ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER P2015-05

May 15, 2015

FAIRMONT HOTELS AND RESORTS INC.

Case File Numbers P2004, P2210 and P2418

Office URL: www.oipc.ab.ca

Summary: The Applicant made three access requests to his former employer, Fairmont Hotels and Resorts Inc. ("the Organization") for information in his personnel file. The Organization responded to his first request, providing some of the responsive records it was able to locate, but withholding some of them on the basis of section 24(2)(a) (legal privilege), and section 24(2)(b) (confidential commercial information). The Organization responded to his second request by providing additional records, but withholding some records pursuant to sections 24(2)(a), 24(2)(b), 24(2)(c) (investigation or legal proceeding), 24(2)(d) (information may no longer be provided), and 24(3)(c) (confidential opinions). The Organization did not respond to the Applicant's third access request for many months, and when it did, it said it was unable to find responsive records (though providing a final ROE).

The Adjudicator found that many of the records the Applicant requested did not consist of information that was solely his personal information. Rather, much of the information was not his personal information at all, and much that was his personal information was inseparably intertwined with the opinion information of others. As an applicant has no right under the *Personal Information Protection Act* ("PIPA" or "the Act") to access information other than that which is his solely his own personal information, the Adjudicator confirmed the Organization's decision to refuse to provide to the Applicant information that did not consist solely of his own personal information.

The Adjudicator ordered the Organization to provide the parts of the Applicant's FSI test results to him that did not reveal confidential commercial information that it was reasonable to withhold.

She found that the Organization had performed an adequate search for records, but had initially failed to meet its duties under section 29 when responding to the Applicant's first request, and also failed to meet its duties under section 28 of the Act when it failed to respond to the Applicant's second and third requests.

Statutes Cited: AB: *Personal Information Protection Act* S.A. 2003, c. P-6.5 ss. 1, 24, 27, 28, 29, and 52; *Criminal Code*, RSC 1985, c C-46.

Authorities Cited: AB: Order P2007-002, P2011-D-003, P2012-04, P2009-010.

Cases Cited: *Moseley v Spray Lakes Sawmills (1980) Ltd.***,** 1996 ABCA 141 (CanLII), 184 AR 101, *Nova, An Alberta Corporation v Guelph Engineering Co* (1984), 50 AR 199.

I. BACKGROUND

[para 1] The Applicant is a former employee of the Organization. On September 19, 2011, he asked it for a complete copy of his personnel file. Specifically, he requested:

1. My original resume and application
2. The results of my first "Fairmount Standardized Interview (FSI) and how it was graded in Oct 2003
3. All of my yearly employee performance reviews
4. My June 13, 2011 Application for internal transfer
5. My June 14, 2011 results of interview with [an employee of the Organization]. This should also include the pages from the book in which she made continuous handwritten notes throughout our hour long meeting (minimum 4 pages)
6. The result of my interview with [an employee of the Organization] on June 22, 2011
7. Any notes or written comments taken of meeting between [employees of the Organization] and myself on June 24, 2011
8. Any information regarding my short term disability and my present status of employment
9. My August 19, 2011 application for internal transfer
10. The results and recommendations for my Aug. 2011 FSI and how it is graded
11. The results and recommendations of my interview with [an employee of the Organization] June 2011
12. The result and recommendations of my meeting with [employees of the Organization] on Sept 6, 2011
13. The results and recommendations of my meeting with [an employee of the Organization] Sept 15, 2011
14. Any commendations or disciplinary actions

15. Any other recorded notes or commentary such as the accusations by [an employee of the Organization] during the June 22, 2011 interview of "found reading a newspaper twice", or, "found sleeping in the Wedgewood once."
16. My current pension information
17. My attendance record "Applicant also wants to include paid sick days" [this notation was added by someone other than the Applicant on Nov 1, 2011]

(Applicant's access request, dated, September 19, 2011)

[para 2] On September 29, 2011 the Organization made available to the Applicant what it says it believed at the time was his entire personnel file.

[para 3] On October 3, 2011, the Applicant wrote to the Office of the Information and Privacy Commissioner and requested a review of the Organization's response to this access request. Mediation was authorized by the Commissioner.

[para 4] On December 28, 2011, the Organization provided the Applicant a written response to his access request. However, it said it was unable to locate any employee performance reviews for the years 2004, 2005 and 2007 (item #3 above), any notes from a meeting of June 24, 2011 (item #7 above), nor results of an interview in June, 2011 (item #11 above). The Organization also said it did not have an attendance record or a record of paid sick days (item #17 above), but did provide a Record of Employment.

[para 5] As well, the Organization said it was withholding some records (which it described as notes of two meetings with the Applicant, one on June 22, 2011 with one named hotel employee (item #15 above), and another on September 15, 2011 with another named hotel employee (item #13 above)) in reliance on section 24(2)(a) (legal privilege). It also said it was withholding some records, items #2 and #10 above, in reliance on section 24(2)(b) (information that would reveal confidential information of a commercial nature).

[para 6] The Applicant requested an inquiry on January 23, 2012.

[para 7] On April 13, 2012, the Applicant made a second request to the Organization, for his updated personnel file. He specified the following records:

1. Any medical information or updates from Great West Life or the Fairmont Hotel MacDonald
2. Any policy changes made to the coverage provided by Great West Life
3. Any information regarding the Privacy Commissioner acting on my behalf
4. The incident report I filed against [an employee of the Organization] on or about the 23rd of Oct, 2012
5. All notes, information and recommendations from my meeting with [employees of the Organization] Oct 24, 2012
6. The registered letter from the Fairmont Hotel MacDonald stating my restrictions and conditions

7. The results of the complete and thorough investigation into the assault by whomever investigated it on behalf of the Fairmont Hotel MacDonald such as security camera footage, eye witness accounts from [employees of the Organization], if any disciplinary actions were taken, or plans to prevent this from happening again, etc.
8. Any information provided by [an employee of the Organization], regarding her complete and thorough investigations into the two separate Fairmont Ethics Hotline complaints I registered
9. All of the recorded notes taken at my meeting with [an employee of the Organization] on or about Oct 24, 2011, by herself as well of those of her assistant recording the meeting
10. Any additional records or information that I may have missed in this list.

(Applicant's access request dated, April 13, 2012)

[para 8] On May 31, 2012, the Organization responded and provided the Applicant with additional information. It said there were no responsive records for item #2 above. Other information was located but withheld pursuant to sections 24(2)(a) (item #7 above), 24(2)(b), 24(2)(c) (information collected for an investigation or legal proceeding), 24(2)(d) (disclosure may result in that type of information no longer being provided to the organization) and 24(3)(c) (disclosure would identify a third party who gave the information in confidence) (item #9 above). On November 14, 2012, the Applicant wrote to this office and requested a review of the Organization's response.

[para 9] On May 3, 2013, the Applicant once again wrote to the Organization and requested an updated version of his personnel file, including:

1. Copies of the automatic deposit information, for the pay period of December 15, 2005, August 19, 2010, and May 12, 2011;
2. Copies of every direct deposit made to the Applicant by the Organization;
3. Copies of any information or documentation between Great West Life and the Organization regarding the Applicant, or his work approved medical leave including any payments made to the Applicant, letter of instructions; e-mails, plan coverage, cancellations, termination, and any additional items from April 14, 2012 to February 28, 2013;
4. Copies of any correspondence, emails, notifications, letters, etc., between the Applicant and certain employees of the Organization or the Organization's lawyers including the Applicant's return to work information requests, doctor reports, a couple of work action time delay responses, staff party notice, termination notices (including both the final offer and the previous one), officially appointed contact cancellation information, formal request documents, etc., from April 14, 2012 to present.

[paraphrase of the May 3, 2013 request)

[para 10] The Organization did not respond, and on July 31, 2013, the Applicant requested a review of the Organization's failure to respond.

[para 11] On September 29, 2014, the Organization responded to the Applicant's May 3, 2013 request. The Organization indicated it had found no records responsive to the Applicant's specific requests, but did provide him with a Record of Employment dated January 23, 2013 (which noted amounts paid for sick days). It also said it was withholding summaries of telephone calls made between November 14, 2011 and November 20, 2012, which it said were between the Organization and Applicant, and between the Organization and its solicitors, both pursuant to section 24(2)(a) of the Act.

[para 12] As there are overlapping issues, it was decided all three of the Applicant's access requests would be dealt with in this inquiry. To this end, the Notice of Inquiry was issued July 31, 2014. I received both initial and rebuttal submissions from both parties.

[para 13] As well, the Applicant requested a variation to allow for one final submission. I allowed this initially but the Applicant did not respond within the specified timeframe. He did provide an additional request for a variation/time extension, to allow him to respond to the rebuttal submission provided by the Organization. I have reviewed the Organization's rebuttal submission, which reiterates and reemphasizes points made in its initial submission, and refers to an Affidavit provided in that initial submission. The Applicant has already had an opportunity to respond to these points, and to the Affidavit. I saw no reason to provide him with a second opportunity to do these things. Accordingly, I decided it was not necessary for me to allow for a further extension and variation to permit the Applicant to provide an additional submission outside the usual processes of this office, in order to reach my conclusions in this matter.

[para 14] The Organization did not initially provide for my review the records for which it relied on section 24(2)(a) of the Act, instead making use of this office's solicitor-client privilege adjudication protocol. However, as its submissions suggested that some of the information was being withheld in reliance on litigation privilege, I informed the Organization that the protocol was meant to apply only to records for which solicitor-client privilege was being claimed, but not to litigation privilege. The Organization responded by providing the latter records for my review. However, it continued to withhold from my review records for which it was relying on solicitor-client privilege.

II. INFORMATION AT ISSUE

[para 15] The information at issue in this inquiry are the records that were withheld by the Organization when it responded to the Applicant's access requests, as well as information that the Applicant believes ought to exist but which the Organization did not provide in its responses.

III. ISSUES

[para 16] The Notice of Inquiry dated July 31, 2014 lists the issues for this inquiry as follows:

Issue A: Is the information the Applicant is requesting the Applicant's personal information?

Issue B: If the Organization refused to provide access to the Applicant's personal information in its custody or control, did it do so in accordance with section 24(2) or with section 24(3)? In particular,

a. **Did the Organization properly apply section 24(2)(a) (legal privilege)?**

b. **Did the Organization properly apply section 24(2)(b) (confidential information of a commercial nature) to certain requested records or parts thereof?**

c. **Did the Organization properly apply section 24(2)(c) (information collected for an investigation or legal proceeding) to certain requested records or parts thereof?**

d. **Did the Organization properly apply section 24(2)(d) (will result in information no longer being provided) to certain requested records or parts thereof?**

e. **Does section 24(3)(b) (information revealing personal information about another individual) apply to certain requested records or parts thereof?**

f. **Does section 24(3)(c) (information revealing identity of a person who provided opinion in confidence) apply to certain requested records or parts thereof?**

Issue C: If the withheld records contain or consist of personal information of the Applicant, and if section 24(2)(b), 24(3)(b) or 24(3)(c) applies to these records, is the Organization reasonably able to sever the information to which these sections apply, and provide the personal information of the Applicant, as required by section 24(4)?

Issue D: Did the Organization comply with section 27 of the Act (duty to assist)? In this case, the Commissioner will also consider whether the Organization conducted an adequate search for responsive records which the Applicant has indicated he believes exist or should exist.

Issue E: Did the Organization respond to the Applicant in accordance with section 28(1) of the Act (time limit for responding)?

Issue F: Did the Organization comply with section 29(1)(c) of the Act (contents of response)?

[para 17] I will reorder these issues slightly. After determining which parts of the information requested by the Applicant consist of his personal information, I will deal first with whether the exceptions under sections 24(3)(b) and (c) apply, since these exceptions protect the privacy of third parties, and are mandatory.

[para 18] I have noted that throughout the Applicant's submissions he makes reference to and arguments about the employment policies and procedures of the Organization, and the way his own issues were dealt with, with which he disagrees. A significant proportion of his rebuttal submission describes related events, and the Applicant's views about the propriety of the Organization's treatment of him and his issues, and whether it was following appropriate procedures, including its own written procedures. The Applicant appears to believe the organization is required to produce documents to him that support its positions and actions.

[para 19] Employment issues are not within my jurisdiction to review, nor is it within my jurisdiction to make findings regarding the adequacy of an organization's investigation of employment complaints, or whether it can justify the decisions it reached and actions it took relative to employment matters. My role is limited to a review of whether the Organization responded properly to the Applicant's access requests by searching for his personal information in its possession and providing to the Applicant that part of it that is not subject to properly applied exceptions.

[para 20] I also note that throughout the Organization's submissions, it makes reference to the findings and opinions of the Portfolio Officer who investigated and attempted to resolve some of the issues now before me in this inquiry. The mediation process is confidential, and this inquiry is a *de novo* process. Therefore, I will not consider the Organization's submissions regarding the Portfolio Officer's findings or what occurred during mediation.

IV. DISCUSSION OF ISSUES

Issue A: Is the information the Applicant is requesting the Applicant's personal information?

[para 21] Section 24(1) of the Act allows an applicant to request access to his or her own personal information. Section 24(1) of the Act states:

> *24(1) An individual may, in accordance with section 26, request an organization*
>
> > *(a) to provide the individual with access to personal information about the individual, or*

[para 22] Section 1(1)(k) of the Act defines "personal information" as follows:

> *1(1)(k) "personal information" means information about an identifiable individual;*.

The records withheld under section 24(2)(a) by reference to litigation privilege

[para 23] Earlier orders of this office have said that information that relates to an individual is not necessarily "about" that person.

[para 24] In decision P2011-D-003[1], former Commissioner Work said (at paras 29-30):

> …under PIPA, an access request can only be for a person's own personal information, and in this and similar cases, what is properly regarded as the requestor's personal information does not by any means extend to what are likely to be the greatest parts of the file. I addressed a similar point in an earlier order, P2006-004. In that case, an individual had requested his own personal information from the Law Society. Much of the information in the Law Society's files consisted of its dealings with complaints the applicant had made against Law Society members. I said:
>
> > My jurisdiction over information requests under the Personal Information Protection Act is limited to access requests for personal information. Sections 24 and 46(1) of the Act combine to confer my jurisdiction. They provide:
> >
> > > 24(1) Subject to subsections (2) to (4), on the request of an individual for access to personal information about the individual and taking into consideration what is reasonable, an organization must provide the individual with access to the following:
> > >
> > > (a) the individual's personal information where that information is contained in a record that is in the custody or under the control of the organization; ... .
> > >
> > > 46(1) An individual who makes a request to an organization respecting personal information about that individual may ask the Commissioner to review any decision, act or failure to act of the organization. [emphasis added]
> >
> > The Act defines "personal information" as "information about an identifiable individual". In my view, "about" in the context of this phrase is a highly significant restrictive modifier. "About an applicant" is a much narrower idea than "related to an Applicant". Information that is generated or collected in consequence of a complaint or some other action on the part of or associated with an applicant - and that is therefore connected to them in some way - is not necessarily "about" that person. In this case, only a part of the information that the A/C asked for was information "about" him.
> >
> > **...**
> >
> > I do not need to decide for the purpose of this inquiry precisely which parts of the information in the documents collected or created for the purpose of the complaint proceedings were "personal information" of the A/C, as that term is to be understood in PIPA. It is sufficient to say that there is a great deal of information in the documents that is not the A/C's personal information even though it was generated in consequence of his complaints. The latter includes information about the persons about whom he complained and their dealings with the A/C, information about other third parties and their dealings with the A/C, descriptions of various events and transactions, and correspondence and memos related to the handling of the complaints and other aspects of the complaint process. As well, the fact the A/C was the author of documents does not necessarily mean that the documents so authored were his personal information.

[1] This decision is currently under judicial review.

> In my view, there is likely to be a close parallel between the type of information that is in the "client file" held by the law firm, and the type of information described in the paragraphs just quoted. The fact the file contains information related to one of the Applicants because he was the opposing party in the legal matters does not of itself make the information "about him". What is "about him" is information such as what he has said or expressed as an opinion, the fact he has done certain things or taken certain steps, details of his personal history, and personal details about him such as his name and other associated information such as where he lives or his telephone number. This is not meant to be an exhaustive list, but is provided to illustrate the type of information that is personal information, in contrast to information other than this type of information, that was generated or gathered by the law firm or its client for the purpose of pursuing the litigation. The point is that much or most of the latter may well not be the first Applicant's personal information even though it relates to a legal matter that involved him. An obvious example would be legal opinions given to the law firm's client as to how to deal with the litigation with the Applicant or associated legal matters. The way in which the law firm was advising its client and dealing with the legal matters may have affected the Applicants, but it was not "about" them in the sense meant by the definition of personal information in the Act.

[para 25] As well, in Order P2012-04, the Adjudicator found (at para 14) that even though a person was presenting statements about the requestor as though they were factual, because this person was relaying his own interpretation of a state of affairs, the statements were more accurately characterized as his opinion than as purely factual statements.

[para 26] In my view, someone's version of events or the particular things they observed in a particular situation is their information, though the event may have involved an applicant. Choosing what to recount is implicitly expressing an opinion as to what it is important to convey. Some accounts may be more factual than others, for instance where one person is simply recalling, without comment, what another person said. However, in other types of circumstances, while an account of events may contain purely factual items of information about an applicant, much of the account will also consist of opinion or value-laden observations.

[para 27] I have had an opportunity to review the information in the personnel records that the Organization withheld in reliance section 24(2)(a) by reference to litigation privilege. These withheld records consist largely of the Organization's documented discussions about how to deal with the Applicant's employment issues and related matters, and observations of related events.

[para 28] Some of these records recount events in which the Applicant was involved and the nature of his involvement – where he was, what he did and said, and so on. On this account, they can be said to contain information about the Applicant which is his personal information.

[para 29] Some of this information is the Applicant's, but is at the same time the personal information of third parties, for example, where it describes personal feelings other employees have about the Applicant. As will be discussed further below, personal information of the Applicant that is inseparably intertwined with the personal information of third parties is not subject to access under PIPA.

[para 30] Some of the information does not relate to the Applicant at all, such as information describing other employees' personal plans or activities, or is information about the activities of the Organization.

[para 31] The greatest part of the withheld information consists of discussions about the Applicant and his job-related issues amongst other employees of the Organization whose role it was to deal with these issues, as well as statements of other employees who recounted events involving the Applicant. To a large extent, these discussions include ideas or intentions as to how his employment issues should be dealt with. The records also include descriptions of how the Applicant behaved or reacted in certain situations, that are value-laden in that they reveal the speakers' opinions about the Applicant and the way these persons interpreted events concerning him.[2] (Because the discussions are work-related rather than personal, most of the 'opinion' information in this category does not appear to be – though some of it may be – the personal information of the employees engaged in these discussions and making these statements.)

[para 32] With respect to such information, I agree with the reasoning in the decision of Commissioner Work, cited above, as well as the reasoning of the Adjudicator in Order P2012-04. Insofar as this withheld information consists of the intentions, ideas and opinions of the other employees, it does not consist *solely* of the Applicant's personal information, nor does some of it consist of his personal information at all.

[para 33] To illustrate the latter point, X's statement that "I believe we should take steps a, b and c to deal with Y's employment complaint" is not Y's personal information. While the fact Y has made an employment complaint is Y's personal information, the steps X believes should be taken to address it, though related to Y, are not. Ultimately, if the steps are taken and affect Y's situation, this may, at that point, be Y's personal information, for example, that Y accepted a new position. However, the intervening considerations or discussions by others about the merits of the complaint and how to resolve it, are not. Most certainly they are not if the suggested steps are never effected. Even if they are, only the way Y's situation is affected by the outcome, and not why and by whom this was effected, is personal information in the sense of being "about Y" within the terms of the Act.

[para 34] Similar considerations apply to notes of some of the meetings in which the Applicant was present. One of the sets of notes withheld by reference to litigation privilege appears to simply record the Applicant's statements about his views and positions, and his observations of events, recorded in what seems to be a non-subjective way, and on this account is his personal information (these notes will be discussed further below at para 46, and paras 85 to 87). However, other notes, even though recording a situation in which the Applicant was present, document positions others were taking and

[2] I note that in the Applicant's rebuttal submissions he himself states (at his page 3, para 4): "The investigation information being withheld is not about the Applicant, it's about the investigation into the actions of the fore mentioned senior staff at the Hotel."

explanations they were giving for decisions that had been made, which is not the Applicant's personal information.

[para 35] In view of the foregoing, much of the information that has been withheld by reference to litigation privilege, though relating to the Applicant, is not the Applicant's "personal information" within the terms of the Act. To the extent this is the case, this type of information is not subject to an access request, and the Applicant has no right to have access to it, under PIPA.

[para 36] As to the remaining information in the records withheld in reliance on litigation privilege, insofar as the Applicant's personal information in these records is intertwined with opinion information, as will be discussed further below, it falls within the scope of the mandatory exception in section 24(3)(c) (which requires withholding of the opinion information of someone else).[3] In my view, one or the other of these descriptions applies to most of the information the Organization has withheld in reliance on the "litigation privilege" exception under section 24(2)(a).[4]

[para 37] Some small parts of the information, if excised from the context, consist of strictly factual information about the Applicant, such as a recounting of places where he was or statements that he made. I will discuss below whether it is reasonable, or not, to require the Organization to sort through the many pages of records to locate, and provide to the Applicant, these minor items of purely factual information.

The records withheld under section 24(2)((a) by reference to solicitor-client privilege

[para 38] With respect to the records for which solicitor-client privilege has been claimed, the Organization has said in its submissions (for example, its initial submission at page 21) that these records consist of summaries of telephone conversations between employees and the Applicant (presumably relating to his employment issues), as well as summaries of telephone conversations between the Organization and its lawyers about the same topic, that consisted of legal advice. It says:

> The Phone Call Records consist of written summaries of phone calls made between various employees of [the Organization] and the Applicant. Additionally, the Phone Call Records include a written summary of a phone call between employees of [the Organization] and legal counsel for [the

[3] I will discuss below the requirements under section 24(3)(b) that the information must be given in confidence and that the absence of consent must be shown.

[4] I acknowledge that the question posed by the present heading is: "Is the information the Applicant is requesting the Applicant's personal information?". To answer this question completely, it would be necessary to separate the parts of the information that do not consist of the Applicant's personal information – such as a statement about what a participant in the discussions thinks ought to be done relative to a request by the Applicant – from information that is 'opinion information' but is at the same time information "about" the Applicant in the stricter sense – such as a statement about how he reacted to a situation. However it is not necessary to undertake this task, since even for such information that is in part the Applicant's personal information, section 24(3)(c) creates a mandatory exception to disclosure.

> Organization], in which [the Organization's lawyers] provide advice regarding the Applicant.

[para 39] This account differs from the account of these records given in the form the Organization filled out pursuant to this office's solicitor-client privilege adjudication protocol. The protocol form does not include a check in the box that indicates a lawyer was involved in the discussions. This may be an error.

[para 40] It seems likely to me, in any event, that at least some of these telephone conversations would be of a similar character to those which were withheld under section 24(2)(a) by reference to litigation privilege (which were supplied to me for my review and about which I have already made determinations that they do not consist of, or solely of, the Applicant's personal information). Further, if some of these discussions were with a lawyer and involved the giving of legal advice, this would fall squarely within the reasoning given by Commissioner Work in the decision (P2011-D-003) quoted above, to the effect that legal advice given in relation to an opposing party is not that party's personal information.

[para 41] However, the Organization does not appear to have made decisions about whether the information it withheld by reference to solicitor-client privilege is the Applicant's personal information, or not. I will therefore ask it to do so, as only information that is personal information of the Applicant can be the subject of an exception under the Act.

The testing information

[para 42] The Applicant also requested the results of his "FSI" testing and how it is graded. In my view, while the scoring matrix and profile categories are not the Applicant's personal information, the results of the test are.

Names withheld in records under Tab 14 of records supplied for the first access request

[para 43] The Organization does not seem to address in its submissions the fact that it redacted certain names in records under Tab 14 of the records it supplied to the Applicant in response to his first request. The records in which third party names were withheld by the Organization contain the Applicant's personal information. The names themselves reveal the personal information of third parties, and while these persons were involved in matters that related to the Applicant, the names do not reveal the personal information of the Applicant. (Some of these names are of employees of the organization, but the information is of such a nature that it has a personal aspect for the employees.) None of this information is the Applicant's personal information.

The policy information

[para 44] Further with regard to what is personal information of the Applicant, I note that in his second request, he asked for "[a]ny policy changes made to the coverage

provided by Great West Life". This is not his personal information. The Organization found no responsive records in relation to this request but, in any event, the Organization would not have been required to provide records that would meet this part of the Applicant's request.

[para 45] I also note that in the bundle of records provided to me to which the Organization applied section 24(2)(a) of the Act (litigation privilege), there is a record which appears to be a print-out of a policy. This does not contain any personal information of the Applicant and, therefore, the Organization is not required to provide this record to the Applicant under the Act.

Notes taken in the assault investigation.

[para 46] The notes taken during the investigation into the Applicant's allegations of an assault (already mentioned above at para 34) are of two types: those of an interview with the Applicant himself, and of interviews with others who knew something about the incident. The former is the Applicant's personal information, as it appears to be an unsubjective recording by the employee of what the Applicant said about the incident and the events that led up to it. The latter, for reasons similar to those already given, consist of information of the Applicant intertwined with the opinion information of others, and, in some cases, with the personal information of others.

Issue B.1: If the Organization refused to provide access to the Applicant's personal information in its custody or control, did it do so in accordance with section 24(3)?

Does section 24(3)(b) (information revealing personal information about another individual) apply to certain requested records or parts thereof?

Does section 24(3)(c) (information revealing identity of a person who provided opinion in confidence) apply to certain requested records or parts thereof?

[para 47] Section 24(3) of the Act states in part:

> *24(3) An organization shall not provide access to personal information under subsection (1) if*
>
> *…*
>
> *(b) the information would reveal personal information about another individual;*
>
> *(c) the information would reveal the identity of an individual who has in confidence provided an opinion about another individual and the individual providing the opinion does not consent to disclosure of his or her identity.*

Records withheld by the organization under section 24(2)(a)

[para 48] As already discussed above, some of the information in the records withheld by the Organization by reliance on section 24(2)(a) (litigation privilege) is the personal information of other third parties, and cannot be disclosed by reference to the mandatory exception in section 24(3)(b), for example, a description of the promotion of another individual and the day that person was to start their new position. [See page 11 of the records withheld by reference to litigation privilege, supplied for my review on January 27, 2015.]

[para 49] Most of the information withheld by the Organization in reliance on section 24(2)(a) (litigation privilege) consists of information either that is not the Applicant's personal information (but instead consists of the views and ideas of others about what should be done about issues concerning him) or that is his personal information in the sense it describes events in which he was involved or his behaviour, but that is inseparably intertwined with views or opinions of the person recounting the event. The latter includes statements about what the Applicant said or did, when recounted from the subjective perspective of others.

[para 50] In my view, therefore, all of this information is either not subject to the access request to start with as not consisting of the Applicant's personal information, or falls within the mandatory exception to disclosure in section 24(3)(c).

[para 51] I note in saying this that section 24(3)(c) requires that the person provides the opinion in confidence and "does not consent to disclosure of his or her identity", and as well that disclosure of the information would reveal their identity.

[para 52] With regard to the first requirement, the Organization argues (for the purpose of asserting privilege) that the intention of the parties was to keep the information confidential, by reference to both the context, the content (referencing statements made by some of these people that they felt concerned for their safety), and the Organization's usual practice. [See the Organization's initial submission, page 8.]

[para 53] I accept that the discussions in which the Applicant did not participate were of the sort that would normally be held in confidence, and the recordings of the discussions, including some of those in which the Applicant participated, were such as were created and provided in confidence. I have no direct evidence that the persons giving the opinions have not consented (or whether they were asked if they did so), but given their nature (including the fact, as revealed in the statements, that some of the individuals did express concerns about being intimidated and about their safety) I may assume the personnel involved in resolving the issues, and the people asked to provide opinions and accounts of events given from their own perspectives, would refuse their consent.

[para 54] With regard to the second requirement in section 24(3)(c), given the small number of people involved in the Applicant's employment issues, and the nature of the

discussions, it seems likely the names could not be severed from the content without revealing the identities of the persons making the statements.

[para 55] Therefore, in my view, section 24(3)(c) applies to the opinion-based or value-based statements and discussions about the Applicant in the records withheld by the Organization under section 24(2)(a), including descriptions of his activities that are given from a subjective perspective.

[para 56] Very similar observations apply to the records withheld by the Organization in response to the access request in inquiry P2210, that consist of interview notes with a number of third parties during the investigation of an incident in which the Applicant alleged he was assaulted. While these notes contain the Applicant's personal information, this information is intertwined with the opinions and personal observations of individuals, who would likely be identifiable to the Applicant in the circumstances, given the small number of people involved in the matter. As well, these notes are such that the information was very likely given in confidence, and the people giving the information would not consent to disclosure. Possibly, the relationship between some of these people and the Applicant may have been such that the opinion statements also had a personal dimension, and thus also constituted their personal information. Thus, in my view, these interview notes fall within section 24(3)(c), and possibly for some of the interviews also under section 24(3)(b), and they must be withheld on a mandatory basis.

Issue B.2: If the Organization refused to provide access to the Applicant's personal information in its custody or control, did it do so in accordance with section 24(2)? In particular,

a. Did the Organization properly apply section 24(2)(a) (legal privilege)?

[para 57] Section 24(2)(a) of the Act states:

> *24 (2) An organization may refuse to provide access to personal information under subsection (1) if*
>
> > *(a) the information is protected by any legal privilege;… .*

[para 58] It is not necessary for the Organization to rely on exceptions to the Act to withhold information which does not, to begin with, constitute the sort of information to which a requestor is entitled under the Act. As discussed above, that is the case, in my view, for most of the information the Organization withheld in reliance on litigation privilege, but provided for my review when I asked it to do so.

[para 59] Nor should it be necessary for this office to review decisions about the application of an exception before the Organization has made an appropriate determination as to whether the information is subject to an access request.

Records for which solicitor-client privilege was claimed

[para 60] I have discussed above the direction I will give to the Organization to make a determination as to whether the records it withheld in reliance on solicitor-client privilege consist of the Applicant's personal information, in accordance with the discussion about this topic above.

[para 61] On the assumption it does, the Organization should consider whether any of the information it withheld on the basis of solicitor-client privilege falls within the mandatory exception in section 24(3)(c), taking into account relevant factors about this provision as discussed above. If it concludes that it does, I will ask it to provide the basis of its reasoning about this to me.

[para 62] With regard to application of the discretionary exception based on solicitor-client privilege, I am not satisfied on the basis of the evidence the Organization has provided so far, that these records are subject to solicitor-client privilege. First, the evidence is internally contradictory as to whether a lawyer was involved, by reference to the way the solicitor-client privilege protocol form was filled in.

[para 63] Even if some of the summaries are of discussions with a lawyer, with respect to the discussions between the Applicant and employees (that did not involve a lawyer), the Organization does not explain how the summaries of telephone conversations with the Applicant (which it says were created to ensure it was organized and would have a record of such calls) were part of the continuum leading up to the request for advice – whether, for instance, the summaries were provided or described to the lawyer.

[para 64] Therefore, should the Organization decide it is necessary for it to continue to rely on solicitor-client privilege, I ask it to indicate to me whether some of the discussions consisting of such personal information involved lawyers, and to explain how the discussions between the employees and the Applicant could be said to form part of the continuum in the seeking of advice, as well as to provide any additional information that would help me to determine if the information at issue is subject to solicitor-client privilege.

Records for which litigation privilege was claimed

[para 65] With respect to the records at issue that were withheld under litigation privilege, which I have had a chance to review, I have already stated my view that most of the information withheld under this head is either not the personal information of the Applicant, or it is personal information that is intertwined with opinion information and is thus subject to the mandatory exception under section 24(3)(c). It is accordingly not necessary for me to decide whether this privilege applies.

[para 66] I will say in passing, however, that litigation privilege attaches only to information created in anticipation of litigation[5], and that some of the documented discussions are about trying to find ways to resolve the Applicant's employment issues or provide explanations to him, or to handle them appropriately so as to avoid litigation. Indeed, some of them document meetings initiated by the Applicant, or arise from complaints made by the Applicant under a process that does not or does not necessarily give rise to litigation but appears to have its own procedure for investigation and resolution (the "ethics hotline" complaints). In my view, it may be premature to describe discussions of this nature, though they might ultimately be relevant for litigation, as having been created for the dominant purpose of litigation, and wrong to assert that they attract litigation privilege. Before the claim can be made, litigation must be reasonably in contemplation, and it appears that, for at least some points in the discussion, there was as yet no "potential discipline or dismissal of the Applicant." (See Organization's initial submissions at page 9.)

b. Did the Organization properly apply section 24(2)(b) (confidential information of a commercial nature) to certain requested records or parts thereof?

[para 67] Section 24(2)(b) of the Act states:

> *24(2) An organization may refuse to provide access to personal information under subsection (1) if*
> …
> *(b) the disclosure of the information would reveal confidential information that is of a commercial nature and it is not unreasonable to withhold that information;*

[para 68] The Organization applied this section to the results of a standardized test that it gives to potential hires and transfers called Fairmont Standardized Interview[6] ("FSI"). The Organization states that the FSI is a proprietary tool that it developed with the help of Gallup, Inc. It uses the standardized test to assess the suitability of potential employees. The Organization argues the FSI is confidential and of a commercial nature.

[para 69] The Organization argues that the methodology of the test and the results themselves are not revealed to anyone other than senior management and human resources personnel who are involved in the hiring process. Further, the Organization states that Gallup is contractually obligated to keep the materials it developed for the

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[5] The test for litigation privilege was articulated in *Nova, An Alberta Corporation v. Guelph Engineering Co* (1984), 50 AR 199 as the dominant purpose test. It was explained by the Alberta Court of Appeal *Moseley v. Spray Lakes Sawmills (1980) Ltd.*, 1996 ABCA 141 (CanLII), 184 AR 101 as follows:

> The key is, and has been since this Court adopted the dominant purpose test in *Nova*, that statements and documents will only fall within the protection of the litigation privilege where the dominant purpose for their creation was, at the time they were made, for use in contemplated or pending litigation. [emphasis in original]

[6] This test is also referred to in the Organization's submission as "Fairmont Selection Interview".

Organization, as well as the terms of its agreement with the Organization for the creation of the FSI, confidential.

[para 70] Given the Organization's evidence, I accept that the testing materials are contractually confidential, and that the results are normally kept confidential.

[para 71] The Organization further argues that the information is of a commercial nature in that it is information that, "…relates or pertains to commerce or…concerns the operations of a commercial entity". The Organization states that hiring staff that will deliver a high level of service to its customers is a key element of its operations and provides it with a competitive advantage over other hotels. In support of its position, the Organization cites Order P2007-002 in which I determined that releasing psychological testing protocols would have a negative impact on the utility of those tests. It should be noted, however, that in Order P2007-002, I also found (at para 82) that:

> Insofar as the answers, results and interpretations do not reveal the questions or other information that would compromise the future commercial value of the tests, it is not "confidential information that is of a commercial nature", and in my view section 24(2)(b) does not apply.

[para 72] I agree with the Organization that finding staff that are well-suited for their positions is critical to the success of its business. The Organization runs a hotel and restaurants – businesses in which customer service is at the core. I also agree that the utility of the FSI would be lost if the testing protocols were known to candidates for the position who could then manipulate their answers to give the potentially false impression that they were well suited for the position. This could lead to the Organization providing substandard service which could lead to the Organization losing customers. Therefore, I find that the testing protocols (including questions asked and how the test is graded) would be exempt from disclosure pursuant to section 24(2)(b) of the Act. In accordance with the earlier discussion, this information would also not be the Applicant's personal information, hence would not be subject to an access request to begin with.

[para 73] However, I do not believe that disclosing the Applicant's test results could reasonably be said to have the same effect on the Organization's operations. The Organization argues that the results would be of little assistance to the Applicant or most people but if the results were provided to, "…a competitor that is familiar with this type of standardized testing…" that the competitor would, without further information, "…likely be able to glean valuable commercial information from the FSI scoring matrix and assessment categories that could harm the competitive position of [the Organization]."

[para 74] With respect to the scoring matrix (which I presume describes the second page under Tab 10 in the records binder of the Organization's initial submission), I agree that this could allow competitors to know something about how the Organization rates candidates' suitability for jobs, and could give it a starting point for developing comparable testing methods. However, the only personal information of the Applicant on

this page seems to consist of his name and a personal identifier. Other than this limited information, the rest of the page does not contain the Applicant's personal information, and need not be provided on this account (and the very limited amount of personal information – his name and a numerical identifier – would be of no value to the Applicant).

[para 75] That is not the case for the first page under Tab 10, however. The only thing that it appears to be possible to glean from this page is that the Applicant scored at what is possibly a particular percentage level, which score could be converted to a recommendation as to the degree of suitability for each of four possible aspects of the hotel's operations. As well, it shows a letter rating (one of two possible choices). There may also be a colour code that is not visible on the black and white copy provided to me, which would provide a further indication of the Applicant's ratings. There is nothing here that could, in my view, be said to have the potential to give advantage to a competitor in the ways asserted by the Organization such that it would be reasonable to withhold it, and I will direct the Organization to disclose it. The document should also be provided in colour if that reveals additional rating information.

[para 76] The page under Tab 2 of the records binder is somewhat more complex. This page has four categories of abilities, with three sub-categories under each. It reveals the Applicant's score under each of the 12 categories, and concludes with a comment.

[para 77] Again, it appears possible the categories have been developed by experts in developing suitability profiles, which could conceivably be appropriated by competitors without having to invest as many resources in this type of endeavor. Providing this information would be unreasonable on this account. The same could be said of the information the Applicant requested as to how the tests were graded (assuming this request is for the methodology rather than the results).

[para 78] However, that is not the case for the grid to the right of the categories, which reveals the Applicant's scores for each of them. I also do not believe the three headings at the top of the grid could be said to have the potential to be unfairly appropriated, nor, most significantly could the comment at the bottom of the page. For these parts of the record, which disclose the Applicant's personal information (his test results), I see no reason for withholding.

[para 79] Accordingly, in my view, this document should be provided to the Applicant, including the titles (which give important context but do not disclose commercial information that it would not be reasonable to disclose), but with redactions of the four categories, the 12 sub-categories, and the headings at the top of each of the two columns of categories. Though the Applicant may be unable to learn the categories to which his strengths and weaknesses are tied, he will be able to gain some sense of where he falls in a grid for a particular profile type. Most importantly, he will gain knowledge of the comment at the bottom of the page.

[para 80] The Organization also applied section 24(2)(b) of the Act (commercial information) to interview notes made in October, 2011. Given my findings about this information under other provisions of the Act, it is not necessary for me to consider this argument. However, I note that in Order P2009-010, the adjudicator said:

> In prior orders, this Office has interpreted the meaning of the term "commercial information" under section 16(1)(a) of the *Freedom of Information and Protection of Privacy Act* ("FOIP Act") to include a contract price and information that relates to the buying, selling, or exchange of merchandise or services (Orders 96-013, 97-013, 2000-005). I find that this definition is also applicable to the term "commercial" within section 24(2)(b) of PIPA.

In my view these notes, while arguably taken to further the Organization's successful commercial operations, are not commercial information in the sense discussed in Order P2009-010.

c. Did the Organization properly apply section 24(2)(c) (information collected for an investigation or legal proceeding) to certain requested records or parts thereof?

[para 81] Sections 24(2)(c) of the Act states:

> *24(2) An organization may refuse to provide access to personal information under subsection (1) if*
> *...*
> *(c) the information was collected for an investigation or legal proceeding;... .*

[para 82] "Investigation" is defined in the Act as follows:

> *1(1)(f) "investigation" means an investigation related to*
>
> *(i) a breach of agreement,*
>
> *(ii) a contravention of an enactment of Alberta or Canada or of another province of Canada, or*
>
> *(iii) circumstances or conduct that may result in a remedy or relief being available at law,*
>
> *if the breach, contravention, circumstances or conduct in question has or may have occurred or is likely to occur and it is reasonable to conduct an investigation; ... .*

[para 83] In reliance on this provision, the Organization withheld handwritten notes in which it was investigating the Applicant's allegations that he was physically assaulted by an employee of the Organization ("the incident"). (See Tab 9 of the Records in P2210/P2418.)

[para 84] The notes were taken during an interview of the Applicant himself, as well as during interviews with other employees as to what occurred during the incident, by reference to this provision. I have reviewed these records.

[para 85] With respect to the notes of the interview an Organization employee held with the Applicant himself, as discussed above, as it appears to be an unsubjective recording by the employee of what the Applicant said about the incident and the events that led up to it, this is the Applicant's personal information.

[para 86] I believe the notes of the interview with the Applicant fall within the terms of section 24(2)(c). An assault, if it occurred, would be a contravention of the *Criminal Code of Canada*. Given the allegations, it was reasonable for the Organization to conduct an investigation into the matter. Therefore, I find that the notes of the incident as recounted by the Applicant fall within the terms of section 24(2)(c).

[para 87] However, the Organization has not told me why it exercised its discretion against disclosing to the Applicant notes that were made of what appears to be primarily his own account of the incident. I will therefore ask the Organization to exercise its discretion about this question, taking into account that the notes do not seem to contain much or any information other than what the Applicant had himself supplied, and it is therefore not clear what objective is served by withholding it.

[para 88] With respect to the interview notes about the incident with persons other than the Applicant, as was the case with records withheld under section 24(2)(a), I do not believe any part of these records (other than minor, insignificant 'snippets') consists solely of the Applicant's personal information. Rather, such information is intertwined with the opinion information of identifiable others. Some of it does not consist of the Applicant's personal information at all. For these reasons, section 24(3)(c) (a mandatory exception) applies to as much of this information as is the Applicant's personal information. It is therefore not strictly necessary for me to consider whether section 24(2)(c) was properly applied.

[para 89] Nevertheless, given an investigation into the incident was being conducted, I believe section 24(2)(c) is also applicable to the information in the notes of third party interviews that are about the Applicant (and any minor 'snippets' that might be solely his personal information). In saying this, I note again that the provision is a discretionary one, and the Organization has not told me what factors it took into account in exercising its discretion. However, the fact it also withheld this information by reference to section 24(2)(d) shows that it held the view that disclosing information of this nature could have a chilling effect on the provision of such information for future investigations. Thus I accept the Organization properly applied this provision to the interview notes with third parties.

d. Did the Organization properly apply section 24(2)(d) (will result in information no longer being provided) to certain requested records or parts thereof?

[para 90] The Organization also applied section 24(2)(d) of the Act to the interview notes regarding the incident. Section 24(2)(d) of the Act states:

> *24 (2) An organization may refuse to provide access to personal information under subsection (1) if*
>
> *…*
>
> *(d) the disclosure of the information might result in that type of information no longer being provided to the organization when it is reasonable that that type of information would be provided;… .*

[para 91] While this provision seems to embrace the notes of interviews with third parties in relation to the alleged assault, given my findings with respect to sections 24(3)(c) and 24(2)(c), I do not need to decide if it was properly applied.

Issue C: If the withheld records contain or consist of personal information of the Applicant, and if section 24(2)(b), 24(3)(b) or 24(3)(c) applies to these records, is the Organization reasonably able to sever the information to which these sections apply, and provide the personal information of the Applicant, as required by section 24(4)?

[para 92] Section 24(4) of the Act states:

> *24(4) If an organization is reasonably able to sever the information referred to in subsection (2)(b) or (3)(a), (b) or (c) from a copy of the record that contains personal information about the applicant, the organization must provide the applicant with access to the part of the record containing the personal information after the information referred to in subsection (2)(b) or (3)(a), (b) or (c) has been severed.*

[para 93] As noted earlier, for some of the records withheld in reliance on section 24(2)(a), there are details about where the Applicant was at a given time, what he said or did, or the situation in which he found himself, that could conceivably be excised from the greatest part of the information and provided to him.

[para 94] However, section 24(1.2), which gives the right of access, includes the limitation that in providing access, an organization can take into account what is reasonable. As well, section 24(4) itself refers to the 'reasonability' of severing. While items of information such as just mentioned arguably fall within section 24(4), in my view, it would not be reasonable to require the Organization to undertake such a task. It would be difficult and time-consuming, and would not give the Applicant information that is not obvious or that he does not already know, or that I can see could have any utility to him.

[para 95] The same observation applies to any discrete items of information in the notes of third party interviews in the assault investigation, withheld by the Organization under sections 24(2) (b), (c), and (d), and 24(3)(c), that consist solely of the Applicant's personal information. Such information would be insufficiently meaningful to merit the onerous task of severing the remaining information under section 24(4).

[para 96] Moreover, as the Organization points out, the obligation to sever under section 24(4) does not extend to records withheld under section 24(2)(c) (investigation or legal proceeding), and I have accepted that some of the records were properly withheld under this provision.

[para 97] I will accordingly not require the Organization to attempt to sever the information in the records in this way.

Issue D: Did the Organization comply with section 27 of the Act (duty to assist)? In this case, the Commissioner will also consider whether the Organization conducted an adequate search for responsive records which the Applicant has indicated he believes exist or should exist.

[para 98] Section 27 of the Act states:

> *27(1) An organization must*
>
> *(a) make every reasonable effort*
> *(i) to assist applicants, and*
> *(ii) to respond to each applicant as accurately and completely as reasonably possible, and*
>
> *(b) at the request of an applicant making a request under section 24(1)(a) provide, if it is reasonable to do so, an explanation of any term, code or abbreviation used in any record provided to the applicant or that is referred to.*
>
> *(2) An organization must, with respect to an applicant making a request under section 24(1)(a), create a record for the applicant if*
>
> *(a) the record can be created from a record that is in electronic form and that is under the control of the organization, using its normal computer hardware and software and technical expertise, and*
>
> *(b) creating the record would not unreasonably interfere with the operations of the organization.*

[para 99] The Organization provided an affidavit from one of its employees explaining what the Organization did to locate responsive records. The employee stated that she consulted with the past and present General Managers as to how to respond to the

Applicant's access requests. She searched the Applicant's personnel file and provided the Applicant with records that were responsive to much of what he had requested.

[para 100] However, she says she was unable to locate some notes that the Applicant requested. In those instances, the authors of the notes were contacted directly and searched for the records but were unable to find them. She was also unable to locate any policy changes made by Great West Life. As I noted above, this is not the Applicant's personal information, and the Organization was not required to provide this in any event. As for the remainder of the records requested in which no responsive records were found, the Organization noted:

1. The Organization does not have employee attendance records so she could not provide those to the Applicant. The Organization also does not retain payroll records back to 2005;

2. The Applicant had been provided with all of the information the Organization had concerning his short term disability and he was not entitled to long term disability so there were no records to provide to the Applicant;

3. In order to provide the Applicant with a copy of all deposits made to this account by the Organization during the course of his employment, an unreasonable amount of time would have to be expended in searching and recreating those records.

[para 101] With regard to the deposit information, I note that the Organization is required by section 27 of the Act only to make a reasonable effort in responding to the Applicant's request. The Organization submits, and I accept, that the deposit records are not part of an easily accessible and discrete set of records. Requiring the Organization to search through years of deposit information to recreate deposits made specifically to the Applicant is beyond what is reasonable.

[para 102] In saying this, I note the Applicant seems to be looking for pay cheques he seems to believe he is entitled to, but did not receive. It is no answer to this part of his request to say (as the Organization argues when discussing the feasibility of providing individual deposit records) that he has no need for such information because he already received it. However, the Organization has considered this information separately, and says it does not have the requested pay information, and it is not up to me to determine questions of pay entitlement.

[para 103] Also in his third request, the Applicant asked for a copy of his termination notices. The Organization did not provide the Applicant with these records, nor does it note that the records were found and withheld, or claim that no records exist. For this reason, I will order that the Organization search for the Applicant's termination notices and provide them to the Applicant if it finds them.

[para 104] The Applicant makes several arguments about records that existed at one time (such as records that he provided to the Organization, for example concerning a discrimination complaint he made concerning another employee) or records he feels ought to exist (such as his original job application [rather than a copy], notes of an interview in which he participated in June, 2011, or notes from a meeting with the General Manager and Director of Operations on October 24, 2011). The Act does not require an organization to create specific records, nor to keep records for a specified amount of time. It requires an organization to make reasonable efforts to search for existing records in its possession that are responsive to an applicant's access request.

[para 105] I have reviewed the Applicant's submission in which he sets out various events which happened and his belief that records should exist in relation to these events. He seems to expect that the Organization is obligated under the Act to create and retain such information and provide it to him. The Applicant also seems to think the Organization is required to provide him with records that justify its actions relative to him.

[para 106] I appreciate the Applicant might have such expectations; however, they are not supported by the requirements imposed on organizations by PIPA. Even with reference to documents that must necessarily have existed, such as payroll records or the complaints the Applicant submitted, there is no obligation on organizations under PIPA to keep such records for any particular time period. There may be reasons why retaining such information would be good business practice, and there may be obligations under other legislation to keep certain types of employee records, but there is no such duty under PIPA. If an Organization has kept records for such other purposes, it must provide them, and it must not destroy them to avoid an access request, but it need not create or keep records that explain or justify its own actions in order to have them available should an applicant wish to see them.

[para 107] Further, as discussed at length above, many of the records the Applicant describes, and claims should have been located, are not his personal information, or solely his personal information. Thus he would not be entitled to access this type of information even if it exists in the Organization's possession.

[para 108] Policy and general information, such as that in relation to general benefits coverage, is also not the Applicant's personal information. Nor is correspondence between the Organization and this office, even though concerning him.

[para 109] In view of these considerations, with the exception of the Applicant's termination notices, I am satisfied that the Organization performed an adequate search in this case. Other than the termination records, I find that the Organization made every reasonable effort to locate records responsive to the Applicant's requests.

Issue E: Did the Organization respond to the Applicant in accordance with section 28(1) of the Act (time limit for responding)?

> *28(1) Subject to this section, an organization must respond to an applicant not later than*
>
> > *(a) 45 days from the day that the organization receives the applicant's written request referred to in section 26, or*
> >
> > *(b) the end of an extended time period if the time period is extended under section 31.*

[para 110] As noted above, the Applicant made three separate access requests. The Applicant's first access request was made September 19, 2011. The Organization responded September 29, 2011, within the timelines set out in section 28(1)(a) of the Act. I will deal with the adequacy of the content of that response below.

[para 111] On April 13, 2012, the Applicant made his second request. The Organization responded on May 31, 2012, slightly beyond the 45-day time period allowed by section 28(1) of the Act.

[para 112] The Applicant's final access request was made May 3, 2013. According to the Organization it was confused and did not treat this request as an access request and did not respond to it initially. On September 29, 2014, the Organization responded to the Applicant's request.

[para 113] It is clear to me that the Applicant's letter dated May 3, 2013 was an access request. Therefore, the Organization responded outside the timeline set in section 28(1) of the Act.

Issue F: Did the Organization comply with section 29(1)(c) of the Act (contents of response)?

> *29(1) In a response to a request made under section 24(1)(a), the organization must inform the applicant*
> *…*
> > *(c) if access to all or part of the applicant's personal information is refused,*
> >
> > > *(i) of the reasons for the refusal and the provision of this Act on which the refusal is based,*
> > >
> > > *(ii) of the name of the person who can answer on behalf of the organization the applicant's questions about the refusal, and*
> > >
> > > *(iii) that the applicant may ask for a review under section 46.*

[para 114] Initially, in responding to the Applicant's first access request, the Organization simply made a copy of his personnel file available for him to pick up. There was no indication if all or part of the information was refused, the reasons for the refusal, or the name of the person who could be contacted with questions, nor was the Applicant advised he could ask this office to review the Organization's response. The response was, on this account, inadequate.

[para 115] The Organization's second response to the Applicant's first request, provided, after mediation, on December 28, 2011, met all of these requirements.

[para 116] The Organization's response to the Applicant's second access request and its eventual response to the Applicant's third access request also met the requirements of section 29(1) of the Act.

V. ORDER

[para 117] I make this Order under section 52 of the Act.

[para 118] I find that much of the information the Applicant requested was not information that was solely his personal information. Rather, some of it was not his personal information at all, and much of his personal information in the records was intertwined with the opinion information of others. As the Applicant has no right under the Act to access information other than that which is solely his own personal information, I confirm the Organization's decision to refuse to provide any information to him that is not solely his own personal information. This consists of all the information withheld by reference to litigation privilege under section 24(2)(a), as well as the interview notes with third parties about the alleged assault.

[para 119] I direct the Organization to make a determination as to whether the records it withheld by reference to solicitor-client privilege under section 24(2)(a) consist of or contain solely the Applicant's personal information, having reference to the principles discussed in this Order. Should it decide they do not, I direct it to provide an explanation to me, within 50 days of receipt of this order. Should it find that these records consist of or contain such information, I direct it to provide further information to me as to any basis for withholding this information in reliance on either section 24(3)(c), or on solicitor-client privilege, within 50 days of the receipt of this order. I reserve my jurisdiction to ask for further submissions from the parties and to make further determinations and rulings under the Act about these records. I will inform the Organization and the Applicant in due course of the results of any determinations I make in this regard.

[para 120] I find that some of the information the Organization withheld pursuant to section 24(2)(b) of the Act (the FSI test results) was not commercial information that can reasonably be withheld. I order the Organization to sever these records in accordance with my findings at paras 72 to 79, and to provide the remainder of these records to the Applicant, (that is, it is to provide parts of the document under Tab 2 of the records

binder in accordance with the instructions in para 79, and it is to provide the first page of the two pages under Tab 10, in colour format if possible).

[para 121] I find that the Organization properly withheld information from records pursuant to section 24(2)(c) of the Act, as well as pursuant to section 24(3)(c), with the exception of what appear to be the interview notes with the Applicant concerning his allegation of assault and other concerns (19 pages of notes located under Tab 9 of the records in Inquiry P2210, dated October 25, 2011). With respect to these notes, I direct the Organization to exercise its discretion taking into account that the notes seem to be or primarily be a recounting of the Applicant's own observations and views. If it decides to disclose the records, it should provide them to the Applicant within 50 days of the receipt of this order. If it decides not to disclose all or part of them, it should inform me of its decision and reasons, within 50 days of receipt of this order. I reserve my jurisdiction to ask for further submissions from the parties and to make further determinations and rulings under the Act about these records. I will inform the Organization and the Applicant in due course of the results of any determinations I make in this regard.

[para 122] I order the Organization to search for the Applicant's termination notices, to notify the Applicant of the results of its search, and to provide to him any records it locates.

[para 123] I find that the Organization failed to respond to the Applicant's April 13, 2012 access request, and his May 3, 2013 access request, in accordance within the timelines set out in section 28 of the Act.

[para 124] I find that the contents of the Organization's initial response to the Applicant's September 19, 2011 access request failed to comply with section 29 of the Act.

[para 125] I order the Organization to notify me in writing, within 50 days of being given a copy of this Order, that it has complied with the parts of the order not specifically discussed in paras 119 and 121.

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Christina Gauk, PhD
Adjudicator and Director of Adjudication