ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2023-39

September 21, 2023

AFFORDABILITY AND UTILITIES

Case File Number 012773

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Summary: An individual made a request to Alberta Energy (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for "all notes, memos, emails, text messages, briefings, etc. regarding transition payments paid to generating unit operators under off-coal agreements in Alberta."

The Public Body responded, providing 170 pages of responsive records with information withheld under sections 16, 17, 20, 22, 24, 25, and 27 of the FOIP Act. The Applicant requested a review of the Public Body's decision to withhold information on specific pages. A Senior Information and Privacy Manager was assigned to investigate and attempt to settle the matter. Prior to the end of the Manager's review, the Commissioner decided that the issue of the Public Body's claim of privilege under section 27(1)(a) would proceed to inquiry.

In Order F2023-16, resulting from the first part of the inquiry, the Adjudicator accepted the Public Body's claim of privilege under section 27(1)(a) with respect to most of the records, but found that the Public Body did not provide sufficient support for its claim of litigation privilege over several records (pages 29-31, 81, and 122). The Adjudicator ordered the Public Body to review these records and respond to the Applicant without relying on section 27(1)(a). The Adjudicator also retained jurisdiction to review the Public Body's new response to the Applicant, should the Applicant ask the Adjudicator to do so.

The Public Body complied with the Order and provided the Applicant with new copies of pages 29-31, 81, and 122. The Public Body applied sections 24 and 25 to the information previously withheld under section 27. In accordance with Order F2023-16, the Applicant requested a review of the Public Body's new decisions. The Public Body provided the Adjudicator with a copy of the records at issue for the inquiry.

In the course of the second part of this inquiry, the Adjudicator was notified that the public body responsible for the records at issue is now Affordability and Utilities.

The Adjudicator found that section 24(1) applied to some information in the records, but not all of the information to which that provision was applied. The Adjudicator ordered the Public Body to disclose some additional information to the Applicant. The Adjudicator also ordered the Public Body to re-exercise its discretion to apply section 24(1).

The Adjudicator found that section 25(1) did not apply to the information in the records.

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

Authorities Cited: AB: Decision F2014-D-01, Orders 96-006, 96-012, 96-016, 99-013, F2004-026, F2007-013, F2010-036, F2013-13, F2014-18 , F2015-29, F2019-17, F2020-03, F2020-16, F2022-39, F2023-16

Cases Cited: *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (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] An individual made a request to Alberta Energy (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for "all notes, memos, emails, text messages, briefings, etc. regarding transition payments paid to generating unit operators under off-coal agreements in Alberta."

[para 2] The Public Body responded, providing 170 pages of responsive records with information withheld under sections 16, 17, 20, 22, 24, 25, and 27. The Applicant requested a review of the Public Body's decision to withhold information on specific pages. A Senior Information and Privacy Manager was assigned to investigate and attempt to settle the matter. Prior to the end of the Manager's review, the Commissioner decided that the issue of the Public Body's claim of privilege under section 27(1)(a) would proceed to inquiry.

[para 3] In Order F2023-16, resulting from the first part of the inquiry, I accepted the Public Body's claim of privilege under section 27(1)(a) with respect to most of the records, but found that the Public Body did not meet its burden to establish its claim of litigation privilege over several records (pages 29-31, 81, and 122). I ordered the Public Body to review these records and respond to the Applicant without relying on section 27(1)(a). I also retained jurisdiction to review the Public Body's new response to the Applicant, should the Applicant ask the Adjudicator to do so.

[para 4] The Public Body complied with the Order and provided the Applicant with new copies of pages 29-31, 81 and 122. Under sections 24 and 25, the Public Body continued to withhold the information previously withheld under section 27. In accordance with Order F2023-16, the Applicant requested a review of the Public Body's new decisions. The Public Body provided the Adjudicator with a copy of the records at issue for the inquiry.

[para 5] In the course of the second part of this inquiry, I was notified that the public body responsible for the records at issue is now Affordability and Utilities. References to the "Public Body" in the remainder of this Order denotes Affordability and Utilities.

II. RECORDS AT ISSUE

[para 6] The records at issue consist of the portions of pages 29-31, 81, and 122 withheld under sections 24 and 25 of the Act, which had previously been withheld under section 27(1).

III. ISSUES

[para 7] The issues for this inquiry were set out in the Notice of Inquiry, dated June 22, 2023, as follows:

1. Did the Public Body properly apply section 24 of the Act (advice from officials) to the information/record(s)?

2. Did the Public Body properly apply section 25 of the Act (disclosure harmful to economic and other interests of a public body) to the information/record(s)?

IV. DISCUSSION OF ISSUES

1. Did the Public Body properly apply section 24 of the Act (advice from officials) to the information/record(s)?

[para 8] The Public Body applied sections 24(1)(a) and (c) to information 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,*
>
> *...*
>
> *(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*
>
> *...*

[para 9] The test for section 24(1)(a), as stated in past Orders, is that the advice, proposals, recommendations, analyses, or policy options (which I will refer to as "advice, recommendations, etc.") 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 10] 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 11] In addition to the requirements in those tests, section 24(1)(a) applies only to the records (or parts thereof) that reveal substantive information about which advice, recommendations, etc. was sought. Information such as the names of individuals involved in the advice, recommendations, etc., dates, and information that reveals only the fact that advice, recommendations, etc. is being sought on a particular topic (and not the *substance* of the advice etc.) cannot generally be withheld under section 24(1) (see Order F2004-026, at para. 71).

[para 12] Bare recitation of facts or summaries of information also cannot be withheld under section 24(1)(a) unless the facts are interwoven with the advice, recommendations, etc. such that they cannot be separated (Order F2007-013 at para. 108, Decision F2014-D-01 at para. 48).

[para 13] As well, section 24(1)(a) does not apply to a decision itself (Order 96-012, at para. 31).

[para 14] For information to fall under section 24(1)(c), it must reveal positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the government or a public body, or considerations that relate to those negotiations. A "consideration" is a fact or thing taken into account in deciding or judging something (Order 99-013 at para. 44).

[para 15] The above limitations on the application of section 24(1)(a) also apply where section 24(1)(c) is cited for withholding information (Orders 96-012 at para. 37, F2019-17, F2020-03, Decision F2014-D-01).

Public Body's arguments

[para 16] The Public Body's arguments in support of its application of sections 24(1)(a) and (c) are limited. The Public Body provided a brief explanation of the purpose of each provision. With respect to the application of these provisions to the information in the records at issue, the Public Body states (initial submission):

> Section 24(1)(a) may be applied to statements of advice or recommendations that aim to examine possible direction or options in dealing with an issue or problem, to establish a policy or to make a decision The records contain advice, recommendations, analysis, and policy options made by Affordability and Utilities staff regarding the calculation of transition payments to coal plant owners. Disclosure of this information would reveal options considered and positions and recommendations regarding items currently under dispute.
>
> Another of the exceptions relied upon by the head of the Public Body is section 24(1)(c) of the FOIP Act. Section 24(1)(c) can be applied to the strategies, plans, approaches and bargaining positions that have been employed or are contemplated for the purposes of contractual and other negotiations or considerations that relate to those negotiations. Some of the information contains strategies, plans, and approaches that were developed for negotiations or considerations related to the negotiations of compensation to be paid for truncating the life of six coal-fired electricity plants. Some information also contains considerations for negotiations regarding the disagreement over the rollback of transition payment amounts.

[para 17] In its rebuttal submission, the Public Body cites Order F2015-29, which states (at para. 33):

> 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).

[para 18] The Public Body also cites Order F2022-39, which agreed with the above analysis. The Public Body states that the records at issue

> … involve Briefing Notes to the Deputy Minister for a decision about Off-coal Transition Payments, to Executive Council that was advice regarding the Business Outlook for Capital Power, and to the Deputy Minister for a decision about Off-coal Transition Payments 2018. These Briefing Notes contain advice, proposals, analysis, and recommendations regarding what action should be taken for the Off-coal transition payments. These documents were clearly generated to provide decision makers not only with advice, but also recommended courses of action for the complex issue of

> determining payments to the various stakeholders involved in the transition payment process.

Applicant's arguments

[para 19] The Applicant has made only brief arguments to this part of the inquiry. The Applicant states that unlike the first part of this inquiry, wherein the Public Body provided an affidavit in support of its claim of privilege, the Public Body has not provided any evidence in support of its applications of sections 24 and 25.

Analysis

[para 20] With respect to the Applicant's arguments about evidence, in the first part of this inquiry I did not have an unredacted copy of the records over which privilege was claimed. When a public body claims solicitor-client or litigation privilege, it is not compelled to provide those records to this office for a review or inquiry. However, where a public body elects not to provide such records, it must provide support for its claims in the form of an affidavit that complies with Rules 5.7 and 5.8 of the Alberta Rules of Court.

[para 21] For this part of the inquiry, the Public Body has provided me with an unredacted copy of the records at issue, in compliance with Order F2023-16.

[para 22] In its index of records, the Public Body has described pages 29-31 as a briefing note to the Deputy Minister that includes "legal advice regarding Off-Coal Transition Payments." It is not clear what information the Public Body believes to be legal advice; regardless, the Public Body's claim of litigation privilege was rejected in the first part of this inquiry.

[para 23] The Public Body has argued that the records at issue involve briefing notes provided to the Deputy Minister, which contain advice and recommendations. I agree with this assessment; however, section 24(1)(a) does not apply to a briefing note in its entirety unless all of the information in the record meets the test for that provision. As stated above, section 24(1)(a) does not apply to bare recitation of facts or summaries of information, unless this information reveals advice or recommendations. As stated in Order F2020-03 (at para. 73):

> Given these limits on the application of section 24(1), even where it applies to information on a page, it is often the case that portions of a page will be disclosed with discrete items of information withheld (i.e. more often than not, entire pages cannot be withheld under this provision). Public bodies must therefore conduct a line-by-line review of each page in order to apply section 24(1) appropriately.

The same principle applies to section 24(1)(c).

[para 24] I will consider whether each piece of information withheld under section 24(1) meets the relevant test, in the context of the record as a whole.

[para 25] In the Order F2023-16 resulting from the first part of this inquiry, I discussed the briefing note comprising pages 28-31 as follows (at paras. 116-118):

> Pages 29-31 are part of a four-page briefing note that starts with page 28. The Public Body has provided me with a copy of page 28, much of which was disclosed to the Applicant with some information withheld under sections 16(1) and 24(1) (these exceptions are not at issue in this inquiry).
>
> The disclosed portion of page 28 shows that the document is titled "Advice to Deputy Minister For Decision about Off-Coal Transition Payments". The issue set out in the briefing note is the payments to be made to three companies that are entitled to yearly payments relating to off-coal transitions, subject to compliance with their agreements. The Government of Alberta has used a particular method for determining those payments, and hired a third party to audit those numbers. The audits now being complete, and the companies having submitted their required data, the briefing note states that "a decision is now required so that the first payments can be processed and companies advised accordingly." The briefing note recommends that the Government of Alberta acknowledge that the companies have met the obligations of their agreements; adjust the payments to reflect the findings of the audit; and remit the payments to the companies.
>
> Under the heading "Key Considerations" the disclosed portion of the briefing on pages 28-29 state that the auditors have completed their reports and provided them to the Government. The briefing states:
>
> > … The reports outline several reconciling items that likely warrant payment adjustments, as these items are beyond the scope of what the transition payments were intended to cover as part of the off-coal agreements, including:
> >
> > [severed information]
> >
> > - See Attachment 7 for further details on the calculation of payments and liabilities and Attachment 8 for the breakdown of each of the companies recalculated payments.
> >
> > …

[para 26] The information severed under "Key Considerations" in that part of the inquiry continues to be withheld, under sections 24(1)(a), (c) and 25(1)(c). The withheld information summarizes items included by organizations in their off-coal payment claims that the auditors recommended be amended or reconciled. The withheld information identifies the items, provides an explanation of what the items are, which organizations claimed them, and whether the author is advising that the items be removed from the payment calculation for each organization. The withheld information clearly contains recommendations to the Deputy Minister, and the reasons for the recommendations.

[para 27] Most of the information withheld on pages 29-31 consists of analysis underlying the recommendations appearing in the briefing. I find that section 24(1)(a) applies to that information withheld on page 29, and the information on page 30 withheld under the headings "Financial Impacts", "Stakeholder Impacts" and "Challenges". This

provision also applies to the information withheld under the heading "Analysis" on page 31.

[para 28] There are a few sentences on page 30 that do not consist of analysis but rather appear to state background facts only. The information withheld under the "Implementation" heading merely state that an action has been taken. That action does not appear to affect the analysis or recommendations made in the briefing. The information may be characterized as revealing the fact that advice had been sought on a matter; however, the information does not reveal what advice may have been given. As discussed above, the mere fact that advice was sought is not substantive information to which section 24(1)(a) applies.

[para 29] The Public Body's submissions do not explain how this information reveals the substance of advice, recommendations, etc. such that section 24(1)(a) applies. As the content of the record does not support the application of section 24(1)(a) and the Public Body's submissions do not provide sufficient support, I cannot find that section 24(1)(a) applies to the information withheld under the "Implementation" heading on page 30. The Public Body did not apply any other exception to this information; therefore, I will order the Public Body to disclose this information to the Applicant.

[para 30] The Public Body has also withheld the title of two attachments to the briefing, appearing on page 31. It is not clear how the titles of these attachments could reveal the substance of any advice, recommendations, etc., nor does the Public Body's submission provide any support for the application of section 24(1)(a). It is also not clear how the titles of these attachments could reveal positions, plans, etc. under section 24(1)(c). To be clear, the attachments themselves are not at issue; merely the title of the attachments. As discussed above, subject lines (or titles) are not usually the type of substantive information to which section 24(1) applies. Nothing in the records or the Public Body's submission indicates why that general rule does not apply in this case. Therefore, I conclude that section 24(1) does not apply to the titles of attachments appearing on page 31 and will order the Public Body to disclose this information to the Applicant.

[para 31] Most of the information withheld on page 81 was withheld as non-responsive; this is not at issue in this inquiry. Two bullet points on this page were withheld under section 24(1)(a). The Public Body's index of records states that this page is part of a briefing note to executive counsel regarding the business outlook of a third party. The Public Body has also described the information withheld on this page as "confidential analysis provided to executive council" (initial submission).

[para 32] Page 81 is the first of a three-page briefing note. The title of the briefing note – "Advice to Executive Council, Capital Power Business Outlook" – has been disclosed to the Applicant. The issue set out in the briefing note was also disclosed to the Applicant; it states: "Following briefings on ATCO and TransAlta, Energy has prepared a similar briefing on Capital Power for Executive Council". The information at issue appears in item 1 under the "Analysis" heading. There are three bullet points under item

1; the first bullet point was disclosed to the Applicant and the last two bullet points were withheld under section 24(1)(a).

[para 33] While only information on page 81 is at issue, I have a full copy of the three-page briefing note. The title of the briefing indicates that it contains advice to Executive Council; however, I cannot locate any advice or recommendations in this briefing note. Rather, it contains information about the business outlook for Capital Power. The information under the "Analysis" heading is a collection of facts; it is unclear what is being analysed or what the analysis consists of. Were there advice or a recommendation in the briefing note – even implicit advice or recommendations – then possibly these facts could be said to have formed part of the analysis resulting in the advice or recommendation. However, as stated, there is no advice or recommendation stated in the three-page briefing note. I have considered whether there is implicit advice or recommendations that aren't clearly identified as such, but based on my review of the records I cannot find any. Given this, I cannot conclude that the information withheld is the type of information to which section 24(1)(a) applies. As no other provision has been applied, I will order the Public Body to disclose this information to the Applicant.

[para 34] Page 122 is the second of a three-page briefing note. The Public Body's index of records describes this page as a briefing note to the Deputy Minister regarding Off-Coal Transition Payments. While only information on page 122 is at issue, I have a full copy of the briefing note. The briefing is titled "For Decision about Off-Coal Transition Payments 2018".

[para 35] While the Public Body has withheld several pieces of information on page 122, the only information at issue is the information that had previously been withheld under section 27(1)(a) as privileged. This is the second bullet point under the heading "Background of Issue". There is also a sub-bullet point under this main bullet, which was also withheld under sections 24(1)(a) and (c).

[para 36] The Public Body disclosed the first sentence in the main bullet, which states that Capital Power launched legal action against the Government of Alberta in 2018. The remainder of the main bullet, which has been withheld, relates to that sentence. As noted in Order F2023-16, Capital Power has already filed a statement of claim for this action, outlining its allegations; this statement of claim is a public document.

[para 37] Following this main bullet point is a sub-bullet point containing a recommendation, to which section 24(1)(a) clearly applies.

[para 38] I have considered the public nature of the information in the main bullet point preceding the recommendation. Information that has already been disclosed elsewhere, or is otherwise available to the public, cannot be said to *reveal* advice, recommendations, etc. if disclosed in the record at issue (see Orders F2014-18 at para. 90, F2020-16 at para. 68). However, even if this particular information has been disclosed or is otherwise public, section 24(1)(a) may still apply if disclosing it in this record could reveal the recommendation in the sub-bullet, to which section 24(1)(a)

applies. In this case, I find that the information in the main bullet point does not reveal the recommendation in the sub-bullet.

[para 39] The Public Body has also applied section 24(1)(c) to the information in this bullet point. However, the information preceding the actual recommendation discusses actions that have already been taken by a third party. This information does not relate to plans of the Public Body or the Government of Alberta more generally. Further, for the same reasons I have found that this information does not reveal the content of the recommendation appearing in the subsequent sub-bullet point, I also find that it does not reveal any plan of the Public Body.

[para 40] I find that section 24(1) does not apply to the main paragraph in the second bullet point under "Background of Issue" on page 122; I will order the Public Body to disclose this information to the Applicant. However, I find that section 24(1)(a) does apply to the recommendation in the sub-bullet under that main bullet point.

Exercise of discretion

[para 41] I have found that section 24(1) applies to information withheld on pages 29-31, and 122.

[para 42] Section 24(1) is a discretionary exception to disclosure. In *Ontario (Public Safety and Security) 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 Public Body's exercise of discretion.

[para 43] 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 44] 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 45] 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. 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 46] 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 47] 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 48] In its initial submission, the Public Body states (at page 2):

> Section 24 is a discretionary exception intended to maintain candour in the giving of advice, recommendations, deliberations, consultation and related analytical alternatives

> for potential courses of action. Advice and recommendations are provided and may either be accepted or rejected as the deliberative process progresses toward final decision. The purpose and intent of this section is to protect the government decision or policy-making process, and to allow government staff to have open and candid discussions when dealing with an issue or problem, to establish a policy or to make a decision. The records contain information that involves advice, recommendations, proposals, and various policy options regarding transition payments. Some of the records contain strategies, plans, approaches, and bargaining positions that have been employed or are being contemplated for the purposes of negotiating the terms of the transition payments for each private sector stakeholder. It is intrinsic that elements of these discussion be protected to ensure that government officials continue to have open and candid discussions regarding the ongoing disagreement over the rollback of transition payment amounts.

[para 49] In its rebuttal submission, the Public Body reiterates the test for applying section 24(1), and states that the information withheld under that provision meets the test; the Public Body concludes:

> The public body therefore reaffirms its position that it properly exercised its discretion to apply section 24(1)(a) to some of the information in these records.

[para 50] I agree that the Public Body has correctly identified the purpose of sections 24(1)(a) and (c), and the tests for applying those provisions. I also agree that the purposes of the provisions are relevant to a proper exercise of discretion. However, the Public Body's explanation does not include any indication that it considered any relevant factors other than the purpose of the provisions.

[para 51] For example, the Public Body has not mentioned whether it considered factors weighing in favour of disclosure, such as any public interest in disclosure, or interest the Applicant may have in disclosure. The issue of off-coal transition payments has been discussed in the media; it is reasonable to conclude there may be a public interest in disclosing the information at issue. The Public Body does not appear to have considered this factor when exercising its discretion.

[para 52] I will order the Public Body to re-exercise its discretion to withhold information in the records to which section 24(1) applies, with a view to the guidance provided by the Court in *EPS*.

2. Did the Public Body properly apply section 25 of the Act (disclosure harmful to economic and other interests of a public body) to the information/record(s)?

[para 53] The Public Body applied section 25(1) to some information withheld on page 29; this same information was also withheld under section 24(1)(a) and (c). I have found that this information was properly withheld under section 24(1); however, I ordered the Public Body to re-exercise its discretion to apply that provision. I will therefore also consider the application of section 25(1) to the relevant information on page 29.

[para 54] Section 25(1) states:

> *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;*
>
> *(d) information obtained through research by an employee of a public body, the disclosure of which could reasonably be expected to deprive the employee or the public body of priority of publication.*

[para 55] 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 56] 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 probable harm, 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 57] With respect to the harm alleged from disclosure of the relevant information, the Public Body specifically cites sections 25(1)(c)(i) and (iii).

[para 58] The Public Body describes the withheld information as follows (initial submission):

> The records for this request contain information that could directly affect the coal transition payments, which could cause a direct monetary financial loss for the Government of Alberta. Disclosure could also interfere with contractual or other negotiations of the Government of Alberta or a public body.

[para 59] In its initial submission, the Public Body states that the information withheld under section 25(1)(c)

> …could reasonably be expected to harm the economic interest of the Government of Alberta by discouraging investment in the province which is required to support the coal emissions phase out or leading to increased payment and liability for the coal transition costs.

[para 60] The Public Body states that the information could also interfere with the contractual or other negotiations of the Public Body insofar as disclosing the information could "have an impact on the current litigation around the transition payments."

[para 61] In its rebuttal submission, the Public Body cites Order 96-016, in which former Commissioner Clark described the purpose of section 25(1)(c) (then section 24(1)(c)). He said (at para. 13):

> The wording of section 24(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 24(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 62] The Public Body further argues (rebuttal submission):

> The public body determined that some of the information in the records is indeed capable of causing harm as it could reasonably be expected to result in financial loss to the Government of Alberta, and interfere with contractual or other negotiations of the Government of Alberta or a public body. This includes specific information that third-party auditors compiled while engaging with several stakeholders. This information was presented to the Government of Alberta in the final reports from those auditors. The information was then used to warrant payment adjustments to the amounts issued to each of these individual stakeholders for their off-coal transition payments. This information could directly impact current litigation that the Government of Alberta is involved in between the Public Body and a third party. Therefore, the public body submits that economic harm would arise by releasing the substance of the information being withheld under section 25 in the record at issue.

[para 63] The Public Body has not explained how disclosing the withheld information on page 29 of the records could impact the current litigation with the third party. It is unclear if the information being withheld is information the third party would not already be privy to. From the content of the record itself, it appears that the third party would already have much, if not all, of this information withheld under section 25(1). Some of the withheld information on page 29 is information that was provided to the Public Body by the third party. Other information relates to actions or decisions of the Public Body that led to the litigation; it is reasonable to assume the third party is aware of the actions or decisions described in page 29, as these are the actions or decisions that led the third party to initiate the litigation.

[para 64] Even if the third party is not already aware of some of the information withheld under section 25(1), it is not apparent from the content of that information how it could impact the litigation with the third party if it were disclosed. The Public Body has not specified how disclosure could cause that harm. The Public Body's arguments on this point are essentially speculative; as stated above, the Public Body must provide sufficient evidence to show that the likelihood that the harms set out in sections 25(1)(c)(i) or (iii) is "considerably above" a mere possibility. It has not met this burden.

[para 65] I come to the same conclusion regarding the Public Body's argument that disclosure could discouraging investment in the province or lead to increased payment and liability for the coal transition costs. It is not clear from the record itself how disclosure of the information could lead to this alleged harm, and the Public Body has not provided sufficient detail to support this argument. The Public Body has not met its burden of showing that the harm alleged is considerably above a mere possibility.

[para 66] I find that section 25(1) does not apply to the information withheld on page 29. However, as I have found that section 24(1) applies, I cannot order the Public Body to disclose this information to the Applicant.

V. ORDER

[para 67] I make this Order under section 72 of the Act.

[para 68] I find that section 24(1) does not apply to the information described at paragraphs 28-29, 30, 33, and 40 of this Order. I order the Public Body to disclose that information to the Applicant.

[para 69] I find that the Public Body properly applied section 24(1) to information described at paragraphs 27 and 37 of this Order. However, I order the Public Body to re-exercise its discretion to apply that provision, in accordance with the guidance in this Order. The Public Body is to provide a new response to the Applicant, either providing the relevant information in the records or explaining how it exercised its discretion to continue to withhold that information, as appropriate.

[para 70] I find that section 25(1) does not apply to information in the records.

[para 71] I further order the Public Body to notify me and the Applicant in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

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Amanda Swanek
Adjudicator