

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2023-42

October 24, 2023

SERVICE ALBERTA AND RED TAPE REDUCTION

Case File Number 014830

Office URL: www.oipc.ab.ca

Summary: An Applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) to Service Alberta (now Service Alberta and Red Tape Reduction) (the Public Body) for records and correspondence between the Alberta Real Estate Association and Service Alberta.

A Third Party requested a review by this office of the Public Body's decision to disclose information affecting that Third Party.

The Adjudicator found that the information withheld under section 16(1) is not commercial, financial, or labour relations information as argued by the Third Party; nor is it any other type of information listed under section 16(1)(a). The Adjudicator ordered this information to be provided to the Applicant.

The Adjudicator found that most of the information about individuals in the records was not personal information to which section 17(1) can apply. However, the Adjudicator found that some discrete items of information was information to which section 17(1) applied. The Adjudicator ordered the Public Body to review the records and sever this information before providing its final response to the Applicant.

Statutes Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1, 16, 17, 71, 72

Orders Cited: AB: Orders 2000-003, 2001-013, F2003-002, F2004-013, F2005-009, F2005-011, F2008-028, F2009-028, F2010-031, F2013-03, F2020-23, **BC:** Order F05-02

I. BACKGROUND

[para 1] An Applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) to Service Alberta (now Service Alberta and Red Tape Reduction) (the Public Body) for

Copies of all records of correspondence between the Alberta Real Estate Association (or affiliates or representatives of, including but not limited to New West Public Affairs, Counsel Public Affairs, Forward Public Affairs) and Service Alberta.

[para 2] The Alberta Real Estate Association (AREA, the Third Party) requested a review by this office of the Public Body's decision to disclose information affecting that Third Party. The matter was not resolved at mediation and the Commissioner agreed to hold an inquiry.

[para 3] The Public Body provided the Applicant with responsive records that were not subject to the Third Party's objection. The Public Body withheld information in these records under sections 4(1) and 17(1).

[para 4] The Applicant was invited to participate in the inquiry as an affected party but declined to do so.

[para 5] In their initial submissions, both the Third Party and the Public Body addressed the application of section 17(1) to particular information in the records at issue. As section 17(1) is a mandatory exception and as both parties had provided submissions on that issue, I added the following issue to the inquiry (letter dated September 6, 2023):

Does section 17(1) of the Act (disclosure harmful to personal privacy) require the Public Body to sever information from the records?

[para 6] The only information the Public Body has withheld under section 16(1) is the information in pages 138-143. As the Public Body and Third Party agree on the application of section 16(1) to the information in those pages, that information is not at issue in this inquiry.

[para 7] The Public Body also withheld some information in the records under section 17(1). The application of section 17(1) to that information is not in dispute between the parties and is also not at issue in this inquiry.

II. RECORDS AT ISSUE

[para 8] The records at issue consist of the portions of the responsive records that the Third Party argues ought to be withheld under sections 16(1) and/or 17(1), to which the Public Body has not itself applied either sections 16(1) or 17(1).

III. ISSUES

[para 9] The issue set out in the Notice of Inquiry dated June 28, 2023, is as follows:

1. Does section 16(1) of the Act (disclosure harmful to business interests of a third party) require the Public Body to sever information from the records?

This inquiry will also consider the following issue:

2. Does section 17(1) of the Act (disclosure harmful to personal privacy) require the Public Body to sever information from the records?

IV. DISCUSSION OF ISSUES

1. Does section 16(1) of the Act (disclosure harmful to business interests of a third party) require the Public Body to sever information from the records?

[para 10] Section 16 of the Act reads, in part, as follows:

16(1) The head of a public body must refuse to disclose to an applicant information

(a) that would reveal

(i) trade secrets of a third party, or

(ii) commercial, financial, labour relations, scientific or technical information of a third party,

(b) that is supplied, explicitly or implicitly, in confidence, and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,

(iii) result in undue financial loss or gain to any person or organization,
or

...

[para 11] As this inquiry involves information about a third party, the burden of proof set out in section 71(3) of the Act applies. It reads as follows:

71(3) If the inquiry relates to a decision to give an applicant access to all or part of a record containing information about a third party,

(a) in the case of personal information, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy, and

(b) in any other case, it is up to the third party to prove that the applicant has no right of access to the record or part of the record.

[para 12] Section 16(1) does not apply to personal information, so the Third Party has the burden, under section 71(3)(b), of establishing that the Applicant has no right of access to the records by virtue of section 16(1).

[para 13] For section 16(1) to apply to information, the requirements set out in all three paragraphs of that section must be met.

- Would disclosure of the information reveal trade secrets of a third party or commercial, financial, labour relations, scientific or technical information of a third party under section 16(1)(a)?
- Was the information supplied, explicitly or implicitly, in confidence under section 16(1)(b)?
- Could disclosure of the information reasonably be expected to bring about one of the outcomes set out in section 16(1)(c)? (Order F2004-013 at para. 10; Order F2005-011 at para. 9)

[para 14] In order to withhold information under section 16(1), each subsection (1)(a), (b) and (c) must be met.

Section 16(1)(a)

[para 15] The Third Party has argued that the records reveal commercial, financial and/or labour relations information of the Third Party.

Commercial or financial information

[para 16] Past Orders of this Office have defined “commercial information” as information belonging to a third party about its buying, selling or exchange of merchandise or services. “Financial information” is information belonging to a third party about its monetary resources and use and distribution of its monetary resources (Order F2009-028).

[para 17] The only information the Public Body has indicated consists of commercial information is pricing information. This same information has also been referred to as financial information by the Third Party.

[para 18] The Third Party has argued that pricing information appears on pages 162-163 of the records. These pages consist of a letter from the Third Party to the Public Body regarding changes made by the Real Estate Council of Alberta (RECA) that affect the Third Party's members. Regarding those records, the Public Body states (initial submission at page 8):

The Third Party submits that the records contain "*confidential pricing and costing figures*", but the pricing and costing figures are estimates regarding the industry as a whole, in order to be compliant with the change, not AREA itself.

As such, the information does not meet the definition of financial information. The information is also not commercial, labour relations, scientific or technical information of the Third Party.

[para 19] I agree with the Public Body's characterization of the information contained in pages 162-163. The 'pricing information' on these pages does not relate to the Third Party, or any other third party (such as individual members of the Third Party). Rather, the costs set out in these pages are a projected estimated cost that *may* be borne by all members of the Third Party collectively, in complying with changes imposed by RECA. This cannot be characterized as confidential commercial or financial information of any particular organization or party.

Labour relations information

[para 20] With respect to labour relations, the Third Party cites Order 2000-003, which states (at paras. 97-99):

The term "labour relations" has been defined by a number of other sources:

- Sack and Poskanzer, *Labour Law Terms, A Dictionary of Canadian Labour Law*, defines labour relations as "employer-employee relations including especially matters connected with collective bargaining and associated activities".
- Webster's Third New International Dictionary defines labour relations as "relations between management and labour, especially as involved in collective bargaining and maintenance of contract".
- Arthur Mash, *Concise Encyclopedia of Industrial Relations*, defines labour relations within the context of industrial relations, as follows: "...relationships within and between workers, working groups and their organizations and managers, employers and their organization... 'Labour relations' are sometimes abstracted from 'industrial relations' as describing organized or institutionalized relationships within the whole, though sometimes the two terms are used as if they were interchangeable..."

Given these definitions, I agree that "labour relations" would include "collective relations", such as collective bargaining and related activities.

However, I do not think that “labour relations” should be limited to “collective relations”, as that would unduly limit the scope of labour relations. For the purposes of section 15(1), I favour a more comprehensive definition, such as that set out in the *Concise Encyclopedia of Industrial Relations*.

[para 21] The term ‘labour relations’ may not be restricted to collective relations, but it is also not so broad as to include any type of relationship or interaction in the workplace.

[para 22] In BC Order F05-02 the adjudicator reviewed precedent from Ontario, concluding (at para. 100):

Section 21(1)(a)(ii) of the Act refers to “labour relations information” but, unlike s. 65(6)3 of the Ontario legislation, it does not also refer to “employment-related matters”, a more expansive phrase. I conclude that “labour relations information” in s. 21(1)(a)(ii) may not necessarily be strictly limited to the collective bargaining relationship between employer and union in that it may also include negotiations, bargaining and related matters between parties to analogous relationships. At the same time, labour relations information is not synonymous with the wider category of information about an individual’s actions on the job, and information may be “of or about” an employee without being “of or about” organizations to which the employee belongs, in this case the BCTF or the NDTA.

[para 23] The Third Party’s submissions do not contain much detail regarding its claim that the records contain labour relations information of the Third Party. With its initial submission, the Third Party provided an affidavit sworn by a Managing Director of AREA; this affidavit states:

9. The release of the Records would also result in the disclosure of labour relations and financial information of AREA. The Records set out internal discussions of AREA including discussions within and between workers and members of AREA as well as some costing and price information. This information was supplied to Service Alberta with the clear understanding that it would remain confidential.

[para 24] The Third Party argues that emails contained in pages 62-69, 102-109, 113-118, 138-147, and 156-159

...contain discussions pertaining to the relationships within and between workers, working group and their organizations and managers, employers; and as such this is confidential business information of AREA that must not be disclosed, pursuant to section 16 of the Act.

[para 25] Regarding the specific pages identified above, I have carefully reviewed them and cannot agree with the Third Party’s characterization of the information as ‘labour relations’. The identified pages consist of communications between the Third Party and Public Body. Even if communications between Third Party employees, or between Third Party employees and members of the Third Party can be characterized as “labour relations”, the pages identified by the Third Party do not contain information that could be characterized as negotiations, bargaining and related matters between parties in

relationships analogous to that between employer and employee, or employer and union. Information is not “labour relations” information for the mere reason that it relates to communications or interactions between employees or members.

[para 26] Some of the information in these pages relates to the body that regulates the Third Party’s members’ profession. Possibly the Third Party means to argue that communications regarding how this body regulates the members is analogous to labour relations. Even if the relationship between a regulator and a regulated member (or an association of regulated members) is sufficiently analogous to that of employer/employee or employer/union such that it could fall within the scope of “labour relations”, the information in the identified pages cannot be characterized as labour relations. This is because the communications are between the Third Party (or members of the Third Party) and the Public Body, which is not the regulator. These communications relate to the Third Party’s comments about actions of the Public Body in relation to the regulator, such as how the Public Body did or did not respond to particular activities of the regulator. Although these actions of the Public Body affect the Third Party and its members generally, the information about those actions (or the Third Party’s position regarding those actions) is not thereby “labour relations” information of the Third Party. The Third Party’s communications in these records do not relate to negotiations, bargaining, or associated matters of the Third Party.

[para 27] Lastly, some of the information in the identified pages seems to relate to the Third Party supporting or advocating for one of its members. This is also not “labour relations” information as the information does not relate to negotiations, bargaining, or associated matters.

[para 28] Section 16(1) can also apply to scientific or technical information of a third party, or trade secrets of a third party. Neither the Third Party nor the Public Body have argued that the withheld information can be so characterized, and from the records before me I do not see how any of the information could be so characterized.

[para 29] I find that the information in the records at issue in this inquiry is not information set out in section 16(1)(a). Therefore, section 16(1) cannot apply to that information, and I do not need to consider whether section 16(1)(b) or (c) apply.

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

Preliminary matter under section 17(1)

[para 30] Under section 17, if a record contains personal information of a third party, section 71(2) states that it is then up to the applicant to prove that the disclosure would not be an unreasonable invasion of a third party’s personal privacy.

[para 31] The Third Party argues that because the Applicant bears the burden of proof, the Public Body should not be permitted to make submissions regarding the application

of section 17(1). It argues that the Public Body's submissions on this point should be disregarded.

[para 32] The Third Party further argues that it is also not appropriate for the Commissioner (or I as her delegate) to "attempt to discharge or alleviate the Applicant's burden." The Third Party cites *Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner)*, 2006 ABQB 515 (*Qualicare*) in support of this argument, wherein the Court said (at para. 59-60):

[59] In my view, the Privacy Commissioner's requirement for an evidentiary foundation withstands a somewhat probing examination. As discussed, the scope and intention of **FOIPP** presumes access to information, subject only to limited exceptions, and the responsibility for establishing an exception rests with the party resisting access to the information.

...

[60] The requirement of some cogent evidence permits the Privacy Commissioner to discharge his duty of balancing competing interests and policy considerations by rationally assessing the likelihood of reasonable expectations of harm. To suggest that requiring some evidence is unreasonable means that access to information could be denied based solely on hypothetical possibilities, and that only the most preposterous theoretical risks could be rejected by the Commissioner.

[para 33] *Qualicare* is a decision resulting from a judicial review of Order F2005-009, in which former Commissioner Work rejected a public body's application of sections 16, 20, and 25 of the Act. The excerpt above, cited by the Third Party, relates to the burden of proof required by the Commissioner in Order F2005-009 in order to find that the harms test in those provisions was met. The Court found that the evidentiary standard set by the Commissioner in Order F2005-009 with respect to the application of these sections was appropriate.

[para 34] This decision does not indicate that because a party may have an evidentiary burden, or otherwise have a burden of proof, that the Commissioner cannot consider arguments or factors that were not raised by a party.

[para 35] Indeed, as stated by the Court in *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10, I have an 'investigatory role' in conducting an inquiry (at paras. 172-174, 179):

A tribunal is not bound by the authorities cited by parties. By raising an issue, a party opens the door to the existing jurisprudence governing that issue. Put another way, a tribunal is not constrained by the parties' legal research. Tribunal (and judicial) economy extends latitude to decide based on the law rather than on the specific authorities invoked by the parties: *Grenon v Canada Revenue Agency*, ABCA 96 at para 41. I agree with the IPC that an adjudicator is not obligated "to update or request submissions from the parties on every aspect of the Adjudicator's reasoning process, including references to case law:" IPC Brief at para 174.

Moreover, the Adjudicator was not confined to resolving the solicitor-client privilege dispute on the basis of the issues as framed by the parties (unlike a trial or chambers judge, since, subject to rule 1.3(2), “[i]t is well-established that a trial or chambers judge should not decide a case on a matter not pleaded, and specifically should not grant remedies beyond the pleadings:” *Mazepa v Embree*, 2014 ABCA 438 at para 8).

Indeed, the IPC Orders issued from “Inquiries” conducted by the Adjudicator. That role gives an adjudicator greater scope for raising issues not raised by the parties than might be available to, say, a trial court: see David Mullan, *Administrative Law* (Toronto: Irwin Law, 2001) 297, fn. 170. For example, the Notice of Inquiry for Inquiry F7384 listed the issues in the inquiry, but prefaced the list with the words “[w]ithout limiting the Commissioner” and followed the list with the warning that “[t]he above does not prevent the Commissioner from raising any further issues during the inquiry that are deemed appropriate:” CRP 2, vol. 2, tab 11, Notice of Inquiry, p. 2; IPC Brief at para 171.

...

An adjudicator is not only an investigator. An adjudicator’s decisions arise from a relatively formal process permitting parties to make submissions and to respond to matters raised by an adjudicator, as occurred in this case. The submission and counter-submission process drew the procedures into proximity with judicial procedures and raised legitimate expectations that the matter would be decided based on issues to which the parties had an opportunity to respond: *Baker* at paras 23 and 26.

[para 36] Given the above, I disagree with the Third Party’s arguments on this point. In this inquiry I am reviewing the Public Body’s application of exceptions to access, including where it determined that exceptions do not apply. The Public Body is permitted to make submissions regarding its decisions.

[para 37] Further, I am not bound by the arguments of any party in coming to my decision on the issues in this inquiry.

Application of section 17(1)

[para 38] This issue relates to information the Public Body has not withheld under section 17(1), that the Third Party argues ought to be withheld under that provision. I will not make findings regarding the application of section 17(1) to information the Public Body and Third Party agree ought to be withheld under section 17(1).

[para 39] Section 17 states in part:

17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party’s personal privacy.

...

[para 40] Section 17 is a mandatory exception: if the information falls within the scope of the exception, it must be withheld.

[para 41] Under section 17, if a record contains personal information of a third party, section 71(2) states that it is then up to the applicant to prove that the disclosure would not be an unreasonable invasion of a third party's personal privacy.

[para 42] Section 1(n) defines personal information under the Act:

1 In this Act,

...

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

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

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

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

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

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

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

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

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

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

[para 43] Many past Orders of this Office state that the disclosure of the names, contact information and other information about public body employees, that relates only to the employees acting in their professional capacities is not an unreasonable invasion of personal privacy under section 17(1) (see Orders 2001-013 at paras. 89-90, F2003-002 at para. 62, F2008-028 at para. 53) unless that information has a personal dimension in the circumstances. In other words, in the absence of a personal dimension, information cannot be withheld under section 17(1).

[para 44] Where section 17(1) was applied to business contact information (such as work phone numbers of public body employees or business employees), it is not information to which section 17(1) can apply unless there is a personal dimension.

[para 45] Past Orders of this office have also found there to be a personal dimension to information about an employee's work duties where it appears in the context of

allegations of wrongdoing (e.g. investigations into the conduct, disciplinary proceedings, etc.). In Order F2010-031 the Adjudicator stated:

Information about an individual's performance of work duties may be personal information in a context where it is suggested or alleged that the individual has acted improperly or wrongfully (Order F2008-020, para. 28).

Arguments of the Third Party

[para 46] The Third Party argues that the information in the records has a personal dimension as it relates to investigations and allegations of wrongdoing. It states (initial submission, at page 4):

The information in the Records is about allegations of inappropriate behaviour, and therefore, there is a personal dimension to the information such that section 17(1) applies. AREA submits that the identities of the individual AREA staff and members are inextricably linked to the information in the Records such that disclosing any of the names of any of the staff or members, the nature and substance of the allegations, or the investigations would render individuals identifiable.

Therefore, the personal information of all named and unnamed individuals involved in the allegations, and the investigations of same, must be considered in the section 17(1) analysis.

[para 47] The Third Party provided more detailed arguments regarding information on pages 62-69, 73-76, 84-86, 102-109, and 113-118, as follows:

These pages identify some individuals by name, while other names are severed, pursuant to section 17(1). The information is about allegations of inappropriate conduct such that there is a personal dimension to the information, and section 17(1) applies. Given the overall context of the Records, releasing the Records, even with some names severed, could result in the identity of the severed names being identifiable, and the complaints and investigations known.

[para 48] With respect to information on pages 113-118, 119-124, 134, 158, and 177, the Third Party states:

The information is about allegations of inappropriate conduct such that there is a personal dimension to the information, and section 17(1) applies. Given the overall context of the Records, releasing the Records could result in the identity of individuals and their role in raising the inappropriate conduct.

[para 49] In its rebuttal submission, the Third Party provides additional detail regarding the allegations of wrongdoing. It states:

The Records relate to alleged wrongdoing by RECA, as set out by AREA. AREA submits that the information is about allegations of inappropriate behaviour such that there is a personal dimension to the information, and that section 17(1) applies to the Records.

Arguments of the Public Body

[para 50] The Public Body has withheld some names appearing in the records, and contact information for a few individuals.

[para 51] The Public Body states that it withheld personal information in pages 62-69 that has a personal dimension. It also states that it withheld email addresses of individuals acting in their professional capacity, where those email addresses appeared to be personal rather than a business email address. The Public Body states that the records at issue do not contain any other personal information to which section 17(1) applies. It states (initial submission, at page 10):

It is the position of the Public Body that the bulk of the records at issue do not contain any personal information of the Third Party as the names that appear within the records are names of employees that work for the Third Party, rather than individual members of the Association bringing their concerns forward. The information contained within the records is consistent with business card information. The communication is generalized and does not contain any identifiable information about any individuals. There is identifiable personal information of individuals contained within of some of the records at issue. Below are further details regarding section 17(1) and pages 62-69, 74, and 134.

Analysis

[para 52] With respect to the Third Party's arguments that the information in the records at issue relates to investigations, there are few references in the records to investigations. Some of the references occur in pages of the records that are not at issue; some of that information was withheld by the Public Body under sections 16(1) or 17(1) and is not at issue in this inquiry. I have reviewed this information to provide context for the information that is at issue in this inquiry; however, my findings relate only on the information that is at issue.

[para 53] An investigation is referenced on pages 64-66. That investigation appears to be an internal investigation of the Public Body conducted into its own actions. The investigation affects an individual who is not an employee of the Public Body; that individual's name and contact information has been withheld under section 17(1) on these pages. Most of page 66 is comprised of an email to the individual from the Public Body; that email has been withheld in its entirety under section 17(1).

[para 54] It is not clear that this is the investigation the Third Party is referring to in its submissions. If so, the Third Party appears to argue that additional information about this investigation should be withheld as it could identify the affected individual. Having reviewed these pages, both by themselves and in the context of the remaining responsive records (including the information not at issue in this inquiry), it is unclear how this could be the case. The remaining information regarding the Public Body's internal investigation is primarily about the Public Body's internal processes, rather than the affected individual. The information to which section 17(1) has not been applied does not appear to identify the affected individual and the Third Party's submissions are insufficient to

satisfy me that it could. Therefore, the information about the Public Body's internal investigation in the records at issue, to which section 17(1) was not applied by the Public Body, is not personal information of an identifiable individual.

[para 55] I have considered whether any of this information could reveal personal information that has been withheld in pages that are not at issue, as the Third Party has argued that section 17(1) applies to any information that relates to investigations referenced in the records. I cannot conclude from the information before me that the information at issue could reveal information to which the Public Body has applied sections 16(1) or 17(1) that is not at issue in this inquiry.

[para 56] An investigation is also referenced in pages 144-147. I will discuss the application of section 17(1) to information in these pages in greater detail, below.

[para 57] The Third Party has also argued that the information at issue relates to allegations of wrongdoing or inappropriate conduct, which gives the information a personal dimension. The Third Party has clarified that the allegations referenced in the records at issue were made by members of the Third Party against RECA. The Third Party's concerns appear to relate to the identity of the Third Party members involved in making allegations of wrongdoing or inappropriate conduct. Some records also name individuals against whom the allegations are made.

[para 58] I will first deal with information that identifies or is about Third Party employees or members who were involved in making the allegations.

[para 59] The Public Body argues that these members of the Third Party were acting in their professional capacity, such that section 17(1) does not apply to the information at issue about those members.

[para 60] In Order F2013-03, the adjudicator set out the distinction between employees acting in their work capacity or in a more personal capacity, as follows (at paras. 44-45):

Given these principles, I find that section 17(1) does not apply to some of the information that the Public Body withheld, as set out later in this Order. For instance, when the Applicant's former supervisor or the Public Body's human resources coordinator sent or received correspondence, or dealt with the Applicant, they were generally acting in a work-related capacity, without any personal dimension. Conversely, when employees, associates or clients of the Applicant provided their views or opinions about the Applicant, as a result of difficulties they were having when dealing with her, I find that there is a sufficient personal dimension so as to give rise to the possibility that disclosure of their identities, in conjunction with their views and opinions, would be an unreasonable invasion of their personal privacy.

When the third parties in question, whether unsolicited or during an interview, provided their views or opinions about the Applicant – who was their supervisor or associate – there is a personal dimension because they did so confidentially, and would presumably have concerns about their job or their relationship with the Applicant, or fear retaliation or some other negative consequence, if the Applicant came to know their

comments. Where the disclosure of information is likely to have an adverse effect on an individual, the record of a work-related act potentially has a personal dimension, and may therefore constitute the individual's personal information (Order F2006-030 at paras. 12, 13 and 16; Order F2008-020 at para. 28). Conversely, when the Applicant's supervisors and the human resources coordinator provided their views or opinions about the Applicant and her work performance, they were doing so in a work-related capacity without any personal dimension, as part of their roles and responsibilities were to evaluate, or assist in the evaluation, of the Applicant. Having said this, my comments are not intended to set out a uniform rule. There may be times, depending on the context and the content of the particular record, when a colleague or someone being supervised provides comments strictly in a work-related capacity, and when a supervisor's comments have a personal dimension.

[para 61] In Order F2020-23, the adjudicator considered the application of section 17(1) to statements made by public body employees in the course of a workplace investigation. He said (at paras. 158-161):

Under section 17(1), the Public Body redacted its employee's answers to the investigator's questions in their entirety, applying section 17(1) in a blanket fashion. It appears that the Public Body considered that the mere fact that a statement was made in the context of an investigation makes the statement, or the fact that a certain person made it, personal information. This is not the case.

The Public Body's employees took part in the investigation as matter of their employment duties. The fact that they made any particular statement is a matter of performance of their duties, and as such is not their personal information. See Order F2009-026 at paras. 10 to 11. This principle also extends to opinions about an applicant that are formed as a result of dealing with the applicant in the course of employment duties, when the opinion is given as matter of employment duties, such as answering the investigator's questions. As stated by the Adjudicator in Order F2009-026 at paras. 14 to 17:

The employee brought an incident that took place in the course of her employment to the attention of the Public Body's security office. As the records at issue indicate that the Applicant has knowledge of the incident described in the records at issue, and is aware of the employee's role in the incident, it would not be possible to provide the Applicant with his own personal information, without also providing information about the employee. The question becomes whether the information about the employee is personal information, or information about the employee as a representative of the Public Body.

Not only do I find that the employee's knowledge of the incident arose from her duties as an employee, but I find that reporting the incident to the security office and making a statement about the incident was also part of her duties as an employee. All of her dealings with the Applicant were done as an employee of the Public Body and decisions made in relation to his requests were made with the authority of the Public Body. This finding is supported by the employee's reported statement referring to "enforcing guidelines", which appears in paragraph 1(e) of page 2 of the records at issue.

Under section 1(n) of the Act, cited above, an opinion held about an individual is the personal information of the subject of the opinion. However, the fact that an individual holds an opinion about another individual can be information about the individual who has formed the opinion. In Order F2006-006 the Adjudicator noted:

A third party's personal views or opinions about the Applicant - *by that reason alone* - are expressly not their personal information under section 1(n)(ix). However, the identification of the person providing the view or opinion may nonetheless result in there being personal information about him or her. Section 1(n)(ix) of the Act does not preclude this conclusion, as that section only means that the content of a view or opinion is not personal information where it is about someone else. In other words, the *substance* of the view or opinion of a third party about the Applicant is not third party personal information, but the *identity* of the person who provided it is third party personal information.

In this case, the opinion formed about the Applicant is based on the employee's experience providing services to the Applicant on behalf of the Public Body, and on a conversation that took place between the Applicant and the employee regarding the Public Body's guidelines. Further, review of the records at issue indicates that this opinion was given to the security office so that the security office could assess the situation and take any steps that office considered necessary. I find that the opinion was also provided by the employee in a representative capacity, as part of her employment duties.

As I find that the information in the records at issue about the employee is about her as a representative of the Public Body, I find that section 17 does not apply to that information.

I agree with the Adjudicator in Order F2009-026.

Accordingly, section 17(1) does not apply in blanket fashion to the answers given to the investigator. As with the Public Body's other redactions under section 17(1), it must be applied to individual pieces of personal information. The result is that much of the information redacted from these pages should be disclosed to the Applicant.

[para 62] The cases cited above show a consistent approach to the application of section 17(1) to information in statements made by public body employees in the course of their job duties. I agree with the above analyses and find that it applies equally to any employee in the public or private sector, acting in the course of their job duties. Whether information about Public Body or Third Party employees is personal information to which section 17(1) applies depends on whether the information relates only to the employees' work duties or whether there is a personal dimension to the information. An employee providing an opinion on a matter may be doing so in the course of their work duties, which does not have a personal dimension. However, there can be situations in which there is a personal dimension to the opinion or context in which it is given, such that it is properly characterized as personal information of the opinion giver to which section 17(1) can apply.

[para 63] I agree with the Public Body's assessment of the information at issue relating to members of the Third Party. The information in the records indicate that the Third Party (or members of the Third Party) made complaints or allegations about RECA's actions to the Public Body. These complaints or allegations are regarding the effect of RECA's actions on members of the Third Party in their professional capacities.

[para 64] The Third Party is a professional association for real estate agents. Its website describes its mandate as follows¹:

As the professional provincial body, the Alberta Real Estate Association (AREA) represents the interests and concerns of more than 12,500+ Alberta REALTORS®, from the 10 local real estate Board/Associations. We provide strategic leadership and advance the Alberta real estate profession through member-centric services, advocacy and professional development.

[para 65] It further states²:

One of AREA's core services to members is advocating on behalf of Alberta REALTORS® with key industry stakeholders, including the Government of Alberta. As a strong, collective voice in provincial discussions, AREA speaks to matters that may impact REALTOR® careers, their daily work lives, and their ability to serve their clients effectively.

[para 66] Representatives of the Third Party fulfilling these mandates are acting in their professional capacity. The Third Party's communications with the Public Body regarding RECA in the records at issue appear to have been made in the course of performing the Third Party's functions. Specifically, the members of the Third Party involved in the communications appear to have been acting in their professional or representative capacity in making these communications.

[para 67] The Third Party's submissions do not indicate that employees or members of the Third Party were not acting in their professional capacities with respect to the communications in the records at issue. Nothing in the records or in the Third Party's submissions indicate that there is a personal dimension to the information about members or employees of the Third Party in the records at issue.

[para 68] For this reason, I find that section 17(1) does not apply to information about employees or members of the Third Party involved in making the allegations that appear in the records at issue. Again, this finding does not apply to information to which the Public Body has applied sections 16(1) or 17(1), as that information is not at issue.

[para 69] As noted above, pages 144-147 include references to individuals being investigated, as well as individuals against whom allegations were made. The Public Body has withheld the names of these individuals under section 17(1). The Third Party

¹ <https://www.albertarealtor.ca/page/about>

² <https://www.albertarealtor.ca/page/advocacy>

has argued that these pages should be withheld in their entirety, although it isn't clear whether this is because the Third Party is concerned about information that identifies employees or members of the Third Party making the allegations, or the identity of the individuals about whom the allegations are made (or both).

[para 70] These pages discuss actions that were taken by various parties, including the Public Body, with respect to certain individuals. Much of the information is not about an identifiable individual. Many of the individuals named in these pages were acting in a professional capacity, such that section 17(1) does not apply to information about them. However, the same cannot be said with respect to the individuals against whom allegations were made and/or who were being investigated. Although the allegations appear to relate to the individuals in their professional capacity, they specify alleged inappropriate behaviour undertaken by the individuals; this gives the information a personal dimension, such that section 17(1) can apply.

[para 71] The Public Body has applied section 17(1) to the names of these individuals. While I am not making findings regarding the application of section 17(1) to that information, I *am* making a finding with respect to information to which the Public Body has not applied section 17(1). In my view, there are a few additional items of information in these pages that could identify the individuals whose names have been withheld by the Public Body under section 17(1). The Public Body's application of section 17(1) to certain individuals' names could be undermined if other identifiable information is not also withheld. For the reasons above, I agree that section 17(1) can apply to the names of these individuals; for the same reasons, section 17(1) can also apply to the additional information that could identify those individuals.

[para 72] For example, the job titles associated with these individuals in pages 144-147 may identify the individuals whose names have been withheld under section 17(1). I say this because the organizations that these individuals are employees or members of are sufficiently small that only a few people (or even one person) might hold the relevant job title. Further, the records contain dates, such that a search using the job title and date might be used to identify the particular individual.

[para 73] It remains to be determined whether the factors set out in sections 17(2) – (5) weigh in favour of, or against, disclosure of this information.

[para 74] Sections 17(2) and (3) refer to circumstances in which disclosure of personal information is not an unreasonable invasion of privacy. None of the parties have argued that any provisions of sections 17(2) or (3) are relevant and, from the face of the records, none appear to apply.

[para 75] Sections 17(4) and 17(5) state:

(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

- (a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,*
 - (b) the personal information is an identifiable part of a law enforcement record, except to the extent that the disclosure is necessary to dispose of the law enforcement matter or to continue an investigation,*
 - (c) the personal information relates to eligibility for income assistance or social service benefits or to the determination of benefit levels,*
 - (d) the personal information relates to employment or educational history,*
 - (e) the personal information was collected on a tax return or gathered for the purpose of collecting a tax,*
 - (e.1) the personal information consists of an individual's bank account information or credit card information,*
 - (f) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations,*
 - (g) the personal information consists of the third party's name when*
 - (i) it appears with other personal information about the third party, or*
 - (ii) the disclosure of the name itself would reveal personal information about the third party,*
- or*
- (h) the personal information indicates the third party's racial or ethnic origin or religious or political beliefs or associations.*

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

- (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,*
- (b) the disclosure is likely to promote public health and safety or the protection of the environment,*
- (c) the personal information is relevant to a fair determination of the applicant's rights,*
- (d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people,*

- (e) *the third party will be exposed unfairly to financial or other harm,*
- (f) *the personal information has been supplied in confidence,*
- (g) *the personal information is likely to be inaccurate or unreliable,*
- (h) *the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant, and*
- (i) *the personal information was originally provided by the applicant.*

[para 76] The list of circumstances in section 17(5) is not exhaustive. Any other relevant circumstances must also be considered when determining whether or not disclosure is an unreasonable invasion of third party personal privacy.

[para 77] As noted by the Third Party, the Applicant has elected not to participate in this inquiry and has therefore not provided any arguments regarding the disclosure of personal information in the records.

[para 78] Neither the Third Party nor the Public Body have addressed the applicability of any factors set out in sections 17(4) or (5).

[para 79] Section 17(4)(g) applies to all of the personal information in the records at issue to which I have found section 17(1) can apply. Section 17(5)(h) may also apply to some or all of that information. These factors weigh against disclosing the personal information.

[para 80] I have reviewed the information to determine, in the absence of any argument by the parties, whether any factors weigh in favour of disclosure. None appear to apply on the basis of the records themselves.

[para 81] As at least one factor weighs against disclosure, and no factors appear to weigh in favour of disclosure, I find that the Public Body is required to withhold the additional information that identifies the individuals whose names have been withheld in the records at issue by the Public Body under section 17(1).

Conclusion regarding section 17(1)

[para 82] I find that the information in the records at issue, to which the Public Body has not already applied section 17(1) (or section 16(1)), is not personal information to which section 17(1) can apply, with a few exceptions. These exceptions are additional items of information that could identify individuals whose names have been withheld in the records at issue.

[para 83] I will order the Public Body to review the records at issue and determine what additional items of information (such as job titles) could identify individuals whose

names have been withheld under section 17(1). The Public Body is to sever that information before providing access to the Applicant.

V. ORDER

[para 84] I make this Order under section 72 of the Act.

[para 85] I find that section 16(1) does not apply to the information at issue in this inquiry that the Third Party argues should be withheld under that provision. I order the Public Body to disclose it to the Applicant, subject to the application of section 17(1) as set out below. This finding does not apply to information the Public Body has already withheld under sections 16(1) or 17(1), as that information is not at issue in this inquiry.

[para 86] I find that most of the information in the records at issue is not personal information to which section 17(1) applies, with the exception of some information discussed at paragraphs 69-72 of this Order. I order the Public Body to review the information in the records and determine what additional items of information could identify individuals whose names have been withheld under section 17(1), in light of the guidance provided at paragraphs 69-72, and 83 of this Order. The Public Body is to sever that information before providing access to the Applicant. This finding does not apply to information the Public Body has already withheld under sections 16(1) or 17(1), as that information is not at issue in this inquiry.

[para 87] I further order the Public Body to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

Amanda Swanek
Adjudicator