

**ALBERTA**

**OFFICE OF THE INFORMATION AND PRIVACY  
COMMISSIONER**

**DECISION F2009-D-001**

August 26, 2009

**ALBERTA SOLICITOR GENERAL AND PUBLIC SECURITY**

Case File Number F4189

**Office URL:** [www.oipc.ab.ca](http://www.oipc.ab.ca)

**Summary:** The Applicant made a request for records from the Alberta Solicitor General and Public Security (the Public Body) about a cost-benefit study conducted by KPMG of the Royal Canadian Mountain Police's (RCMP) performance as Alberta's contract provincial police force.

The Public Body identified a briefing note and a review entitled *Review of the Provincial Police Services Agreement* (the KPMG review) as records responsive to the Applicant's access request. The Public Body disclosed some information from the briefing note, but withheld the remainder of the information under sections 21(1)(a) (harm to intergovernmental relations), 24(1)(a), (b) and (c) (advice from officials) and section 25 (harm to economic and other interests of a public body) of the Act.

During the inquiry, the Public Body submitted submissions and evidence *in camera*. The adjudicator decided that there was no basis for accepting the Public Body's submissions and evidence *in camera*.

**Statutes Cited:** **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 59, 69, 72, 74

**Orders Cited:** **AB:** F2009-007

**Authorities Cited:** Jones and DeVillars, *Principles of Administrative Law* 3<sup>rd</sup> Edition  
Scarborough: Thomson Canada Ltd. 1999

**Cases Cited:** *Nortel Networks Inc. v. Calgary (City)*, 2008 ABCA 370; *Alberta (Employment and Immigration) v. Alberta Federation of Labour*, 2009 ABQB 344

## **I. BACKGROUND**

[para 1] The Applicant made a request to the Public Body for records about a cost-benefit study conducted by KPMG of the Royal Canadian Mountain Police's (RCMP) performance as Alberta's contract provincial police force.

[para 2] On July 18, 2007, the Public Body advised that the request was denied by application of sections 4, 24, and 25 of the Act.

[para 3] On August 20, 2007, the Commissioner received the Applicant's request for a review of the Public Body's decision.

[para 4] The Commissioner authorized mediation. As mediation was unsuccessful, the matter was scheduled for a written inquiry. On November 16, 2007, the Commissioner extended the time for completion of the review and provided an anticipated date of completion of December 14, 2007. On November 28, 2007, the anticipated date of completion of the review was formally extended to September 30, 2009.

[para 5] The parties exchanged initial and rebuttal submissions. The Public Body provided *in camera* submissions, which I rejected on the basis that they did not disclose information contained in the records at issue and the Act did not authorize or require withholding the information they contained. The Public Body then provided exchangeable submissions. I reviewed the submissions of the parties and decided that I had questions for the Public Body and required more evidence from it. In my letter of January 8, 2009, I said:

Any additional evidence the Public Body chooses to provide is to be shared with the Applicant, unless the evidence specifically addresses information contained in the records at issue or an exception to disclosure under the Act would apply to the evidence. Information that the Public Body would be required to disclose to the Applicant under section 12 of the Act, and which does not disclose information contained in the records at issue and to which an exception of the Act would not apply, will not be accepted *in camera*.

[para 6] On February 13, 2009, the Public Body provided exchangeable submissions and these were shared with the Applicant. The Public Body also provided *in camera* submissions and evidence. I reviewed the evidence and submissions and responded on March 11, 2009. I said:

I have reviewed your *in camera* submissions dated February 25, 2009. I have decided to accept them for the sake of expediency and they will not be shared with the other party.

However, I am providing you with notice that I will refer in the Order to the submissions and evidence you submitted where the submissions and evidence do not reveal the contents of the records at issue, or the *Freedom of Information and Protection of Privacy Act* does not authorize or require withholding the information contained in the submissions. Otherwise, the issues and arguments you raise could not be meaningfully addressed in the Order and the reasons for any decision I make would be unclear.

If you have an objection to this procedure please advise me in writing at your earliest convenience, detailing your specific objections and reasons.

[para 7] On March 13, 2009, I requested records referred to in the Public Body's submissions and exhibits of February 13, 2009. In that letter, I stated the following:

These records may be submitted *in camera* if they reveal the contents of the records at issue or a specific provision of the *Freedom of Information and Protection of Privacy Act* [authorizes or requires] withholding the information contained in these records.

[para 8] On March 20, 2009, the Public Body provided the requested records in camera and stated:

**However, as these documents are referred to in our in camera submission we must insist that they remain in camera.** The disclosure of these documents without established relevancy to this inquiry would, in effect, allow the applicant access to a record that is not routinely available. For a normal request to access a record, a public body is afforded the legislative time limit of 30 days and the opportunity to consider whether any of the exceptions under Part I of the *FOIP Act* apply, including those exceptions that lie at the discretion of the Public Body. [emphasis in original]

[para 9] On March 24, 2009, I wrote the Public Body in response to its letter of March 20, 2009 and said:

To avoid any further delay, I have decided to accept these records *in camera*. However, where they do not reveal information from the records at issue or provisions of the *Freedom of Information and Protection of Privacy Act* do not obviously require or authorize withholding the information they contain, I will refer to their contents in the order, where relevant.

[para 10] On March 24, 2009, the Public Body responded to my letter of March 11, 2009. The Public Body stated:

While we recognize that you may have to make limited reference to the in camera submission and the evidence we submitted in issuing your Order, to the extent that such references do not reveal the contents of the records at issue and are restricted to that which is absolutely necessary we will not make any objection.

However, you further stated in your letter that you "... will refer in the Order to the submissions and any evidence [we] submitted where ... the Freedom of Information and Protection of Privacy Act does not authorize or require withholding the information contained in the submissions." With respect, we must object to the disclosure of any such information. The information was supplied to your office in confidence and had we known it would be disclosed to the other party without our consent, we may not have done so. At a minimum, we must insist on the opportunity to make submissions in this regard, prior to any such disclosure.

[para 11] On March 26, 2009, I returned the Public Body's *in camera* submissions to it, but I retained the evidence it had supplied. I said:

As noted in my previous correspondence to you, the basis for accepting submissions *in camera* is section 69(3) of the *Freedom of Information and Protection of Privacy Act* (the Act). The ability to provide submissions *in camera* authorized by section 69(3) of the Act is intended to enable public bodies and third parties to make detailed submissions in support of their position without indirectly disclosing the information they seek to withhold in order to make their case. Section 69(3) states:

*69(3) The person who asked for the review, the head of the public body concerned and any other person given a copy of the request for the review must be given an opportunity to make representations to the Commissioner during the inquiry, but no one is entitled to be present during, to have access to or to comment on representations made to the Commissioner by another person.*

Section 69(3) applies only to representations, not to evidence. While no one has a right to have access to or to comment on representations made to the Commissioner by another person, it does not follow that parties have a right to make representations without exchanging them with the other parties. In general, only those submissions that would reveal the information at issue, or that contain information that a provision of the *Freedom of Information and Protection of Privacy Act* (the Act), such as section 17, would require or authorize to be withheld, are accepted *in camera*. Practice Note 8 explains this Office's policy in relation to *in camera* submissions. It states, in part:

Sometimes a party asks to provide part or all of its written submission "in camera", meaning that part or all of the submission is provided for the Commissioner only and is not to be exchanged among the other parties. A party should provide reasons as to why part or all of a written submission should not be exchanged among the other parties. The Commissioner decides whether to accept some or all of a written submission "in camera". Generally, the Commissioner will accept "in camera" the records or information a public body withholds under the FOIP Act. The Commissioner will also accept "in camera" the personal information or confidential business information of other parties. If the Commissioner refuses an "in camera" request, he will return the submission to the party, so that the party can decide what can be exchanged among the other parties.

None of the representations you supplied *in camera* reveal information about the records at issue. Further, they do not reveal information that the Act authorizes or requires to be withheld. I accepted these submissions *in camera* only to avoid any further delay to the inquiry. I advised you that I would refer to the submissions where it would not offend the Act to do so, so that both the Public Body and the Applicant would know the reasons and the basis for my Order. As you are aware, your arguments as to the application of sections 21, 24, and 25 are primarily presented in your *in camera* submissions of February 13, 2009. Consequently to consider your main arguments in the Order, I would need to be able to refer to them.

[para 12] On March 30, 2009, counsel for the Public Body wrote to me to clarify the Public Body's position:

I would like to clarify that my client does not object to your use of the evidence before you in this Inquiry. Rather, we object to the disclosure by your office of information that was supplied and accepted *in camera*.

As you mentioned in your letter, the Commissioner is bound by section 59(3) of the *Freedom of Information and Protection of Privacy Act*...

My client supplied the information and records *in camera* because we felt they contain information that we would be required or authorized to refuse to disclose, had these records been responsive to the access request. Otherwise, we would have provided them to the Applicant as well.

Contrary to what you stated in your letter, my client is not purporting to suggest which evidence the Commissioner may refer to in an order. Rather we are merely attempting to protect the confidentiality of records that were provided to assist him in this process but that are not responsive to the request itself.

While you indicated that they were accepted *in camera*, your stated intention to refer to them in the Order and possibly disclose information they contain argues otherwise. Where public bodies are attempting to establish why they properly refused access to particular records, I believe it is imperative that they be allowed full and frank disclosure to your office of their reasons without fear that their confidential information will be disclosed.

[para 13] On March 31, 2009, the Public Body provided exchangeable submissions. These submissions state that they are intended to replace the submissions it had submitted *in camera* on February 13, 2009.

[para 14] On June 23, 2009, the Public Body made the following objection to my use of the evidence it had submitted:

This is further to our previous correspondence with you regarding our objection to the disclosure by your office of information that was supplied and accepted *in camera* in relation to this matter.

In light of the fact that portions of an *in camera* affidavit were cited verbatim in Order F2008-027 that was recently issued from your office, we feel the need to reiterate our strong objection to the disclosure – in any form – of any information that we have provided to you *in camera*.

We are firmly of the view that this is information my client would be required or authorized to refuse to disclose had these records been responsive to the access request. As such, we are of the view that you are bound by section 59(3) of the Freedom of Information and Protection of Privacy Act and **must not disclose** such information. [emphasis in original]

[para 15] On July 8, 2009, I returned all the evidence, affidavit and otherwise, that the Public Body requested I accept *in camera*. I said:

I have reviewed your letter of June 23, 2009. In that letter, you object to my disclosing any information supplied by the Solicitor General and Public Security (the Public Body) *in camera*. I understand from your letter that the Public Body submitted this evidence *in camera* in the belief that information supplied *in camera* cannot be referred to or disclosed in an order.

This is not the case. I must be able to refer to, and to disclose if necessary, evidence in an order so that the parties have the benefit of my reasons as to why I accept or reject the evidence. I cannot accept evidence that I cannot refer to or disclose in an order unless section 59(3) of the *Freedom of Information and Protection of Privacy Act* (the Act) applies to it.

While you have argued that section 59(3) prohibits me from disclosing *in camera* affidavits, my reading of this provision is that this provision prohibits me from disclosing information to which an exception to disclosure in Part I, Division II of the Act applies. Consequently, if the Public Body has an objection to my disclosing evidence in an order, it must cite the exception in the Act it believes applies and explain how it applies to the evidence it believes cannot be disclosed.

However, the final decision as to whether information may be referred to or disclosed in an order remains mine.

Given that the Public Body was unaware that I must be able to refer to evidence or disclose it in an order unless an exception in Part I Division II applies, I have decided to return all evidence submitted by the Public Body *in camera*, so that it can make a decision as to whether it wishes to resubmit this evidence.

If the Public Body chooses to resubmit the evidence, it must clarify which parts of the evidence may be exchanged with the Applicant and disclosed or referred to in the order. If the Public Body believes that there are parts of its evidence that cannot be exchanged, or referred to or disclosed in the order, it must explain which exception to disclosure in the Act it considers applies to that information. I will then take into consideration those submissions when I make my final decision as to whether the evidence may be referred to or disclosed in the order.

The evidence may be resubmitted no later than Tuesday, July 21, 2009.

[para 16] The Public Body requested an extension until July 31, 2009. On July 31, 2009, the Public Body objected to my letter of July 8, 2009. It restated its position that it believes section 59(3) applied to its evidence. The Public Body submitted that it considered my decision to be subject to judicial review. It also argued that section 59(1) creates a presumption that the Commissioner will not disclose information supplied *in camera*, unless the Commissioner must disclose information under section 59(2). The Public Body agreed that the final decision to disclose information is the Commissioner's.

[para 17] The Public Body made the following statement at the conclusion of the letter:

We would therefore respectfully ask you to reconsider your request with respect to the resubmission of the *in camera* evidence by the Public Body. If you are still unwilling to assure us that information submitted *in camera* will only be disclosed as necessary to conduct the inquiry and only with prior notice to the Public Body such that we may establish whether we agree with the determination prior to any disclosure of the information, we would ask that you please formalize that decision so that we may take whatever action we deem advisable.

[para 18] On August 4, 2009, I provided the Public Body the opportunity to resubmit its evidence. I said:

I have reviewed your points in your letter of July 31, 2009. You acknowledge that the Commissioner is permitted to disclose any information provided to him in the course of an inquiry that is necessary for the purpose of conducting an inquiry. The possible point of disagreement is as to what is necessary to conduct an inquiry. It is necessary to reveal any information supplied by one side that will permit the other side to know the case to be met. It is also necessary to reveal any information in the decision that explicates the decision-maker's reasoning. The Commissioner cannot be constrained in meeting either of these objectives by a desire by one side that its submissions be received *in camera*, unless section 59(3) of the Act requires that this information not be disclosed.

I have already returned the material that you provided *in camera*, and it does not at present form part of the submissions in this inquiry. If you choose to provide *in camera* submissions, you must, as I indicated previously, explain how section 59(3) applies to the material. If you do not provide either new submissions that may be shared with the parties, or *in camera* submissions containing

the requisite explanations, by August 11, 2009, I will proceed to decide this case on the basis of the submissions that are presently before me.

[para 19] On August 11, 2009, the Public Body made the following arguments:

This is further to your letter dated August 4, 2009 wherein you refused our request to be given notice prior to the disclosure of material submitted *in camera* so that we may take appropriate steps if we disagree with your determination that disclosure of such information is necessary to conduct an inquiry under the Act.

This decision effectively precludes us from submitting sensitive information to you as it would risk its disclosure. We are of the view that this decision is contrary to section 59(1) and 69(3) of the Act and will seriously impair our ability to meet the burden of proof imposed on us under the Act. As a result we believe this constitutes an unfair procedural decision.

Please be advised that we will be seeking judicial review of this decision. We are of the view that the final determination of this matter should be stayed until that application has been determined. Should you disagree, please advise as soon as possible so that we may take appropriate steps.

[para 20] On August 12, 2009, I acknowledged the Public Body's letter to me of that date. I said:

A judicial review presumes that some decision has been made that could be the subject of a judicial review. Despite what you say in your letter, on the date of your letter, August 11, it was within your power to take up my invitation that you provide reasons why it would be appropriate, within the terms of the Act and my obligation to be procedurally fair, for me to accept certain of your submissions *in camera*.

The only decision I have made, if it can be characterized as such, is that I cannot make a decision to accept a submission *in camera* unless I am told why it should be so accepted. I do not see that this is a "decision" that could be susceptible of review.

However, if you do not share this view, and you believe that a reviewable decision has been made, please point to the particular decision that I have made. If you cannot do that, then judicial review does not lie, and I must issue an order, as required by the legislation.

[para 21] On August 17, 2009 the Public Body made the following argument:

While you have indicated that we may submit information *in camera* if we identify those portions of the records that we believe section 59(3) would apply to, you note that this identification is no guarantee that the information will not be disclosed as you will merely take that identification into consideration in determining whether or not to disclose the information.

[para 22] I will now make a decision whether to accept *in camera* the information the Public Body seeks to submit *in camera*.

## **II. RECORDS AT ISSUE**

[para 23] As this is a decision whether I should accept information *in camera*, there are no records at issue.

## **III. ISSUE**

**Should the information the Public Body seeks to submit *in camera* be accepted?**

#### **IV. DISCUSSION OF THE ISSUE**

**Should the information the Public Body seeks to submit *in camera* be accepted?**

[para 24] The Public Body asserts that “it is firmly of the view” that the information that it formerly supplied or wishes to supply *in camera* falls under section 59(3) of the Act, and that “as such”, I “must not disclose” it, but it does not point to the particular information to which it is referring, nor to the particular exceptions in the FOIP Act that would require or authorize withholding. It appears to decline to do so in part on the basis that its doing so would not be a “guarantee” that I would not disclose the information, but that I would only use its submissions in this regard to make my own determination. I take from this that the Public Body’s position is that section 59(3) requires me to accept information *in camera* that a public body chooses to submit *in camera*. Further, it interprets section 69(3) as creating a right to supply information *in camera*.

[para 25] The Public Body also suggests that if I find it necessary to disclose information it submitted *in camera*, I must check with it first to be sure that it agrees that the disclosure is necessary, or “absolutely necessary” for me to conduct the inquiry.

[para 26] Section 59 states:

*59(1) The Commissioner and anyone acting for or under the direction of the Commissioner must not disclose any information obtained in performing their duties, powers and functions under this Act, except as provided in subsections (2) to (5).*

*(2) The Commissioner may disclose, or may authorize anyone acting for or under the direction of the Commissioner to disclose, information that is necessary to*

*(a) conduct an investigation or inquiry under this Act, or*

*(b) establish the grounds for findings and recommendations contained in a report under this Act.*

*(3) In conducting an investigation or inquiry under this Act and in a report under this Act, the Commissioner and anyone acting for or under the direction of the Commissioner must take every reasonable precaution to avoid disclosing and must not disclose*

*(a) any information the head of a public body would be required or authorized to refuse to disclose if it were contained in a record requested under section 7(1), or*

(b) *whether information exists, if the head of a public body in refusing to provide access does not indicate whether the information exists.*

(4) *The Commissioner may disclose to the Minister of Justice and Attorney General information relating to the commission of an offence against an enactment of Alberta or Canada if the Commissioner considers there is evidence of an offence.*

(5) *The Commissioner may disclose, or may authorize anyone acting for or under the direction of the Commissioner to disclose, information in the course of a prosecution, application or appeal referred to in section 57.*

[para 27] Section 69(3) states:

*69(3) The person who asked for the review, the head of the public body concerned and any other person given a copy of the request for the review must be given an opportunity to make representations to the Commissioner during the inquiry, but no one is entitled to be present during, to have access to or to comment on representations made to the Commissioner by another person.*

[para 28] Order F2009-007 addresses *in camera* submissions. In that order, I said:

The basis for accepting representations *in camera* is section 69(3) of the Act. The ability to provide submissions *in camera* afforded by section 69(3) of the Act is intended to enable public bodies and third parties to make detailed submissions and to provide evidence in support of their position without disclosing the information they seek to withhold in order to make their case. Section 69(3) states:

*69(3) The person who asked for the review, the head of the public body concerned and any other person given a copy of the request for the review must be given an opportunity to make representations to the Commissioner during the inquiry, but no one is entitled to be present during, to have access to or to comment on representations made to the Commissioner by another person.*

This provision ensures that the Commissioner may comply with his duty under section 59(3), which states that the Commissioner must not disclose information the head of a public body would be authorized or required to withhold if the head received an access request for the information.

While no one has a right to have access to or to comment on representations made to the Commissioner by another person, it does not follow that parties have a right to make representations without making them exchangeable with the other parties. In general, only those submissions that would reveal the information at issue, or that contain information that a provision of the *Freedom of Information and Protection of Privacy Act* (the Act), such as section 17, would require or authorize to be withheld, are accepted *in camera*.

[para 29] Practice Note 8 “IN CAMERA” WRITTEN SUBMISSIONS FOR INQUIRIES, which has represented this office’s procedures regarding *in camera* written submissions since June, 2001, states:

Sometimes a party asks to provide part or all of its written submission “in camera”, meaning that part or all of the submission is provided for the Commissioner only and is not to be exchanged among the other parties. A party should provide reasons as to why part or all of a written submission should not be exchanged among the other parties.

The Commissioner decides whether to accept some or all of a written submission “in camera”. Generally, the Commissioner will accept “in camera” the records or information a public body withholds under the FOIP Act. The Commissioner will also accept “in camera” the personal information or confidential business information of other parties. If the Commissioner refuses an “in camera” request, he will return the submission to the party, so that the party can decide what can be exchanged among the other parties.

[para 30] I can see no basis in either section 59 or 69 to accept *in camera* material that a public body submits *in camera* on the basis that it submitted it in this manner. If section 59(3) applies to information, then I have a duty not to disclose that information. If section 59(2) applies to information, and section 59(3) does not apply to the information, I may disclose it to meet the purposes of section 59(2). Section 59(2) is clear that the decision to disclose information for the purposes of an inquiry is that of the Commissioner or the Commissioner’s delegate, and section 59(3) is equally clear that the duty it imposes is that of the Commissioner or the Commissioner’s delegate. I therefore find that there is no legislative basis for the Public Body’s demand that I provide it with the information I consider necessary to conduct the inquiry and relevant to the order prior to issuing the order. The Public Body has not responded to any requests I have made as to why I should not refer to information in the order. As it has not yet explained why it believes exceptions to disclosure apply to the information, despite the opportunities I have given it do so, even if I did decide to provide parts of the draft of the order to the Public Body to obtain its views as to which information could be disclosed, I have no reason to believe that it will provide what it has declined to provide thus far.

[para 31] In addition, the suggestion that the Public Body be given the opportunity to review the information in the order prior to release would give it an advantage denied to the Applicant. It would also create the appearance that the Public Body is the decision maker, which would also contribute to an appearance of unfairness. Finally, it would be delegating my discretion and duty under section 59 to the Public Body.

[para 32] Since I requested the Public Body to provide reasons for its belief that the information it seeks to submit *in camera* should not be disclosed, the only argument that the Public Body has made is that the information is “sensitive” and is its “confidential information”. In my view, section 59(3) applies to information that the head of a public body would be authorized or required to withhold if an access request was made for the information. In other words, section 59(3) applies to information to which an exception to disclosure in Part 1, Division 2 of the Act applies. Part 1, Division 2 does not create an exception on the basis of sensitivity, or a sense on the part of a public body that its information is “confidential”.

[para 33] As noted in Practice Note 8 and in previous orders of this office, information that does not reveal information in the records at issue and to which an exception to disclosure does not apply, is not accepted *in camera*.

[para 34] As noted above, the Public Body also argues that requiring public bodies to supply exchangeable submissions limits the ability of a public body to make full and frank disclosure to this office. It argues:

I believe it is imperative that they be allowed full and frank disclosure to your office of their reasons without fear that their confidential information will be disclosed.

[para 35] I note that in *Nortel Networks Inc. v. Calgary (City)*, 2008 ABCA 370, the majority said the following about the ability to cross-examination at paragraph 19:

While there is no absolute entitlement to cross-examination... it is often the most effective means to challenge and test evidence. In this case, the lack of disclosure effectively precluded Nortel either from tendering evidence through its own expert witness to explain why the alleged comparables were not in fact comparables, or from demonstrating the same through cross-examination. The Board received and relied upon critical evidence without requiring disclosure which would have permitted such evidence to be challenged and tested by the opposite party. While a board has considerable scope in determining what evidence is relevant for its purposes, it is not thereby entitled to deprive an opposite party of the means to effectively challenge such evidence. The question is not so much one of relevance of evidence but one of procedural fairness. The Board gave no explanation why the evidence sought was not relevant for Nortel's purposes, nor explained how Nortel could test the Board's conclusion that the properties were indeed comparable in the absence of the disclosure in question.

While these remarks are made specifically about allowing a party to cross-examine another party on its evidence, in my view, they also hold true in relation to exchanging evidence and submissions in a written inquiry. Disclosing evidence allows other parties to test it, which enables a decision maker to ensure that he or she is making a decision on the best available evidence. In addition, disclosure assists a decision maker to meet the requirements of procedural fairness. While section 69(3) establishes that this office is not required to share all information it receives, it does not follow that it is not required to be procedurally fair to an applicant in all other aspects of the inquiry. Further, given that section 59(3) prohibits this office from disclosing information subject to Part 1, Division 2 of the Act and the records at issue, which limits an applicant's ability to test evidence, it is all the more necessary to share information that is not subject to section 59(3), to ensure that all parties to the inquiry may make full argument and challenge evidence.

[para 36] The Public Body also argues that it would be procedurally unfair for me not to accept *in camera* the information it seeks to submit *in camera*. The two basic requirements of procedural fairness -- the right to know the case to be met and the right to make representations -- are set out in Jones and DeVillars, *Principles of Administrative Law*:

The courts have consistently held that a fair hearing can only be had if the persons affected by the tribunal's decision know the case to be made against them. Only in this circumstance can they correct evidence prejudicial to their case and bring evidence to prove their position. Without knowing what might be said against them, people cannot properly present their case. But knowing the case that must be met is not enough, of course; the opportunity to present the other side of the matter must also be allowed. (Jones and DeVillars, *Principles of Administrative Law* Third Edition (Scarborough: Thomson Canada Ltd. 1999) p. 260

The Public Body is aware of the case it must meet, that is, that information it seeks to submit *in camera* must either reveal the contents of the records at issue or be subject to an exception to disclosure in the Act. In addition, it is aware of the case it must meet for the inquiry. Further, the Public Body has been given the right to make representations that the information it seeks to submit *in camera* meets these requirements and the right to make representations regarding the information it seeks to withhold. The fact that I do not agree with the Public Body in its interpretation of section 59 is not a breach of procedural fairness. In my view, procedural fairness does not include a right to make representations *in camera* absent a compelling reason for doing so.

## V. DECISION

[para 37] The Public Body has not provided any reasons to suggest that section 59(3) applies to the information it seeks to submit *in camera* or that this information would reveal the contents of the records at issue. As a result, the Public Body has not established that the information it seeks to submit *in camera* should be accepted *in camera*. I therefore decide that I will not accept the information it supplied *in camera*. I have already returned this information to the Public Body and this information will not be considered in the order. I will proceed to make an order regarding the Applicant's request for review 45 days after the Public Body has been given a copy of this decision. I say this because I understand the Court to say in *Alberta (Employment and Immigration) v. Alberta Federation of Labour*, 2009 ABQB 344 at paragraph 65 that procedural decisions interpreting the legislation governing this office are orders for the purposes of section 74(3) of the Act. The contrary view would be that an order under section 74 of the FOIP Act is an order contemplated by section 72 of the Act, that is, a decision made by the Commissioner or an external adjudicator at the conclusion of an inquiry in order to dispose of the issues between the parties. However, I am bound by the decision of the Court in *Alberta (Employment and Immigration)*. Consequently, the 45 day judicial review period applies to this decision as well.

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Teresa Cunningham  
Adjudicator