ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2023-02

January 11, 2023

EDMONTON POLICE SERVICE

Case File Number 004060

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request to the Edmonton Police Service (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for "all written or electronic communications to or from executive and senior managers of Human Resources at the Edmonton Police Service regarding [the Applicant], and his employment, illness, disability, reengagement, recruit training, evaluation, progress, or termination, including but not limited to correspondence to or from: [7 named individuals]". The relevant dates for the request are August 1, 2012 to the date of the request (April 15, 2016).

The Public Body responded to the request, providing 1886 pages of records, as well as a video recording. Some information was withheld under sections 17(1), 20(1), 21(1), 23(1), 24(1) and 27(1) of the FOIP Act.

The Applicant requested a review, and subsequently an inquiry, into the Public Body's response.

The Adjudicator found that the Public Body properly applied section 17(1) to most, but not all, information withheld under that provision.

The Adjudicator found that section 21(1) does not apply to information in the records. The Adjudicator found that the Public Body's submissions were insufficient to conclude that section 23(1)(b) could apply to any information in the records.

The Adjudicator found that sections 24(1) and 27(1)(c) apply to some information in the records. The Adjudicator also found that the Public Body established its claim of solicitor-client privilege with respect to most, but not all, of the records over which that claim was made.

The Adjudicator ordered the Public Body to review the records at issue and amend its application of sections 23, 24 and 27; to re-exercise its discretion to apply those provisions; to reconsider its claim of privilege over some records; and to consider what information in the records is properly non-responsive. In providing a new response to the Applicant, the Adjudicator recommended that the Public Body clarify whether the Applicant is interested in duplicate copies of records.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 17, 20, 21, 23, 24, 27, 71, 72

Authorities Cited: AB: Decision F2014-D-01, Orders 96-012, 97-007, F2004-003, F2004-026, F2007-008, F2007-013, F2007-014, F2008-008, F2008-028, F2010-007, F2010-036, F2011-018, F2012-08, F2013-13, F2014-R-01, F2014-29, F2014-38, F2015-22, F2016-20, F2016-57, F2017-57, F2017-58, F2020-22, F2021-05, F2021-28, **BC**: Order F14-38

Cases Cited: *Blood Tribe v. Canada (Attorney General)*, 2010 ABCA 112 (CanLII), *Canada v. Solosky*, [1980] 1 S.C.R. 821, *Canada (Information Commissioner) v. Canada (Prime Minister)*, 1992 CanLII 2414 (FC), [1992] F.C.J. No. 1054, *Canada (Minister of Justice) v. Blank*, 2007 FCA 147, *Canadian Natural Resources Limited v. ShawCor Ltd.*, 2014 ABCA 289 (CanLII), *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2012 ABQB 595, *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (CanLII), *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2022 ABCA 397 (CanLII), *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII), *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23 (CanLII)

I. BACKGROUND

[para 1] The Applicant made an access request to the Edmonton Police Service (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for "all written or electronic communications to or from executive and senior managers of Human Resources at the Edmonton Police Service regarding [the Applicant], and his employment, illness, disability, reengagement, recruit training, evaluation, progress, or termination, including but not limited to correspondence to or from: [7 named individuals]". The relevant dates for the request are August 1, 2012 to the date of the request (April 15, 2016).

[para 2] The Public Body responded to the request, providing 1886 pages of records, as well as a video recording. Some information was withheld under sections 17(1), 20(1), 21(1), 23(1), 24(1) and 27(1) of the FOIP Act.

[para 3] The Applicant requested a review, and subsequently an inquiry, into the Public Body's response.

II. RECORDS AT ISSUE

[para 4] The records at issue consist of the withheld portions of the responsive records.

III. ISSUES

[para 5] The issues set out by the adjudicator previously assigned to this inquiry in the Notice of Inquiry dated November 21, 2019, are:

1. Does section 17(1) of the Act (disclosure an invasion of personal privacy) apply to the information?

2. Did the Public Body properly apply section 20(1) of the Act (disclosure harmful to law enforcement) to the information in the records?

3. Did the Public Body properly apply section 21(1) of the Act (disclosure harmful to intergovernmental relations) to the information in the records?

4. Did the Public Body properly apply section 23(1) of the Act (local public body confidences) to the information in the records?

5. Did the Public Body properly apply section 24(1) (advice from officials) to the information in the records?

6. Did the Public Body properly apply section 27 (privileged information) to the information in the records?

IV. DISCUSSION OF ISSUES

[para 6] There are over 1800 pages of records at issue in this inquiry, though a large number of those records are duplicates.

[para 7] The rationale behind much of the Public Body's severing decisions is not clear from the records or from the Public Body's submissions. In some cases, the Public Body has not provided the necessary support to justify the application of a particular provision and I am left to speculate as to how that exception could apply (for example, section 23, and in some cases, section 21). In other cases, the rationale seems logically unsound – for example, withholding the Applicant's employee number under section 20(1)(m).

[para 8] In its index of records provided with the Public Body's initial submission, which was exchanged with the Applicant, the Public Body included the following columns:

Tab	Page Range	DocDate	Doctype	Authors	Recipients	DocTitle	Section

This is helpful information for the purposes of an inquiry. However, the Public Body often disclosed information in this index that was withheld in the records themselves. In most instances, the Public Body withheld the title of a document or the subject line of an email in a record under an exception, but included the document title or subject line in the "DocTitle" column of the index. Withholding information in a responsive record while disclosing that same information in a submission exchanged with the Applicant is nonsensical.

[para 9] In many cases, the Public Body has not conducted the requisite line-by-line review when applying an exception and as a result, applied the exception too broadly.

[para 10] The Public Body has also withheld applied several exceptions to a given page, without delineating which exception is applied to which information. In some cases it is clear that the Public Body intends to apply multiple exceptions to the same information; however, this does not appear to be the case in every instance. For example, on page 203 of Record 1, the entire page is withheld under sections 21, 24 and 27. The lower half of the page consists of an email that also appears several times elsewhere in the records – in those other instances the Public Body has not applied section 24 to that email (for example, page 152 in Record 1). Presumably then, the Public Body means to apply section 24 to *other* information on page 203, but it has not delineated which information. It is also possible, given other inconsistencies in the Public Body's application of exceptions, that the Public Body does mean to apply section 24 to the email on that lower half of page 203, even though it was not applied to the same information found elsewhere in the records. All this is to say that I am left to guess how the Public Body intended to apply various exceptions in many of the records.

[para 11] As a result, I cannot make a definitive finding on the application of each exception in every record before me. Where a public body's application of an exception is unclear, it is usual for the adjudicator to ask for additional arguments from the public body in order to come to a decision on the matter. In this case, there are a large number of records at issue and the Public Body has made the same errors in many of those records (such as applying an exception too broadly). There are also quite a number of decisions the Public Body has made that I cannot make sense of. Given the number of questions I have and the number of records affected by the questions, if I were to ask for clarification, the Public Body would essentially be making its submissions anew. The Public Body's last submissions were made to the adjudicator previously assigned to this file, in July 2020. In view of the amount of time that has passed, and the number of questions raised by the Public Body's submissions and the content of the records, it is inefficient to essentially ask the Public Body to make new submissions at this point.

[para 12] In Order F2014-29 I ordered the public body to reprocess the records at issue and make new decisions regarding its application of certain exceptions, rather than substituting my own decisions. I said (at para. 11):

> In some instances, it seems clear from the records themselves that a particular exception applies to certain information; similarly, it seems likely that none of the exceptions cited by the Public Body apply to some of the information in the records. However, in many instances in the 373 pages of records, I lack the Public Body's particular knowledge and expertise regarding the substance of these records. As such, it is my view that the Public Body is in a better position to delineate what information in the records can be withheld under each of the exceptions, taking into account the guidance provided in this order.

[para 13] For the reasons above, I have decided to take a similar approach in this case.

[para 14] The Public Body's submissions and the records at issue are sufficient for me to make a finding regarding the application of sections 17, 20, and 21.

[para 15] With respect to the remaining exceptions applied by the Public Body, I will explain which arguments of the Public Body I have accepted or rejected and why, provide the principles for applying each exception, and provide examples of instances in which each was applied appropriately or inappropriately. To be clear, if I have not specified that a particular exception *does* apply to a page, the parties are not to infer that the exception does not apply (and vice versa). I have made findings on particular pages because they are good examples for the Public Body of the principles I am explaining.

[para 16] I will order the Public Body to review the records at issue again, and apply the exceptions keeping in mind the principles and guidance provided in this Order.

[para 17] As the Public Body will be reviewing all of the records again, I will also ask it to again exercise its discretion to withhold information under discretionary provisions.

[para 18] In re-processing the records, the Public Body should consider how it has categorized information in the records at "non-responsive". In many records consisting of emails, the Public Body withheld the body of the emails as non-responsive, but disclosed the to/from/date information to the Applicant (in the pages of Record 2, for example). If the content of the emails is not responsive, it is unclear how the disclosed information could be responsive. Withholding information as non-responsive was discussed in Order F2018-75 (at paras. 55-56):

> As stated in Order F2009-025, 'non-responsive' is not an exception from the Act to separate sentences or other items of information from the context of the record as a whole in order to withhold them.
>
> Information must be considered in the context of the record as a whole, in determining whether it is separate and distinct from the remainder of the record.

[para 19] It is possible to have non-responsive information within a responsive record; however, it seems highly unlikely that the to/from/date and signature line of an email is responsive if the entire body of the email is not. I will order the Public Body to review how it has characterized information as non-responsive in the records.

[para 20] The Public Body has noted that the records at issue contain many duplicates. Having reviewed the records provided to me, I agree that the volume of records could be significantly reduced by removing duplicates. Before providing a new response to the Applicant, I recommend that the Public Body clarify whether the Applicant is interested in receiving duplicate copies of records.

1. Does section 17(1) of the Act (disclosure harmful to personal privacy) apply to the information in the records?

[para 21] The Public Body applied section 17(1) to withhold information about employees other than the Applicant, including names, information about their employment, payroll numbers, personal comments (such as information about planned vacation absences), and names and file numbers relating to accused individuals.

[para 22] Section 17 states in part:

> *17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.*
> *...*
>
> *(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*
>
> *...*
>
> *(b) the personal information is an identifiable part of a law enforcement record, except to the extent that the disclosure is necessary to dispose of the law enforcement matter or to continue an investigation,*
>
> *...*
>
> *(g) the personal information consists of the third party's name when*
>
> *(i) it appears with other personal information about the third party, or*
>
> *(ii) the disclosure of the name itself would reveal personal information about the third party,*
>
> *...*
>
> *(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether*
>
> *(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,*

...

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

...

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

...

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

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

[para 23] Section 17 is a mandatory exception: if the information falls within the scope of the exception, it must be withheld.

[para 24] Under section 17, if a record contains personal information of a third party, section 71(2) states that it is then up to the applicant to prove that the disclosure would not be an unreasonable invasion of a third party's personal privacy.

[para 25] Section 1(n) defines personal information under the Act:

1 In this Act,

...

(n) "personal information" means recorded information about an identifiable individual, including

(i) the individual's name, home or business address or home or business telephone number,

(ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,

(iii) the individual's age, sex, marital status or family status,

(iv) an identifying number, symbol or other particular assigned to the individual,

(v) the individual's fingerprints, other biometric information, blood type, genetic information or inheritable characteristics,

(vi) information about the individual's health and health care history, including information about a physical or mental disability,

(vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,

(viii) anyone else's opinions about the individual, and

(ix) the individual's personal views or opinions, except if they are about someone else;

[para 26] Much of the information described by the Public Body as being withheld under section 17(1) is personal information to which that provision applies. However, the Public Body has withheld some information about employees that relates only to their work duties.

[para 27] Past Orders of this Office state that the disclosure of the names, contact information and other information about public body employees, that relates only to the employees acting in their professional capacities is not an unreasonable invasion of personal privacy under section 17(1) (see Orders 2001-013 at paras. 89-90, F2003-002 at para. 62, F2008-028 at para. 53) unless that information has a personal dimension in the circumstances. In other words, in the absence of a personal dimension, information cannot be withheld under section 17(1).

[para 28] While the Applicant has the burden of proving that it would not be an unreasonable invasion of privacy to disclose personal information to which section 17(1) applies, the Public Body has the burden of establishing that the information withheld under section 17(1) is personal information to which that provision can apply (Order F2010-002, at para. 9).

[para 29] Page 5 of Record 3 consists of an email sent to various Public Body employees, including the Applicant, regarding what appears to be a training protocol. The body of the email was disclosed to the Applicant, as was the author and subject line. As this email appears to have been sent to these employees as part of their work duties, section 17(1) does not seem to apply to the names of the recipients. In any event, in its index of records, the Public Body listed every recipient of the email in the "Recipients" column of the index. The same was done with respect to the names withheld on page 24 of Record 7. Withholding that same information in the records at issue is now pointless.

[para 30] The Public Body also withheld work cell phone numbers of various Public Body employees. In its submissions, the Public Body has referred these numbers as "personal cell phone numbers" of public body employees. However, almost all of the cell phone numbers appear in the signature lines of emails sent by public body employees, along with their other business contact information. In the few instances that these cell phone numbers appear in the body of an email, they match the number appearing elsewhere in a signature line. They also appear to have been provided by the author of the email for the purpose of contacting the author for work-related matters. Further, the Public Body's submission indicates that these cell phone numbers are work-related.

[para 31] Based on this, this I conclude that these numbers are work-assigned cell phone numbers. While these cell phone numbers are clearly unique numbers assigned to individual employees (rather than a general number for a work area), they are phone numbers assigned to Public Body employees for work purposes. As such, they are better characterized as a *direct* phone number, than a *personal* phone number.

[para 32] Many past Orders of this office and other jurisdictions have discussed the application of section 17(1) to work cell phone numbers of public body employees. The

Public Body did not address any of those Orders. Order F2019-09 reviews past decisions regarding the application of section 17(1) to work-issued cell phone numbers (see especially paragraphs 20-28). That Order concludes (at paras. 26, 28-30):

> Employer-issued cell phone numbers (or landline numbers, for that matter) could reveal personal information about an employee if that number was associated with other personal information of the employee. For example, phone logs that reveal personal calls made by the employee to a medical specialist may constitute personal information. However, it is not the number that is personal information; the personal information is the fact that the individual contacted that medical specialist. In some circumstances, the employer-issued phone number might not be severable from the personal information, in which case it could reveal personal information as well.
>
> …
> I prefer the analysis from Order F2018-36 and the Ontario orders: the fact that an employee may use an employer-issued cell phone to make a personal call, or that the employee may carry the cell phone with them, does not alter the character of the work-issued cell phone *number* such that it has a personal dimension. Employees may also use landlines to make personal calls, or employer-issued email addresses to send personal emails; the occasional personal use of a work-issued phone or email address does not make the phone number (or email address) the personal information of the employee.
>
> The Public Body has also argued, with respect to its application of section 17(1), that the Public Body has experienced difficulty with employees not adhering to its rules regarding the dissemination of information. Specifically, the Public Body states that its Code of Conduct instructs employees to "refrain from providing non-confidential information and data to third parties if such information in available through Information Services and/or through an access request under the *Freedom of Information and Protection of Privacy Act*" (initial submission at page 6). The Public Body is concerned that if it discloses the direct phone numbers of employees, "it is likely that the AER would lose much ground in its efforts to ensure that dissemination occurs through proper channels."
>
> I understand this as a general argument for why the Public Body does not publish the direct phone numbers of its employees. However, concerns about how employees disseminate information via phone do not render the phone number personal. This concern seems to relate to a human resources or employee conduct matter, rather than a FOIP matter.

[para 33] In this case, the Public Body states that disclosing the cell phone numbers of officers could result in members of the public calling those numbers instead of 911. This is a speculative argument with no evidence provided to support it. Even if the Public Body provided support for finding such an outcome was reasonably likely, such an outcome does not give the work-issued cell phone number a *personal dimension* such that section 17(1) applies. If the harm alleged by the Public Body is reasonably likely, there are other exceptions in the FOIP Act that may apply. In this case, as stated, the Public Body did not provide any evidence that the harm alleged could reasonably be expected to result from disclosure, nor did it argue that any other exception applies.

[para 34] The Public Body also argued that disclosing cellphone numbers could result in individuals calling these numbers to intimidate the officers. A similar argument was discussed in Order F2019-09 (at para. 31):

> The Public Body has argued that some of its employees have been subjected to harassing or threatening phone calls. It has also argued that it has four staff members who received exemptions under the *Public Sector Compensation Transparency Act*, such that their names and compensation are not disclosed. The fact that employees may have received harassing phone calls, or have valid safety concerns regarding disclosure of their names and workplace does not change the character of business contact information such that it has a personal dimension. In other words, an employer-issued phone number does not become the personal information of the employee to whom it was issued, for the reason that callers have misused the phone number. Other provisions of the Act address such circumstances; specifically section 18(1). For example, in Order F2017-60, I found that the names and contact information of employees of the Civil Forfeiture Office were properly withheld under section 18(1), due to a risk of threats to health and safety of the employees. I will therefore consider the Public Body's arguments regarding threatening or harassing phone calls under issue #2 (the application of section 18(1)).

[para 35] This rationale was also applied in Order F2020-22 to find that section 17(1) did not apply to work-assigned cell phone numbers of employees of the Calgary Police Service, as the numbers lacked a personal dimension in the context of the records. That Order was issued shortly after the Public Body's last submission to this inquiry. Although the Public Body has not had an opportunity to address Order F2020-22, the rationale in that order followed that of Order F2019-09, which the Public Body could have addressed but did not.

[para 36] As stated in the Order F2019-09 reproduced above, section 18(1)(a) of the Act contemplates withholding information that could reasonably be expected to threaten the health or safety of an individual if disclosed. In Orders F2017-60, F2020-08, and F2021-34, the public body provided sufficient evidence of a threat to health or safety of the relevant employee such that section 18(1) was found to apply. In this case, the Public Body has not applied section 18(1). Even if it had, the Public Body has merely speculated that individuals may call an officer's cell phone number to intimidate them, without providing any support for that statement.

[para 37] Nothing in the Public Body's submission persuades me that the analysis in past Orders of this office and other jurisdictions ought not to apply here. For section 17(1) to apply to business contact information such as work-related cell phone numbers, that information must have a personal dimension.

[para 38] Business contact information may have a personal dimension when it is associated with other information that has a personal dimension, such as where the information appears in a disciplinary context (see Orders F2016-20, F2018-08, F2021-05).

[para 39] In BC Order F14-38, the adjudicator found that section 22 of BC's FOIP Act (which is equivalent to section 17 of Alberta's Act) can apply to a work-issued phone

number that appeared in a records unrelated to the employee's job duties. The adjudicator found (at para. 19):

> The City is withholding name, telephone number, address and other similar identifying information. Nearly all of this withheld information is about identifiable individuals and most of it is clearly not contact information as defined by FIPPA. This is because the names and other identifying information is about people in their personal rather than business capacities, and is their home telephone numbers and addresses. There is also a work telephone number listed for a third party, which would typically be contact information. However, I find that this telephone number is not contact information in its context because it was recorded for the purpose of having a way to contact the third party with respect to a bylaw complaint, which was a personal rather than business matter for the third party. (At para. 19, emphasis mine)

[para 40] In BC's FOIP Act, business contact information is specifically excluded from the definition of personal information. Therefore, section 22 of BC's Act generally does not apply to business contact information of public body employees, including work-issued cell phone numbers. Although Alberta's Act does not exclude business contact information from the definition of personal information, the requirement for personal information that relates to an individual's work duties (including business contact information) to have a personal dimension creates a similar outcome. Therefore, the analysis in the BC Orders cited above may apply where a public body employee provides their work-issued phone number as a contact number in relation to a personal matter, unrelated to their work duties.

[para 41] Those are some examples where a work-issued cell phone number may have a personal dimension such that section 17(1) can apply. None of those circumstances apply in this case; nor are there any other reasons to believe that the cell phone numbers in the records have a personal dimension. As stated, the cell phone numbers of public body employees in the records at issue all appear in relation to those employees' performance of their work duties. As such, there is no personal dimension to these numbers as they appear in the records.

[para 42] Given the above, I find that the cell phone numbers of public body employees appearing in the records lack a personal dimension such that section 17(1) can apply. I will therefore order the Public Body to disclose that information to the Applicant, subject to the proper application of another provision as discussed in the remainder of this Order.

[para 43] The remaining information withheld under section 17(1) is information to which that provision can apply. The analysis below applies only to the information to which I found section 17(1) can apply.

Application of sections 17(2) – 17(5)

[para 44] Sections 17(2) and (3) refer to circumstances in which disclosure of personal information is not an unreasonable invasion of privacy. None of the parties have argued

that any provisions of sections 17(2) or (3) are relevant and, from the face of the records, none appear to apply.

[para 45] Section 17(4) lists circumstances in which disclosure is presumed to be an unreasonable invasion of privacy. The Public Body has argued sections 17(4)(a), (b), (d), (f), and (g) apply to the information withheld under section 17(1).

[para 46] The relevant portions of this provision state:

> *17(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*
>
> > *(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,*
> >
> > *(b) the personal information is an identifiable part of a law enforcement record, except to the extent that the disclosure is necessary to dispose of the law enforcement matter or to continue an investigation,*
> >
> > *…*
> >
> > *(d) the personal information relates to employment or educational history,*
> >
> > *…*
> >
> > *(f) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations*
> >
> > *(g) the personal information consists of the their party's name when*
> >
> > > *(i) it appears with other personal information about the third party, or*
> > >
> > > *(ii) the disclosure of the name itself would reveal personal information about the third party*

[para 47] I agree that sections 17(4)(a), (b), (d) and (f) apply to various items of information withheld under section 17(1). Section 17(1)(g) applies to all of the third party personal information withheld under section 17(1).

[para 48] Section 17(5) is a non-exhaustive list of factors to consider in determining whether disclosing personal information would be an unreasonable invasion of privacy. The Public Body argues that sections 17(5)(e), (f), (g) and (h) apply to some information, weighing against disclosure of that information.

[para 49] The Applicant argues that the information is relevant to a fair determination of his rights under section 17(5)(c). These provisions state:

17(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

...

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

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

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

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

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

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

...

Section 17(5)(c)

[para 50] Section 17(5)(c) weighs in favour of disclosure where the personal information is relevant to a fair determination of the Applicant's rights. Four criteria must be fulfilled for this section to apply:

> (a) the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds;
>
> (b) the right is related to a proceeding which is either existing or contemplated, not one which has already been completed;
>
> (c) the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
>
> (d) the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing. (Order F2008-012 at para. 55, Order F2008-031 at para. 112)

[para 51] The Applicant states that in December 2016 he filed a complaint with the Alberta Human Rights Commission against the Public Body in relation to his termination. Specifically, the Applicant alleges that the Public Body erroneously considered his disability-related performance when refusing to continue his employment. He states that the personal information he seeks "has some bearing on or is significant to the determination of his human rights, and the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing" (rebuttal submission, at page 2).

[para 52] At the time of the Applicant's rebuttal submission (June 26, 2020), he states that this proceeding had not been completed. It is not clear if the proceeding is ongoing at this time; however, for the following reasons I do not need to determine that point.

[para 53] The Public Body argues that the information it has described in its initial submission as being withheld under section 17(1) does not relate to the Applicant. As such, it is unclear how it could be relevant to his human rights complaint.

[para 54] I agree. The Applicant has reiterated parts of the test for the application of section 17(5)(c) without specifying how they apply to the particular information in the records. I understand that the Applicant cannot review the information withheld under section 17(1), but the Public Body has provided a description of the information withheld under that provision in its initial submission. Therefore, the Applicant had an opportunity in his rebuttal submission to explain how that information is relevant to his human rights complaint. Without such an explanation, I cannot see how the personal information of third parties in the records relates to the Applicant's human rights complaint. I find that section 17(5)(c) is not applicable.

Conclusion regarding section 17(1)

[para 55] The Applicant has not argued that any other factors weigh in favour of disclosing the third party personal information in the records, and none appear to apply. As there is at least one factor that weighs against disclosure, I find that the Public Body must continue to withhold the third party personal information to which section 17(1) can apply.

2. Did the Public Body properly apply section 20(1) of the Act (disclosure harmful to law enforcement) to the information in the records?

[para 56] The Public Body applied section 20(1)(m) to a few discrete items of information that appears in several records. This provision states:

> *20(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*
>
> > *(m) harm the security of any property or system, including a building, a vehicle, a computer system or a communications system,*

[para 57] Section 71(1) of the Act states:

> *71(1) If the inquiry relates to a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part of the record.*

[para 58] The Public Body has the burden of showing that disclosure of the information could reasonably be expected to lead to the outcome set out in section 20(1)(m).

[para 59] In *Canada (Information Commissioner) v. Canada (Prime Minister)*, 1992 CanLII 2414 (FC), [1992] F.C.J. No. 1054, Rothstein J., as he then was, made the following observations in relation to the evidence a party must introduce in order to establish that harm will result from disclosure of information. He said (emphasis added):

> While no general rules as to the sufficiency of evidence in a section 14 case can be laid down, what the Court is looking for is support for the honestly held but perhaps subjective opinions of the Government witnesses based on general references to the record. Descriptions of possible harm, even in substantial detail, are insufficient in themselves. At the least, there must be a clear and direct linkage between the disclosure of specific information and the harm alleged. The Court must be given an explanation of how or why the harm alleged would result from disclosure of specific information. If it is self-evident as to how and why harm would result from disclosure, little explanation need be given. Where inferences must be drawn, or it is not clear, more explanation would be required. The more specific and substantiated the evidence, the stronger the case for confidentiality. The more general the evidence, the more difficult it would be for a court to be satisfied as to the linkage between disclosure of particular documents and the harm alleged.

[para 60] The "harm test" must be applied on a record-by-record basis (Orders F2002-024, at para. 36, F2009-009, at para. 91).

[para 61] The Supreme Court of Canada has clearly enunciated the test to be used in access-to-information legislation wherever the phrase "could reasonably be expected to" is found (such as in section 18(1)(a)). In *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII), the Court stated:

> Given that the statutory tests are expressed in identical language in provincial and federal access to information statutes, it is preferable to have only one further elaboration of that language; *Merck Frosst*, at para. 195:
>
> > I am not persuaded that we should change the way this test has been expressed by the Federal Courts for such an extended period of time. Such a change would also affect other provisions because similar language to that in s. 20(1)(c) is employed in several other exemptions under the Act, including those relating to federal-provincial affairs (s. 14), international affairs and defence (s. 15), law enforcement and investigations (s. 16), safety of individuals (s. 17), and economic interests of Canada (s. 18). In addition, as the respondent points out, the "reasonable expectation of probable harm" test has been followed with respect to a number of similarly worded provincial access to information statutes. Accordingly, the legislative interpretation of this expression is of importance both to the application of many exemptions in the federal Act and to similarly worded provisions in various provincial statutes. [Emphasis added.]
>
> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to"

> language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences": *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41, at para. 40.

[para 62] The Supreme Court of Canada has made it clear that there is one evidentiary standard to be used wherever the phrase "could reasonably be expected to" appears in access-to-information legislation. There must be a reasonable expectation of the relevant outcome, and the Public Body must provide sufficient evidence to show that the likelihood of any of the above scenarios is "considerably above" a mere possibility.

[para 63] Section 20(1)(m) permits the Public Body to withhold information if the disclosure of that information could reasonably be expected to harm the security of any property or system.

[para 64] In this case, the Public Body has withheld payroll numbers of Public Body employees, including the Applicant's payroll number (this number was also referred to as an employee number, on page 5, Record 8). Payroll numbers of other employees were also withheld under section 17(1), which I have upheld. I do not need to also consider the application of section 20(1)(m) to that same information. I need only consider the application of section 20(1)(m) to the Applicant's own payroll number.

[para 65] The Public Body states that the application of section 20(1)(m) to withhold an employee payroll number was upheld in Order F2017-58. This is incorrect. In that Order, the adjudicator said (at paras. 78-80):

> The Public Body applied section 20(1)(m) to withhold an employee's payroll number from record 2.
>
> In its rebuttal submissions, the Applicant states that it does not take issue with the Public Body's decision to apply section 20(1)(m) to this information.
>
> As there is no dispute with respect to the Public Body's application of section 20(1)(m), I need not address this issue further.

[para 66] In that case, the adjudicator did not consider the Public Body's arguments regarding the application of section 20(1)(m) as the applicant was not interested in the information withheld under that provision. This is not the same as upholding the application of that exception. I understand that in the judicial review of Order F2017-58, the Court referred to the adjudicator has having upheld the Public Body's application of section 20(1)(m), but this doesn't change the fact that the application was upheld due to the Applicant's lack of interest in the relevant information, not on the basis of the analysis put forward by the public body in that case.

[para 67] With its initial submission, the Public Body provided an affidavit sworn by a Disclosure Analyst with the Public Body. Regarding the Applicant's payroll number, the Analyst states:

> 28. Payroll identification numbers are unique identification numbers intended to facilitate the compilation and communication of employment information and can be linked to a large amount of confidential information including employment status, employment history, beneficiary information, and salary information.
>
> 29. Additionally, payroll identification numbers are one identification factor that can be used by EPS members and employees to access the EPS computer system and are therefore used in conjunction with the EPS' secure computer systems. Disclosure of an employee payroll identification number may compromise the operation of the EPS computer system as an outsider to the computer system can potentially use a payroll identification number to access a vast majority of information held in the EPS computer systems.
>
> 30. The information in turn, may be used for fraudulent or criminal activity. Such a compromise to the EPS computer system would impact the ability of the EPS to carry out policing functions and to administer human resources internally which represents more than a mere inconvenience.

[para 68] This explanation indicates that employees know their own payroll numbers, as the numbers are used by employees to access the Public Body's computer system. As all current and former Public Body employees would know their payroll numbers, it is unclear how disclosing the Applicant's payroll number could reasonably be expected to harm the security of the Public Body's systems. The Public Body has not presented any evidence that it prohibits employees from disclosing their own payroll numbers, or that it has implemented any security measures to maintain the confidentiality of those numbers. Presumably the Public Body has the ability to remove any access or authorities associated with a payroll number once the relevant employee is no longer employed by the Public Body, which would mitigate the harms alleged by the Public Body.

[para 69] In any event, it is difficult to contemplate how disclosing the Applicant's own payroll number in the records could lead to the harms as alleged by the Public Body, when the Applicant already knows that number. I find that section 20(1)(m) does not apply to that information wherever it appears in the records.

[para 70] The Public Body has also applied section 20(1)(m) to communications codes appearing in the records. The Disclosure Analyst states in their affidavit:

> 31. With respect to the communication codes used by the EPS, EPS officers use communication codes to convey certain information with each other over the radio and in public. Communication codes are used to communicate information in a way that cannot be understood by the public. Communication codes are part of a broader system of communication with the EPS.

> 32. Disclosure of the communication codes would harm the effectiveness of the EPS's use of codes, the effectiveness of the codes as part of the communications system, and the EPS ability to control crime. Disclosure of the information would prevent officers from privately communicating investigative information in public, and if the content fell into the public domain, the communications systems would not serve their intended purpose. This in turn would impair the EPS' ability to protect the public and its members from criminal activities. Damage to the efficacy of the communications system would require new systems to be formulated and may compromise the safety of police officers. If information about the communication codes and the EPS's communications system and procedures fell into the public domain, the information could eventually come to be known by individuals willing to use it to the detriment of police officers when interacting with them in dangerous situations, which in turn, hampers the EPS' ability to control crime.

[para 71] The Public Body cites Order F2005-001 in support of its application of section 20(1)(m). In that Order, the adjudicator appears to accept the application of section 20(1)(m) to information that "would harm the communications system and codes used by CPS" without further explanation of what that information consisted of (at para. 82).

[para 72] In contrast, Order F2013-13 expressly rejects the application of section 20(1)(k) and (m) to communications codes used by police. In that case, the arguments before the adjudicator were substantially the same as the arguments made by the Public Body here. The adjudicator found (at paras. 112-113):

> With regard to the communications code contained in record 164, the disclosure analyst states that it is her belief that disclosure of this information will "permit outsiders to facilitate the commission of an unlawful act or hamper EPS's ability to control crime". She explains this view by stating that if the codes became known to individuals they could use it to the detriment of police officers in dangerous situations or enable such individuals to evade the police. However, the disclosure analyst does not explain, either in her exchangeable affidavit or *in camera* affidavit, how disclosure of the numerical code appearing on record 164 could be expected to lead to the harm she anticipates. Moreover, as the Public Body does not dispute the Applicant's statement that the communications codes are disclosed to defense lawyers in other circumstances, it is unclear why the disclosure analyst anticipates harm would result by providing the same kind of information to the Applicant in response to an access request when harm does not result by providing it to the Applicant's members in a disclosure package.
>
> Having reviewed record 164, I find that it is highly unlikely that disclosing the communications code it contains would facilitate the commission of an offence or impede the ability of the Public Body to control crime in any way. I also find that the code does not impart any information about safety procedures and that disclosing the numerical code would not be reasonably likely to interfere with safety of police officers. I also find that it has not been established that disclosure would reasonably be expected to interfere with the Public Body's system of communications such that it would need to be replaced or modified.

[para 73] Although that Order was subject to judicial review, the adjudicator's determination regarding the application of section 20(1)(m) was not challenged in that proceeding.

[para 74] The Public Body has not acknowledged the analysis in Order F2013-13 or otherwise indicated why the analysis therein should not apply here. I agree with the analysis in Order F2013-13; the Public Body has not met the test to find that disclosure of communications codes used by officers in the public domain would lead to the harm contemplates in section 20(1)(m). As a former employee, the Applicant would likely already know these codes and their meaning; the Public Body has not provided any evidence to indicate that it has taken steps to ensure that current or former employees do not discuss or disclose the meaning of these communications codes to persons outside the Public Body. Further, the records in which these codes appear in this case do not explain the meaning of the codes. Therefore, disclosing the code itself does not appear to impart any confidential investigative communications as argued by the Public Body.

[para 75] I find that section 20(1)(m) does not apply to the codes withheld under that provision.

3. Did the Public Body properly apply section 21(1) of the Act (disclosure harmful to intergovernmental relations) to the information in the records?

[para 76] The Public Body withheld communications between Public Body employees and counsel for the Edmonton Police Commission (EPC) under section 21(1)(b). These communications were also withheld under sections 27(1)(b) and/or (c).

[para 77] The Public Body also applied section 21(1)(b) to communications between Public Body employees (for example, pages 49 and 53 of Record 1).

[para 78] Section 21(1) states:

> *21(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*
>
> *(a) harm relations between the Government of Alberta or its agencies and any of the following or their agencies:*
>
> *(i) the Government of Canada or a province or territory of Canada,*
>
> *(ii) a local government body,*
>
> *(iii) an aboriginal organization that exercises government functions, including*
>
> *(A) the council of a band as defined in the Indian Act (Canada), and*
>
> *(B) an organization established to negotiate or implement, on behalf of aboriginal people, a treaty or land claim agreement with the Government of Canada,*
>
> *(iv) the government of a foreign state, or*
>
> *(v) an international organization of states,*

or

(b) reveal information supplied, explicitly or implicitly, in confidence by a government, local government body or an organization listed in clause (a) or its agencies.

[para 79] Section 21(1) addresses intergovernmental relations. Section 21(1)(b) applies to information that was supplied to a public body by a government, local government body, or organization listed in section 21(1)(a), or one of its agencies. The Public Body may withhold information if either section 21(1)(a) or (b) apply to that information.

[para 80] In Order F2004-018, the former Commissioner stated that four criteria must be met before section 21(1)(b) applies:

> There are four criteria under section 21(1)(b) (see Order 2001-037):
>
> a) the information must be supplied by a government, local government body or an organization listed in clause (a) or its agencies;
>
> b) the information must be supplied explicitly or implicitly in confidence;
>
> c) the disclosure of the information must reasonably be expected to reveal the information; and
>
> d) the information must have been in existence in a record for less than 15 years.

[para 81] This test has been applied in subsequent Orders (see Order F2009-038 at para. 74-75, which also addressed EPS as the public body applying the provision).

[para 82] Past Orders of this Office have cited the following factors in determining whether a third party supplied information in confidence:

> 1. communicated to the public body on the basis that it was confidential and that it was to be kept confidential;
> 2. treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the public body;
> 3. not otherwise disclosed or available from sources to which the public has access;
> 4. prepared for a purpose which would not entail disclosure.

(See Orders 99-018, F2008-017). This test was upheld by the Court of Queen's Bench in *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2012 ABQB 595 (at para. 41).

[para 83] With respect to the communications between Public Body employees, section 21(1)(b) clearly cannot apply, unless the communications revealed information that was supplied by one of the bodies set out in section 21(1)(b), in confidence. Nothing in the records refers to another public body or information that may have been provided by another public body. The Public Body's application of section 21(1)(b) to emails between

Public Body employees is entirely without support. The Public Body has not provided any explanation for its application of 21(1)(b) to these communications. The Public Body's submissions regarding section 21(1)(b) refer only to communications with counsel for the EPC, which I will discuss below.

[para 84] I note that section 21(1)(b) was recently the subject of a judicial review of Order F2020-17. That Order considered whether section 21(1)(b) can apply to information supplied by the RCMP, acting as a provincial police service, to the Edmonton Police Service. In its decision resulting from that review, the Alberta Court of Appeal found that section 21(1)(b) is not limited to information supplied by a non-Government of Alberta entity (*Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2022 ABCA 397 (CanLII), at para. 25). The Court of Appeal concluded that section 21(1)(b) can apply to information supplied by the RCMP (acting provincially) to another police service. That decision does not apply here, as the emails discussed above are not between different police services but are entirely internal to the Public Body.

[para 85] I find that section 21(1)(b) cannot apply to communications between Public Body employees.

[para 86] With respect to communications from the EPC counsel, the Public Body has withheld emails from counsel, as well as other documents that may have been attached to those emails. The EPC is a local government body under section 1(i) of the Act. Therefore, it can supply information within the terms of section 21(1)(b) of the Act.

[para 87] Two emails from EPC counsel appear in succession, several times in the records at issue; both emails refer to unnamed attached documents. These two emails comprise two pages of records, and are located at pages 152-153, 154-155, 533-534, and 535-536 of Record 1 (it is not clear why so many copies appear in Record 1, as each copy appears identical). The copies at pages 154-155 and 535-536 are followed by the same documents: a briefing note, meeting minutes, and another briefing note. The two consecutive emails also appear in Record 7 (pages 229-230) with the same three documents following them, and in Record 4 (at pages 15-16) without the briefing notes or meeting minutes following.

[para 88] The content of the EPC counsel's emails indicate that some or all of these three documents (the briefing notes and meeting minutes) may have been attached to the emails, but this is not clear from the records or the submissions before me. The Public Body's index of records merely identifies these other documents by their title, and not as attachments to the EPC counsel's emails. This is in contrast to other documents in the records that are clearly labelled in the index as attachments.

[para 89] These possible attachments are documents that originated from the Public Body; this is obvious from the content of the documents. If they were attached to the EPC counsel's emails, it would appear that they were sent to counsel by the Public Body, and were returned to the Public Body by counsel. It is not clear whether this is the case and

the Public Body has not provided any additional explanation in its submissions. Any documents that originated with the Public Body and were merely returned by EPC counsel cannot be withheld under section 21(1)(b) as that is not information that was *supplied by* the EPC counsel. Had counsel amended the documents that originated from the Public Body, this analysis may be different (i.e. EPC counsel may be said to have *supplied* the amended information in such a case). However, there is no indication in the records or submissions that these documents were amended by counsel in any way.

[para 90] The Public Body has withheld most of the records relating to the EPC counsel in their entirety. This includes where those emails were forwarded within the Public Body. As discussed earlier in this Order, it is unclear whether the Public Body intended to apply section 21(1)(b) to these forwarding emails, as the Public Body applied several exceptions to these pages and did not delineate which provision applied to what information on each page. To be clear, by "forwarding emails" I mean only the emails between Public Body employees forward*ing* the EPC counsel's emails, and not the emails from EPC counsel that were forward*ed*. Those forwarding emails do not themselves reveal the content of the EPC counsel's emails; therefore, section 21(1)(b) cannot apply.

[para 91] With respect to the EPC counsel's emails, it is not clear that the content therein was supplied in confidence. There is no indication in the emails themselves that they were intended to be kept confidential.

[para 92] As stated in Order F2019-06, section 21(1)(b) does not necessarily apply to a record in its entirety if confidential information can be severed and the remaining information is not meaningless. As the Public Body has freely disclosed the to/from and subject line of these emails in its index of records, this information is presumably not confidential; they do not even contain the boilerplate message of confidentiality common in work-related emails.

[para 93] The Public Body's submissions state that the Public Body and EPC "have consistently treated the information in a manner that indicates a concern for its protection from disclosure." The Public Body states that the parties have not otherwise disclosed the information, and that the purpose of the emails was to "confirm the correct process or procedure and so the information was prepared for a purpose which would not entail disclosure" (initial submission at para. 59).

[para 94] The Public Body's statement that the information is treated in a manner so as to protect it from disclosure is not sufficient without additional support, such as some indication that the information was supplied in confidence. Possibly in some situations, confidentiality can be implicit from the context or content of the records; however, this is not such a case. For example, it is not clear why an explanation of EPC procedures or processes would be confidential.

[para 95] The Public Body has also applied sections 27(1)(b) and (c) to the emails involving EPC counsel. In the Public Body's exchanged submission discussing the

application of those provisions, the Public Body provided a fair amount of detail regarding some of the emails from EPC counsel to the Public Body. It states (at page 37):

> a. In one of the emails, she provided an update to the EPS about the Commission's decision to extend the Applicant's probation period.
>
> b. In the other email, she explained to the EPS that she received the recommendation for termination from the Chief and that she was assisting the Commission as their legal counsel. She asked a few questions of the EPS, like if they had legal counsel and also whether the officer had been notified. She also had questions about the Board of Evaluators and Suitability Review Committee procedures and the process that the EPS had followed up until that point.

[para 96] This description reveals a significant amount of information in at least one of the emails from EPC counsel (located several times in the records), to which section 21(1)(b) was applied. It is difficult to reconcile the Public Body's arguments regarding the confidentiality of the emails from EPC counsel with the amount of detail about the content of some of those emails in the Public Body's submissions.

[para 97] Given the above, I cannot find that section 21(1)(b) applies to any information in the records. The Public Body has also applied sections 24(1) and 27(1)(b) and (c) to the emails involving the EPC counsel, which I will consider in the relevant sections of this Order.

[para 98] The Public Body has applied section 21(1)(b) alone to communications between Public Body employees and I will order the Public Body to disclose that information to the Applicant.

4. Did the Public Body properly apply section 23(1) of the Act (local public body confidences) to the information in the records?

[para 99] The Public Body applied section 23(1)(b) to reports that it states were prepared by the Public Body in relation to requests to the Commission to extensions for probationary periods. This provision states:

> *23(1) The head of a local public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*
>
> *...*
>
> *(b) the substance of deliberations of a meeting of its elected officials or of its governing body or a committee of its governing body, if an Act or a regulation under this Act authorizes the holding of that meeting in the absence of the public.*
>
> *(2) Subsection (1) does not apply if*
>
> *...*
>
> *(b) the information referred to in that subsection is in a record that has been in existence for 15 years or more.*

[para 100] In order to apply this section, each of the following questions must be answered in the affirmative:

> (i) Was there a meeting of elected officials, a governing body or a committee of a governing body of a local public body?
>
> (ii) Does an Act, or a regulation under the FOIP Act, authorize the holding of that meeting in the absence of the public?
>
> (iii) Could disclosure of the information reasonably be expected to reveal the substance of deliberations of that meeting? (Order F2009-040 at para. 38, citing Order 2001-040 at para. 9)

[para 101] The Public Body's submissions regarding the application of this exception are confusing. The Public Body states that the reports withheld under this provision were prepared by the Public Body for the purpose of requesting extensions to the probationary period of employment. It states that the reports are deliberations of a committee of the EPS.

[para 102] The Public Body cites section 18(1)(b) of the FOIP Regulation as authority to hold the relevant meeting in camera. That section of the Regulation states:

> *18(1) A meeting of a local public body's elected officials, governing body or committee of its governing body may be held in the absence of the public only if the subject mailer being considered in the absence of the public concerns*
>
> *...*
>
> *(b) personal information of an individual, including an employee of a public body,*

[para 103] The Public Body further argues that disclosure of the reports would reveal the substance of at least some of the deliberations of the meetings, as "the reports are based entirely on the discussions at the meetings" (initial submission, at para. 66).

[para 104] These arguments indicate that the relevant governing body (or committee of a governing body) referred to in section 23(1)(b) is the governing body (or committee) of the Public Body.

[para 105] However, the affidavit of the Disclosure Analyst indicates that the relevant governing body is the EPC. The Analyst states:

> 39. In deciding whether to exercise its discretion to withhold the information pursuant to section 23(1)(b), the EPS took into account the importance of protecting the Commission's decision-making process and the role that the EPS plays in making recommendations to the Commission. The EPS also considered the following:
>
> > a. the impact the disclosure would reasonably be expected to have on the Commission's ability to carry out similar decision-making processes and deliberations in the future;

> b. the impact the disclosure would reasonably be expected to have on the EPS' ability to freely provide information and make recommendations to the Commission for the Commission's deliberations;
> c. that both the Commission and the EPS had a reasonable expectation that these matters would be kept confidential; and
> d. the objectives and purposes of the *Act,* including the Applicant's right of access.

[para 106] This argument indicates that the body making the deliberations was the EPC, and not the Public Body. As I cannot be sure which argument the Public Body is making, I will address both.

Meeting of the Public Body's governing body or committee of its governing body

[para 107] If the Public Body means to argue that the reports reveal the deliberations of a meeting of the Public Body's governing body or a committee of its governing body, it has not provided any information about the relevant body or committee that held these meetings. The records themselves indicate that the reports were signed by several Public Body employees. However, section 23(1)(b) does not apply to a meeting of any group of employees or any committee of employees within a local public body. Rather, the meeting must be of the Public Body's elected officials, its governing body or a committee of its governing body. The Public Body in this case does not have elected officials, so for section 23(1)(b) to apply, the meetings must have been meetings of the Public Body's governing body or a committee of its governing body.

[para 108] The reports are signed by (or intended to be signed by) several Public Body employees; presumably these are the employees who attended the relevant meetings. In one case, the report lists the Chief as a signatory, along with two human resources employees and an employee with the Employee Services Branch. With respect to the other report withheld under section 23(1)(b), the signatories are employees with the Employee Services Branch, human resources employees, and a deputy chief (in two instances), with the Chief approving the report; it is not clear if the Chief attended the meetings relating to those latter reports.

[para 109] Given the signatories of these reports, it is unclear how the relevant meetings can be characterized as meetings of the Public Body's governing body or a committee of its governing body.

[para 110] I agree that the topic of the reports relates to personal information of a (then) Public Body employee, such that section 18(1)(b) of the FOIP Regulation may be applicable. This addresses the second part of the test for applying section 23(1)(b). However, without knowing whether the relevant meetings were meetings that fall within the first part of the test, cannot uphold the Public Body's application of section 23(1)(b).

[para 111] As discussed in the beginning of this Order, the usual process where a public body's submission are unclear is to ask the Public Body for additional information to clarify that point. In this case, I will order the Public Body to define what its governing

body is, and how these meetings can be characterized as meetings of this governing body or a committee of its governing body. These explanations should be provided to the Applicant with the Public Body's new release of records, if it continues to apply section 23(1)(b) to information in the records.

Meeting of the EPC

[para 112] The EPC is a local public body under the Act. I do not have any information about any meeting that took place in relation to the reports. If any meeting took place, I presume that the reports were provided for the EPC's consideration during those meetings.

[para 113] Similar situations have been discussed in past Orders of this Office. In Order F2018-14, I considered the application of section 23(1)(b) to a report created at the request of a city auditor, prepared by an external consultant. This report was later provided to the city council. The public body argued that disclosing the report would reveal the substance of deliberations of the city council meeting where the report was discussed. I reviewed past precedents of this office, as well as precedents from other jurisdictions and concluded that section 23(1)(b) did not apply to the report. I said (at paras. 36-46):

> In Order F2013-23, the adjudicator considered the meaning of "substance of deliberations"; he cites *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 112 (CanLII), in which the Court considered whether the mere indication of the topics and issues discussed form part of the substance of deliberations. The Court states:
>
> > The OP [Office of the Premier of British Columbia] submits that the records at issue that identify the topics of discussion of the committees would allow someone to draw an accurate inference about the "substance of deliberations" of Cabinet or a Cabinet committee.
> >
> > The IPC [Information and Privacy Commissioner] Delegate concluded that the severed words do not consist of "descriptions" of the issues or topics of discussion, but are "a barebones series of subjects or agenda items". She concluded that there is no "substance" to them and that they reveal no "deliberations".
> >
> > The OP submits that the headings describe the specific issues to be discussed and therefore reveal the substance of deliberations. Having reviewed the records in dispute, I cannot agree with that submission. In my view, the IPC Delegate's characterization that "there is no 'substance' to them and they reveal no 'deliberations'" is reasonable.
> >
> > In my view, the conclusion of the IPC Delegate, that headings that merely identify the subject of discussion without revealing the "substance of deliberations" do not fall within the s. 12(1) exception, was a reasonable decision. I can find no reviewable error with regard to Order F08-17.

The adjudicator in Order F2013-23 adopted this approach endorsed by the BC Supreme Court. He stated (at paras. 61-64):

> The *British Columbia (Attorney General)* decision approves an approach by which mere indications of topics and issues discussed may not be withheld as part of deliberations unless their disclosure would permit a reader to draw an accurate inference about the substance of the deliberations. For the purpose of Alberta's legislation, I prefer this approach. In my view, the "substance" of deliberations refers to more than merely a topic or issue being discussed, in that it refers to the views, advice, recommendations, pros and cons, reasons, rationales, etc. that were conveyed and considered in relation to the topic or issue.
>
> The foregoing also accords with this Office's interpretation of section 24(1)(b), which uses the same term "deliberations". As noted earlier in this Order, section 24(1)(b) does not permit a public body to withhold the fact that consultations or deliberations on a particular topic took place; topics may only be withheld if their indication would, in and of itself, reveal the content of the consultations or deliberations (Order F2004-026 at para. 71).
>
> Also consistent with this Office's interpretation of "deliberations" within the terms of section 24(1)(b), I find that section 23(1)(b) does not apply to merely factual information unless it reveals the substance of the deliberations. A similar conclusion was reached in the *Aquasource* decision (at para. 50). The Court noted that background information cannot be withheld as part of the substance of deliberations unless interwoven with that substance.
>
> Finally, the substance of a deliberations, within the terms of section 23(1)(b) of the Act, does not include information revealing a decision that has been made. Deliberations are what lead up to a decision and are not the decision itself.

Where the Public Body may hold a meeting in the absence of the public under section 18 of the FOIP Regulation, the Public Body may withhold only information that would reveal the substance of those discussions under section 23(1)(b), in response to an access request.

The Public Body argued that disclosing the Report would reveal the substance of *in camera* deliberations. It said (at paras. 99 and 101, initial submission):

> The Public Body submits that the phrase "reasonably be expected" should be given its ordinary and plain meaning. Consideration should be given to whether disclosure of the information, having regard to all of the circumstances, could reasonably be expected to reveal the substance of the deliberations of the City Council Meetings. The Public Body submits the term "deliberations" involve the careful weighing of information, a consideration of the pros and cons of proceeding with a course of action… As set out in the minutes of the public portion of the City Council meetings, recommendations were considered and adopted. Further, Council turned its mind to the application of the Act. Refer to Tab 33 for minutes of the public City Council meetings.
>
> …
>
> As set out in Order F2013-23 at para. 63 [Tab 30], when background information is interwoven with the substance of deliberations, it may be withheld. The Public

> Body submits that while the release of any single factual statement may not reveal the substance of the deliberations at the City Council Meetings, when all of those statements are reviewed collectively the substance of the deliberations conducted by City Council are revealed.

The Public Body made a similar argument in Order F2014-29; in that case, the same provision was applied to a report prepared for consideration by the Calgary City Council, and discussed by that Council *in camera*. My decision here is consistent with the finding in that Order, for the same reasons (see paragraphs 45-50 of that Order).

The Public Body's arguments confuse "substance of deliberations" with the *topic* of deliberations, or issues being deliberated. The latter is much broader than the former. The disclosure of factual statements or document headings would reveal the subject-matter of the deliberations; however, the test is whether the information would review views, advice, recommendations, pros and cons, reasons, rationales, etc. that were conveyed and considered by Council.

The Public Body cited Order F2013-23 in support of its position; however, in that Order the records included notes or minutes taken at the *in camera* meeting. In this case, the records consist of the Report that was prepared by a third party and considered by Council in a meeting.

The same issue was considered by former BC Information and Privacy Commissioner Loukidelis in Order No. 326-1999. Specifically, former Commissioner Loukidelis considered whether section 12(3)(b) of the BC Act (equivalent to section 23(1)(b) of the FOIP Act) applies to a report that had been commissioned by a city council and considered in an *in camera* meeting of that council. He stated:

> … Still, disclosure of the report would not reveal anything about those discussions. Council members may have debated the IAO Report vigorously, with many different views being expressed and various possible courses of actions being suggested. The IAO Report itself is silent about this. Its disclosure tells us nothing about what was said at the council table, much less what was decided. We simply do not know, and cannot tell from the IAO Report – which was prepared by outside consultants - what the deliberations of council were. The most that can be said is that disclosure of the report would disclose one subject of such meetings. We already know the IAO Report was one of the subjects addressed at the meeting or meetings discussed above, of course, from the Montain Affidavit and the City's submissions in this inquiry.
>
> …
>
> … As was said in Order No. 113-1996, at p. 4, one can – in cases such as this one – release the source documents without disclosing the substance of deliberations about them.

As I noted in Order F2014-29, a comparison of sections 22(1) and 23(1) of the FOIP Act support the application of the former BC Commissioner's approach to the equivalent of section 23(1)(b). Section 22(1) applies to Cabinet and Treasury Board confidences; it states (in part, emphasis added):

> *22(1) The head of a public body must refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees or of the Treasury Board or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees or to the Treasury Board or any of its committees.*
>
> This provision specifically encompasses advice etc. that has been prepared for or submitted to Cabinet or Treasury Board.
>
> In contrast, section 23(1)(b) applies only to the substance of deliberations. Had the Legislature intended to include advice etc. prepared for or submitted to an *in camera* meeting of a local public body, it would have included language similar to that in section 22(1).

[para 114] If the Public Body means to argue that the relevant meetings are those of the EPC, it has not made any arguments to persuade me that the above reasoning does not apply in this case. Therefore, following Orders F2014-29 and F2018-14, I adopt the approach taken by the former BC Commissioner to section 23(1)(b). Although the EPC may have deliberated on the contents of the reports, the reports themselves do not reveal whether related deliberations occurred or what any such deliberations consisted of.

[para 115] If the Public Body is applying section 23(1)(b) to the reports on the basis that they reveal the deliberations of EPC meetings, that provision does not apply.

Exercise of discretion – section 23(1)

[para 116] Section 23(1) is a discretionary exception. In *Ontario (2020Security) v. Criminal Lawyers' Association,* 2010 SCC 23 (CanLII), the Supreme Court of Canada commented on the authority of Ontario's Information and Privacy Commissioner to review a head's exercise of discretion.

[para 117] The Supreme Court of Canada confirmed the authority of the Information and Privacy Commissioner of Ontario to quash a decision not to disclose information pursuant to a discretionary exception and to return the matter for reconsideration by the head of a public body. The Court also considered the following factors to relevant to the review of discretion:

- the decision was made in bad faith
- the decision was made for an improper purpose
- the decision took into account irrelevant considerations
- the decision failed to take into account relevant considerations

[para 118] In Order F2010-036 the adjudicator considered the application of the above decision of the Court to Alberta's FOIP Act, as well as considered how a public body's

exercise of discretion had been treated in past orders of this Office. She concluded (at para. 104):

> In my view, these approaches to review of the exercise of discretion are similar to that approved by the Supreme Court of Canada in relation to information not subject to solicitor-client privilege in *Ontario (Public Safety and Security)*.

[para 119] In *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (CanLII) (*EPS*), the Court provided detailed instructions for public bodies exercising discretion to withhold information under the Act. This decision was issued after the Public Body provided its submissions to this inquiry. However, it might be helpful for the Public Body to review the discussion.

[para 120] The Court said (at para. 416):

> What *Ontario Public Safety and Security* requires is the weighing of considerations "for and against disclosure, including the public interest in disclosure:" at para 46. The relevant interests supported by non-disclosure and disclosure must be identified, and the effects of the particular proposed disclosure must be assessed. Disclosure or non-disclosure may support, enhance, or promote some interests but not support, enhance, or promote other interests. Not only the "quantitative" effects of disclosure or non-disclosure need be assessed (how much good or ill would be caused) but the relative importance of interests should be assessed (significant promotion of a lesser interest may be outweighed by moderate promotion of a more important interest). There may be no issue of "harm" in the sense of damage caused by disclosure or non-disclosure, although disclosure or non-disclosure may have greater or lesser benefits. A reason for not disclosing, for example, would be that the benefit for an important interest would exceed any benefit for other interests. That is, discretion may turn on a balancing of benefits, as opposed to a harm assessment.

[para 121] It further explained the weighing of factors at paragraph 419:

> …If disclosure would enhance or improve the public body's interests, there would be no reason not to disclose. If non-disclosure would benefit the public body's interests beyond any benefits of disclosure, the public body should not disclose. If disclosure would neither enhance nor degrade the public body's interests, given the "encouragement" of disclosure, disclosure should occur. Information should not be disclosed only if it would run counter to, or degrade, or impair, that is, if it would "harm" identified interests of the public body.

[para 122] Lastly, the Court described burden of showing that discretion was properly exercised (at para. 421):

> I accept that a public body is "in the best position" to identify its interests at stake, and to identify how disclosure would "potentially affect the operations of the public body" or third parties that work with the public body: EPS Brief at para 199. But that does not mean that its decision is necessarily reasonable, only that it has access to the best evidence (there's a difference between having all the evidence and making an appropriate decision on the evidence). The Adjudicator was right that the burden of showing the

> appropriate exercise of discretion lies on the public body. It is obligated to show that it has properly refrained from disclosure. Its reasons are subject to review by the IPC. The public body's exercise of discretion must be established; the exercise of discretion is not presumptively valid. The public body must establish proper non-disclosure. The IPC does not have the burden of showing improper non-disclosure.

[para 123] It is not clear from the Public Body's submissions on its exercise of discretion with respect to section 23(1)(b) whether it was applying this provision to a meeting of the Public Body or of the EPC. Given that there is confusion on such a fundamental point, I cannot find that the Public Body properly exercised its discretion to apply section 23(1)(b), in the event that this provision can apply to any information in the records.

[para 124] If the Public Body determines that it is appropriate to apply this provision to information in the records given the guidance provided above, it must re-exercise its discretion in doing so, taking into account the discussion set out in *EPS*.

5. Did the Public Body properly apply section 24(1) (advice from officials) to the information in the records?

[para 125] The Public Body applied section 24(1)(a) and (b) to information in several pages in the records at issue. These sections state:

> *24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*
>
> *(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,*
>
> *(b) consultations or deliberations involving*
>
> *(i) officers or employees of a public body*
>
> *(ii) a member of the Executive Council, or*
>
> *(iii) the staff of a member of the Executive Council,*
>
> *...*

[para 126] Section 71(1) of the Act states:

> *71(1) If the inquiry relates to a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part of the record.*

[para 127] Therefore, the burden of proof lies with the Public Body to prove that section 24(1) of the Act applies to the records at issue.

[para 128] A "consultation" occurs when the views of one or more officers or employees are sought as to the appropriateness of particular proposals or suggested actions; a "deliberation" is a discussion or consideration, by persons described in section

24(1)(b), of the reasons for and/or against an action (Orders 96-006 at p. 10; Order 99-013 at para. 48, F2007-021, at para. 66).

[para 129] The test for sections 24(1)(a) and (b), as stated in past Orders, is that the advice, recommendations etc. (section 24(1)(a)) and/or the consultations and deliberations (section 24(1)(b)) should:

1. be sought or expected, or be part of the responsibility of a person by virtue of that person's position,
2. be directed toward taking an action,
3. be made to someone who can take or implement the action. (See Order 96-006, at p. 9)

[para 130] In Order F2013-13, the adjudicator stated that the third arm of the above test was overly restrictive with respect to section 24(1)(a). She restated that part of the test as "created for the benefit of someone who can take or implement the action" (at paragraph 123).

[para 131] In addition to the requirements in those tests, sections 24(1)(a) and (b) apply only to the records (or parts thereof) that reveal substantive information about which advice was sought or consultations or deliberations were being held. Information such as the names of individuals involved in the advice or consultations, or dates, and information that reveals only the fact that advice is being sought or consultations held on a particular topic (and not the *substance* of the advice or consultations) cannot generally be withheld under section 24(1) (see Order F2004-026, at para. 71).

[para 132] Bare recitation of facts or summaries of information also cannot be withheld under sections 24(1)(a) or (b) unless the facts are interwoven with the advice, proposals, recommendations etc. such that they cannot be separated (Order F2007-013 at para. 108, Decision F2014-D-01 at para. 48).

[para 133] As well, neither section 24(1)(a) nor (b) apply to a decision itself (Order 96-012, at para. 31).

[para 134] A request for factual information does not fall within the scope of section 24(1) if it does not otherwise reveal the substance of advice, recommendations etc. (see Orders F2016-57, at para, 30; F2020-22, at para. 101).

[para 135] The Public Body has cited the appropriate tests for applying sections 24(1)(a) and (b), but has misapplied those sections in several instances. For example, the subject lines of emails and titles of documents are withheld under section 24(1), even though the Public Body has disclosed that same information in its index of records provided for the inquiry.

[para 136] A significant amount of information withheld under section 24(1) is not substantive information to which that provision applies. For example, the Public Body

has withheld emails that merely refer to a topic that will need to be discussed in the future but that don't themselves contain any discussion to which section 24(1) could apply (for example, pages 203, top of page 238, Record 1).

[para 137] Some applications of this exception are inconsistent. For example, an email withheld on page 154 of Record 7 was disclosed a few pages later. Information on pages 237-238 of Record 1 was withheld under section 24(1) but the same information was withheld under sections 27(1)(b) and (c) on page 256 of Record 1.

[para 138] In many instances, the Public Body has applied section 24(1) to requests for factual information; this is not the same as a request for input or advice, the latter of which falls within the scope of section 24(1). In other instances, an intended course of action or 'heads up' that something is about to happen is provided in the records, without any indication that input is sought on that matter. As well, some of the communications merely provide instructions to other employees. For example, on pages 69 and 82 of Record 1, a Public Body employee asked a question of another employee in an email, with some background information relating to the question. The author is telling the recipient of his intended plan. There is no indication that the author is consulting with the recipient on that course of action. The author requested contact information to enact this plan. The recipient's response provided the contact information, without further comment. Page 12 of Record 3 contains instructions for where to file a document, which is not information to which section 24(1) applies.

[para 139] A request for factual information does not fall within the scope of section 24(1) if it does not otherwise reveal the substance of advice, recommendations etc. (see Orders F2016-57, at para, 30; F2020-22, at para. 101). Similarly, providing 'situational awareness' does not fall within the scope of section 24(1). A consultation requires an employee to seek views regarding the appropriateness of a particular proposal. Merely mentioning a plan, or providing an update on a situation, is not the same as a consultation or seeking advice. Pages 91, 92, 289 and 290 of Record 1 and page 9 of Record 3 are examples of such a misapplication of section 24(1).

[para 140] Pages 292-293 of Record 1 are comprised of a memo addressed to the Applicant; the Public Body's index of records indicates as much. The memo is unsigned but there is no indication it is in draft form. In comparison, the index of records notes that pages 89-91 of Record 6 are comprised of a draft of a document. Further, an email at page 291 of Record 1 indicates that two documents were attached to it, and the email indicates that both documents were to be provided to the Applicant. There is no indication in the email that these attachments are incomplete or drafts. Rather, the email indicates the attachments are final documents, provided to the email recipient so that the recipient can provide them to the Applicant. The attachments are named in the email, and the names correspond with the records at pages 292-293 and 294-300. All of these pages were withheld in their entirety under section 24(1).

[para 141] The Public Body has withheld information under section 24(1) that consists only of attempts to find meeting times among a group of employees (for example, at pages 307 and 358 of Record 1, and page 10 of Record 3).

[para 142] The records at issue do contain information to which section 24(1) properly applies. For example, the Public Body has properly applied section 24(1)(b) to an email on page 280 of Record 1 in which one employee is seeking input from another employee as to how to proceed on a matter. The records indicate that both employees are involved in the matter and are in a position to be providing advice and making the appropriate decisions. However, the subject line of that email cannot be withheld as it has already been disclosed to the Applicant in the index of records. Section 24(1) was also properly applied to emails copied into systems records at pages 30-32 of Record 8, wherein Public Body employees were seeking input on steps to be taken. On pages 186-187 of Record 8, the Public Body withheld the entire body of a lengthy email under section 24(1). In the email the author is providing their input on a matter to be addressed, and the records indicate that this author is in a position to provide that input. In this case, it would be difficult to sever only the information to which section 24(1) applies and provide any meaningful information to the Applicant. Therefore, withholding the email in its entirety is appropriate.

[para 143] I will order the Public Body to review the information to which it has applied section 24(1), and to make new decisions following the guidance provided above.

Exercise of discretion – section 24(1)

[para 144] Section 24(1) is a discretionary exception. The discussion set out above as to the exercise of discretion with respect to the application of section 23(1) also applies here.

[para 145] The Public Body's explanation of its exercise of discretion is described in the Analyst's affidavit as follows:

> 84. Both sections 24(1)(a) and 24(1)(b) are discretionary. The importance of protecting the decision making process within the EPS was a strong factor that the EPS considered in exercising its discretion here. The EPS also considered the following:
>
> a. the impact that disclosure could reasonably be expected to have on the EPS' ability to carry out similar decision-making processes in the future;
>
> b. the employees involved in the communications had a reasonable expectation that their advice would be kept confidential and so could be freely provided;
>
> c. similarly, the employees involved in the communications had a reasonable expectation that the consultations and deliberations would be kept confidential and so could be freely provided; and
>
> d. the objectives and purposes of the *Act*, including the Applicant's right of access.

[para 146] These are applicable factors to consider in exercising discretion to apply section 24(1). However, given the amount of information in the records to which section 24(1) was misapplied, it is appropriate to order the Public Body to re-exercise its discretion once it has made new decisions regarding the proper application of section 24(1).

6. Did the Public Body properly apply section 27(1) (privileged information) to information in the records?

[para 147] The Public Body applied sections 27(1)(a), (b) and (c) to information in many pages of the records. The Public Body did not provide me with a copy of the records to which section 27(1)(a) was applied. The Public Body claimed solicitor-client privilege over those records.

[para 148] Section 27(1) states:

> *27(1) The head of a public body may refuse to disclose to an applicant*
>
> *(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,*
>
> *(b) information prepared by or for*
>
> *(i) the Minister of Justice and Solicitor General,*
>
> *(ii) an agent or lawyer of the Minister of Justice and Solicitor General, or*
>
> *(iii) an agent or lawyer of a public body,*
>
> *in relation to a matter involving the provision of legal services,*
>
> *(c) information in correspondence between*
>
> *(i) the Minister of Justice and Solicitor General,*
>
> *(ii) an agent or lawyer of the Minister of Justice and Solicitor General, or*
>
> *(iii) an agent or lawyer of a public body,*
>
> *and any other person in relation to a matter involving the provision of advice or other services by the Minister of Justice and Solicitor General or by the agent or lawyer.*

[para 149] Section 71(1) of the Act states:

> *71(1) If the inquiry relates to a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part of the record.*

[para 150] Therefore, the burden of proof lies with the Public Body to prove that section 27(1)(a) of the Act applies to the records at issue.

Solicitor-client privilege

[para 151] The test to establish whether communications are subject to solicitor-client privilege is set out by the Supreme Court of Canada in *Canada v. Solosky*, [1980] 1 S.C.R. 821. The Court said:

> … privilege can only be claimed document by document, with each document being required to meet the criteria for the privilege--(i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties.

[para 152] The requirements of this privilege are met if information is a communication between a solicitor and a client, which was made for the purpose of seeking or giving of legal advice and intended to be kept confidential by the parties.

[para 153] Solicitor-client privilege can also extend past the immediate communication between a solicitor and client. In *Blood Tribe v. Canada (Attorney General)*, 2010 ABCA 112 (CanLII), the Alberta Court of Appeal stated (at para 26):

> The appellant also argues that even if some of the documents contain legal advice and so are privileged, there is no evidence that all of the documents do so. For example, the appellant argues that minutes of meetings, emails and miscellaneous correspondence between Justice Canada lawyers and the Department of Indian and Northern Affairs may not contain any actual advice, or requests for advice, at all. The solicitor-client privilege is not, however, that narrow. As the court stated in *Balabel v. Air India*, [1988] Ch 317, [1988] 2 All E.R. 246 at p. 254 (C.A.):
>
> > Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communication and meetings between the solicitor and client. The negotiations for a lease such as occurred in the present case are only one example. Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover,

> legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.
>
> The miscellaneous documents in question meet the test of documents which do not actually contain legal advice but which are made in confidence as part of the necessary exchange of information between the solicitor and client for the ultimate objective of the provision of legal advice.

[para 154] In Order F2015-22, the adjudicator summarized the above, concluding that "communications between a solicitor and a client that are part of the necessary exchange of information between them so that legal advice may be provided, but which do not actually contain legal advice, may fall within the scope of solicitor-client privilege" (at para. 76). I believe this is a well-established extension of the privilege.

[para 155] The Court in *Alberta (Municipal Affairs) v Alberta (Information and Privacy Commissioner)*, 2019 ABQB 274 found (at paras. 17-18):

> There are emails in "chains" that are not directly between lawyer and client, or lawyer and lawyer, but have been sent by and received from members of the client group or department. Communications in this category request and give information, make inquiries, answer questions and otherwise relate topically to those in which legal counsel are directly involved.
>
> Those emails form part of a discrete body of communications that includes clearly privileged material. I must take a holistic approach to this question. In these instances, they are "part of a continuum in which legal advice is given": ***Calgary (Police Service)*** at para 6. What all of them have in common is that they essentially "transmit or comment" on the work products that, I find, are privileged: ***Bank of Montreal v Tortora***, 2010 BCSC 1430 at paras 11-12, 14 BCLR (5th) 386.

[para 156] Where a public body elects not to provide a copy of the records over which solicitor-client or litigation privilege is claimed, the public body must provide sufficient information about the records, in compliance with the civil standards set out in the *Rules of Court* (Alta Reg 124/2010, ss. 5.6-5.8). These standards were clarified in *Canadian Natural Resources Limited v. ShawCor Ltd.*, 2014 ABCA 289 (CanLII) (*ShawCor*). *ShawCor* states that a party claiming privilege must, for each record, state the particular privilege claimed and provide a brief description that indicates how the record fits within that privilege (at para. 36 of *ShawCor*).

[para 157] In *EPS*, cited above, the Court found that the adjudicator in Order F2017-58 correctly identified the standard as follows: evidence supporting a claim of privilege must be sufficiently clear and convincing so as to satisfy the burden of proof on a balance of probabilities (at para. 82 of *EPS*).

[para 158] In *EPS* the Court further states that the role of this Office in inquiries involving claims of privilege under section 27(1)(a) of the Act is to review claims and assertions of privilege. The Court commented on the limitations of this review, given that the Office does not have authority to compel production of information over which solicitor-client privilege is claimed. It states that "… the IPC cannot "properly determine"

whether solicitor-client privilege exists: *2018 CPS (CA)* at para 3. The scope of the IPC's review of claims of solicitor-client privilege is inherently limited. The IPC is not entitled to review the relevant records themselves" (at para. 85).

[para 159] It describes the role of this Office in reviewing a claim of privilege as follows (at paras. 103-105):

> The clear direction from the Supreme Court is that compliance with provincial civil litigation standards for solicitor-client privilege claims suffices to support the exception from disclosure under *FOIPPA*. The IPC's statutory mandate must be interpreted in light of the Supreme Court's directions. The IPC has an obligation to review and a public body has an obligation to prove the exception on the balance of probabilities. But if the public body claims solicitor-client privilege in accordance with provincial civil litigation standards, the exception is thereby established on the balance of probabilities. It is likely that the privilege is made out, in the absence of evidence to the contrary…
>
> Does this approach mean that the IPC must simply accept a public body's claims of privilege? Is the IPC left with just "trust me" or with "taking the word" of public bodies? Does this approach involve a sort of improper delegation of the IPC's authority to public bodies or their counsel?
>
> In part, the response is that the IPC is not left with just "trust me." The IPC has the detail respecting a privilege claim that would suffice for a court. If the *CNRL v ShawCor* standards are not followed, the IPC (like a court) would be justified in demanding more information. And again, if there is evidence that the privilege claim is not founded, the IPC could require further information.

[para 160] I understand the Court to mean that my role in reviewing the Public Body's claim of privilege is to ensure that the Public Body's assertion of privilege meets the requirements set out in *ShawCor*, and that the information provided in support of that assertion is consistent with the relevant tests for the cited privilege.

[para 161] The Public Body provided arguments regarding its claim of privilege in its exchanged submission and affidavit. It also provided a more detailed affidavit of records, which the adjudicator previously assigned to this file accepted *in camera*. The Public Body has bundled multiple records together in its *in camera* affidavit, following the guidance set out in *ShawCor*. The affidavit provides a description of eighteen distinct bundles of records. As that more detailed affidavit was accepted *in camera*, I can refer to the evidence therein only in general terms.

[para 162] In its exchanged initial submission, the Public Body describes the records withheld as privileged as follows:

> 93. As for the second requirement, that the EPS must provide a sufficient description about the pages of the record to allow for an assessment of the validity of the privilege, without waiving the EPS' privilege, the pages can be described or summarized as follows:

a. legal opinions from external legal counsel concerning the Applicant or other legal issues that came to light in the course of the Applicant's employment with the EPS;

b. documents prepared by external legal counsel for use by the EPS in relation to the Applicant;

c. emails between various EPS employees and external legal counsel concerning the Applicant's employment with the EPS. These emails discuss the legal opinions and other documents prepared by external legal counsel and provide feedback on them or offer clarification on them. They also discuss next steps;

d. emails between various EPS employees and internal legal counsel concerning matters related to the Applicant's employment with the EPS. These emails provide updates and information on matters relating to the Applicant and legal issues in the course of the Applicant's employment with the EPS; and

e. emails between various EPS employees. In these emails, the EPS employees discuss the legal advice provided by legal counsel, prepare information for legal counsel in order to obtain legal advice or make arrangements to meet with legal counsel.

[para 163] The Public Body further argues:

95. It's important to remember here that the privilege attaches to the continuum of communications and that privilege should not be assessed by isolating particular communications or fragments of communications. A holistic approach must be taken, and in order for a lawyer to provide advice, they will require history and background. In this regard, it's also important to recognize that the Applicant was employed by the EPS for a significant amount of time, during which a number of matters arose that the EPS needed to seek legal advice on.

96. With respect to the legal opinions, other documents and emails exchanged between the EPS and external legal counsel, it's obvious that solicitor-client privilege applies to these pages: the pages are communications between solicitor and client; they entail the seeking and giving of legal advice; and they are intended to be confidential by the parties. The same comments are true in relation to the emails with internal legal counsel.

97. As for the emails between various EPS employees, solicitor-client privilege applies here as well even though neither external nor internal legal counsel is included in the emails. As set out above, the privilege attaches to the continuum of communications. In order for a lawyer to provide advice, they will require history and background from a client. Similarly, after a lawyer provides advice to a client, there

may be some back and forth concerning the advice. What this means here is that solicitor-client privilege applies when EPS employees are:

a. gathering information for legal counsel;

b. advising one another of the advice received from legal counsel;

c. discussing the advice received from legal counsel; and

d. discussing meeting with legal counsel.

[para 164] I agree with the Public Body's arguments regarding the scope of solicitor-client privilege. The records described in the exchanged submission appear to fall within that scope. I note that the Public Body's submissions, including the *in camera* affidavit, mention confidentiality only once, with respect to the information described at paragraph 96 of the Public Body's initial submission, quoted above. That information relates to legal opinions, other documents and emails exchanged between the Public Body and external legal counsel. Many bundles of records described in the Public Body's *in camera* affidavit include communications between the Public Body and external counsel.

[para 165] However, the descriptions for some bundles of records do not reference external counsel. For information to be protected by solicitor-client privilege, the third part of the *Solosky* test must be met: the information must be intended to be kept confidential. In *Governors of the University of Alberta v Alberta (Information and Privacy Commissioner)*, 2022 ABQB 316, the Court found that affidavit evidence stating that the records were intended to be confidential, and that the Public Body has maintained the confidentiality of these records is sufficient to meet that element of the *Solosky* test (at para. 41). However, I do not have even that basic statement with respect to some of the information over which privilege is claimed.

[para 166] The confidentiality of documents over which privilege is claimed may be implicit from the nature of the documents themselves (Order F2007-008) or from the circumstances under and, purposes for which, the legal advice was being sought or given (Order F2004-003). With respect to many of the bundles of records described in the Public Body's *in camera* affidavit of records, it is clear from the descriptions that legal advice was sought or given. Many of those bundles involve external counsel and as such, the Public Body has provided an express statement of confidentiality (bundles 3, 4, 5, 6, 7, 9, 10, 12, 13, 16 and 18). There are two bundles of records that involve only internal counsel; however, it is clear from the descriptions that they relate to the giving or seeking of legal advice (bundles 11 and 17). With respect to those bundles, I accept that confidentiality is implicit from the nature of the records described.

[para 167] I have other concerns about the descriptions of some bundles of records provided in the Public Body's *in camera* affidavit.

[para 168] The *in camera* affidavit refers to communications between the Public Body and third parties (other than the Public Body's external counsel). Communications with third parties usually are not protected by solicitor-client privilege. There are exceptions to this general rule; however, it is not clear from the Public Body's submissions whether they apply.

[para 169] For example, a third party communication may be protected by solicitor-client privilege where a Public Body employee receives a communication from a third party and forwards it to counsel seeking advice on how to proceed. In such a case, forwarding the third party communication would appear to fall within the scope of solicitor-client privilege as it has been discussed above.

[para 170] However, it is not clear that this is the circumstance in this case. The Public Body's *in camera* affidavit states that some email chains start with communications from a third party. This description raises questions about the applicability of solicitor-client privilege to those initial communications. By way of analogy: where a company receives a complaint from a customer about an injury resulting from the company's product, the company might forward that complaint to its counsel, asking for legal advice about liability. Those communications would be protected by solicitor-client privilege, including the copy of the complaint that was forwarded in the communications. However, the complaint as it exists by itself, is not thereby protected by solicitor-client privilege simply because a copy was sent to counsel.

[para 171] The *in camera* affidavit also refers to communications in which the Public Body's counsel and other employees are making a factual determination. It is unclear how making the factual determination described in the affidavit amounts to legal advice. It seems likely that the determination relates to legal services provided by counsel such that sections 27(1)(b) or (c) might apply, but relating to legal services is not the same as solicitor-client communications (or even the continuum of communications).

[para 172] The *in camera* affidavit describes one bundle of records as communications relating to scheduling. Another bundle of records is described as containing communications between counsel and a Public Body employee relating only to what appears to be purely administrative matters. Other bundles are described as containing (but not limited to) similar scheduling or administrative/organizational matters. It is unclear how such communications fall within the scope of solicitor-client privilege. The continuum of communications refers to the necessary exchange of information that enables legal advice to be sought or given. It does not extend to any communications with counsel that merely relate to the fact that legal advice was sought or given. The purpose of sections 27(1)(b) and (c) is to apply to information prepared by or for counsel, or communications with counsel that are not encompassed by legal privilege. The Court recognized as much in *EPS* (at para. 396):

> Further, a virtue of the Adjudicator's interpretation is that it gives a job to each statutory provision, aligning with Professor Sullivan's articulation of the "presumption against tautology" in *The Construction of Statutes* at §8.23:
>
> > §8.23 ***Governing principle.*** It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain. Every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose …. [footnote omitted]
>
> The Adjudicator's interpretation avoids the prospect of solicitor/client privilege doctrine, particularly regarding the continuum of communications, expanding from s. 27(1)(a) and obviating the need for paras (b) and (c), at least respecting communications tied to the provision of legal services.

[para 173] With respect to the 'mixed' bundles, it is possible that the purely administrative/scheduling matters are part of a record containing legal advice. As stated by the Federal Court of Appeal in *Canada (Minister of Justice) v. Blank*, 2007 FCA 147, "Courts should not strain to surgically excise from a privileged communication sentences which, though of a general nature, are nonetheless part and parcel of that communication" (at para. 3). This principle has been applied in past Orders (see Order F2011-018). However, the evidence currently before me does not indicate whether this principle applies in this case.

[para 174] The concerns I have raised above apply to part of the first and tenth bundle of records, and all of the second, eighth and fourteenth bundle of records, described in the *in camera* affidavit.

[para 175] The evidence provided by the Public Body with respect to the remaining thirteen bundles of records meets the requirements set out in *ShawCor* and is consistent with the test for finding solicitor-client privilege applies. For these bundles, I find that the Public Body has established its claim of privilege.

Sections 27(1)(b) and (c)

[para 176] The Public Body applied sections 27(1)(b) and (c) to the same information in the records at issue.

[para 177] Orders F2014-R-01 and F2014-38 both specify that sections 27(1)(b) and (c) require the information withheld under those provisions to reveal substantive information about the relevant legal services. In other words, section 27(1)(c) protects substantive information in correspondence between the persons listed in that provision, about a matter involving the provision of advice or other legal services. Order F2014-R-01 states (at para. 69):

> Information "prepared by or for an agent or lawyer of a public body" within the terms of section 27(1)(b) is *substantive* information, and the section does not apply to information that merely refers to or describes legal services without revealing their *substance* (Order F2013-51 at para. 85). Similarly, the purpose of section 27(1)(c) is to protect the *substance* of advice and services by an agent or lawyer of a public body, and the section does not extend to such information as dates or the names of the senders and recipients of correspondence (Order F2009-018 at paras. 45 to 47). (Order F2014-R-01, at para. 69)

[para 178] In Order F2008-028, the adjudicator found that non-substantive information does not fall within the scope of that provision. He said (at para. 157):

> … In keeping with principles articulated in respect of sections 22 and 24 of the Act, section 27(1)(b) does not extend to non-substantive information, such as dates and identifying information about senders and recipients, unless this reveals the substantive content elsewhere.

[para 179] A similar analysis operates with respect to section 27(1)(c) which applies to information *in* correspondence between the persons listed in that provision.

[para 180] In *EPS*, cited above, the Court commented on the interpretation of section 27(1)(c) set out in Order F2013-13. It said (at para. 448, emphasis added):

> The Adjudicator commented (correctly in my view) at para 263 of F2013-13 that
>
> > [para 263] It appears that section 27(1)(c) anticipates that an agent of the Attorney General or counsel for a public body could be either the sender or the recipient of the correspondence referred to in this provision. It also appears that the "person" referred to in this provision need not be the recipient of the legal services referred to in this provision. As long as the correspondence in question relates, in some way, to a matter that involves the provision of legal services by the agent or lawyer, it appears that section 27(1)(c) gives the head of a public body the discretion to withhold the correspondence ….

[para 181] In its initial submission the Public Body argues that section 27(1)(c) is sufficiently broad that it includes communications between Public Body lawyers and other Public Body employees "that do not involve the seeking or giving of legal advice or even the provision of legal services" (at para. 103). This contradicts the analysis in Order F2013-13, which was specifically upheld in in *EPS*. That said, I agree that communications do not need to involve *legal advice* to fall within the scope of section 27(1)(c), as that information would presumably fall within the scope of section 27(1)(a).

[para 182] The Public Body has applied sections 27(1)(b) and (c) inconsistently in some instances. As noted above, the same information withheld on pages 237-238 of Record 1 under section 24(1) was also withheld under sections 27(1)(b) and (c) on page 256. These pages consist of an email on which the Public Body's in-house counsel was copied. Counsel's role with respect to the matter discussed in that email is not clear. It is not the case that section 27(1)(c) applies to any email for the sole reason that counsel is copied on that email. The test to be met is that the correspondence is in relation to matter involving the provision of advice or legal services by that lawyer. The copy of the email on pages 237-238 to which section 24(1) was applied (and not section 27(1)) is followed by another email on page 238, sent to the lawyer copied on the emails at pages 237-238 (and again at page 256). This email sent directly to the lawyer on page 238 was also withheld under section 24(1) and not section 27(1). This suggests the possibility that the lawyer may have been providing advice or services other than legal advice or services, with respect to the matter addressed in those records. Possibly the Public Body erred in applying section 24(1) and not section 27(1) to this email, but I cannot come to such a conclusion on the basis of what is before me. All this is to say, it is not clear what the role of this lawyer is in the matters discussed in the records at issue, and the Public Body's submissions have not provided clarity. As such, it is not clear that section 27(1) can apply to this information.

[para 183] The Public Body's submissions regarding sections 27(1)(b) and (c) refer only to emails and attachments from counsel for the EPC (discussed earlier in this Order with respect to the application of section 21(1)(b)). The Public Body argues that all of the information withheld under sections 27(1)(b) and (c) "stem from these emails". However, sections 27(1)(b) or (c) do not necessarily apply to records for the sole reason that they were created as a result of a communication that falls within the scope of section 27(1)(b) or (c). The information in each record must itself fall within the scope of section 27(1)(b) or (c) in order for those provisions to apply.

[para 184] The Public Body states in its initial submission (at para. 105):

> All of the emails from her contain information that was prepared by [EPC counsel]. The emails in response to her, or exchanged among EPS employees as a result of her questions or requests, contain information that was prepared for her in order to answer her questions or requests. Much of the information was exchanged in correspondence with her.

[para 185] This argument suggests that the Public Body applied sections 27(1)(b) and/or (c) to communications between Public Body employees as a result of questions raised by EPC counsel in her emails. The Public Body states that emails between Public Body employees contain information prepared "for" EPC counsel.

[para 186] Section 27(1)(b) applies to information prepared "by or for" an agent or lawyer of a public body. As in every other instance where the phrase "by or for" appears in the Act, it means "on behalf of" (see Orders 97-007 at para. 29, F2008-008, at paras. 42-44). In other words, for section 27(1)(b) to apply, the information must have been "prepared by the lawyer or someone acting under the direction of the lawyer for the purpose that a lawyer will use the information in order to provide legal services to a public body" (Order F2010-007, at para. 37). This restriction of the phrase "by or for" was upheld in *EPS* (at para. 441):

> In my opinion, the Adjudicator correctly interpreted s. 27(1)(b) by not extending "by or for" to "by or for the benefit of" and by confining the meaning of "by or for" to "by or on behalf of" or "by or at the direction of."

[para 187] Nothing in the records or the Public Body's submissions indicate any information in the records was prepared by the Public Body acting under the direction of the EPC lawyer or any other lawyer. Therefore, section 27(1)(b) does not apply to communications between Public Body employees discussing how to respond to questions from EPC counsel.

[para 188] I have not located any information in the records to which section 27(1)(b) appears to apply. (I do not have a significant number of records to which this provision was applied, as the Public Body also applied section 27(1)(a) to that information and did not provide it for the inquiry).

[para 189] That said, information in correspondence between the Public Body and EPC counsel can fall within the scope of section 27(1)(c), and I agree that it does. I agree that counsel for EPC was acting in her role as counsel, and was providing a legal service to EPC in her communications with the Public Body. The Public Body must review the records to which sections 27(1)(c) applies, to ensure it has withheld only substantive information. Further, section 27(1)(c) (or (b)) does not apply to the forwarding of these emails from one Public Body employee to another, unless the forwarding email reveals the content of the EPC counsel's email.

[para 190] As discussed earlier in this Order, the documents following the EPC counsel's emails as they appear in the records at issue may have been attached to those emails. If so, I agree that section 27(1)(c) would extend to those attachments as well. However, for the reasons discussed above (at paragraphs 87-88), it is not clear that those documents were attached to the EPC counsel's emails. As such, I will order the Public Body to ensure this is the case when it re-processes the records.

Exercise of discretion – Section 27(1)(a)

[para 191] Past Orders of this Office have found that once solicitor-client privilege has been established, withholding the information is usually justified for that reason alone (see Orders F2007-014, F2010-007, F2010-036, and F2012-08 citing *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, cited above).

[para 192] This approach was discussed with approval in *EPS*, cited above.

[para 193] Where I have found that the Public Body properly claimed solicitor-client privilege, its exercise of discretion to withhold that information can be presumed to be appropriate.

Exercise of discretion – sections 27(1)(b) and (c)

[para 194] Sections 27(1)(b) and (c) are discretionary exceptions. The discussion above as to the exercise of discretion with respect to the application of section 23(1) also applies here.

[para 195] The Public Body states the following with respect to its exercise of discretion to apply sections 27(1)(b) and (c):

> 106. In deciding to withhold the information under these sections, the EPS weighed considerations for and against disclosure, such as:
>
> a. the impact the disclosure would reasonably be expected to have on the EPS' and the Commission's ability to carry out similar communications in the future;
>
> b. that the release of the information could make consulting between the EPS and the Commission, including its lawyers, less candid, open and comprehensive in the future;

> c. that those involved in the communications expected that their consultations would be kept confidential; and
>
> d. the objectives and purposes of the *Act*, including the Applicant's right of access.

[para 196] I agree that these are appropriate factors. The Public Body cites the decision in *EPS*, noting that public bodies should weigh considerations for and against disclosure, including the public interest in disclosure. However, the Public Body has not indicated whether it did consider whether there is any public interest in disclosing information in the records. And while the Public Body specified that it considered the Applicant's right of access under the Act, it did not specify whether it considered the Applicant's interests in disclosure of the particular information withheld under section 27(1)(b) or (c).

[para 197] I will therefore order the Public Body to re-exercise its discretion in applying section 27(1)(c).

[para 198] I have noted in the discussion of section 21(1)(b) that the Public Body has provided a fair amount of detail regarding some of the emails from EPC counsel to the Public Body, to which section 27(1)(c) has also been applied. The Public Body should consider how much information about the emails has been disclosed when re-exercising its discretion to apply this provision.

V. ORDER

[para 199] I make this Order under section 72 of the Act.

[para 200] I find that section 17(1) cannot apply to some information withheld under that provision. I order the Public Body to disclose the information to which that provision does not apply, as set out this Order.

[para 201] I find that the Public Body properly withheld personal information to which section 17(1) applies.

[para 202] I find that section 21(1)(b) does not apply to information in the records.

[para 203] The Public Body's submissions are insufficient to conclude whether section 23(1) applies to any information in the records.

[para 204] I find that section 24(1) applies to some information withheld under that provision.

[para 205] I uphold the Public Body's application of section 27(1)(a) to some information in the records.

[para 206] I find that section 27(1)(b) does not apply to information in the records that have been provided to me.

[para 207] I find that section 27(1)(c) applies to some information withheld under that provision.

[para 208] I order the Public Body to review the records at issue and amend its application of sections 23, 24 and 27 in accordance with the examples and guidance provided in this Order. I also order the Public Body to again exercise its discretion in applying sections 23(1)(b), 24(1) and 27(1), in accordance with the guidance in this Order. The Public Body should also consider what information is non-responsive, in a more consistent manner, in accordance with the examples and guidance provided in this Order. Before providing its new response to the Applicant, the Public Body should clarify whether the Applicant is interested in duplicate copies of records, which accounts for a significant number of the records at issue.

[para 209] With respect to the Public Body claim of privilege, I order the Public Body to review the records about which I have raised concerns. If the Public Body continues to claim solicitor-client privilege over all or some of that information, the Public Body should provide a brief description of how that privilege applies when it provides a new response to the Applicant.

[para 210] I will retain jurisdiction to review the Public Body's new response to the Applicant, should the Applicant ask me to do so. If the Applicant wishes to seek a review, he must inform this office within 30 days of receiving the Public Body's new response.

[para 211] I further order the Public Body to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

_____

Amanda Swanek
Adjudicator