fall within the terms of section 24(1)(a).

[para 103] In view of the content of all the records, and the subsequent actions of the Public Body documented in the records, I have that the ARC process is a means by which the Public Body takes advice and I have decided that section 24(1)(a) applies to records 707 and 708.

Record 712

[para 104] The Public Body severed information from two emails on record 712 on the basis of section 24(1)(b). I am unable to identify any information falling within the terms this provision, given that the emails appear to be documenting work that has been done and to be seeking answers to factual questions. The emails do not appear to be part of a decision or policy making process. I am unable to find that section 24(1) applies.

Records 726 – 727

[para 105] The Public Body severed information from records 726 – 727 under section 24(1)(a) and (b). It is not clear what information was severed from the record – the information outlined in red, or information outlined in gray, or both. In future, it would assist the Commissioner if the Public Body were to clearly and consistently document its severing decisions. I will proceed on the basis that the information the Public Body has outlined in red and gray has been severed.

[para 106] I find that the information outlined in red at the end of the document is analysis and is subject to section 24(1)(a). I also find the information appearing in a gray box in the middle of record 727 is analysis within the terms of section 24(1)(a) and the text appearing before the red box on record 727 is analysis. However, I find that the remaining information in records 726 – 727 consists of statements of background facts and is not subject to section 24(1).

[para 107] In Order F2017-65, the Director of Adjudication said:

In Order 96-006, on which the Public Body relies in its submissions, former Commissioner Clark noted:

In passing, I want to note that the equivalent section of the British Columbia Act (section 13) specifically states that “factual material” (among other things) cannot be withheld as “advice and recommendations”. As I stated, I fully appreciate that our section differs significantly from that of our neighbours. However, I cannot accept that the bare recitation of facts, without anything further, constitutes either “advice etc” under [section 24(1)(a)] or “consultations or deliberations” under [section 24(1)(b)].

In some circumstances, factual information can be conveyed that makes it clear a decision is called for, and what is recounted about the facts provides background for a decision that is to be made. Such a case involves more than merely “a bare recitation of facts”. Rather, what is recounted about particular events or the way in which they are presented may be said to constitute part of the ‘consultations or deliberations’ a decision maker uses to develop a decision. This may be so whether the decision maker specifically requests the information, or it is provided unsolicited having regard to the responsibilities of both the provider and receiver.

In Order F2017-65, the Director of Adjudication acknowledged that sometimes factual information may be arranged or presented in such a way as to necessitate a particular decision. In such cases, factual information may be considered subject to section 24(1)(a) or (b), depending on the circumstances. However, the background information appearing on record 726 and continuing until the information I have found to be subject to section 24(1) appears only intended to explain what had happened until that point. As a result, I conclude it is not subject to a provision of section 24(1).

[para 108] As I find that not all portions of records 726 – 727 are subject to section 24(1), I must direct the Public Body to provide the Applicant with access to the information I have found to be background facts, as discussed above.

Records 754 - 755

[para 109] I note that records 754 – 755 have some indications that the Public Body may have applied section 24(1)(a) to it at one time. These records are also duplicates of the Request to Proceed to Arbitration document, records 707 – 708, discussed above. However, the Public Body did not include these records in its index of records as being subject to section 24 or highlight anything in the document in red. It is therefore possible that the Public Body has disclosed these records to the Applicant, even though it has attempted to withhold other copies of these records.

[para 110] If it is the case that the Public Body has disclosed records 754 – 755, it should release the duplicates of these records to the Applicant. If not, my decisions in relation to records 754 and 755 are the same as my decisions in relation to records 707 and 708.

Record 757

[para 111] It is unclear from record 757 whether the Public Body intended to sever the information described as advice from the ARC or whether it intended to sever more than this. Regardless, I am satisfied that the information characterized as advice from the ARC, and highlighted in red in the document, is advice within the terms of section 24(1)(a). As discussed above, in my view, “decisions” of the ARC are better described as “advice developed for the Public Body”.

[para 112] However, without more, I am unable to say that the information that is not highlighted is anything other than background facts, and I will direct the Public Body to give the Applicant access to it.

Record 759

[para 113] Record 759 is a blank template form. The form is entitled “Arbitration Review Committee Appeal Letter Template”. The Public Body severed a portion of this form under section 24(1)(c). However, as the form is blank, I am unable to agree with the Public Body that it reveals its plans or other information subject to section 24(1)(c) in relation to contractual negotiations. I will direct the Public Body to disclose this record in its entirety.

Records 765 – 768

[para 114] Records 765 – 768 are a memorandum from the ARC asking questions of a program area in the Public Body and the program area’s answers. In my view, these questions and answers are likely consultations or deliberations within the terms of section 24(1)(b). That being said, records 805 – 808 are duplicates of these records, and there is no indication on the records, or on the index of records prepared by the Public Body that they were withheld from the Applicant. If the Public Body has disclosed records 805 – 808, nothing would be served by withholding records 765 – 768.

Record 798

[para 115] The Public Body severed a portion of an email appearing on record 798 on the basis of section 24(1)(c). I find that the severed information does not reveal information subject to section 24(1)(c). While I agree that the information could be characterized as a “plan”, it is not in relation to negotiations. As the plan does not relate to negotiations, section 24(1)(c) cannot apply. I will direct the Public Body to release record 798 in its entirety.

Record 801

[para 116] The Public Body severed a portion of a form appearing on record 801 on the basis of section 24(1)(c). I find that the severed information does not reveal information subject to section 24(1)(c). While I agree that the information could be characterized as a “plan”, it is not in relation to negotiations. As the plan does not relate

to negotiations, section 24(1)(c) cannot apply. I will direct the Public Body to release record 801 in its entirety.

Record 830

[para 117] The Public Body severed a sentence from an email appearing on record 830 under section 24(1)(b). I find that the sentence is intended as a statement of fact. I find that the statement is not a consultation or deliberation; there is no evidence before me that the Public Body had to make a decision regarding the fact stated in the email, or that it was part of a policy making process. I will direct the Public Body to give the Applicant access to this information.

Record 832

[para 118] Record 832 contains two emails. The Public Body severed portions of these emails on the basis of section 24(1)(b). With the exception of the final sentence in the top email, which I consider to be advice within the terms of section 24(1)(a), I am unable to find that these emails form part of a decision-making or policy-making process. I will therefore direct the Public Body to give the Applicant access to these emails, but for the final sentence in the top email.

Record 834

[para 119] The Public Body withheld a portion of an email from record 834 under section 24(1)(b). I am unable to find that the severed information is subject to section 24(1). There is no indication that the Public Body had a decision to make regarding the information, or that the comments severed from the email related to policy development. I am unable to find that the information is a consultation or deliberation. I will direct the Public Body to give the Applicant access to this information.

Record 837

[para 120] The Public Body severed portions of two emails from record 837. One email asks if something has been done, while the other provides a status report. The Public Body has applied section 24(1)(b) to sever the information. There is no indication in the records that the authors of the emails were deliberating over a decision they had to make or consulting with others as to what to decide. There is also no indication that the emails were intended to provide advice or other information subject to section 24(1)(a) to a recipient, or to ask for such. I will direct the Public Body to give the Applicant access to the severed information.

Exercise of Discretion

[para 121] In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* 2010 SCC 23 (CanLII), [2010] 1 SCR 815, the Supreme Court of Canada explained the process for applying discretionary exceptions in freedom of information legislation and

the considerations that are involved. The Court illustrated how discretion is to be exercised by discussing the discretionary exception in relation to law enforcement:

In making the decision, the first step the head must take is to determine whether disclosure could reasonably be expected to interfere with a law enforcement matter. If the determination is that it may, the second step is to decide whether, having regard to the significance of that risk and other relevant interests, disclosure should be made or refused. These determinations necessarily involve consideration of the public interest in open government, public debate and the proper functioning of government institutions. A finding at the first stage that disclosure may interfere with law enforcement is implicitly a finding that the public interest in law enforcement may trump public and private interests in disclosure. At the second stage, the head must weigh the public and private interests in disclosure and non-disclosure, and exercise his or her discretion accordingly.

[para 122] While the foregoing case was decided in relation to the law enforcement provisions in Ontario's legislation, it is clear from paragraphs 45 and 46 of this decision that its application extends beyond law enforcement provisions to the application of discretionary provisions in general and to the discretionary provisions in freedom of information legislation in particular. The provisions of section 24(1) of Alberta's FOIP Act are discretionary.

[para 123] Applying the principles in *Ontario (Public Safety and Security)*, a finding that section 24(1)(a) or (b) applies means that the public interest in ensuring that public bodies obtain candid advice *may* trump public or private interests in disclosing the information in question. After determining that section 24(1)(a) or (b) applies, the head of a public body must then consider and weigh the public and private interests in disclosure and non-disclosure in making the decision to withhold or disclose the information.

[para 124] Section 72(2)(b) of Alberta's FOIP Act establishes that the Commissioner may require the head to reconsider a decision to refuse access in situations when the head is authorized to refuse access. A head is authorized to withhold information if a discretionary exception applies to information. Section 72(2)(b) provision states:

72(2) If the inquiry relates to a decision to give or to refuse to give access to all or part of a record, the Commissioner may, by order, do the following:

(b) either confirm the decision of the head or require the head to reconsider it, if the Commissioner determines that the head is authorized to refuse access...

[para 125] The Public Body states:

After deciding that the records fell within section 24 the FOIP Coordinator in exercising his discretion pursuant to the section weighed the following factors: that the release of information could make consultation less candid, open and comprehensive; that staff members had a reasonable expectation that their deliberations, consultations and advice would be confidential and the objectives and purposes of the Act, including the Applicant's right of access. The Coordinator exercised his discretion to withhold access on the basis that consultations of staff had to be candid and such deliberations had to be kept confidential.

[para 126] In *Carey v. Ontario*, 1986 CanLII 7 (SCC), [1986] 2 SCR 637, the Supreme Court of Canada set out the following factors to consider when deciding whether releasing records will inhibit the functioning of government:

The foregoing authorities, and particularly, the *Smallwood* case, are in my view, determinative of many of the issues in this case. That case determines that Cabinet documents like other evidence must be disclosed unless such disclosure would interfere with the public interest. The fact that such documents concern the decision-making process at the highest level of government cannot, however, be ignored. Courts must proceed with caution in having them produced. But the level of the decision-making process concerned is only one of many variables to be taken into account. The nature of the policy concerned and the particular contents of the documents are, I would have thought, even more important. So far as the protection of the decision-making process is concerned, too, the time when a document or information is to be revealed is an extremely important factor. Revelations of Cabinet discussion and planning at the developmental stage or other circumstances when there is keen public interest in the subject matter might seriously inhibit the proper functioning of Cabinet government, but this can scarcely be the case when low level policy that has long become of little public interest is involved. [Emphasis added.]

[para 127] The Court held that when deciding to withhold or disclose information about government decision making in the public interest, it is important to consider the level of the government decision making process, whether the decision that was being made is current, whether the decision is significant and, in that case, whether producing the record serves the administration of justice.

[para 128] *Carey* addresses Crown privilege, rather than a freedom of information request; however, the considerations for applying Crown privilege to refuse production, and for withholding information under section 24(1) of the FOIP Act are similar. In my view, the factors listed in *Carey* assist in determining whether discretion is appropriately applied in relation to section 24(1). In the case of some records, it seems likely that the Public Body's decision making process could be impeded by their disclosure; however, in other cases, it is not clear that disclosure to the Applicant could have that effect, given the age of the information, the nature of the decision, and the level of the employees making the decisions for which advice was sought or given. While I agree with the Public Body that it should consider whether disclosing the information would affect its decision making processes, it is not clearly the case that this would be a reasonably likely outcome of disclosing all the records to which section 24(1)(a), (b), or (c) applies, given that in some cases the level of the decision maker, the subject matter of the decision, and the age of the information argues against it. However, the decision is minor in many cases, the information is old, and the decision makers are not necessarily senior. The Public Body does not address the age of the records or the level of the decision makers in its submissions regarding the exercise of discretion.

[para 129] Finally, I note that the Public Body appears to suggest that it is required to keep the consultations of its employees confidential. If that is so, then the Public Body has fettered its discretion in its application of section 24(1).

[para 130] For all these reasons, I must direct the Public Body to exercise its discretion again in relation to the records I have found to be subject to section 24(1). In

exercising discretion, it should consider the age of the records, the level of the decision maker, and the subject matter of the decision. In addition, it must not fetter its discretion by considering that it must withhold the deliberations of its employees in all cases.

Issue E: Did the Public Body comply with section 11 of the Act (time limit for responding)?

[para 131] Section 11 imposes a duty on a public body to respond to an applicant within 30 days. It states:

11(1) The head of a public body must make every reasonable effort to respond to a request not later than 30 days after receiving it unless

(a) that time limit is extended under section 14, or

(b) the request has been transferred under section 15 to another public body.

(2) The failure of the head to respond to a request within the 30-day period or any extended period is to be treated as a decision to refuse access to the record.

[para 132] The Public Body conceded that it did not comply with the terms of section 11 when it responded to the Applicant. As the Public Body has responded to the Applicant, there would be no benefit to ordering it to respond, which is the only order I can make when a public body does not comply with section 11.

V. ORDER

[para 133] I make this Order under section 72 of the Act.

[para 134] I confirm that the Public Body met its duty to assist the Applicant.

[para 135] I order the Public Body to give the Applicant access to the information it severed from records 433, 434, 442, 443, 445, 456, 459, 469, 484, 489, 498, 506, 528, 530, 588, and 643 under section 17. However, I confirm its decision in relation to its application of section 17 to other records.

[para 136] I order the Public Body to reconsider its application of section 24(1) to records 15, 31, 87, 176, 279, 309, 310, 321, 326, 340, 342, 444, 457, 493, 523, 563, 564, 587, 658, 707, 708, 757, 765, 768, 832, and to any duplicates of these records, taking into consideration only relevant factors, as discussed above. If the Public Body has already disclosed some of these records, then the Public Body should give the Applicant access to those records, without reliance on section 24(1).

[para 137] I order the Public Body to give the Applicant access to the remaining information in the records.

[para 138] I order the Public Body to notify me within 50 days of receiving this order that it has complied with it.

Teresa Cunningham
Adjudicator