

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER P2006-005

November 15, 2007

ALBERTA TREASURY BRANCHES / ATB FINANCIAL

Case File Number P0008

Office URL: www.oipc.ab.ca

Summary: The Applicant requested records relating to her work performance and termination from Alberta Treasury Branches / ATB Financial (the Organization).

The Applicant requested review by the Commissioner of whether the Organization had responded to her request within the time limits of the *Personal Information Protection Act* (the Act). In addition, she requested review of the Organization's decision to deny her request to correct her personal information.

The Applicant also requested that the Commissioner address questions she had about the Act.

The Commissioner determined that the Organization had responded to the Applicant's access request within the timeframe set out in the Act. The Commissioner confirmed the Organization's decision not to correct the Applicant's personal information.

The Commissioner addressed the Applicant's questions, but determined that he lacked jurisdiction to determine whether the Organization had properly withheld records under sections 24(2)(a), 24(2)(c) and 24(3)(c).

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 7, 36; *Personal Information Protection Act* S.A. 2003, c. P-6.5 ss. 1(i)(i), 3, 25, 28, 29, 30, 33, 46, 47, 48, 52, *Personal Information Protection and*

Electronic Documents Act S.C. 2000, c 5 P-8.6, s. 2 *Provincial Offences Procedure Act* RSA 2000 c. P-34 s. 1

Authorities Cited: AB: Orders 97-020, 99-011, F2003-019, F2005-023, P2006-004
CANADA *Finding #14*, 2001 CanLII 21535 (P.C.C.),

Cases Cited: *Kellogg Brown and Root Canada v. (Alberta) Information and Privacy Commissioner*, 2007 ABQB 499, *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809

I. BACKGROUND

[para 1] On September 26, 2003, the Applicant made a request to the Organization under section 7 of the *Freedom of Information and Protection of Privacy Act* (FOIPPA). She requested records in its custody or control from December 1, 2002 to September 26, 2003 that contained information regarding her performance leading to her termination, including information from several employees. In addition, she requested information relating to her termination filed with the Alberta Securities Commission, the National Registration Database, the Mutual Fund Dealers Association (MFDA) and other organizations.

[para 2] As FOIPPA does not apply to the Organization, the Organization denied the request on October 8, 2003. However, on December 18, 2003 the Applicant submitted the request again, this time under the *Personal Information Protection Act* (the Act), to which the Organization would be subject once the Act was in force on January 1, 2004. The Applicant also requested additional records containing her personal information created by two other employees of the Organization.

[para 3] On February 9, 2004, the Organization wrote to the Applicant and advised the following:

1. The application would be treated as having been received on January 1, 2004, the date that the Act came into force.
2. The Organization would charge \$57 dollars in total fees, which included photocopying 208 pages and postage.
3. The Organization would grant access to information relating to her application for employment, her hiring, her work performance and termination, when the fees were paid.
4. The Organization may refuse information subject to exceptions in the Act, such as privileged information.
5. The Organization must refuse to disclose information containing the personal information of other individuals or information that would reveal opinions about the Applicant provided in confidence.
6. The Organization would withhold specific records because they were subject to legal privilege.

7. The Organization did not have records relating to the Mutual Fund Dealers Association or other organizations.
8. The Applicant could contact counsel for the Organization if she had questions regarding the Organization's response to her request.
9. The Applicant could request review by the Information and Privacy Commissioner of the decision to withhold records.

[para 4] On February 23, 2004, the Applicant requested that I review the following issue:

1. The Organization was required to provide records to her on February 14, 2004 and had not done so.

I authorized mediation to resolve the issue.

[para 5] On January 18, 2005, the Applicant requested the assistance of the Information and Privacy Commissioner in the following matters:

1. Ensuring ATB provides the "*Correction*" that I have requested under Section 25 of PIPA (emphasis in original)
2. Issues for Inquiry in regards to contraventions by ATB of Sections 33, 28 and 59 of PIPA as concerns my original requested dated December 18, 2003 for access to information under PIPA ... As stated in my original request to ATB under PIPA, my goal was to ensure the completeness and accuracy of information related to my employment and termination at ATB Investor Services / ATB Financial at a time that I had reason to believe I had been terminated for issues that were without cause.

[para 6] On January 21, 2005 the Organization advised the Applicant that it would not correct its records in the manner she requested, but would annotate her personal information with her request, pursuant to section 25(3) of the Act.

[para 7] On February 10, 2005, the Applicant made a complaint about the Calgary PIPA office. In this letter, she requested that I charge the Organization with breaches of Sections 28, 33 & 59 of PIPA, and order ATB to provide her corrections statements and to the Alberta Securities Commission.

[para 8] As mediation was unsuccessful, the matter was scheduled for a written inquiry. The parties provided both initial and rebuttal submissions in relation to these issues.

II. RECORDS AT ISSUE

[para 9] Records under the control of the Organization containing the Applicant's personal information.

III. ISSUES

[para 10] The Notice of Inquiry set out the following issues for the inquiry:

- A. Is ATB Investment Services Inc. a subsidiary of Alberta Treasury Branches for the purposes of section 2 of the *Personal Information Protection Act*?**
- B. Is the 45-day time limit to respond to a request under section 28(1)(a) of the Act suspended until an applicant pays the fee estimate, as provided by section 15 of the *Personal Information Protection Act*?**
- C. Does the 45-day time limit under section 28(1)(a) of the Act apply to an organization's response in mediation?**
- D. Does a time limit apply to the review process under the Act?**
- E. Did the Organizations conduct an adequate search for responsive records and thereby meet their duty to the Applicant, as required by section 27(1) of the Act?**
- F. Did the Organizations respond to the Applicant openly, accurately and completely, as required by section 27(1) of the Act?**
- G. Does section 29 of the Act (contents of a response) apply to the Commissioner's office?**
- H. Is certain information or are certain records responsive to the Applicant's access request as being "personal employee information", as defined by section 1(j) of the Act?**
- I. Did the Organizations properly apply section 24(2)(a) of the Act (legal privilege) to the records / information?**
- J. Did the Organizations properly apply section 24(2)(c) of the Act (information collected for investigation or legal proceeding)?**
- K. Does section 24(3)(c) of the Act (information revealing identity of individual providing confidential opinion) apply to the records / information?**
- L. Did the Organizations properly refuse to correct the Applicant's personal information, as provided by section 25 of the Act?**
- M. If the Organizations properly refused to correct the Applicant's personal information, are the Organizations in breach of the requirement under section 33 of the Act to ensure that personal information is accurate and complete?**
- N. Does section 33 of the Act apply to the Commissioner's office?**
- O. Does section 38(3) of the Act require the Organizations to produce to the Commissioner the records the Applicant specifies in mediation?**

P. Do sections 40 and 41 of the Act prohibit disclosure of details of communications between the Commissioner’s office and the Organizations occurring during the mediation process under the Act?

Q. Does the Commissioner have jurisdiction to find that the Organizations have committed various offences under section 59 of the Act?

DISCUSSION OF ISSUES

Issue A: Is ATB Investment Services Inc. a subsidiary of Alberta Treasury Branches for the purposes of section 2 of the *Personal Information Protection Act*?

[para 11] This issue was not brought by the Applicant, and appears to have been added by my office. In its submissions, the Organization concedes that ATB Investment Services Inc. is a wholly owned subsidiary of Alberta Treasury Branches for the purposes of the Regulation. It further submits that it is unnecessary to decide the issue as Alberta Treasury Branches responded to the access request. I agree that it is not necessary to decide the issue. I will accordingly refer to both Alberta Treasury Branches and ATB Investment Services Inc. as the Organization in the decision.

Issue B: Is the 45-day time limit to respond to a request under section 28(1)(a) of the Act suspended until an applicant pays the fee estimate, as provided by section 15 of the *Personal Information Protection Act*?

[para 12] I have rephrased issue B, as answering the proposed question would not address the parties’ issues. Instead, I will answer the following question:

Did the Organization respond to the Applicant’s access request within the statutory time limit in section 28?

[para 13] Section 29 explains what a response under the Act must contain. It states:

29 In a response to a request made under section 24, the organization must inform the applicant

- (a) as to whether or not the applicant is entitled to or will be given access to all or part of his or her personal information,*
- (b) if the applicant is entitled to or will be given access, when access will be given, and*
- (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 14] Section 28 establishes the time limits in which an Organization must respond to an access request. It states in part:

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 15] The Applicant argues that section 28 of the Act required the Organization to submit records to her by Saturday, February 14, 2004 to comply with the Act. Both parties accept that for the purposes of section 28, the Organization received the access request on January 1, 2004, the date the Act came into force.

[para 16] I outlined the contents of the Organization's letter of February 9, 2004 in paragraph 3. I find that this letter is a response to the Applicant within the meaning of section 29 of the Act. In her request for review, the Applicant confirmed that she received this letter on February 12, 2004. .

[para 17] Section 30 of the Act explains how an organization may give access to applicant. It states in part:

30 Where an applicant is informed under section 29 that access will be given, the organization must,

- (a) *if an applicant has asked for a copy of the applicant's personal information and the information can reasonably be reproduced,*
 - (i) *provide with the response a copy of the information or the record or part of the record relating to the information, or*
 - (ii) *give the applicant reasons for the delay in providing the information or record...*

[para 18] In its letter of February 9, 2004, the Organization explained that it would not provide the requested records until it had received payment of fees. As a result, I find that the Organization met the requirements of section 30(a)(ii) by providing a reason as to the delay in providing the information. The Act does not require an organization to provide information or records with a response if it provides reasons for delay in providing the information or records.

[para 19] As I have found that the Organization's letter dated February 9, 2004 was a response under the Act, the next issue is whether the Applicant received it within the time frame allowed by the Act. As noted above, both parties are in agreement that the Organization effectively received the access request on January 1, 2004 when the Act came into force.

[para 20] As the Applicant points out, the 45th day fell on Saturday, February 14th. However, the Applicant received the Organization's response, by her own admission, on February 12, 2004, two days prior.

[para 21] For these reasons, I find that the Public Body responded to the Applicant within the time specified in the Act.

Issue C: Does the 45-day time limit under section 28(1)(a) of the Act apply to an organization's response in mediation?

[para 22] Mediation is authorized by the Commissioner in relation to a matter under review or relating to a complaint under section 49. The Act does not impose any requirements on the parties during mediation, as mediation under the Act is a voluntary process intended to assist the parties to settle their issues without an inquiry.

[para 23] Section 28 does not impose any requirements on an organization to provide records during mediation, but imposes a statutory time limit to respond to an applicant who has submitted an access request. As discussed above, the Act does not require an organization to provide an applicant with records within 45 days from the date of receipt of an access request if the organization has provided a reason for not providing the records under section 30.

Issue D: Does a time limit apply to the review process under the Act?

[para 24] The Applicant questions whether this office has met its timelines under section 50(5). Section 50(5) states:

50(5) An inquiry into a matter that is the subject of a written request referred to in section 47 must be completed within 90 days from the day that the written request was received by the Commissioner unless the Commissioner

- (a) notifies the person who made the written request, the organization concerned and any other person given a copy of the written request that the Commissioner is extending that period, and*
- (b) provides an anticipated date for the completion of the review.*

[para 25] In Order 99-011, the former Commissioner determined that a provision in FOIPPA that is parallel to section 50(5) of PIPA was discretionary rather than mandatory:

In this case, one of the objects of the Act is “to provide for independent reviews of decisions made by public bodies under this Act”: see section 2(e). I agree with the British Columbia Information and Privacy Commissioner when, in British Columbia Order 291-1999, he said:

...[T]he ninety-day period...is not intended to create a technical barrier which robs applicants, public bodies or third parties of my Office’s independent review of decisions made under the Act. The ninety-day period is intended to benefit the independent review process by requiring that inquiries proceed in a timely way, but without creating a structure of strict compliance which would be, in itself, counterproductive to the delivery of a fair yet flexible review process to those who are affected by decisions under the Act.

The effect of ruling that my non-compliance with section 66(6) ends my jurisdiction over the Applicant’s request for review would work serious general inconvenience or injustice to the Applicant, who has no control over my review process. The Applicant would lose the right to have the Public Body’s decision reviewed. Therefore, I interpret section 66(6) as directory only (“may”).

This office has consistently applied this rationale to requests for review and inquiries held under FOIPPA, the Health Information Act and the Act.

[para 26] In *Kellogg Brown and Root Canada v. (Alberta) Information and Privacy Commissioner*, 2007 ABQB 499, a recent decision of the Court of Queen’s Bench, the court determined that section 50(5) of the Act is mandatory and that it applies to the review process. In determining that the Commissioner had no jurisdiction to complete an inquiry, once the time limit in section 50(5) is exceeded, the court said:

In the result, having considered all of the foregoing, I have concluded that s. 50(5) of *PIPA* is a mandatory legislative provision. While accepting that this result will cause some inconvenience, I do not accept that serious inconvenience will result.

Having concluded that s. 50(5) is mandatory, the Commissioner lost jurisdiction by failing to conduct this inquiry in accordance with that provision.

[para 27] In the present circumstances, neither party has requested that I cease conducting this inquiry or challenged my jurisdiction to do so. I find that the issue was raised primarily as a question, rather than as a demand that I end the inquiry without making a decision. Consequently, I have answered the question, and make no determination regarding the application of section 50(5) to the case at hand. In any event, I am appealing the Court’s decision in *Kellogg Brown and Root Canada*.

Issue E: Did the Organizations conduct an adequate search for responsive records and thereby meet their duty to the Applicant, as required by section 27(1) of the Act?

Issue F: Did the Organizations respond to the Applicant openly, accurately and completely, as required by section 27(1) of the Act?

[para 28] I will address Issues E and F together, as a decision under Issue E will assist me to answer Issue F.

[para 29] The Applicant argues that an organization must take a broad view rather than a narrow view of the scope of responsive records. She relies on Order 99-002 in support of this position. She also argues that any records relating to function and job description would be responsive records. She cites Order 98-005 for the proposition that a Public Body must address an Applicant's entire access request and must provide records that an Applicant may already have. The Applicant argues that the Organization could not have conducted an adequate search for responsive records because records responsive to her request would include records "regarding her performance measured according to known objective performance criteria". She also states that the Organization "withheld / concealed/ destroyed" the position description and performance criteria related to the Investment Specialist position she held.

[para 30] The Organization argues that the records the Applicant still seeks are not responsive to her request. I take this to mean that the records she requests do not contain her personal information within the meaning of the Act.

[para 31] The Organization also argues that it responded to the Applicant openly, accurately and completely within the meaning of the Act. It further argues that there is no requirement to date each record or to research the circumstances of an undated record. Finally, it submits that there is no evidence to support the Applicant's contention that it has concealed and destroyed records or misled the PIPA office.

[para 32] I have already found that the Organization responded to the Applicant within the meaning of sections 28 and 29 of the Act on February 12, 2004. The issues now are whether the records referred to in that response were the result of a reasonable search and whether the Organization responded accurately and completely as reasonably possible.

[para 33] The Applicant's primary argument in relation to the adequacy of the search appears to be that the Organization did not provide her with a performance evaluation that meets her own assessment of her performance, or additional documents set out in Issue H that she would like to receive. However, an organization is not required to generate documents pleasing to an applicant or to provide records to which the Applicant is not entitled under the Act. Instead, its obligation is to conduct a reasonable search for the records actually in its custody or under its control that are properly the subject of an access request. I find that the evidence establishes that the Organization did conduct a reasonable search of the records in its custody and under its control. Not only did it conduct an initial search for records, but it conducted additional searches to ensure thoroughness.

[para 34] The Applicant relies on decisions made under FOIPPA to support her position that access requests should be interpreted broadly rather than narrowly. However, it is important to distinguish the purpose of FOIPPA from that of the Act. Section 3 of the Act states:

3 The purpose of this Act is to govern the collection, use and disclosure of personal information by organizations in a manner that recognizes both the right of an individual to have his or her personal information protected and the need of organizations to collect, use or disclose personal information for purposes that are reasonable.

Significantly, providing access to information is not a stated purpose of the Act. In contrast, section 2 of FOIPPA states:

- 2 The purposes of this Act are*
- (a) to allow any person a right of access to the records in the custody or under the control of a public body subject to limited and specific exceptions as set out in this Act,*
 - (b) to control the manner in which a public body may collect personal information from individuals, to control the use that a public body may make of that information and to control the disclosure by a public body of that information,*
 - (c) to allow individuals, subject to limited and specific exceptions as set out in this Act, a right of access to personal information about themselves that is held by a public body,*
 - (d) to allow individuals a right to request corrections to personal information about themselves that is held by a public body, and*
 - (e) to provide for independent reviews of decisions made by public bodies under this Act and the resolution of complaints under this Act.*

Because a primary purpose of FOIPPA is to provide access to information, access requests are interpreted broadly. In contrast, the Act is intended to protect personal information and to govern the purposes for which an organization may collect, use and disclose personal information. Access requests under the Act are therefore not given a broad interpretation as they are under FOIPPA, since the right to make an access request under the Act is intended only to enable an individual to determine whether his or her personal information is being collected, used and disclosed by an organization in accordance with the Act. The Act does not authorize an individual to request information other than the individual's own personal information.

[para 35] The Applicant made her original access request under FOIPPA, before she was advised that the Organization is not a public body within the meaning of FOIPPA. While her request was then treated as a request under the Act, her request was in fact broader than the parameters of the Act. The Applicant requested:

- “all information regarding my performance from December 2002 to the present as held by ATB Investor Services / ATB Financial, including but not limited to:
- 1. Performance information including details regarding my performance leading to my termination...
 - 2. Information regarding my termination effective (date) filed with:
 - a) The Alberta Securities Commission
 - b) National Registration Database

- c) Mutual Fund Dealers Association (MFDA)
- d) Other organizations

Under the Act, the Applicant was only entitled to request access to personal information about herself in the custody or under the control of the organization.

[para 36] For the reasons set out in Issue H, below, the Act does not entitle the Applicant to request information that broadly relates to the position she held or to records that she created solely to perform her work duties.

[para 37] Information filed with the Alberta Securities Commission and the National Registration Database would be excluded from the jurisdiction of the Act under section 4(3)(e), as the Securities Commission is a public body within the meaning of FOIPPA and it has control over its records and those of the National Registration Database. (See Order F2006-017).

[para 38] I am satisfied that the Organization did respond completely and accurately. The Organization explained which records would be provided and explained which records would be withheld and why. The Organization was under no obligation to provide the Applicant with a job description, as a job description would not be personal information about the Applicant for the purposes of the Act. As stated above, the Organization was under no duty to create a performance evaluation to satisfy the Applicant's criteria. As discussed under Issue H, the information the Applicant considers outstanding is not her personal information within the meaning of the Act, and so the Organization has not breached its duty to assist her by not providing it.

[para 39] I would also like to point out that the Act is not intended to create a discovery process or to litigate wrongful dismissal actions. Throughout her submissions, the Applicant made arguments that her employer wrongfully dismissed her from her employment. These arguments are irrelevant to an application under PIPA and suggest that the Applicant was attempting, improperly, to use my office as a forum to express her dissatisfaction with a former employer.

Issue G: Does section 29 of the Act (contents of a response) apply to the Commissioner's office?

[para 40] Section 29 states:

29 In a response to a request made under section 24, the organization must inform the applicant

- (a) as to whether or not the applicant is entitled to or will be given access to all or part of his or her personal information,*
- (b) if the applicant is entitled to or will be given access, when access will be given, and*
- (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 41] Section 29 of the Act applies to organizations who have received an access request from an applicant. An organization is defined in section 1(i) of the Act as including a corporation, an unincorporated association, a trade union, a partnership, and an individual carrying on business in a commercial capacity. The Commissioner's office is not an organization under the Act. Consequently, section 29 of the Act does not apply to the Commissioner's office.

Issue H: Is certain information or are certain records responsive to the Applicant's access request as being "personal employee information", as defined by section 1(j) of the Act?

[para 42] I understand that the Applicant's concern is that the Organization has withheld records as "non-responsive" that the Applicant believes contain her personal information. In particular, the Applicant argues that sales management pipeline reports, information about investment advisors, position description, performance criteria and work email are all her personal employee information. The Applicant argues that these records constitute her personal employee information because she was a salesperson working for a mutual fund dealer. She also argues that as she was terminated for the reason that her skills do not meet job requirements, the job requirements must be personal employee information. Her interpretation of the term "personal employee information" in the Act is any information reasonably required to establish, manage or terminate an employment relationship.

[para 43] The Organization provided rebuttal submissions in relation to this issue. It argues that personal information within the meaning of the Act includes such things as an employee's home address, home phone number, social insurance number, employee health information, formal and informal evaluations, video surveillance, resumes, letters of reference and reference checks. The Organization takes the position that information that is the work product of an employee is not personal information within the meaning of the Act.

[para 44] "Personal information" is defined in section 1(k) of the Act as "information about an identifiable individual". In other words, an individual may only obtain access to information under the control of an organization that is *about* the individual, as opposed to *by* the individual or associated with the individual.

[para 45] "Personal employee information" is defined in section 1(j) of the Act as:

I In this Act...

(j) “personal employee information” means, in respect of an individual who is an employee or a potential employee, personal information reasonably required by an organization that is collected, used or disclosed solely for the purposes of establishing, managing or terminating

*(i) an employment relationship, or
(ii) a volunteer work relationship
between the organization and the individual but does not include personal information about the individual that is unrelated to that relationship;*

[para 46] In Order P2006-004, I considered the meaning of “personal information about an individual” within the meaning of the Act:

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.

[para 47] This reasoning applies equally to an individual’s work, which may be associated with an individual, but is not necessarily about the individual who performed the work.

[para 48] Information about investment advisors, position descriptions, and performance criteria may well be used by the Organization generally to establish, manage and terminate employment relationships in general. However, these records do not contain information about the Applicant specifically, and therefore do not contain her personal information for the purposes of the Act. The Applicant therefore has no right to request these records under the Act. The Act permits an applicant access to the applicant’s own personal information contained in a record under the control of an organization, as opposed to all records in the organization’s control that an applicant wishes to review.

[para 49] I disagree with the Applicant’s argument that information need only relate to the establishment, management or termination of the employee relationship to be personal employee information. Personal employee information is defined as personal information and must therefore be about an identifiable individual before it can be considered personal employee information.

[para 50] I agree with the Organization’s position that the “work product” or records produced by an employee in the course of employment is generally not the personal information of the employee. Pipeline reports, asset allocation reports, client agreements, tapes of calls, customer satisfaction and referrals are records created by employees as part of their employment duties. These records are not about the employee as an individual, but about the task at hand.

[para 51] In cases where the work product of an employee is evaluated and the employer organization attaches the evaluation directly to the work product, the work product itself may become personal employee information. However, that is not the case with the pipeline reports, asset allocation reports, client agreements, tapes of calls, work emails, customer satisfaction and referrals sought by the Applicant.

[para 52] For these reasons, I find that the Applicant is not entitled to make an access request under the Act for information about investment advisors, position descriptions, and performance criteria, or an access request for pipeline reports, asset allocation reports, client agreements, tapes of calls, work emails, customer satisfaction and referrals as these records do not contain her personal information.

Issue I: Did the Organizations properly apply section 24(2)(a) of the Act (legal privilege) to the records / information?

[para 53] Section 24(2) states in part:

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 54] While the Organization had originally withheld 35 records under section 24(2)(a), these were later provided to the Applicant during the mediation process. However, it appears that the Organization continues to withhold records 200010 and 200092 on the basis that they are subject to legal privilege for the purposes of section 24(2)(a).

[para 55] I will not review the 35 records provided to the Applicant through mediation. The Organization argues that a kind of settlement privilege attaches to them; however, that would be an argument to be made to the court in the event that the Applicant enters them into evidence at a trial.

[para 56] In relation to the issue of the records that continue to be withheld under section 24(2)(a), I have reviewed the Applicant's correspondence to this office and conclude that she has never requested review within the meaning of section 47 of the Act of the Organization's decision to withhold those records. I do not find that this issue flows from her complaint that the Organization did not respond to her within the time limit set out in the Act, or from her request for a review of the Public Body's decision not to amend her personal information as she requested. It appears that the Portfolio Officer assigned to mediate this matter may have identified Issues, I, J, and K as possible issues, overlooking the fact that the Applicant had not requested review of these issues within the meaning of the Act.

[para 57] Section 47 of the Act explains what an applicant must do to request review of an organization's decision. It states:

47(1) To ask for a review or to initiate a complaint under this Part, an individual must, as soon as reasonable, deliver a written request to the Commissioner.

(2) A written request to the Commissioner for a review of a decision of an organization must be delivered within

(a) 30 days from the day that the individual asking for the review is notified of the decision, or

(b) a longer period allowed by the Commissioner...

[para 58] In addition, once an individual has submitted a written request for review of an Organization's decision, section 48 requires me to give a copy of that request to the Organization and any other person I consider appropriate.

[para 59] As I have found above, the Applicant was notified of the Organization's decision to withhold records under section 24(2)(c) on February 12, 2004. She did not submit a request for review of the issue within 30 days, and she did not request that I allow a longer period. Because the Applicant did not submit a request for review of the Organization's decision, and because I have not provided a copy of a written request review of the Organization's decision to the Organization, I lack jurisdiction to consider whether the Organization properly withheld these records under section 24(2)(c).

[para 60] If I were to interpret the Applicant's February 23, 2004 letter as including a request for review of the Organization's decision to withhold records under section 24(2)(a), I would have jurisdiction to decide the issue.

[para 61] I note that the Organization originally withheld these records on the basis that they were subject to legal privilege. The Organization also applied its discretion to withhold these records on the basis that litigation with the Applicant was anticipated.

[para 62] Were I to decide the issue, I would find that Record 200010 is not subject to legal privilege. While Record 200010, an email, was created, in part, by legal counsel, it is important to note that legal counsel in this case is in-house legal counsel. In *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809, the Court noted that in-house counsel may be called upon to provide different types of advice. In order to determine whether advice provided by in-house counsel is legal advice for the purposes of solicitor client privilege, it is necessary to consider three factors: the nature of the relationship, the subject matter of the advice, and the circumstances in which the advice is sought and rendered. In relation to Record 200010, the information from the solicitor is not legal advice. This information would also not be subject to litigation privilege as it would have been sent by counsel to the employee of the Organization regardless of whether litigation was contemplated.

[para 63] I would have found that Record 200092 was subject to legal privilege as it is an email forwarded by employees of the Organization in order that legal counsel could provide the Organization with legal representation.

Issue J: Did the Organizations properly apply section 24(2)(c) of the Act (information collected for investigation or legal proceeding)?

[para 64] The Organization withheld records 200004, 200010, 200011, 200091, 200092 and 200104 on the basis of section 24(2)(c) of the Act.

[para 65] Section 24(2)(c) 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 66] I have reviewed the Applicant's correspondence to this office and conclude that she has never requested a review within the meaning of section 47 of the Act of the Organization's decision to withhold records on the basis of section 24(2)(c).

[para 67] For the reasons set out in Issue I, above, I find that I lack jurisdiction to consider whether the Organization properly withheld records 200004, 200010, 200011, 200091, 200092 and 200104.

[para 68] Were I to have found that I had jurisdiction to decide the issue, I would have found that section 200004 should not have been withheld under section 24(2)(c), 200011 was outside the scope of the access request and that the Organization properly applied section 24(2)(c) to Records 200091, 200092, and 200104.

[para 69] Record 200004 is an email enquiring whether certain documents had been sent to the applicant. I would not find that it contains personal information collected for the purpose of an investigation or legal proceeding. This email would have been sent regardless of whether the Organization was anticipating taking part in a legal proceeding. For the same reasons, I would not find that record 200010 contains information collected in anticipation of an investigation or legal proceeding.

[para 70] Record 200011 indicates that it was prepared for the legal department on January 19, 2004. As this record was prepared after the Applicant's access request was made, it was not within the custody of the Organization and could therefore not have been included in the access request.

[para 71] I would find that Records 200091, 200092, and 200104 contain personal information collected in anticipation of an investigation or legal proceeding. The Organization argues that a legal proceeding under the Act includes issues surrounding the termination of an employment agreement and I agree with that interpretation. While the Applicant argues that there is no legal proceeding, she submitted evidence to my office indicating that she retained counsel. The Organization also submitted evidence that the Applicant had filed a civil claim for wrongful dismissal.

[para 72] For the reasons above, had the issue been properly before me, I would have found that the information in Records 200091, 200092, and 200104 was collected in anticipation of a legal proceeding and I would have found that the Organization exercised its discretion appropriately when it withheld them.

Issue K: Does section 24(3)(c) of the Act (information revealing identity of individual providing confidential opinion) apply to the records / information?

[para 73] The Organization severed the name of the author of record 200114 on the basis of section 24(3)(c).

[para 74] Section 24(3)(c) states:

24(3) An organization shall not provide access to personal information under subsection (1) if

(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.

[para 75] I have reviewed the Applicant's correspondence to this office and conclude that she has never requested a review within the meaning of section 47 of the Act of the Organization's decision to withhold records on the basis of section 24(3)(c).

[para 76] For the reasons set out in Issue I, above, I find that I lack jurisdiction to consider whether the Organization properly severed information on the basis of section 24(3)(c).

[para 77] Were I to find that I had jurisdiction to consider whether section 24(3)(c) of the Act applies to record 200114, I would find that it does. The record contains the identity of an individual who provided an opinion. The author of the email has not consented to disclosure of identity. The context of the email suggests that the author intended the email to go to the intended recipient and another colleague only. I would therefore find that the opinion was intended to be kept confidential for the purposes of section 24(3)(c) and that the Public Body was correct to sever the identity of the author of the opinion.

Issue L: Did the Organizations properly refuse to correct the Applicant's personal information, as provided by section 25 of the Act?

Issue M: If the Organizations properly refused to correct the Applicant's personal information, are the Organizations in breach of the requirement under section 33 of the Act to ensure that personal information is accurate and complete?

[para 78] I will address issues L and M together.

[para 79] In her December 21, 2004 letter, the Applicant requested that the Organization correct her personal information in statements and opinions made by employees of the Organization. Specifically, the Applicant requested that the Organization replace the statements and opinions about her work in its files with the following:

(The Applicant) achieved the following successes while employed as an (employee trainee) with (the Organization) from (starting date) to (date of termination).

1. 99% in the (Initial Training Course) having completed it in 3 not the 4 standards weeks (start to end date). The course instructor commented that (the Applicant's) performance was "Awesome".
2. 84.5% (Honors) in the two exams of the Canadian Securities Course.
3. Successfully passed the ATB Investor Services Wealth Management Course
4. Achieved 43% of her monthly sales target during my first week of sales on the ...team (start date to end date) and achieved 83% of her monthly sales target to (date).
5. Received commendations from branch personnel and others in (the Organization) division regarding her conduct with customers.
6. Conducted securities trades in compliance with securities regulations, standards, policies and rules as well as in compliance with (the Organization's) business rules.

Prior to (the Applicant's) termination a performance review was NOT conducted. Neither was (the Applicant) provided with written documentation regarding performance concerns by ATB. (The Applicant) exceeded performance and skill expectations at termination as compared to objective performance criteria provided to her by (an employee of the organization) prior to hire and shortly thereafter. In this respect, she excelled in both a customer-service as well as an analytical capacity. (Emphasis in original)

[para 80] The Organization decided not to make the corrections requested by the Applicant in relation to her personal information. Instead, the Organization annotated this information with the Applicant's proposed correction under section 25(3) of the Act. The Organization provided the following reason:

ATB Financial ha(s) chosen to exercise its discretion to not correct your personal information by recording in the files of ATB Financial the information submitted by you and identified above. We have reviewed the information provided by you and we disagree that there is an error or omission in your personal information under the control of ATB Financial. Your proposed correction seeks to correct information that is not personal information, seeks to affect business records related to ATB Financial, seeks to insert opinions by third parties, and contains "facts" that ATB Financial disputes the truth of. Your proposed correction really amounts to a request for a personal letter of reference signed by (a head of the Organization). As such your proposed correction is inappropriate, particularly given the nature of the ongoing dispute between ATB Financial and yourself regarding your termination.

[para 81] The Applicant argues that inaccuracy in her personal information under the Organization's control has prevented her from obtaining new employment opportunities in her field.

[para 82] The Organization argues that it properly exercised its discretion when it chose not to correct the Applicant's personal information. The Organization argues that

an organization may not correct an opinion for the reason that opinions are a subjective understanding or belief and “correcting” an opinion has the effect of destroying the integrity of the record in question. The Organization relies on section 25(5) and Order 97-020 of this office to support this position.

[para 83] Section 25 of the Act states:

25(1) An individual may request an organization to correct an error or omission in the personal information about the individual that is under the control of the organization.

(2) If there is an error or omission in personal information in respect of which a request for a correction is received by an organization under subsection (1), the organization must, subject to subsection (3),

- (a) correct the information as soon as reasonably possible, and*
- (b) where the organization has disclosed the incorrect information to other organizations, send a notification containing the corrected information to each organization to which the incorrect information has been disclosed, if it is reasonable to do so.*

(3) If an organization makes a determination not to make the correction under subsection (2)(a), the organization must annotate the personal information under its control with the correction that was requested but not made.

(4) On receiving a notification under subsection (2)(b) containing corrected personal information, an organization must correct the personal information in its custody or under its control.

(5) Notwithstanding anything in this section, an organization shall not correct or otherwise alter an opinion, including a professional or expert opinion.

[para 84] Section 33 of the Act states:

33 An organization must make a reasonable effort to ensure that any personal information collected, used or disclosed by or on behalf of an organization is accurate and complete.

[para 85] The information that the Applicant seeks to have corrected is the statements and opinions of employees of the Organization. In essence, she seeks to replace their statements and opinions of her work performance with her own evaluation.

[para 86] In Order 97-020, the former Commissioner found that a third party’s statement of fact could not be corrected, even if that statement is not true, because of the importance of maintaining the integrity of the record. He said:

The statement does not appear for the truth of it; it appears for the fact that it was what was said, truthful or not.

He also noted that the only way an applicant could meet the burden of proof in these situations is to show that the third party's statement of fact is not accurately recorded.

[para 87] In Order 97-020, the former Commissioner also took the position that section 36(1) of FOIPPA should not be used as a means to appeal decisions and opinions of a public body. I find that this reasoning applies equally to section 25(1) of the Act, which is a parallel provision and serves a similar purpose.

[para 88] The Applicant appears to take the position that section 25(4) of the Act overrides all other provisions of section 25. Because the Organization has not made the changes she requested, she argues that it has breached sections 25 and 33. However, it is important to note that section 25(5) applies notwithstanding the other provisions in section 25. It prohibits an organization from correcting or altering an opinion, even if the Public Body accepts that the opinion contains an error or omission. In addition, were the Organization to alter an opinion, it would arguably be in breach of section 33, as the record of the opinion would no longer be accurate.

[para 89] Having reviewed the records at issue, I find that the personal information the Applicant seeks to request may be classified as either third party statements or opinions. Applying the reasoning from Orders 97-020, F2003-019 and F2005-023 of my office, I find that section 25(1) does not apply to statements made by third parties and that they cannot be corrected under this section. I also find that the opinions expressed in the records fall under section 25(5). Consequently, I find that the Organization was correct when it refused to correct the information.

N. Does section 33 of the Act apply to the Commissioner's office?

[para 90] Section 33 of the Act creates a duty for organizations to make reasonable efforts to ensure that personal information that is collected, used, or disclosed by or on behalf of an organization is accurate and complete. As discussed above, the Commissioner's office is not an organization within the meaning of the Act, and therefore section 33 does not apply to it.

O. Does section 38(3) of the Act require the Organizations to produce to the Commissioner the records the Applicant specifies in mediation?

[para 91] The Applicant argues that Organization breached section 38(3) by not providing records she specified that she wished to receive during mediation.

[para 92] Section 38(3) refers to the power of the Commissioner to require records to be produced during an investigation under section 36, or an inquiry under section 50. If I require an Organization to produce records under section 38(3), then the Organization must produce the record within 10 days or allow me to examine the record in person.

[para 93] A request for records made by a Portfolio Officer during mediation is not the same as a requirement to produce under section 38(3). To clarify, I did not require the Organization to produce records.

P. Do sections 40 and 41 of the Act prohibit disclosure of details of communications between the Commissioner’s office and the Organizations occurring during the mediation process under the Act?

[para 94] In her *in camera* submissions of May 2, 2005 on page 104, the Applicant clarified that she does not seek information disclosed to this office during the mediation process and conceded that she would not be entitled to this information because of the operation of section 41 of PIPA.

[para 95] As a result, I will not decide this issue.

[para 96] Although the Applicant indicated that her May 2, 2005 submissions were intended to be “in camera” and to be kept confidential from the Organization, section 50(4) allows me to determine whether parties are entitled to have access to representations made to me during an inquiry. As the Applicant’s submissions effectively withdraw the issue, I have determined that the Organization is entitled to know that she made submissions to that effect.

Q. Does the Commissioner have jurisdiction to find that the Organizations have committed various offences under section 59 of the Act?

[para 97] The Applicant requests the Commissioner’s clarification as to whether the Commissioner may make an order under section 59 of the Act.

[para 98] The Organization submits that the Applicant has produced no evidence to support her position that it has committed an offence under section 59.

[para 99] Section 59 establishes offences and penalties under the Act. It states:

59(1) Subject to subsections (3) and (4), a person commits an offence if the person

- (a) wilfully collects, uses or discloses personal information in contravention of Part 2;*
- (b) wilfully attempts to gain or gains access to personal information in contravention of this Act;*
- (c) disposes of or alters, falsifies, conceals or destroys personal information or any record relating to personal information, or directs another person to do so, with an intent to evade a request for access to the information or the record;*

- (d) *obstructs the Commissioner or an authorized delegate of the Commissioner in the performance of the Commissioner's duties, powers or functions under this Act;*
- (e) *knowingly makes a false statement to the Commissioner, or knowingly misleads or attempts to mislead the Commissioner, in the course of the Commissioner's performance of the Commissioner's duties, powers or functions under this Act;*
- (f) *fails to comply with an order made by the Commissioner under this Act.*

(2) *A person who commits an offence under subsection (1) is liable,*

(a) in the case of an individual, to a fine of not more than \$10 000, and

(b) in the case of a person other than an individual, to a fine of not more than \$100 000.

(3) *No person is liable to prosecution for an offence against this or any other Act by reason only of complying with a requirement of the Commissioner under this Act.*

(4) *Neither an organization nor an individual is guilty of an offence under this Act if it is established to the satisfaction of the court that the organization or individual, as the case may be, acted reasonably in the circumstances that gave rise to the offence.*

[para 100] Section 59 does not give me jurisdiction to make findings of guilt or innocence, to convict persons for offences under the Act, or to assess penalties. Instead, the *Provincial Offences Procedure Act* gives jurisdiction to the Provincial Court of Alberta to decide whether a person had committed an offence under section 59 of the *Personal Information Protection Act* and to assess an appropriate penalty.

[para 101] For these reasons, I find that I have no jurisdiction to convict an organization for an offence under section 59 of the Act.

V. ORDER

[para 102] I make this Order under section 52 of the Act.

[para 103] I confirm that the Organization performed its duty to respond to the Applicant not later than 45 days from the day the Organization received the Applicant's written request.

[para 104] I confirm the decision of the Organization not to correct the Applicant's personal information.

[para 105] Given my other findings, there are no further orders to make.

Frank Work Q.C.
Information and Privacy Commissioner