

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2019-24

July 16, 2019

NORQUEST COLLEGE

Case File Number 000591

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request to NorQuest College (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act). He requested records regarding the Public Body’s respectful workplace policy and a summary report dated June 1, 2014 that had been prepared by an investigator regarding the Applicant’s allegations of workplace bullying. The Public Body located records but severed most of the information in the records under sections 17(1) (disclosure harmful to personal privacy) and 24 (advice from officials).

The Adjudicator found that the Public Body had not demonstrated that it had applied section 17(1) appropriately and ordered it to make a new decision. She stated:

I order the Public Body to make a new decision in relation to the application of section 17(1). Before applying section 17(1), it must first determine whether the information is the personal information of a third party. If it decides that the information is “personal information of a third party”, it must then consider whether the information is subject to section 17(2) or section 17(4). If it concludes that the information is subject to section 17(4), it must then make a decision under section 17(5) that considers only relevant factors. Finally, if it decides that section 17(5) requires it to withhold the information, it must then consider to what extent it can sever the information, and to provide the remainder to the Applicant. If, it finds it necessary to consider severing information, it may only withhold information on the basis that “meaninglessness” will result, if it first makes that determination after consideration of each specific piece of information that is left after severing.

In relation to the Public Body's application of section 24(1), the Adjudicator found that it had applied this provision to information that was subject to section 24(2)(b), given that the information was a statement of the reasons for a decision "made in the exercise of a discretionary power or adjudicative function". If a provision of section 24(2) applies to information, then section 24(1) cannot apply to it.

The Adjudicator confirmed that some information was appropriately severed under section 24(1), but directed the Public Body to disclose the remaining information to the Applicant, subject to the order to make a new determination under section 17(1).

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 6, 17, 24, 72

Authorities Cited: AB: Orders 99-018, F2003-016, F2012-20, F2015-29

Cases Cited: *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

I. BACKGROUND

[para 1] On February 2, 2015, the Applicant made an access request to NorQuest College (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act). He requested records regarding the Public Body's respectful workplace policy and a summary report dated June 1, 2014 that had been prepared by an investigator regarding the Applicant's allegations of workplace bullying.

[para 2] The Public Body responded to the access request three times. In its first response, on March 3, 2015, the Public Body informed the Applicant that it had located 274 pages of records, but that it was applying sections 17 (disclosure harmful to personal privacy) and 24 (advice from officials) to withhold information in the records from him.

[para 3] The Applicant requested review of the Public Body's decision to deny access to the records he had requested. The Commissioner authorized a senior information and privacy manager to investigate and attempt to settle the matter.

[para 4] On October 17, 2016, the Public Body provided a transcript of the Applicant's interview, a document entitled "Factual Findings and Conclusion", email correspondence from records 272 to 274, and the cover page of the investigation report.

[para 5] The Applicant requested that the Commissioner conduct an inquiry. The Commissioner agreed to conduct an inquiry and delegated her authority to conduct it to me.

[para 6] On October 6, 2017, the Public Body provided previously severed information to the Applicant from records 5 to 12.

[para 7] The parties exchanged submissions.

[para 8] After I reviewed the submissions of the parties and the records at issue, I wrote the Public Body and stated the following:

Section 17

The Public Body has applied section 17(1) to withhold information from the Applicant. However, it is not clearly the case that the information the Public Body has severed under this provision is personal information.

Not all information referring to an individual is necessarily personal information. Information associated with an individual in a professional, official or representative capacity may not be “about” the individual, but about the public body or organization employing the individual – in this case, NorQuest College. Information about the actions of an employee performing work duties may not be about the employee as an individual unless the information has personal consequences for the employee, such as when the information is about the employee being the subject of discipline, or there is something else about the information that gives the information a personal dimension. In Order F2013-51, the Director of Adjudication considered the question of whether information relating to an individual’s work duties was personal information and said:

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.

In this case, it appears that the Public Body may have severed information about employees acting in a representative capacity. It has severed the names of employees who provided witness statements and the statements the employees made; however, the context in which the severed information appears does not, on its own, support finding that the severed information is personal information. In Order F2014-23, I found that the fact that employees participated in an investigation and made witness statements did not mean that the statements were personal information, or contained personal information. More evidence as to context, beyond the content of the records at issue, was required to make that determination. I directed the public body in that case to gather evidence to support its decisions that the information was personal information; as the public body did not do so the records were ordered released in Order F2018-31.

Some of the information the Public Body severed under section 17 does not appear to be personal information at all, but appears to be factual information about the Public Body's operations, while other information appears to be about the Applicant. It may be that the Public Body severed such information on the basis that the information is contained in a witness statement; however, as noted above, witness statements are not necessarily personal information, and it is important to bear in mind that sections 1(n)(viii) and (ix) of the FOIP Act establish that personal opinions about another person are the personal information of that person, rather than the holder of the opinion.

In some cases, if the holder of an opinion is acting in his or her personal capacity when providing an opinion, the fact that the holder of the opinion holds the opinion, will be the opinion holder's personal information. However, if the opinion is provided in the performance of employment duties, and only documents what happened in the workplace in the course of performing employment duties, the identity of the opinion holder may lack a personal dimension.

In addition, assuming that the identity of those making witness statements is personal information, it is unclear why the name and identifying information of the witness could not be severed under section 6(2), and the remaining information provided to the Applicant.

I ask that the Public Body review its severing decisions in relation to section 17 to ensure that the information it has severed is personal information that may be severed under section 17. If it remains of the view that the information is personal information, then I ask that it provide additional evidence, such as the affidavit of the employee(s) whose information has been severed, to provide context for the information it believes to be personal information. I accept it is possible that some of the information severed from the records may have a personal dimension; however, I am unable to make that determination without additional context.

Section 24

In Order F2015-29, the Director of Adjudication interpreted sections 24(1)(a) and (b) of the FOIP Act and described the kinds of information that fall within the terms of these provisions. She said:

The intent of section 24(1)(a) is to ensure that internal advice and like information may be *developed* for the use of a decision maker without interference. So long as the information described in section 24(1)(a) is developed by a public body, or for the benefit or use of a public body or a member of the Executive Counsel, by someone whose responsibility it is to do so, then the information falls under section 24(1)(a).

A consultation within the terms of section 24(1)(b) takes place when one of the persons enumerated in that provision solicits information of the kind subject to section 24(1)(a) regarding that decision or action. A deliberation for the purposes of section 24(1)(b) takes place when a decision maker (or decision makers) weighs the reasons for or against a particular decision or action. Section 24(1)(b) protects the decision maker's request for advice or views to assist him or her in making the decision, and any information that would otherwise reveal the considerations involved in making the decision. Moreover, like section 24(1)(a), section 24(1)(b) does not apply so as to protect the final decision, but rather, the process by which a decision maker makes a decision.

Order F2015-29 has been followed in numerous decisions of this office.

I am unable to say, based on the records, that the Public Body has properly applied section 24(1). While I accept that it could apply to information in the records, I have been provided insufficient information as to the role within the organization of the authors and recipients of the severed information, and the decisions or policies the severed information was intended to influence.

I therefore ask that the Public Body provide evidence to support its application of section 24(1) to the records. In addition, I ask that it provide its theory as to how section 24(1) applies to each instance of severing. If the Public Body finds it necessary to refer to the content of severed or confidential information in order to provide the evidence and argument I have requested, I am prepared to accept its submissions *in camera* to the extent that they refer to the records at issue or other confidential information.

[para 9] In response, the Public Body provided additional submissions. It also provided an *in camera* submission, which I accepted *in camera*.

II. INFORMATION AT ISSUE

[para 10] The information severed from the records is at issue.

III. ISSUES

Issue A: Does section 17(1) of the FOIP Act require the Public Body to sever the information to which it applied this provision?

Issue B: Did the Public Body properly apply section 24(1) of the FOIP Act?

IV. DISCUSSION OF ISSUES

Issue A: Does section 17(1) of the FOIP Act require the Public Body to sever the information to which it applied this provision?

[para 11] Section 1(n) defines personal information under the Act:

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;*

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

[para 12] Section 17 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.

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

[...]

(e) the information is about the third party's classification, salary range, discretionary benefits or employment responsibilities as an officer, employee or member of a public body or as a member of the staff of a member of the Executive Council,

[...]

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

[...]

(d) the personal information relates to employment or educational history,

[...]

(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

[...]

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

[...]

(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 13] Section 17 is restricted in its application to “personal information”. If information is not personal information, it may not be withheld under the authority of this provision.

Is all the information the Public Body withheld from the Applicant personal information that may be withheld under section 17?

[para 14] From my review of the records, I conclude that the Public Body has severed information about the Applicant, its investigator, and its employees from the records under section 17(1). In many cases, the Public Body severed entire interviews of witnesses conducted by the investigator it retained to investigate the Applicant's bullying complaint.

[para 15] In its initial submissions, the Public Body provided the following explanation of its severing decisions:

Section 17 as per Order F2003-016 clearly states that an Investigation Report contains personal information, and because section 17 is a mandatory exception, the personal information must be withheld.

As referenced in Order F2003-016, section 17(4) lists a number of circumstances where disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy. As such, the names of interviewed third parties as part of the investigation were withheld; this includes opinions that could reveal the identity of individuals interviewed. In addition, the order explains that the nature of a Human Resources Investigation Report implies confidentiality. The records referenced within the order are similar to the Investigation Report which is the subject of the Access to Information Request for this inquiry and supports NorQuest's decisions under section 17 of the FOIP Act.

Order F2003-016 also identifies that a Human Resources Investigation Report itself is embedded with personal details that if released would reveal personal information in contradiction to the FOIP Act. The severed information in the NorQuest College Investigation Report is similar to that which is in the order and is clearly section 17 because it is the personal information of a third party who is not the Applicant and disclosure is an unreasonable invasion of personal privacy.

Finally, as per Order F2003-016 the severed records of this inquiry do not contain information that could be considered personal about the Applicant. It does contain personal information such as the names of interviewees, third party employment history, and details of private events that pertain to a third party. The college's decision to withhold information because it is not considered the personal information of the Applicant in this Access to Information Request for this inquiry is supported by the order.

Based on this order and the mandatory exception of section 17, the college believes that the information was withheld in accordance with and supported by the FOIP Act.

[para 16] As noted in the background above, once I reviewed its submissions, I asked the Public Body to provide evidence to support its decision that all the information to which it applied section 17(1) is personal information. I referred it to recent decisions of this office addressing this question. The Public Body provided further explanation of its severing decisions. The Public Body reiterated that Order F2003-016 authorized its severing decisions.

[para 17] In Order F2003-016, the Adjudicator found that most, but not all, information regarding a human rights complaint was personal information. He said:

The Public Body argues that all of the records contain personal information of the Affected Parties. In addition, the Public Body argues that although the records discuss a series of events involving the Applicant, the records do not contain "opinions" about the Applicant. In the alternative, the Public Body argues that if the records contain personal information about the Applicant, the personal information is so intertwined with the Affected Parties' personal information that it cannot be severed without making the rest of the record meaningless.

After a review of the records, I find that pages 14-30 of Package #1 and the pages within Package #2 consists of the personal information of several Affected Parties. In addition, I find

that some of the information is intertwined with the Applicant's personal information such that it cannot reasonably be separated.

However, I find that page 5 of Package #3 does not contain the personal information of the Affected Parties. Furthermore, as there are no other mandatory exceptions that apply to this page and the Public Body did not claim any other discretionary exceptions in regard to this page, I intend to order the Public Body to disclose this information to the Applicant.

[para 18] Where he found information about third parties to be personal information, he said:

I find that section 17 applies to the Affected Parties's [sic] personal information on pages 14-30 of Package #1 and all of the pages within Package #2. Disclosure of this information would be an unreasonable invasion of the Affected Parties' personal privacy as provided by section 17(1) and 17(4) and must not be disclosed. As such, I intend to order the Public Body not to disclose this information to the Applicant. In addition, I find that the Applicant's personal information within these pages is intertwined with the personal information of the Affected Parties and cannot reasonably be separated. Consequently, the Applicant's personal information on these pages cannot be disclosed.

[para 19] The Adjudicator's reasons for finding that information was personal information or, alternatively, not personal information but meaningless information, are not apparent in Order F2003-016. As a result, Order F2003-016 does not constitute authority for a broad principle that all information in an investigation report may be withheld under section 17(1). If information is personal information falling within the terms of section 17(4) and there are no relevant factors outweighing the presumption created by section 17(4), the information may be withheld from an applicant. However, information that does not meet this description, may not be withheld under section 17(1) (with the exception of section 17(3), which is limited in scope).

[para 20] The Public Body in the case before me has severed all statements made by third parties, and the names of third parties and entire interviews. While some of the severed information may constitute personal information of third parties, some does not. For example, most of the questions posed by the interviewer do not impart information about third parties. While many of the questions contain information about the Applicant, unless inextricably intertwined with information about a third party, information about an applicant is not information that can be withheld from an applicant under section 17(1). This is because section 1(r), which defines the term "third party" for the purposes of the FOIP Act, establishes that applicants, like public bodies, are not third parties. Only information about a third party may be withheld under section 17(1).

[para 21] The Public Body has severed information about the Applicant, not only where it appears in questions, but in the answers provided by interviewees. In some cases the information appears to be factual, as in the case where interviewees recount events. In other cases, the interviewees interpret the Applicant's actions, which suggests that the information is an opinion about the Applicant. Under section 1(n)(viii) of the FOIP Act, an opinion about an individual, is not the personal information of the opinion holder, but that of the individual whom the opinion is about.

[para 22] As I noted in my letter to the Public Body, reproduced above, the fact that an individual recounts events involving other individuals and has knowledge of them, or has formed an opinion, may be personal information about that individual. If the individual who recounts events or forms an opinion about someone else does so in a professional capacity, the fact that the individual recounted events or formed an opinion will not be personal information. However, if the individual recounted events or formed the opinion in the individual's personal capacity, then the information may have a personal dimension and be personal information. If the information is personal information, a public body must then conduct an analysis under section 17(1) to determine whether the information of the individual who provided the facts or opinion should be withheld or disclosed. If it is to be withheld, then the Public Body must comply with its duty under section 6(2) of the FOIP Act and consider whether it is possible to sever the identity of the individual who recounted events or provided an opinion and to provide the information about the applicant to the applicant.

[para 23] As it appears that the Public Body has severed information under section 17(1) that is not personal information, or is, alternatively, the personal information of only the Applicant, I must direct it to review the information it has severed under section 17(1) and to make new determinations as to whether the information is personal information of a third party or not. If it is not, then the information cannot be severed under section 17(1).

[para 24] After the Public body has reviewed the records to determine whether the information is personal information, it must then determine whether section 17(1) requires it to withhold the information.

Does section 17(1) require the Public Body to sever information from the records?

[para 25] 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) establishes that disclosing certain kinds of personal information is not an unreasonable invasion of personal privacy.

[para 26] 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). It is important to note that section 17(5) is not an exhaustive list and any applicable relevant circumstances must be considered when making the decision as to whether it would be an unreasonable invasion of personal privacy to disclose the requested personal information. Section 17(1) requires the head of a public body to withhold personal information when the head concludes, after consideration of the factors under section 17(5), that disclosing the personal information would be harmful to the personal privacy of a third party.

Section 17(5)

[para 27] Section 17(5), reproduced above, lists circumstances that may weigh for or against disclosing personal information. Among these is the circumstance in which the applicant has supplied the personal information in question to the public body. As noted in Order F2012-20:

Section 17(5)(i) requires consideration to be given to whether the Applicant has provided a third party's information to the public body. If the Applicant is the source of the third party information in a public body's possession, then this is a factor weighing in favor of finding that it would not be an unreasonable invasion of personal privacy to disclose this information to an applicant.

In this case, the Applicant supplied some of the personal information that the Public Body has severed. Record 5 contains examples of personal information supplied by the Applicant that the Public Body has severed.

[para 28] The Public Body argues that section 17(5)(f) applies and weighs against disclosing personal information.

[para 29] I am unable to accept the Public Body's position that the information it has severed from the records was "supplied in confidence". Rather, I note that the Public Body's Code of Conduct Policy and Respectful Workplace and Learning Environment Policy Complaints and Investigation Procedure states:

Interviewees will be read the following statement at the beginning of all interviews in order to be notified of the FOIP requirements:

- The personal information you provide is collected under the authority of Section 33(c) of the Alberta Freedom of Information and Protection of Privacy Act and will be used for the purpose of administering an investigation. This information may also be disclosed to the police for the purpose of a police investigation. Should you have any questions regarding the collection and use of this information please contact your Human Resources Consultant.

The interviewee will also be notified of the importance of confidentiality, and that they should not share the details of the meeting with anyone else during the course of the investigation.

[para 30] The foregoing excerpt indicates to interviewees that the information they provide will be used by the Public Body for the purpose of conducting an investigation and may be disclosed to the police. In view of the presence of this caution, I am unable to make a determination as to the extent that the interviewees supplied answers with expectations of confidentiality.

[para 31] The Public Body's procedure document does refer to confidentiality; however, it imposes confidentiality on interviewees to keep the nature of its investigation confidential. There is no ability in the procedure for an interviewee to impose conditions of confidentiality on the Public Body. Moreover, I note that the investigator references third party information in questions of the Applicant at various points. (See, for example,

lines 1418 and 1552.) As a result, I am unable to find that section 17(5)(f) is a relevant consideration with regard to making a determination as to whether it would, or would not be an invasion of personal privacy to disclose personal information from the interviews.

[para 32] Past orders of this office have considered four factors in determining whether information is supplied in confidence. In Order 99-018, former Commissioner Clark decided that the following factors should be considered in determining whether information has been supplied in confidence:

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

- (1) Communicated to the [public body] on the basis that it was confidential and that it was to be kept confidential.
- (2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the Third Party prior to being communicated to the government organization.
- (3) Not otherwise disclosed or available from sources to which the public has access.
- (4) Prepared for a purpose which would not entail disclosure.

[para 33] If the Public Body obtains evidence from the interviewees that enables it to determine that any personal information supplied was supplied in confidence, with reference to the factors above, then it should consider section 17(5)(f) as a relevant factor when determining whether it would be an unreasonable invasion of personal privacy to disclose the information. However, if it does not, then section 17(5)(f) would be an irrelevant consideration and should not be considered.

[para 34] Finally, I note that in Order F2003-016, the Adjudicator found that any information left over, once personal information was redacted, would be “meaningless”. The Public Body has not indicated to me if there is information it considers to be personal information, and information it considers would be meaningless, once the personal information is removed. As it is unclear in the records whether personal information has been severed, and the reasons for it, I am unable to conclude that if personal information were severed from the records that the remainder would be meaningless to the Applicant.

[para 35] As I am unable to confirm the Public Body’s decision to sever information under section 17(1), I intend to direct it to make new decisions in relation to section 17(1). The new decision must consider whether information is personal or not. If the information is held to be personal, then the Public Body should consider whether the information is subject to section 17(2) or 17(4). If it is subject to section 17(4), then the Public Body must consider all relevant factors under section 17(5), which may include consideration of section 17(5)(f), if it is established to be relevant, and consideration of whether the information was supplied by the Applicant, or whether severing the information would result in absurdity, where these factors are relevant.

Issue B: Did the Public Body properly apply section 24(1) of the FOIP Act?

[para 36] In its submissions, the Public Body indicates that it is relying on sections 24(1)(a) and (b) of the FOIP Act to sever the information to which it applied section “24(1)”.

[para 37] Section 24 states, in part:

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,

[...]

(2) This section does not apply to information that

[...]

(b) is a statement of the reasons for a decision that is made in the exercise of a discretionary power or an adjudicative function,

[...]

[para 38] 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 39] 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. I note too that this interpretation is consistent with *John Doe v. Ontario (Finance)*, 2014 SCC 36 (CanLII) in which 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 40] Section 24(2) of the FOIP Act, referenced above, removes the ability of the head of a public body to apply section 24(1) to certain types of information. For example, information that is a statement of the reasons for a decision that is made in the exercise of a discretionary power or an adjudication function within the meaning of section 24(2)(b) cannot be withheld under section 24, even if the information otherwise

meets the requirements of section 24(1). Before a public body applies section 24(1) to information, it is necessary to consider whether a provision of section 24(2) also applies to the information. If so, the information cannot be withheld under section 24(1).

[para 41] While not binding on me, I note that the *Freedom of Information and Protection of Privacy Guidelines and Practices Manual 2009*¹, published by the Government of Alberta, states on page 184 that section 24(2)(b) applies when a decision has already been made and is not merely contemplated. It suggests that “reasons for a decision” means the motive, rationale, justification or facts leading to a decision, while “exercise of discretionary power” is considered to refer to making a decision that cannot be determined to be right or wrong in an objective sense. Further, it suggests that “adjudicative function” means a function conferred upon an administrative tribunal, board or other non-judicial body or individual that has the power to hear and rule on issues involving the rights of people and organizations. I find that this analysis is a reasonable interpretation of section 24(2)(b). Section 24(2)(b) ensures greater transparency in decisions affecting individual rights, by ensuring that the reasons for a decision cannot be withheld under section 24(1) even when the reasons for a decision are the result of taking advice or deliberating and such information is reflected in the reasons.

[para 42] I turn now to the question of whether the Public Body has properly applied section 24(1) to the records.

[para 43] The Public Body argues:

Certain types of advice and recommendations are recurring, throughout the responsive records. NorQuest College used section 24 to redact advice and recommendations that were made. This includes:

- Professional advice and recommendations that seek to improve working conditions,
- Investigator and interviewees offering advice in relation to specific incidents,
- Investigator offering advice and recommendations on testimony provided by interviewees which includes recalling of incidents and evidence presented by employees,
- The Investigator made recommendations on what would and would not constitute harassment, and
- NorQuest employees made recommendations, and strategized, on how to implement a performance management plan.

Additionally, it is noteworthy that the Investigation Report and its attachments were created or aggregated by the hired Investigator. The Investigator then provided all of the information to the Executive Director, Workforce Development and Human Resources to make a decision on.

This aligns with standard NorQuest College procedure as noted within the 2015 “Code of Conduct Policy and Respectful Workplace and Learning Environment Policy Complaints and

¹ Service Alberta, FOIP Guidelines and Practices 2009, (Edmonton; Government of Alberta, 2009) p. 184

Investigation Procedure.” As per the procedure, the Executive Director has the authority to make the decision on complex cases such as this, and is responsible for determining what that corresponding actions would be.

Interviews with witnesses and the investigator’s findings: records 2, 10,11, 13 – 40, 42 – 61, 63, 140 – 256

[para 44] The majority of information to which the Public Body applied section 24(1) is information appearing in an investigation report. The Public Body’s Code of Conduct Policy and Respectful Workplace and Learning Environment Policy Complaints and Investigation Procedure provides the following regarding the preparation of an investigation report and its investigation process:

The investigator will be credible, objective, neutral, consultative, and sensitive to the needs of the people he/she is interviewing. The investigator must ensure procedural fairness by behaving fairly and equitably towards all parties.

Before any interviews with AUPE or Faculty members, those members must be advised of their right to union representation during the investigation.

The investigator may interview any one that can help inform the investigation including: the complainant, respondent, the employees’ manager or supervisor and witnesses.

Prior to interviewing the respondent, the investigator will inform the respondent of all of the allegations that have been made against them. It is the [Investigator’s] duty to provide them with the allegations as per the submitted Policy Complaint / Public Interest Disclosure Report Form.

The investigator has the discretion to determine which witnesses to interview and may decide not to interview certain individuals if it unlikely they will add any value to the investigation.

[...]

The investigator will take notes during the interview. These notes will be provided back to the interviewee to review for omissions or errors. Once validated they will sign their interview notes and they will be placed into the investigation file.

Investigation Decision

Once all interviews are complete the investigator will compile all evidence into an investigation report. The investigator then must determine, based on a balance of probabilities, whether or not a breach of policy occurred. This is done based on the civil standard of proof that an incident was more likely to have occurred than not.

In cases where harassment has been alleged, the investigator must establish whether the conduct meets the definition of harassment, in accordance with the policy.

From this report the conclusions of the investigation will be outlined. Possible conclusions include:

- A breach of policy did occur
- A breach of policy did not occur
- No findings, based on lack of evidence
- Not a breach of policy, but inappropriate behavior

Allegations in Bad Faith

If there is evidence to demonstrate that the allegations are vexatious or made in bad faith this must be immediately brought up by the investigator to the Executive Director, Human Resources.

Advising the Parties

Once the investigation is complete the full investigation report is submitted to the Executive Director, WDHR, for review. Following the review, the complainant and respondent will be provided with a letter stating:

The decision
An outline of how the complaint will be resolved (if any)
A summary of the findings

This letter is delivered marked as confidential with the notation that it should be kept in confidence unless disclosure is required by law or is necessary to implement corrective action or other legal remedies.

The parties will not be given access to see or receive the full report or witness statements.

Administrative Closure

Where a complainant does not accept or agree to the investigator's findings, he or she must submit a detailed written request to the Executive Director, WDHR within 7 business days of the decision being released explaining precisely what they disagree with and why.

The Executive Director, WDHR will examine the investigation file and submit a final report back to the complainant. If the Executive Director agrees with the [investigator's] findings, the case will be considered closed.

If no written complaint is received within the 7 business days of the decision being released, the complaint file will be considered complete and closed.

[para 45] From the foregoing, I conclude that when a complaint, such as that made by the Applicant in this case, is made, the Public Body retains an investigator to interview witnesses, assess evidence, and make a determination as to whether the complaint is sustained or not, on the balance of probabilities. If the executive director agrees with the conclusions of the investigator, or no written complaint is received regarding the decision, then the matter is closed.

[para 46] The Public Body has severed information from the investigator's interviews with witnesses, his evaluation of evidence, and his decision as to whether the complaint was sustained on the basis of section 24(1)(a) and (b). For the reasons that follow, I find that these provisions cannot apply to the severed information.

[para 47] In its arguments, the Public Body characterizes the evidence of witnesses and the questions asked by the investigator as "consultations". It also characterizes the findings and conclusions of the investigator as "advice" given to the Public Body.

[para 48] As discussed above, consultations for the purposes of section 24(1)(b) take place when one of the persons enumerated in that provision solicits information of the kind subject to section 24(1)(a) regarding a decision or action. For example, a consultation within the terms of section 24(1)(b) takes place when a decision maker asks for advice or analysis to assist the decision maker to make a decision.

[para 49] The Public Body applied sections 24(1)(a) and (b) to some information in the witness statements. In the complaint process established by the Public Body, when a witness gives evidence, the witness is not providing advice to the interviewer as to what the interviewer should decide. The witness is recounting observations. The decision maker will then weigh the evidence provided by the witness independently to make findings as to what likely happened. Information of this kind is not subject to section 24(1) as it is not intended to guide or influence policy.

[para 50] The Public Body also applied section 24(1)(a) and (b) to the findings and decision of the investigator regarding the Applicant's complaint. Having read the report, I am satisfied that the information to which the Public Body applied sections 24(1)(a) and (b) is information that is subject to section 24(2)(b); that is, information that is a statement of the reasons for a decision that is made in the exercise of a discretionary power or an adjudicative function within the terms of section 24(2)(b). As a consequence, this information cannot be withheld under section 24(1).

[para 51] I am unable to support the Public Body's application of section 24(1) to records 2, 10, 11, 13 – 40, 42 – 61, 63, and 140 – 256 and I will direct it to give the Applicant access to any information in these records that is not subject to my direction in relation to section 17(1).

[para 52] I turn now to records 262 – 263, 264 – 265, 266, 267, 268 – 269, 270 – 271, to which the Public Body also applied provisions of section 24(1). These records consist of discussions between officials of the Public Body as to decisions that had to be made. I agree with the Public Body that these are appropriately considered as advice and analysis within the terms of section 24(1)(a) and as consultations or deliberations within the terms of section 24(1)(b).

[para 53] As I have found that the information severed from records 262 – 263, 264 – 265, 266, 267, 268 – 269, 270 – 271 is subject to sections 24(1)(a) and (b), I must now address the question of whether the Public Body exercised its discretion appropriately.

[para 54] 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 55] 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 56] 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 57] 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...

The Public Body argues that disclosing the information from records would make future discussion of similar issues less candid.

[para 58] From my review of the records, I agree that disclosing advice and consultations of this nature could have a chilling effect on the ability of supervisors to obtain labour relations advice. As a result, I find that the Public Body appropriately severed information from records 262 – 263, 264 – 265, 266, 267, 268 – 269, and 270 – 271.

[para 59] To conclude, I find that the Public Body properly applied section 24(1) to records 262 – 263, 264 – 265, 266, 267, 268 – 269, and 270 – 271. However, I find that section 24(1) does not apply to records 2, 10, 11, 13 – 40, 42 – 61, 63, 140 – 256 and I will direct the Public Body to disclose any information withheld from the Applicant from

these records that is not subject to my direction to reconsider the application of section 17(1).

V. ORDER

[para 60] I make this Order under section 72 of the Act.

[para 61] I order the Public Body to make a new decision in relation to the application of section 17(1). Before applying section 17(1), it must first determine whether the information is the personal information of a third party. If it decides that the information is “personal information of a third party”, it must then consider whether the information is subject to section 17(2) or section 17(4). If it concludes that the information is subject to section 17(4), it must then make a decision under section 17(5) that considers only relevant factors. Finally, if it decides that section 17(5) requires it to withhold the information, it must then consider to what extent it can sever the information, and to provide the remainder to the Applicant. If it finds it necessary to consider severing information, it may only withhold information on the basis that “meaninglessness” will result, if it makes that determination after consideration of each specific piece of information that is left after severing.

[para 62] I confirm the decision of the Public Body to apply sections 24(1)(a) and (b) to records 262 – 263, 264 – 265, 266, 267, 268 – 269, and 270 – 271.

[para 63] Subject to my order to reconsider the application of section 17(1), I order the Public Body to give the Applicant access to the information it severed from records 2, 10, 11, 13 – 40, 42 – 61, 63, 140 – 256 under section 24(1).

[para 64] I order the Public Body to inform me within 50 days of receiving this order that it has complied with it.

[para 65] In the interest of ensuring that the Applicant’s rights under the FOIP Act are adjudicated in a timely manner, I have decided to retain jurisdiction over this matter. If the Applicant is dissatisfied with the Public Body’s response, once the Public Body responds, he may request review of the new response and I will schedule an inquiry regarding the new response.

Teresa Cunningham
Adjudicator