ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2023-07

February 9, 2023

ENVIRONMENT AND PROTECTED AREAS

Case File Number 010860

Office URL: www.oipc.ab.ca

Summary: The Applicant made an access request to under the *Freedom of Information and Protection of Privacy Act* (the Act) to Environment and Parks (now Environment and Protected Areas) (the Public Body) for the following records:

> All internal, incoming and outgoing records between AEP, the new Strategic Alliance Vendor consortium and any other applicable entities or persons (including the following named resources [4 named individuals] that relate to the business and technical support of the WISKI application and the named resources above and the Compass Consulting Group, under the new SAVI initiative. Other resources within the scope of this request include but may not be limited to [11 individuals].

The Public Body searched for and located responsive records. It applied sections 24(1) (advice from officials) and 25 (disclosure harmful to economic and other interests) of the Act to withhold some information from the Applicant.

The Applicant requested review of the completeness of the Public Body's response and its severing decisions.

The Adjudicator directed the Public Body to meet its duty to assist the Applicant. She determined that it could meet this duty by conducting a search for records that includes records relating to the meetings referenced in the records and providing an account of its search with reference to the factors set out in Order F2007-029. Alternatively, if it had already searched for such records, it could meet its duty by providing an account of the

search it conducted. In either case, the account should also include an explanation of how the Public Body interpreted the access request and should explain the search conducted.

The Adjudicator confirmed that section 24(1) applied to the information to which the Public Body had applied this provision; however, she found that the Public Body had not demonstrated that it had exercised its discretion reasonably when it elected to withhold the information.

The Adjudicator found that section 25 did not apply to the information to which the Public Body had applied this provision and directed it to disclose any information withheld solely under this provision.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 10, 12, 24, 25, 72

Authorities Cited: AB: Orders 96-016, 96-017, F2004-026, F2007-029, F2015-29

Cases Cited: *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23

1. BACKGROUND

[para 1] The Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the Act) to Environment and Parks (now Environment and Protected Areas) (the Public Body) for the following records:

> All internal, incoming and outgoing records between AEP, the new Strategic Alliance Vendor consortium and any other applicable entities or persons (including the following named resources [4 named individuals] that relate to the business and technical support of the WISKI application and the named resources above and the Compass Consulting Group, under the new SAVI initiative. Other resources within the scope of this request include but may not be limited to [11 individuals].

[para 2] The timeframe for the request was March 1, 2018 to July 25, 2018.

[para 3] The Applicant provided the following clarification of the access request to the Public Body:

> What we are looking for are any emails/ records between the Ministry (AEP), the new AEP Strategic Alliance Vendor (CGI, Silver Creek, etc.) and the resources listed below that pertain to the support of the Ministry of Environments WISKI application (AMS and ADS services) under the new SAVI agreement.
>
> […]
>
> We are interested in the discussions that took place and the decisions that were made regarding how the new Strategic Alliance Vendor will provide support for AEP's WISKI application after September 4th, 2018. Overall, we would like to understand:
>
> 1) How were the required WISKI AMS/ADS support resources identified (e.g. number

required and names of resources) and who was involved in that discussion?

2) What decisions were made concerning knowledge transfer, resource retention and other transition/support related activities with respect to the WISKI application under the SAVI Vendor transition plan?

3) What was the agreed to approach between the Ministry and the new SAVI Vendor to provide transition support for the WISKI Application to ensure that the ongoing needs of the Ministry were adequately met? (e.g. What was the agreed to / approved WISKI SAVI Vendor transition plan?).

4) What discussions took place between the GOA, the new SAVI Vendor and the resources (identified above) on how the resources would be engaged to continue to provide support under the new SAVI agreement (e.g. post transition)?

5) What discussions took place between the new SAVI Vendor and the identified resources regarding the continuance of providing AMS and ADS support to the Ministry of Environment under the new SAVI agreement?

In my previous e-mail I tried to narrow the scope by identifying the GOA, SAVI Vendor and other resources that may have been engaged in the discussions.

I hope the explanation above helps clarify our request.

[para 4] The Public Body then conducted a search for responsive records.

[para 5] The Public Body located 31 pages of records. It severed some information from them under sections 24 and 25 of the FOIP Act.

[para 6] The Applicant requested review by the Commissioner of the Public Body's response to the access request. In particular, the Applicant questioned the adequacy of the Public Body's search for responsive records and its decisions to sever information from the records it located. The Applicant stated:

> We believe that the response created by the Environment and Parks FOIP Office was inadequate and failed to locate records that would reasonably have been created by the Ministry in establishing their application maintenance and support needs for their Water Information System (WISKI).

II. ISSUES

ISSUE A: Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act (duty to assist applicants)?

ISSUE B: Did the Public Body properly apply section 24(1) (advice from officials) to information in the records?

ISSUE C: Did the Public Body properly apply section 25(1) of the Act (disclosure harmful to economic and other interests of a public body) to the information in the records?

III. DISCUSSION OF ISSUES

ISSUE A: Did the Public Body meet its duty to the Applicant as provided by section 10(1) of the Act (duty to assist applicants)?

[para 7] Section 10(1) of the Act states:

> *10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.*

[para 8] In Order F2007-029, the Commissioner made the following statements about a public body's duty to assist under section 10(1):

> The Public Body has the onus to establish that it has made every reasonable effort to assist the Applicant, as it is in the best position to explain the steps it has taken to assist the applicant within the meaning of section 10(1).
>
> [. . .]
>
> Previous orders of my office have established that the duty to assist includes the duty to conduct an adequate search for records. In Order 2001-016, I said:
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> > In Order 97-003, the Commissioner said that a public body must provide sufficient evidence that it has made a reasonable effort to identify and locate records responsive to the request to discharge its obligation under section 9(1) (now 10(1)) of the Act. In Order 97-006, the Commissioner said that the public body has the burden of proving that it has fulfilled its duty under section 9(1) (now 10(1)).
> >
> > Previous orders . . . say that the public body must show that it conducted an adequate search to fulfill its obligation under section 9(1) of the Act. An adequate search has two components: (1) every reasonable effort must be made to search for the actual record requested and (2) the applicant must be informed in a timely fashion what has been done.
>
> …
>
> In general, evidence as to the adequacy of search should cover the following points:
>
> • The specific steps taken by the Public Body to identify and locate records responsive to the Applicant's access request
>
> • The scope of the search conducted – for example: physical sites, program areas, specific databases, off-site storage areas, etc.
>
> • The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, records retention and disposition schedules, etc.
>
> • Who did the search

- Why the Public Body believes no more responsive records exist than what has been found or produced

[para 9] The Applicant argues:

> Pursuant to our request for an inquiry made to the Information and Privacy Commissioner of Alberta (Case File Number 010860) and by way of this letter and supporting documentation we confirm our desire to proceed with the Request for Inquiry.
>
> Our inquiry request pertains to the Public Body's:
>
> > • Broad application of sections 24(1) and 25(1) which limited the release of records (e.g. raises questions concerning transparency of the Access Request process and overall transparency objectives of the Act);
> > • The scope of the search performed by the Public Body;
> > • Stipulation that they would not releases [sic] the requested records unless we withdrew our complaint regarding the adequacy of the records search.
>
> We believe that more records exist than were located and provided as we had several conversations with the Ministry of Environment Parks Water Infrastructure and Operations and Informatics Branch management teams regarding planned meetings related to our Access Request. These meetings took place, but no resulting information of the discussions including e-mails, Briefing Notes, Meeting Agenda's, Meeting Minutes and / or handwritten notes were identified through the record search.
>
> This is partially confirmed in the Public Body's original response where there are e-mails referencing meetings however no documents related to the meetings were identified through the records search.

[para 10] The Applicant points out that the records contain references to meetings; however, no records relating to the meetings, such as minutes or notes, were included in the Public Body's response. The Applicant also questions why briefing notes were not located.

[para 11] The Public Body submits:

> By the middle of September, a scope was decided-upon [my emphasis], all responsive records had been identified, and the AEP FOIP worked closely with the Applicant in ensuring that they felt comfortable with our records search and our identifying of the responsive records. AEP FOIP spoke with the Applicant at minimum once a week to provide updates on the progress of the access request. Search requests were sent to all the regular contacts within the Public Body. The search for records included email boxes, notebooks, active file repositories, file rooms, paper and digital records repositories, ARTS systems, and records repositories where SAVI transition records were being stored. [my emphasis] Additionally, search requests were provided directly to the following AEP staff who were identified in the Applicant's scope: […] Each contact searched their operational records, email inboxes, notebooks, and shared drive spaces and turned over all records that could reasonably be expected to contain responsive information. The initial search effort was expansive and exhaustive, and despite the Applicant's mistrust of the process [my emphasis], they were provided with every responsive record in the Public Body's custody, with minimal, reasonable, and justified severing. The records include meeting invites, meeting notes, email correspondence, and other records and information relevant to the Applicant's request.
>
> There were no briefing notes, additional meeting notes, or meeting agenda's identified as responsive to the Applicant's scope. The issue specific to the Applicant's request was not a

decision or process that required any kind of intensive meeting or high level briefing materials. [my emphasis] The Public Body had clearly chosen a preferred vendor, and no further analysis of the Applicant's organization was necessary. The remaining responsive records were processed and disclosed to the Applicant. After disclosure, the Applicant immediately came back with concerns about the records, severing, and the search. The Applicant stated they were "disgusted" by our response, which is curious considering the level of communication and input the Public Body allowed the Applicant to have in confirming the search, defining the responsive record set, and the mutual understanding achieved between the Public Body and Applicant throughout the entire process.

From this point, the Applicant made further assertions that they believe a list of four individuals absolutely must have responsive records related to applying for jobs, covertly working with third party vendors, and engaging in discussions that breached their contracts with the Applicant's business. The Public Body explained to the Applicant that the records they are now describing would not have necessarily been responsive to the scope of his original request. Further, these would be records that would likely be third party records requiring a section 30 notice, which the Applicant eliminated from responsiveness in the fee estimate negotiations. Lastly, we explained that the described activities would likely have taken place on personal email services, outside GoA infrastructure, and would not be accessible through FOIP. The Applicant was not satisfied with any of our explanations and insisted that records exist, but offered no rational argument that overturned the Public Body's explanations. They stated their intention was to ask for an OIPC review, and we attempted to resolve the Applicant's concerns before escalating to that level.

AEP FOIP invited the Applicant to submit a FOIP-of-the-FOIP for E18-G-1107. The file number for that request was E18-G-1640. Furthermore, AEP FOIP agreed to do a second search for records potentially responsive to E18-G-1107, and, should any new records present themselves, we would provide a second disclosure for E18-G-1107. E18-G-1640 was processed and disclosed to the Applicant. We disclosed all records related to the search for records, a complete copy of the sign off document with all rationales for applying the Act disclosed, and all other internal correspondence between the FOIP office and program areas related to the search, program area review, and approval process. No discretionary exceptions were applied in E18-G-1640, and the only exceptions applied were related to personal information. Additionally, the Public Body performed an extensive second search for records related to E18-G-1107.

The Public Body went so far as to contact the four individuals named as people of interest by the Applicant and asked them to turn over their entire Outlook inbox to AEP FOIP. [my emphasis] AEP FOIP performed a complete review of these records and found no further information responsive to the Applicant's request that wasn't already disclosed in E18-G-1107. The individuals of interest to the Applicant were more than cooperative, turned over their complete email records without question, and every reasonable effort was made by all staff involved in conducting an adequate search and responding to this Applicant.

Once again, the Applicant was informed that the Public Body had no further records to disclose that would be responsive to E18-G-1107. We explained that we have gone beyond our normal processes and parameters in performing a second search for records and have exhausted all reasonable efforts available to us to satisfy the request. This was still not an acceptable answer to the Applicant and they advised that they would be seeking an OIPC review and later an inquiry.

The Public Body's position is that we have already performed an adequate and reasonable search twice for records, and our efforts on this request more than meet the requirements under section 10 of the FOIP Act. At no time did the Public Body attempt to deny the Applicant's request. Every effort to seek, create, and provide any potentially responsive record in AEP's custody was made. AEP performed a second search and reviewed hundreds of non-responsive emails from the Outlook inboxes of individuals the Applicant felt should have responsive records, which we were not required to do. No further records were identified. Despite the vexatious and exhaustive requests for more from the Applicant and the invasive searches into inboxes of government staff,

> at no time did the Public Body attempt to deny access to the Applicant or cite any concerns related to the potential harm to the operations of the public body. There is no other record that could be searched for that could be responsive to the Applicant's request. All staff involved in the processing of this FOIP request were open, accountable, available, and accommodating to the Applicant's concerns.
>
> Lastly, in the Applicant's initial submission to this Inquiry, they provided no arguments that could reasonably be taken to discredit any of the above descriptions of the Public Body's efforts to respond to this request. The Applicant believes that more records exist because their organization had conversations with the Public Body, but no material evidence of these conversations is provided. Furthermore, conversations between the Applicant's organization and the Public Body are not responsive to the scope of this request, making this assertion irrelevant to the Public Body's response to E18-G-1107. The Applicant then goes on to offer broad descriptions of records they believe should exist, but do not necessarily meet the description of records being sought in the scope of their original request. An absence of expected records in the Public Body's response does not by any mean suggest that the Public Body failed to perform an adequate search. The Applicant themselves agrees that the contractual decisions specific to the Applicant's organization failure to continue as the preferred vendor for WISKI support had already been decided well before the Applicant submitting their access request, making any disposition of transitory meeting notes reasonable and expected once a more adequate vendor had been chosen for SAVI and WISKI operations.
>
> The Public Body has no further comment on the Applicant's other interpretation of OIPC review and mediation outcomes, as they are not material to the issues at inquiry for #010860.

[para 12] In the foregoing excerpt, the Public Boyd refers to the Applicant's questions regarding its search as "vexatious" and suggests that the search of inboxes it was required to conduct in order to respond to the access request was "invasive". Finally, the Public Body states that the issues that are the subject of the records did not require intensive meetings.

[para 13] The Applicant stated in reply:

> The intent of the records search was to identify records that related to the WISKI application support during the period leading up to and directly after the transition to the new Strategic Alliance Vendor (SAVI). At no time did we assert that the Ministry "brokered the poaching" of WISKI support staff nor did we ever use words like "disgusted" or expressed our mistrust of the process that was being led by the Public Body's FOIP personnel. These assertions are false and do not reflect the conversation correctly. At all times the conversations were professional, supportive, and cordial. We felt then and still do today that the Public Body's FOIP personnel followed the established process and did provide valuable advice to us as we navigated the initial records request activities.
>
> Having said that, after participating in this process we do call into question the fullness of the provided records in that we were aware of ongoing discussions within the Ministry related to this issue and that a number of meetings took place to resolve the Ministry's concerns but there were no corresponding records from those discussions (e.g. meeting requests were provided in the search but no resulting outcomes of the discussions were made available). This has made us question the practice of having individuals, directly involved in the FOIP request, performing the search and disclosure of records and suggest that a better approach would be for an internal 3rd-party to perform the search so as to avoid potential conflicts of interest.

[para 14] In the Applicant's reply submissions, the Applicant reiterated its position that meetings were referenced in the records, but no records arising from those meetings had been produced. The Applicant also stated that it was now concerned that the search for records had been conducted by persons with a conflict of interest.

[para 15] I do not agree with the Applicant that requiring third parties to conduct searches is a solution to the issue of potential bias. As has been discussed in prior orders[1], the Commissioner conducts independent reviews of public bodies' responses to access requests. A public body must submit evidence for an inquiry to satisfy the Commissioner that it met its duties under the FOIP Act. If the Commissioner is not satisfied by the Public Body's evidence, the Commissioner may direct the Public Body to comply with its duty. Where the issue is adequacy of search, the Commissioner may direct the Public Body to conduct a new search and to explain the steps it has taken to locate responsive records.

[para 16] I turn now to the question of whether the Public Body has met its burden of establishing that it conducted a reasonable search for responsive records. I am unable to find that it did. As noted in Order F2007-029, a public body must provide evidence regarding the scope of the search it conducted. The Public Body has not explained what it considered the scope of the access request to be – i.e. what did the Applicant request? What records did the Public Body think would be responsive, and why? Further, while it has provided some details about the areas it searched, it has not told me what employees were told to look for.

[para 17] The Public Body has also not explained the specific steps it took to locate responsive records. While I understand that it focused on the emails of four employees and also sent "search requests to regular contacts" I do not know what information the requests contained. Again, I do not know what kinds of information employees were told would be responsive to the access request or what the results of their searches were.

[para 18] The Public Body has also not explained how it determined where responsive records would be located. While it makes sense that it would search for records of the four employees named by the Applicant in the access request to assist the Public Body in its search, it appears possible that responsive records could have been created by other employees in other areas. The Applicant provided the names of individuals he thought would have responsive records, but I do not interpret his request as one for information generated only by these employees. The Public Body has not explained how it concluded that responsive records would only be located in the areas it searched.

[para 19] A public body must also explain why it believes no further responsive records exist than those it has located. The records refer to meetings to discuss the issue of the transition of WISKI support, and the Public Body has not produced any records relating to those meetings, such as minutes or notes, or explained why it has not produced any such records, despite the references to meetings taking place in the records.

[1] See Orders F2007-012, F2018-72, F2021-33, F2022-19

[para 20] In Order F2015-29, the Director of Adjudication said:

> Earlier orders of this office provide that a public body's description of its search should include a statement of the reasons why no more records exist than those that have been located. (See, for example, Order F2007-029, in which the former Commissioner included "why the Public Body believes no more responsive records exist than what has been found or produced" in the list of points that evidence as to the adequacy of a search should cover. This requirement is especially important where an applicant provides a credible reason for its belief that additional records exist.

[para 21] In this case, the Applicant has provided a credible reason for believing that responsive records relating to meetings about the transition of WISKI support would be likely to exist -- that there are references to such meetings taking place throughout the records. The Public Body has not adequately addressed why records that might have been used in the meetings, such as agendas, notes of the meetings, or minutes of the meetings, have not been produced. I acknowledge the Public Body asserted that a meeting wasn't called for in the circumstances, but that does not account for the references to meetings in the records that were provided. The records themselves indicate that the matters to be discussed at the meetings were considered very important to the employees who created the records.

[para 22] I recommend that the Public Body address the factors set out in Order F2007-029 in its future submissions regarding adequacy of search.

[para 23] In this case, I find that the Public Body has not explained the search it conducted with sufficient detail and evidence to enable me to find that it conducted a reasonable search. I am also unable to find that it searched in particular for records documenting, or generated in the course of, the meetings referenced in the records.

[para 24] As the Public Body has not demonstrated that it conducted a reasonable search for responsive records, I must direct it to meet its duty to assist the Applicant. It may meet this duty by conducting a search for records that includes records relating to the meetings referenced in the records and providing an account of its search with reference to the factors set out in Order F2007-029. Alternatively, if it has already searched for such records, it may meet its duty by providing an account of the search it conducted. In either case, the account would also include an explanation of how the Public Body interpreted the access request and should explain the search conducted. The Applicant may then request review if unsatisfied with the new search or the new response.

ISSUE B: Did the Public Body properly apply section 24(1) (advice from officials) to information in the records?

[para 25] Sections 24 of the FOIP Act states, in part:

> *24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*

(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,

(b) consultations or deliberations involving

(i) officers or employees of a public body,

(ii) a member of the Executive Council, or

(iii) the staff of a member of the Executive Council,

(c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Alberta or a public body, or considerations that relate to those negotiations […]

[…]

(2) This section does not apply to information that

(a) has been in existence for 15 years or more […]

[…]

[para 26] In Order F2015-29, the Director of Adjudication interpreted sections 24(1)(a) and (b) of the FOIP Act and described the kinds of information that fall within the terms of these provisions. She said:

> The intent of section 24(1)(a) is to ensure that internal advice and like information may be *developed* for the use of a decision maker without interference. So long as the information described in section 24(1)(a) is developed by a public body, or for the benefit or use of a public body or a member of the Executive Counsel, by someone whose responsibility it is to do so, then the information falls under section 24(1)(a).
>
> A consultation within the terms of section 24(1)(b) takes place when one of the persons enumerated in that provision solicits information of the kind subject to section 24(1)(a) regarding that decision or action. A deliberation for the purposes of section 24(1)(b) takes place when a decision maker (or decision makers) weighs the reasons for or against a particular decision or action. Section 24(1)(b) protects the decision maker's request for advice or views to assist him or her in making the decision, and any information that would otherwise reveal the considerations involved in making the decision. Moreover, like section 24(1)(a), section 24(1)(b) does not apply so as to protect the final decision, but rather, the process by which a decision maker makes a decision.

[para 27] I agree with the analysis of the Director of Adjudication as to the purpose and interpretation of sections 24(1)(a) and (b), and agree these provisions apply to information generated when a decision maker asks for advice regarding a decision, or evaluates a course of action or it is necessary to provide advice so that decisions to guide

a public body's policy may be made. Section 24(1)(a) and (b) are intended to protect the processes by which public bodies make decisions from interference.

[para 28] The Public Body argues:

> AEP submits that the Public Body's application of section 24(1) to the responsive records is restrained and reasonable. The application of section 24(1) is restricted to an email thread appearing on pages 12- 16 of the responsive records where subject matter experts (SMEs) are developing messaging and policy options for an Executive Director's (ED) decision. The records demonstrate the evolution from the initial draft messaging proposed from one SME to another before the final draft is submitted to the ED for their final decision.
>
> In regards to the application of section 24(1)(a), it's clear that this is advice coming from program area SME to an ED for final decision. It's clearly directed toward taking an action on whether to provide funding to named projects; whether to combine data with another platform for easier interpretation of that data; and whether or not to engage in a funding partnership with other public bodies. The funding, data proliferation, and most importantly the cost-sharing potential of these decisions were undecided, decisions were imminent, and the harm in disclosing these options before a final decision had been reached is obvious, especially in an environment where vendors are being consolidated, flood season is beginning, and newly-chosen SAVI vendors are expected to implement these decisions with confidence.
>
> Similarly, the application of section 24(1)(b) is sound. The program area SMEs on pages 12-16 are corresponding and deliberating over how best to communicate the policy options being prepared for an ED decision-maker. All parties are acting within the expected parameters of their positions and expertise. All consultations and deliberations are between employees of the Public Body, prompted by the need to inform and influence an ED's decision. The topics at hand are related to funding, policy, and cost-sharing options that must be decided-upon before committing to a final direction on these data platforms. The actions required are clearly demonstrated in the content of the records, and the requirement for the ED and other decision-makers above that level to come to an informed decision before action can proceed.
>
> Lastly, the application of section 24(1)(c) is required to protect the Public Body's ability to complete negotiations with other municipalities in entering a cost-sharing agreement between these parties to operate these platforms. The applications being described in the responsive records are related to river forecasting and flood management. After the 2013 Alberta flood crisis, modernizing, protecting, and broadening the scope of tools used by municipal and provincial bodies in predicting flood risk and managing potential emergency responses was critical to the Public Body's mandate in the flood management portfolio. Improvements to these programs is costly and time-sensitive, and securing predictable funding and cross-jurisdictional cooperation on this issue was crucial to reaching the full potential of these applications. Clearly disclosing the status and potential of ongoing inter-governmental negotiations would be harmful to the Public Body. Information appearing on pages 12-16 demonstrates the risks and rewards in entering such agreement. It also assesses the viability of the project and consequences for named municipalities were each party unable to reach an agreement. In whole, the content of these records provide positions, plans, procedures, and considerations for an ED decision maker to consider as they complete negotiations to reach a cost-sharing agreement with named municipalities.
>
> The Public Body's application of section 24(1) and the cited subsections is moderate, reasonable, and any attempt to describe it as "overly-broad" is uninformed. In reviewing the responsive records, the OIPC will find that the above rationale for applying section 24(1) may apply to additional information that was ultimately disclosed. There is draft advice that did not make it into the final messaging provided to the ED. There is candid discussion about issues, risks, failures, and undetermined funding figures being disclosed throughout the records package. There is information and timelines related to the plans and decisions in implementing the new SAVI

> initiative, staffing decisions, and other generous insights into the entire process the Public Body applied in coming to these decisions. The Public Body used discretion in considering whether or not to apply section 24(1) to this information, and despite the strong rationale for further applications of section 24(1), the Public Body elected to be open and transparent in its disclosure. Most importantly, the Public Body was most transparent in disclosing information most relevant to the Applicant's request scope.
>
> Flood forecasting and emergency management is a serious issue for the Public Body, and this transformation and expansion of the Public Body's operations in this portfolio was occurring at a crucial and time-sensitive moment in the flooding season. Considering the rationale the Public Body had at its disposal and the resulting applications to the responsive records, it's clear that the final disclosure to this Applicant was more than reasonable.

[para 29] From my review of the information to which the Public Body applied section 24(1)(a), (b), and (c), I agree that the information is "advice" within the terms of section 24(1)(a). In addition, as the author of the information distributed it to colleagues in order to obtain their advice, I also find that the information is a "consultation" within the terms of section 24(1)(b).

[para 30] I am unable to find on the evidence available to me that section 24(1)(c) applies to the information to which the Public Body applied this provision as none of the information appears to be "positions, plans, procedures, criteria or instructions *developed for the purpose of contractual or other negotiations by or on behalf of the Government of Alberta* [my emphasis] or a public body, or considerations that relate to those negotiations". There is no evidence before me that the information to which the Public Body has applied section 24(1)(c) was developed for use in negotiations. The disclosed portion of the email suggests the information was included in the email to persuade the recipient that the Public Body needed to take a particular course of action. If the information was reproduced from plans developed for negotiations, the Public Body has not said so.

[para 31] As I find that section 24(1)(a) and (b) apply to the information to which the Public Body applied these provisions, I turn now to the question of whether it exercised its discretion appropriately when it severed the information.

Exercise of Discretion

[para 32] In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23, the Supreme Court of Canada commented on the authority of Ontario's Information and Privacy Commissioner to review a head's exercise of discretion. The Court noted:

> The Commissioner's review, like the head's exercise of discretion, involves two steps. First, the Commissioner determines whether the exemption was properly claimed. If so, the Commissioner determines whether the head's exercise of discretion was reasonable.
>
> In IPC Order P-58/May 16, 1989, Information and Privacy Commissioner Linden explained the scope of his authority in reviewing this exercise of discretion:

> In my view, the head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. It is my responsibility as Commissioner to ensure that the head has exercised the discretion he/she has under the *Act*. While it may be that I do not have the authority to substitute my discretion for that of the head, I can and, in the appropriate circumstances, I will order a head to reconsider the exercise of his/her discretion if I feel it has not been done properly. I believe that it is our responsibility as the reviewing agency and mine as the administrative decision-maker to ensure that the concepts of fairness and natural justice are followed. [Emphasis in original]
>
> Decisions of the Assistant Commissioner regarding the interpretation and application of the *FIPPA* are generally subject to review on a standard of reasonableness (see *Ontario (Minister of Finance) v. Higgins* (1999), 1999 CanLII 1104 (ON CA), 118 O.A.C. 108, at para. 3, leave to appeal refused, [2000] 1 S.C.R. xvi; *Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor)* (1999), 1999 CanLII 19925 (ON CA), 46 O.R. (3d) 395 (C.A.), at paras. 15-18; *Ontario (Attorney General) v. Ontario (Freedom of Information and Protection of Privacy Act Adjudicator)* (2002), 2002 CanLII 30891 (ON CA), 22 C.P.R. (4th) 447 (Ont. C.A.), at para. 3).
>
> The Commissioner may quash the decision not to disclose and return the matter for reconsideration where: the decision was made in bad faith or for an improper purpose; the decision took into account irrelevant considerations; or, the decision failed to take into account relevant considerations (see IPC Order PO-2369-F/February 22, 2005, at p. 17).
>
> In the case before us, the Commissioner concluded that since s. 23 was inapplicable to ss. 14 and 19, he was bound to uphold the Minister's decision under those sections. Had he interpreted ss. 14 and 19 as set out earlier in these reasons, he would have recognized that the Minister had a residual discretion under ss. 14 and 19 to consider all relevant matters and that it was open to him, as Commissioner, to review the Minister's exercise of his discretion.
>
> The Commissioner's interpretation of the statutory scheme led him not to review the Minister's exercise of discretion under s. 14, in accordance with the review principles discussed above.
>
> Without pronouncing on the propriety of the Minister's decision, we would remit the s. 14 claim under the law enforcement exemption to the Commissioner for reconsideration. The absence of reasons and the failure of the Minister to order disclosure of any part of the voluminous documents sought at the very least raise concerns that should have been investigated by the Commissioner. We are satisfied that had the Commissioner conducted an appropriate review of the Minister's decision, he might well have reached a different conclusion as to whether the Minister's discretion under s. 14 was properly exercised.

[para 33] 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 considered that the absence of reasons for a public body's decision raised concerns as to whether discretion had been properly exercised.

[para 34] While this case was decided under Ontario's legislation, in my view, it has equal application to Alberta's legislation. Section 72(2)(b) of Alberta's FOIP Act establishes that the Commissioner may require the head to reconsider a decision to refuse access in situations when the head is authorized to refuse access. A head is authorized to withhold information if a discretionary exception applies to information. Section 72(2)(b) provision states:

> *72(2) If the inquiry relates to a decision to give or to refuse to give access to all or part of a record, the Commissioner may, by order, do the following:*
>
> > *(b) either confirm the decision of the head or require the head to reconsider it, if the Commissioner determines that the head is authorized to refuse access […]*

[para 35] In Order 96-017, the former Commissioner reviewed the law regarding the Commissioner's authority to review the head of a public body's exercise of discretion and concluded that section 72(2)(b), (then section 68(2)(b)), was the source of that authority. He commented on appropriate applications of discretion and described the evidence necessary to establish that discretion has been applied appropriately.

> A discretionary decision must be exercised for a reason rationally connected to the purpose for which it's granted. The court in *Rubin* stated that "Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act..."
>
> The court rejected the notion that if a record falls squarely within an exception to access, the applicant's right to disclosure becomes solely subject to the public body's discretion to disclose it. The court stated that such a conclusion fails to have regard to the objects and purposes of the legislation: (i) that government information should be available to the public, and (ii) that exceptions to the right of access should be limited and specific.
>
> In the court's view, the discretion given by the legislation to a public body is not unfettered, but must be exercised in a manner that conforms with the principles mentioned above. The court concluded that a public body exercises its discretion properly when its decision promotes the policy and objects of the legislation.
>
> The Information and Privacy Commissioners in both British Columbia and Ontario have also considered the issue of a public body's proper exercise of discretion, both in the context of the solicitor-client exception and otherwise. In British Columbia, the Commissioner has stated that the fundamental goal of the information and privacy legislation, which is to promote the accountability of public bodies to the public by creating a more open society, should be supported whenever possible, especially if the head is applying a discretionary exception (see Order No. 5-1994, [1994] B.C.I.P.C.D. No. 5)…
> …
> In Ontario Order 58, [1989] O.I.P.C. No. 22, the Commissioner stated that a head's exercise of discretion must be made in full appreciation of the facts of the case and upon proper application of the applicable principles of law. In Ontario Order P-344, [1992] O.I.P.C. No. 109, the Assistant Commissioner has further stated that a "blanket" approach to the application of an exception in all cases involving a particular type of record would represent an improper exercise of discretion.
>
> I have considered all the foregoing cases which discuss the limits on how a public body may exercise its discretion. In this case, I accept that a public body must consider the objects and purposes of the Act when exercising its discretion to refuse disclosure of information. It follows that a public body must provide evidence about what it considered.

[para 36] In that case, the Commissioner found that the Public Body had not made any representations or provided any evidence in relation to its exercise of discretion. Further, he determined that the head must consider the purpose of the exception in the context of the public interest in disclosing information when exercising discretion. As the head of the public body had not provided any explanation for withholding information,

the Commissioner ordered the head to reconsider its exercise of discretion to withhold information under a discretionary exception.

[para 37] Similarly, in Order F2004-026, former Commissioner Work said:

> In my view a Public Body exercising its discretion relative to a particular provision of the Act should do more than consider the Act's very broad and general purposes; it should consider the purpose of the particular provisions on which it is relying, and whether withholding the records would meet those purposes in the circumstances of the particular case. I find support for this position in orders of the British Columbia Information and Privacy Commissioner. Orders 325-1999 and 02-38 include a list of factors relevant to the exercise of discretion by a public body. In addition to "the general purposes of the legislation (of making information available to the public) the list includes "the wording of the discretionary exception and the interests which the section attempts to balance". It strikes me as a sound approach that the public body must have regard to why the exception was included, and whether withholding the information in a given case would meet that goal.

[para 38] Once it is determined that a discretionary exception to disclosure applies, a public body must determine whether it will withhold the information or release it to the applicant. In making this decision, the public body will weigh any applicable public and private interests, including the purpose of the provision, in withholding or disclosing the information.

[para 39] Section 12(1) of the FOIP Act requires the Public Body to communicate its reasons for withholding information from the Applicant. It states:

> *12(1) In a response under section 11, the applicant must be told*
>
> *(a) whether access to the record or part of it is granted or refused,*
>
> *(b) if access to the record or part of it is granted, where, when and how access will be given, and*
>
> *(c) if access to the record or to part of it is refused,*
>
> *(i) the reasons for the refusal and the provision of this Act on which the refusal is based,*
>
> *(ii) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and*
> *(iii) that the applicant may ask for a review of that decision by the Commissioner or an adjudicator, as the case may be.*

[para 40] The Commissioner will review the public body's reasons for exercising discretion to withhold information from an applicant. If the Commissioner determines that the public body failed to consider a relevant factor or took into consideration

irrelevant factors, or did not provide adequate reasons for withholding information, the Commissioner will direct the public body to reconsider its exercise of discretion.

[para 41] The purpose of sections 24(1)(a) and (b) is to protect the processes by which a public body takes or gives advice from interference. It is conceivable that the ability of a public body to take candid advice, or to implement its plans, would be harmed if advice or requests for advice were made public prematurely. Nevertheless, when the Legislature enacted section 24(1), it also enacted section 24(2), which establishes circumstances in which information otherwise meeting the requirements of section 24(1) must never be withheld.

[para 42] The Public Body argues that I am limited to reviewing its purposes in applying section 24(1) to withhold information at the time it made the decision. It states:

> The Applicant has offered nothing further in their rebuttal that would require further submissions related to the Public Body's application of section 24(1) to the responsive records. We are not deliberating the application of the Act to the records should the request be submitted today. The purpose of the Inquiry is to review the Public Body's decision at the time that decision was made. The Applicant's attempt to define what is or is not policy options or draft advice is not reinforced by any tangible argument that would debase the rationale behind AEP's application of the Act to the responsive records.

[para 43] The Public Body has provided arguments for the inquiry as to why it exercised discretion to withhold information in 2018. I note that the Public Body's decision that is under review – the Public Body's response of October 3, 2018 -- contains no reasons to explain why the Public Body exercised its discretion in the way that it did. The decision simply states the provision being applied, that an assistant deputy minister made the decision, and that the Applicant is being granted partial access.

[para 44] If I am to confine my review of the Public Body's exercise of discretion in relation to the decision of October 3, 2018, as the Public Body argues, then I must consider that decision. I am unable to give weight to the Public Body's submissions regarding the exercise of discretion, as they are not inferable from the decision of October 3, 2018, which, again, does not provide reasons. Moreover, the Public Body's response of October 3, 2018 indicates that an assistant deputy minister made the decision to withhold information that is under review, but the evidence of that employee has not been offered for the inquiry. The Public Body has made arguments as to what it believes the considerations were when the decision was made, but I am unable to say that these arguments reflect the assistant deputy minister's actual reasons.

[para 45] As the Public Body provided no reasons for exercising discretion as it did in the decision under review, I must direct it to re-exercise its discretion. In making the new decision, the Public Body should consider that the new decision is being made in 2023 and consider the age of the information and its relevance.

[para 46] If a matter is scheduled for inquiry and the public body is no longer convinced there is any reason to withhold information from the applicant, it would be more efficient for the public body to re-exercise discretion in favor of disclosure. Doing

so could eliminate the need for an inquiry, thus freeing up the Public Body's resources and those of this office. Moreover, releasing information once it is no longer likely to result in harms contemplated by exceptions is in keeping with the purpose of the FOIP Act and creates greater transparency.

ISSUE C: Did the Public Body properly apply section 25(1) of the Act (disclosure harmful to economic and other interests of a public body) to the information in the records?

[para 47] The Public Body applied section 25(1)(c) to withhold some information in the records from the Applicant. Section 25 of the FOIP authorizes a public body to withhold information that could harm the economic interests of the Government of Alberta or a public body. It states, in part:

> *25(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to harm the economic interest of a public body or the Government of Alberta or the ability of the Government to manage the economy, including the following information:*
>
> *(a) trade secrets of a public body or the Government of Alberta;*
>
> *(b) financial, commercial, scientific, technical or other information in which a public body or the Government of Alberta has a proprietary interest or a right of use and that has, or is reasonably likely to have, monetary value;*
>
> *(c) information the disclosure of which could reasonably be expected to*
>
> *(i) result in financial loss to,*
>
> *(ii) prejudice the competitive position of, or*
>
> *(iii) interfere with contractual or other negotiations of,*
>
> *the Government of Alberta or a public body […]*
>
> […]

[para 48] In Order 96-016, former Commissioner Clark considered the meaning of section 25(1)(c), [then section 24(1)(c)]. He said:

> The public body claims that section [25(1)] should be interpreted so that the harm to a public body does not have to result directly from disclosing the specific information, but can be "harm at large" or "indirect harm" (my interpretation of the public body's claim). The essence of the public body's argument is this: The information in the record was produced under a contract between a division of a public body and an organization independent of government. There was a confidentiality

> clause in that contract, which restricts publication of the information. Releasing this information under the Act, contrary to the confidentiality clause, will affect AEC's and, consequently, ARC's contracts with this and other organizations, thereby causing harm to both AEC and ARC. Harm will result from cancelled contracts, and from other organizations bypassing AEC and ARC, knowing they are subject to the Act. That harm is quantifiable.
>
> However reasonable the public body's argument sounds, I do not think that section [25(1)] can or should be interpreted as the public body claims. Section [25(1)] focuses on the harm resulting from the disclosure of *that specific information* (my emphasis). The wording of section [25(1)] implies that it is the specific information itself that must be capable of causing the harm, if that information is disclosed. When I look at the kinds of information listed in section [25(1)(a)-(d)], two things are clear to me: (i) the legislature had very specific kinds of information in mind when it was contemplating what information had the potential to cause harm if disclosed; and (ii) there must be a direct link between disclosure of that specific information and the harm resulting from disclosure; in other words, there must be something in the information itself capable of causing the harm.

[para 49] Section 25 recognizes that there is a public interest in withholding information that could harm the economic interests of the Government of Alberta or a public body or the Government of Alberta's ability to manage the economy. Sections 25(1)(a) – (d) contain a non-exhaustive list of information, the disclosure of which could be reasonably expected to result in harm of this kind.

[para 50] A public body seeking to withhold information under section 25 must establish a link between the disclosure of information and a reasonable expectation of harm to the Government of Alberta's or its own economic interests.

[para 51] The Public Body argues:

> Under similar rationale in applying section 24(1)(c) to the responsive records, the Public Body's application of section 25(1) is also restrained despite its correlation to the cost-sharing negotiations and other financial considerations appearing in the responsive records. In consultation with the program area, the information being withheld on pages 13, 15, and 16 was clearly identified as harmful to the financial interests of the Public Body.
>
> In regards to the application of section 25(1)(b), the information withheld under this section is directly tied to the Public Body's financial value of IT applications solely proprietary to the Public Body. These are estimated costs required to develop or improve flood management applications. The Public Body was in negotiations with third party vendors who could develop and expand these applications, while also negotiating cost-sharing options with other public bodies. The monetary considerations for these incomplete negotiations were in the hundreds of thousands of dollars, and the program area had a reasonable concern that the disclosure of this information could be used to manipulate these negotiations and cause financial harm to the Public Body and its potential partners. Furthermore, flood risk was top of mind for the Public Body at this time of year, and securing vendors and finalizing cost-sharing agreements had to be completed in a short timeframe in order to be prepared to predict and support flood risk management. Should another party seek to use these financial figures to stifle either stream of negotiation, the financial harm would be detrimental and potentially reach beyond these applications and into the larger infrastructure within flood zones in Alberta.
>
> Additionally, section 25(1)(c)(i)(ii)(iii) has been applied to information on pages 13, 15, and 16 as there were reasonable concerns from the program area that disclosure of this information would result in financial loss to AEP, prejudice AEP's competitive position in negotiating IT contracts,

> and interfere with ongoing negotiations between AEP, third party vendors, and other public body partners. Disclosing estimated, unconfirmed financial figures related to these applications and upgrades would have a high potential to result in financial loss to the Public Body. In reading the correspondence between AEP staff involved in these discussions, there is a tone of urgency and need to complete these initiatives. There was both a need to secure these services in order to be prepared for potential flood risks and a need to complete these negotiations within the timelines of the SAVI consolidations happening within the Public Body. Disclosure of estimated financial figures, coupled with the obvious urgent need to secure these services, could have resulted in third party vendors and other public bodies having leverage in their negotiating position over AEP. This could have resulted in an inflation of the values of these contracts, reduction in the cost-sharing commitments being discussed with other public bodies, and is a clear risk of prejudicing the competitive position of AEP to negotiate these contracts in good faith and within the demanding timelines available to the Public Body during flood season.
>
> The Public Body was specific and consistent in its application of section 25(1) to the information on pages 13, 15, and 16 of this FOIP request. The program area's rationale for these applications was reasonable and justified when considering the financial interests, urgent timelines, and ongoing negotiations involving these IT contracts and cost-sharing partnerships. Harm in the form of financial loss, prejudicing the competitive position, and interfering with ongoing contractual negotiations involving the Public Body is clear and demonstrated in the above rationale.

[para 52] Section 25(1)(c) of the FOIP Act applies to information that could reasonably be expected to result in financial loss to the Government of Alberta, interfere with its position in negotiations or prejudice its competitive position, if the information is disclosed.

[para 53] The information to which the Public Body applied section 25(1) has not been demonstrated to be likely to result in financial loss to the Government of Alberta, or to interfere with its negotiations or to prejudice its competitive position if it is disclosed. The Public Body has not provided sufficient evidence to explain the risk of harm it projects would result from disclosure of the severed information. While it refers to the potential of third parties using the information to interfere with the Public Body's negotiations or to take advantage of the information in order to stifle negotiations in some way, it has not provided sufficient detail about the third parties and their resources or the Public Body's negotiations, or how it believes harm would be likely to result, so that I could assess the likelihood that disclosure of the information could have the effects the Public Body projects. On its own, the information does not support finding that its disclosure could reasonably be expected to result in the harms the Public Body projects.

[para 54] I find that section 25(1) does not apply to the information to which the Public Body applied this provision. I will therefore direct it to disclose all information to which it applied only section 25.

IV. ORDER

[para 55] I make this Order under section 72 of the Act.

[para 56] I order the Public Body to meet its duty to assist the Applicant. It may meet this duty by conducting a search for records that includes records relating to the meetings referenced in the records and providing an account of its search with reference

to the factors set out in Order F2007-029. Alternatively, if it has already searched for such records, it may meet its duty by providing an account of the search it conducted. In either case, the account will also include an explanation of how the Public Body interpreted the access request and should explain the search conducted.

[para 57] I order the Public Body to reconsider its exercise of discretion in relation to the application of section 24(1) to information in the records.

[para 58] I order the Public Body to disclose any information to which it applied only section 25(1).

[para 59] I order the Public Body to inform me within 50 days of receiving this order that it has complied with it.

_____

Teresa Cunningham
Adjudicator