ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2024-09

March 12, 2024

EDMONTON SCHOOL DIVISION

Case File Number 016701

Office URL: www.oipc.ab.ca

Summary: The Applicants requested access under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to all records in the possession of Edmonton School Division (the Public Body) relating to their son and themselves, including emails both internal and external.

The Public Body located responsive records. It provided the Applicants with access to the records, although it withheld some information from the records under section 4 (records to which this Act applies), section 17 (disclosure harmful to personal privacy), 24 (advice from officials, and section 27 (privileged information) of the FOIP Act.

The Applicants requested review of the Public Body's severing decisions.

The Adjudicator found that section 4 of the FOIP Act did not apply to the information to which the Public Body applied this provision. The Adjudicator found that most of the information withheld under section 17 was properly withheld. The Adjudicator found that some information to which the Public Body had applied section 24 fell within the terms of this provision but it was unclear as to why the Public Body had exercised its discretion in favor of withholding the information. The Adjudicator found that it was likely that the Public Body was authorized to withhold information over which it claimed solicitor-client privilege under section 27(1)(a).

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 4, 17, 24, 27, 72

Authorities Cited: AB: Orders 96-017, F2004-026, F2015-29, F2020-31, F2022-62

Cases Cited: *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23; *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII), [2016] 2 SCR 555

I. BACKGROUND

[para 1] The Applicants requested access under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to all records in the possession of Edmonton School Division (the Public Body) relating to their son and themselves, including both internal and external emails.

[para 2] The Public Body located responsive records. It provided the Applicants with access to the records, although it withheld some information from the records under exceptions in the FOIP Act.

[para 3] The Applicants requested review of the Public Body's severing decisions.

[para 4] The Commissioner agreed to conduct an inquiry and delegated the authority to conduct it to me.

II. ISSUES

Issue A: Are records excluded from the application of the Act by section 4(1)(i) (research information)?

Issue B: Does section 17 of the Act (disclosure harmful to personal privacy) apply to the information in the records?

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

Issue D: Did the Public Body properly apply section 27(1) of the Act (privileged information) to the information in the records?

III. DISCUSSION OF ISSUES

Preliminary Issue: Scope of the Inquiry

[para 5] In their submissions, the Applicants raised issues regarding their son's privacy. The Applicants have not made a complaint to the Commissioner regarding the Public Body's collection, use, or disclosure of their son's personal information and the Commissioner has not delegated authority to me to conduct an inquiry into such a

complaint. I cannot decide issues regarding the Applicants' son's personal information in this inquiry. I am limited to reviewing the Public Body's access decisions, as it is these that are the subject of the Applicants' request for review to the Commissioner.

[para 6] The issues for inquiry are those set out in the notice of inquiry.

Issue A: Are records excluded from the application of the Act by section 4(1)(i) (research information)?

[para 7] Section 4(1)(i) excludes the research of an employee of a post-secondary educational body from the scope of the FOIP Act.

> *4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:*
>
> > *(i) research information of an employee of a post-secondary educational body[…]*

[para 8] The Public Body applied section 4(1)(i) to withhold an email written by a professor of the University of Alberta to a teacher and an email from the teacher to the professor. The email from the professor provides a link for the teacher to provide information for a survey. The teacher then asked a question about the survey. Records 1659 and 1660 *do not* contain the survey questions or any survey responses.

[para 9] The Public Body argues:

> Pages 1659 and 1660 of the records are clearly the research information of an employee of a post-secondary educational body. As such, the Act does not apply to these records, and the records are not subject to disclosure under Part 1 of the Act. The Public Body's decision to redact information on the basis of it falling outside the scope of the Act should be upheld.

[para 10] In Order F2020-31, I considered section 4(1)(i) and how the word "research" has been interpreted in this provision. I said:

> The Public Body argues:
>
> > For the purposes of this Inquiry, the University has no argument with the definition most often cited by the Applicant, that of Ontario IPC Order PO-2693 which defined research as:
> >
> > > a systematic investigation designed to develop or establish principles, facts or generalizable knowledge, or any combination of them, and includes the development, testing and evaluation of research. The research must refer to specific, identifiable research projects that have been conceived by a specific faculty member, employee or associate of an educational institution.
> >
> > As evidenced by the CFREB application and approval, the research was indeed systematic and designed to develop or establish principles. Otherwise, there would have been nothing concrete for evaluation by CFREB. See Appendix 1 for the certification of ethics review.

> The CFREB research proposal identified a specific and distinct research undertaking, led by a Principal Investigator (the "PI") who met all the requirements of a PI, as laid out in the Tri-Council Policy Statement - Ethical Conduct for Research Involving Humans ("TCPS2") which is the guiding document for ethical conduct of research involving humans in Canada. The methodology of the survey, including its CFREB approval was explained in a Survey Working Paper posted on the University's website in 2017. The working paper also shared aggregated information gathered in the survey, and analysis of the data.

The Public Body asserts that although the research was undertaken for the Public Body's strategic planning, the research also had a secondary purpose:

> Unlike the scenario in Ontario IPC Order PO-3576, the EEH survey data was not strictly used for assessing satisfaction levels of university community members. In Order PO-3576, the data was collected at Carleton University was strictly for the purpose of assessing student satisfaction. There was no secondary use of the data being considered. In the current Inquiry, the survey data requested by the Applicant was used both for strategic planning purposes of EEH, and to inform a research project.
>
> Similarly, Ontario IPC Order PO-3464 found that records associated with a particular University of Ottawa Professor did not qualify as research information because the records were not clearly linked to any specific, identifiable research project. In the current Inquiry, the records at issue are clearly associated with the PI's research, ultimately leading to the publication of a book.

The Public Body argues that the research at issue was not collected for the sole purpose of strategic planning, but is also associated with an identifiable research project.

I agree with the parties that the definition of "research" developed by the Ontario Information and Privacy Commissioner is helpful in interpreting the use of this term in section 4(1)(i). I also agree with the Public Body that the research at issue in this case may [be] considered to be linked to a specific, identifiable research project. There is nothing in the nature of the research that argues against this conclusion. Instead, the difficulty for the Public Body's position lies in the requirement that the research be "of an employee".

[para 11] In the foregoing order, I adopted the definition of "research" developed by the Ontario Office of the Information and Privacy Commissioner. That definition holds that information must be "linked to any specific, identifiable research project" to be considered research for the purposes of freedom of information legislation.

[para 12] With regard to records 1659 and 1660, I am unable to find that the information could be said to be "linked to any specific, identifiable research project." The information in the records does not identify a specific research project, or its scope or methodology. While it contains a link, the link apparently is a link to a survey. The link does not actually reveal any information about the research. Had the records contained information regarding the questions the Professor was researching or information about the research being conducted I would agree that the Professor's email could fall within the terms of section 4(1)(i); however, no such information is present. With regard to the questions asked by the teacher in response to the professor's email, there is nothing to suggest that the teacher's email was used by the professor in a particular research project or that the email reveals the research methodology used by the professor.

[para 13] To conclude, I find that records 1659 and 1660 are not exempt from the scope of the FOIP Act and I must direct the Public Body to include these records in its response to the Applicants.

Issue B: Does section 17(1) of the Act (disclosure an unreasonable invasion of personal privacy) apply to the information to which the Public Body applied this provision?

[para 14] Section 17 requires a public body to withhold the personal information of an identifiable individual when it would be an unreasonable invasion of the individual's personal privacy to disclose his or her personal information.

[para 15] Section 1(n) of the FOIP Act defines personal information. It states:

> *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 16] Information is personal information within the terms of the FOIP Act if it is recorded and is about an identifiable individual.

[para 17] Section 17 sets out the circumstances in which a public body may or must not disclose the personal information of a third party in response to an access request. It states, in part:

> *17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.*
>
> *[…]*
>
> *(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*
>
> *[…]*
>
> *(g) the personal information consists of the third party's name when*
>
> *(i) it appears with other personal information about the third party, or*
>
> *(ii) the disclosure of the name itself would reveal personal information about the third party[…]*
>
> *(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether*
>
> *(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,*
>
> *(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 18] Section 17 does not say that a public body is *never* allowed to disclose third party personal information. It is only when the disclosure of personal information would be an unreasonable invasion of a third party's personal privacy that a public body must refuse to disclose the information to an applicant (such as the Applicant in this case) under section 17(1). Section 17(2) (not reproduced) establishes that disclosing certain kinds of personal information is not an unreasonable invasion of personal privacy.

[para 19] When the specific types of personal information set out in section 17(4) are involved, disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. To determine whether disclosure of personal information would be an unreasonable invasion of the personal privacy of a third party, a public body must consider and weigh all relevant circumstances under section 17(5) (unless section 17(3), which is restricted in its application, applies). Section 17(5) is not an exhaustive list and any other relevant circumstances must be considered.

[para 20] The Public Body applied section 17(1) to withhold information that would reveal the names and other personally identifying information of students or individuals whose personal information is contained in the requested records. Section 17(4)(g) applies to this information and the information is therefore subject to a presumption that it would be an unreasonable invasion of personal privacy to disclose it. The Public Body described the information it severed in the following way:

> The Public Body has applied section 17(1) to the personal information of third parties, primarily other students. Section 17(1) has primarily been applied to names of other students, but also parents and other third parties, along with: a. pronouns; b. birthdays; c. Alberta Education Student Identification Numbers; d. School Identification Numbers; e. school name; f. descriptions of actions and feelings; g. personal email addresses; h. personal phone numbers; i. information about other students' special needs (including coding, diagnoses, referrals, accommodations, intervention strategies, behavioral or medical descriptions); j. information about other students' grades, test results or scores, report card comments, reading levels; k. information about when other students had left a program; l. information about the attendance, absence and illnesses of other students; m. other students' grade levels; n. behavioral and disciplinary information of other students; o. feelings of staff members regarding their own professional capabilities; p. information about out-of-work plans for staff; q. religious associations of staff; r. marital status of staff; s. information about other students' medical needs; t. information about the health or wellness of staff and students; and u. photos of other students.

[para 21] In almost all cases I agree with the Public Body's application of section 17(1) as the presumption created by section 17(4)(g) is not rebutted.

[para 22] I note that the Applicants' primary concern regarding the Public Body's severing decisions is that the Public Body may have severed too much information. The Applicants argue:

> Even if section 17 is applied perhaps only third-party names could be blocked out (e.g. other children). It is of our opinion where more information should be provided under numerous 17(1) sections verses large sections simply being blocked. At minimum, blocking third party names may be deemed appropriate but not the entire conversations and notes about our family

From my review of the Public Body's severing decisions, I find that the Public Body -- with the exception of two instances of severing that I will discuss below -- appropriately severed names and personally identifying information from the records. The Public Body's descriptions of the information it severed, reproduced above, are accurate. While there can be cases where a public body need only sever names to depersonalize information, as the Applicants point out, in the case of a school or classroom, where children and parents spend time together in close proximity and may be able to identify each other from facts alone, more is needed to depersonalize information. As a result, information about behavior and activities of other children or parents must all be severed to avoid disclosing personal information.

[para 23] In school records, it is not unusual to see the information of different children included in school and class plans, as the school must plan for and coordinate the needs of all students. It is also not unusual for a school to document activities or incidents involving more than one student. The records before me record information in this manner. It is for this reason that the Public Body has severed blocks of text while providing information solely about the Applicants and their son where that information appears in the records.

[para 24] As noted above, I do not support the Public Body's severing in two instances. I turn now to these records.

Record 104

[para 25] Record 104 is an email written by a teacher to a principal. The Public Body severed portions of a teacher's comments from record 104 on the basis that these portions are the teacher's personal information. There is no reason to believe that those portions of the teacher's comments were made in a personal capacity or contain personal information about the teacher. The teacher was writing in her role as a teacher and the information does not convey anything about her personal life.

[para 26] Past orders of this office have held that information about a third party acting in a representative capacity, rather than a personal capacity, is not personal information within the terms of the FOIP Act. In Order F2013-51, the Director of Adjudication distinguished personal information from information about a third party acting as a representative. She said:

> As well, the Public Body has severed information, partly in reliance on section 17, that may be properly characterized as 'work product'. For example, it has severed the questions asked by an

investigator, in addition to the answers of those interviewed. It has also withheld what is possibly a line of inquiry which the investigator means to follow (the note severed from record 1-151). While some of the questions and notes may reveal the personal information of witnesses, it does not appear that it is always the case that they do, and it appears possible that the Public Body withheld information on the basis that it may reveal something about the investigator performing duties on its behalf, rather than personal information about third parties.

The Public Body has also withheld notes of an interview by the Public Body's investigator of the University of Calgary's legal counsel, in part in reliance on section 17. Information about the legal counsel's participation in the events surrounding the Applicant's complaint to the University is not her personal information unless it has a personal aspect, which was not shown.

As well, it may be that some of the information of persons interviewed in the third volume relating to the Applicant's 'retaliation' complaint, which was withheld in reliance on section 17, may be information about events in which these persons participated in a representative rather than a personal capacity. Again, to be personal in such a context, information must be shown to have a personal dimension.

In Order F2009-026, the Adjudicator said:

> If information is about employees of a public body acting in a representative capacity the information is not personal information, as the employee is acting as an agent of a public body. As noted above, the definition of "third party" under the Act excludes a public body. In Order 99-032, the former Commissioner noted:
>
> The Act applies to public bodies. However, public bodies are comprised of members, employees or officers, who act on behalf of public bodies. A public body can act only through those persons.
>
> In other words, the actions of employees acting as employees are the actions of a public body. Consequently, information about an employee acting on behalf of a public body is not information to which section 17 applies, as it is not the personal information of a third party. If, however, there is information of a personal character about an employee of a public body, then the provisions of section 17 may apply to the information. I must therefore consider whether the information about employees in the records at issue is about them acting on behalf of the Public Body, or is information conveying something personal about the employees.

In that case, the Adjudicator found that information solely about an employee acting as a representative of a public body was information about the public body, and not information about the employee as an identifiable individual. In Mount Royal University v. Carter, 2011 ABQB 28 (CanLII), Wilson J. denied judicial review of Order F2009-026.

In Order F2011-014, the Adjudicator concluded that the name and signature of a Commissioner for Oaths acting in that capacity was not personal information, as it was not information about the Commissioner for Oaths acting in her personal capacity. She said:

> Personal information under the FOIP Act is information about an identifiable individual that is recorded in some form.
>
> However, individuals do not always act on their own behalf. Sometimes individuals may act on behalf of others, as an employee does when carrying out work duties for an employer. In other cases, an individual may hold a statutory office, and the actions of the individual may fulfill the functions of that statutory office. In such circumstances, information generated in performance of these roles may not necessarily be about the

> individual who performs them, but about the public body for whom the individual acts, or about the fulfillment of a statutory function.
>
> I find that the names and other information about employees of the Public Body and the University of Calgary acting in the course of their duties, as representatives of their employers, cannot be withheld as personal information, unless the information is at the same time that of an individual acting in the individual's personal capacity.

[para 27] From the foregoing, I conclude that information about a third party acting in a representative capacity will not be personal information, unless the information has a personal dimension. In cases where it is unclear from context that information has a personal dimension, it must be proven, with evidence that the information has this quality.

[para 28] I find that the severed portions were made in the teacher's professional capacity and were intended to express a professional opinion, as does the remainder of the email. The teacher provided the opinion as part of her employment duties. As I find that the information severed from record 104 is not personal information, I must direct the Public Body to disclose it.

Record 511

[para 29] Record 511 contains discussions of student grades. In the middle of the page, the Public Body appears to have inadvertently severed one sentence containing information about the Applicants' son's grade.

[para 30] As the Applicants are authorized to request and receive their son's personal information, I will direct the Public Body to give the Applicants access to the information about their son appearing on record 511.

Conclusion

[para 31] I confirm that the Public Body is required to withhold the information to which it applied section 17(1) from the Applicants, with the exception of the information severed from records 104 and 511, as described above.

Issue C: Did the Public Body properly apply section 24(1) (advice fro officials) to the information in the records?

[para 32] The Public Body severed information from records 6, 177, 700 – 701, 735 – 737, 757 – 762, 781 – 782, 789 – 792, 825 – 828, 914, 917, 920, 926 – 931, 1629 – 1631, 2371 – 2372 under section 24.

[para 33] Section 24 is a discretionary exception to disclosure. It states, in part:

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

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

(b) consultations or deliberations involving

(i) officers or employees of a public body,

(ii) a member of the Executive Council, or

(iii) the staff of a member of the Executive Council […]

[…]

(2) This section does not apply to information that

[…]

(f) is an instruction or guideline issued to the officers or employees of a public body […]

[…]

[para 34] In Order F2015-29, the Director of Adjudication interpreted sections 24(1)(a) and (b) of the FOIP Act and described the kinds of information that fall within the terms of these provisions. She said:

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

[para 35] I agree with the analysis of the Director of Adjudication as to the purpose and interpretation of sections 24(1)(a) and (b), and agree these provisions apply to information generated when a decision maker asks for advice regarding a decision, or evaluates a course of action.

[para 36] In Order F2022-62, the Adjudicator reviewed prior cases of this office regarding section 24(1) and stated:

> Bare recitation of facts or summaries of information also cannot be withheld under sections 24(1)(a) or (b) unless the facts are interwoven with the advice, proposals, recommendations etc. such that they cannot be separated (Order F2007-013 at para. 108, Decision F2014-D-01 at para. 48).
>
> As well, section 24(1)(a) does not apply to a decision itself (Order 96-012, at para. 31).

[para 37] From the foregoing, I conclude that for information to fall within the terms of section 24(1), it must not be a bare recitation of facts, a summary of events, or a decision, unless such information forms part of advice or is interwoven with it.

Record 6

[para 38] The Public Body severed a note from record 6. The note contains a statement of fact and a direction. While I accept that the note contains information, I am unable to find that it reveals advice, recommendations, or deliberations or any other kinds of information to which section 24(1) applies. I find that section 24(1) has not been demonstrated to apply to the information severed from this record.

Record 177

[para 39] The Public Body severed a paragraph from an email written by an occupational health and safety consultant to a school principal. The severed paragraph contains advice and recommendations. I find that section 24(1) applies to the information severed from the record.

Record 700

[para 40] The Public Body severed portions of two emails from record 700: an email written by an assistant superintendent and an email written by a supervisor. The email from the supervisor contains analysis and a proposal as to how to address a situation. I find that the information severed by the Public Body from the supervisor's email is subject to section 24(1).

[para 41] I am unable to conclude that the email from the assistant supervisor contains information subject to section 24(1). The severed information is a statement of fact and does not advise or seek advice.

Record 735

[para 42] Record 735 contains an email written by a supervisor in response to a request for guidance. The email contains advice. I agree that this information is subject to section 24(1).

Record 736

[para 43] Record 736 contains an email from a supervisor providing analysis and advice in relation to a proposed course of action. I agree that the severed information falls within the terms of section 24(1).

Record 757

[para 44] The Public Body severed information from record 757 under section 24(1). The information consists of an "instruction" to an "employee or officer" of the Public Body and falls within the terms of section 24(2)(f) of the FOIP Act, cited above. As a provision of section 24(2) applies to the information, a provision of section 24(1) cannot apply.

[para 45] Although I find section 24(1) does not apply to record 757, I find that the severed information is a confidential communication intended to facilitate the giving or seeking of legal advice. As a result, I find that the information is subject to solicitor-client privilege and is subject to section 27(1)(a) of the FOIP Act. I will address this record further when I address section 27, below.

Record 781

[para 46] Record 781 contains advice from a supervisor in response to a request for advice. I find that severed information is advice within the terms of section 24(1).

Record 789

[para 47] The Public Body severed an email written by a principal from record 789. I am unable to identify information falling within the terms of section 24(1) in this email. Rather, I find that the email contains a "recitation of facts" or "summary" as described in Order F2022-62.

Record 825

[para 48] The Public Body severed an email written by a supervisor under section 24(1). The email may be characterized as a confidential communication made for the purpose of obtaining legal advice. As a result, I find the email is subject to solicitor-client privilege and falls within the terms of section 27(1)(a). I will address this record in my analysis of the Public Body's application of section 27, below.

Record 914

[para 49] The Public Body severed an email written by a principal from record 914. I am unable to find that this information falls within the terms of section 24(1). The email contains a summary of a meeting. The information may be characterized as a "recitation

of facts." There is no indication that the email is intended to advise or influence a course of action, or to seek advice regarding a course of action or decision to be made.

Record 917

[para 50] The Public Body severed an email written by a supervisor to a principal from record 917. The email contains a statement that the email was provided as information. The email contains an account of a meeting. The email contains a summary rather than information meeting the terms of section 24(1). There is no indication that the email was intended as advice or to be used to make a decision. I find that section 24(1) does not apply to the email.

Record 920

[para 51] Record 920 contains an email written by a principal. The email contains a summary of an event that took place at the school. There is no indication that the email is intended to advise or to obtain advice. The email appears intended to document and to provide information. Without more, I am unable to find that section 24(1) applies to the severed information.

Records 926 – 931

[para 52] Records 926 – 931 contain a letter written by a principal. I am unable to say that the contents of the letter meet the requirements of section 24(1). While I recognize that the letter is an attachment, there is no indication that the letter was intended to advise or propose a course of action. It appears possible that area sending the letter as an attachment is responsible for drafting letters of that kind for schools to send.

Record 1629 – 1631

[para 53] Records 1629 – 31 contain emails written by employees of Alberta Health Services and Children's Services. The Public Body severed portions of an email appearing on record 1629. The email is written by an employee of Children's Services to an employee of the Public Body.

[para 54] The Public Body argues with respect to the severing on this record:

> The Applicant has only raised specific issue with records 1629-1631, which include an email exchange between a Supervisor for the Public Body, a Director for the Public Body and a Liaison Specialist with Government of Alberta Children's Services. Section 24(1)(a) is applied to a portion of the record that specifically includes a Supervisor providing advice to a Director of the Public Body for purposes of the Director taking action, as described in that correspondence. The requirements of section 24(1)(a) are clearly satisfied.
>
> Section 24(1)(b) is applied to a portion of an email from the Liaison Specialist with Government of Alberta Children's Services, involving a consideration of the reasons for/against the involvement from the COAST team to assist with the development of the 'Cozy Room' and the process by which that assistance might be considered (as outlined in the unredacted portions of the

> subject record). Section 24(1)(b) is properly applied to this record considering that it involves consultation with an employee of the Public Body that has authority to act respecting a proposed action to be taken with respect to the Applicant's son.

[para 55] While the Public Body argues that the employee of Children's Services was providing advice to, or consulting with, a Director of the Public Body in order for the Director to take a particular action, I am unable to find that the contents of the records support that conclusion.

[para 56] I am unable to find that the information severed from record 1629 was advice or similar information "developed by or for" the Public Body by an employee whose responsibility it is to develop such information. The employee of Children's Services has not been shown to have been responsible for developing advice for the Public Body. There is nothing to indicate that the Public Body asked the employee to provide advice or that there was any relationship between Children's Services and the Public Body with regard to the subject matter of the email. Instead, it appears that the email was written as a result of requests made by the Applicants and not the Public Body.

[para 57] I am also unable to say that the employee who received the email had a decision to make regarding the subject matter of the email or sought advice from Children's Services in relation to it.

[para 58] For the foregoing reasons, I find that section 24(1) has not been demonstrated to apply to the information severed from records 1629 – 1631.

Record 2371

[para 59] The Public Body severed the content of an email written by a program coordinator from record 2371. The email provides advice, analysis, and recommendations. I find that section 24(1) applies to the severed information.

Records 3118 – 3124 (also numbered Records 739 – 745 of 904 and Records 821 – 827)

[para 60] The Public Body provided records numbered 739 – 745 "of 904" for my review. These records are also marked "Affidavit page 821 – 827". In response to my request that the Public Body reconcile the page numbers it had assigned to the records, it indicated that these records were also numbered 3118-3124. It is unclear why the records at issue have been numbered in the way they have. I understand from the Public Body's correspondence that the records marked 739 - 745 "of 904" before me are not the same records to which it refers in its affidavit of records as having these numbers and over which it claims solicitor-client privilege.

[para 61] In future, I ask that the Public Body number records in sequence, assign only one record number per record, and not renumber the records once it has responded to an applicant. This will avoid delays in the inquiry and avoid confusion as to what the Public Body's decisions are.

[para 62] I turn now to the Public Body's application of section 24(1) to these records.

[para 63] The disclosed portion of the record contains the following heading: "confidential: seeking advice". The heading suggests that the content of the information that follows may be a confidential request for advice or a confidential response to a request for advice.

[para 64] The severed written information indicates that it is being provided as "information". The information is provided by a principal. The information appears to be excerpts from a letter. As I do not know why the principal provided the portions of the letter or what the principal was asked to do or provide, I am unable to say that the severed part of the letter is intended as anything other than information about what was said in a letter.

[para 65] The remaining records are photographs. It is unclear how the photographs could be said to reveal information subject to section 24(1).

[para 66] I note the public body argues:

> With respect to the first part of the test, all of the information in the records was conveyed to individuals who, by virtue of their respective roles within the Public Body, had responsibility to make decisions relating to the matters at issue in the subject records. The subject records all involve teachers of the Applicant's son and/or administrators for the Public Body. The records involve staff and administrative members deliberating on what actions to take. All actions were within each individual's responsibility, by virtue of their position within the Public Body.
>
> With respect to the second part of the test, all information withheld pursuant to section 24(1)(a) or (b) was part of a continuum of advice or deliberation amongst the Public Body's staff. All the correspondence is in relation to action towards matters involved and necessary decisions arising from those matters.

[para 67] Sections 24(1)(a) and (b) do not apply to information that is simply part of a continuum of advice or deliberation. The information must, itself, be expected to reveal "advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council" to fall within the terms of section 24(1)(a), or it must be reasonably expected to reveal consultations or deliberations involving officers or employees of a public body to qualify under section 24(1)(b). As discussed above, "a consultation within the terms of section 24(1)(b) takes place when one of the persons enumerated in that provision solicits information of the kind subject to section 24(1)(a) regarding that decision or action. A deliberation for the purposes of section 24(1)(b) takes place when a decision maker (or decision makers) weighs the reasons for or against a particular decision or action".

[para 68] I am unable to say that the information severed from records 739 – 745 of 904 / Records 821 – 827 / Records 3118 – 3124 could reasonably be expected to reveal information falling within the terms of section 24(1)(a) or (b).

Exercise of Discretion

[para 69] Section 24(1) is a discretionary exception to disclosure; that is, it authorizes public bodies to withhold information falling within its terms but it does not require them to do so.

[para 70] In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, the Supreme Court of Canada commented on the authority of Ontario's Information and Privacy Commissioner to review a head's exercise of discretion. The Court noted:

> The Commissioner's review, like the head's exercise of discretion, involves two steps. First, the Commissioner determines whether the exemption was properly claimed. If so, the Commissioner determines whether the head's exercise of discretion was reasonable.
>
> In IPC Order P-58/May 16, 1989, Information and Privacy Commissioner Linden explained the scope of his authority in reviewing this exercise of discretion:
>
> > In my view, the head's exercise of discretion must be made in full appreciation of the facts of the case, and upon proper application of the applicable principles of law. It is my responsibility as Commissioner to ensure that the head has exercised the discretion he/she has under the Act. While it may be that I do not have the authority to substitute my discretion for that of the head, I can and, in the appropriate circumstances, I will order a head to reconsider the exercise of his/her discretion if I feel it has not been done properly. I believe that it is our responsibility as the reviewing agency and mine as the administrative decision-maker to ensure that the concepts of fairness and natural justice are followed. [Emphasis in original]
>
> Decisions of the Assistant Commissioner regarding the interpretation and application of the FIPPA are generally subject to review on a standard of reasonableness (see Ontario (Minister of Finance) v. Higgins (1999), 1999 CanLII 1104 (ON CA), 118 O.A.C. 108, at para. 3, leave to appeal refused, [2000] 1 S.C.R. xvi; Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor) (1999), 1999 CanLII 19925 (ON CA), 46 O.R. (3d) 395 (C.A.), at paras. 15-18; Ontario (Attorney General) v. Ontario (Freedom of Information and Protection of Privacy Act Adjudicator) (2002), 2002 CanLII 30891 (ON CA), 22 C.P.R. (4th) 447 (Ont. C.A.), at para. 3).
>
> The Commissioner may quash the decision not to disclose and return the matter for reconsideration where: the decision was made in bad faith or for an improper purpose; the decision took into account irrelevant considerations; or, the decision failed to take into account relevant considerations (see IPC Order PO-2369-F/February 22, 2005, at p. 17).
>
> In the case before us, the Commissioner concluded that since s. 23 was inapplicable to ss. 14 and 19, he was bound to uphold the Minister's decision under those sections. Had he interpreted ss. 14 and 19 as set out earlier in these reasons, he would have recognized that the Minister had a residual discretion under ss. 14 and 19 to consider all relevant matters and that it was open to him, as Commissioner, to review the Minister's exercise of his discretion.
>
> The Commissioner's interpretation of the statutory scheme led him not to review the Minister's exercise of discretion under s. 14, in accordance with the review principles discussed above.
>
> Without pronouncing on the propriety of the Minister's decision, we would remit the s. 14 claim under the law enforcement exemption to the Commissioner for reconsideration. The absence of reasons and the failure of the Minister to order disclosure of any part of the voluminous documents

> sought at the very least raise concerns that should have been investigated by the Commissioner. We are satisfied that had the Commissioner conducted an appropriate review of the Minister's decision, he might well have reached a different conclusion as to whether the Minister's discretion under s. 14 was properly exercised.

[para 71] The Supreme Court of Canada confirmed the authority of the Information and Privacy Commissioner of Ontario to quash a decision not to disclose information pursuant to a discretionary exception and to return the matter for reconsideration by the head of a public body. The Court considered that the absence of reasons for a public body's decision raised concerns as to whether discretion had been properly exercised.

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

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

[para 73] In Order 96-017, the former Commissioner reviewed the law regarding the Commissioner's authority to review the head of a public body's exercise of discretion and concluded that section 72(2)(b), (then section 68(2)(b)), was the source of that authority. He commented on appropriate applications of discretion and described the evidence necessary to establish that discretion has been applied appropriately:

> A discretionary decision must be exercised for a reason rationally connected to the purpose for which it's granted. The court in *Rubin* stated that "Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act..."
>
> The court rejected the notion that if a record falls squarely within an exception to access, the applicant's right to disclosure becomes solely subject to the public body's discretion to disclose it. The court stated that such a conclusion fails to have regard to the objects and purposes of the legislation: (i) that government information should be available to the public, and (ii) that exceptions to the right of access should be limited and specific.
>
> In the court's view, the discretion given by the legislation to a public body is not unfettered, but must be exercised in a manner that conforms with the principles mentioned above. The court concluded that a public body exercises its discretion properly when its decision promotes the policy and objects of the legislation.
>
> The Information and Privacy Commissioners in both British Columbia and Ontario have also considered the issue of a public body's proper exercise of discretion, both in the context of the solicitor-client exception and otherwise. In British Columbia, the Commissioner has stated that the fundamental goal of the information and privacy legislation, which is to promote the

> accountability of public bodies to the public by creating a more open society, should be supported whenever possible, especially if the head is applying a discretionary exception (see Order No. 5-1994, [1994] B.C.I.P.C.D. No. 5)…
>
> …
>
> In Ontario Order 58, [1989] O.I.P.C. No. 22, the Commissioner stated that a head's exercise of discretion must be made in full appreciation of the facts of the case and upon proper application of the applicable principles of law. In Ontario Order P-344, [1992] O.I.P.C. No. 109, the Assistant Commissioner has further stated that a "blanket" approach to the application of an exception in all cases involving a particular type of record would represent an improper exercise of discretion.
>
> I have considered all the foregoing cases which discuss the limits on how a public body may exercise its discretion. In this case, I accept that a public body must consider the objects and purposes of the Act when exercising its discretion to refuse disclosure of information. It follows that a public body must provide evidence about what it considered.

[para 74] In that case, the Commissioner found that the Public Body had not made any representations or provided any evidence in relation to its exercise of discretion. Further, he determined that the head must consider the purpose of the exception in the context of the public interest in disclosing information when exercising discretion. As the head of the public body had not provided any explanation for withholding information, the Commissioner ordered the head to reconsider its exercise of discretion to withhold information under a discretionary exception.

[para 75] Similarly, in Order F2004-026, former Commissioner Work said:

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

[para 76] Once it is determined that a discretionary exception to disclosure applies, a public body must determine whether it will withhold the information or release it to the applicant. In making this decision, the public body will weigh any applicable public and private interests, including the purpose of the provision, in withholding or disclosing the information.

[para 77] The Commissioner will review the public body's reasons for exercising discretion to withhold information from an applicant. If the Commissioner determines that the public body failed to consider a relevant factor or took into consideration irrelevant factors, or did not provide adequate reasons for withholding information, the Commissioner will direct the public body to reconsider its exercise of discretion.

[para 78] The purpose of sections 24(1)(a) and (b) is to protect the processes by which a public body takes or gives advice – its decision-making processes – from interference. It is conceivable that the ability of a public body to take candid advice, or to implement its plans, would be harmed if advice or requests for advice were made public prematurely. Nevertheless, when the Legislature enacted section 24(1), it also enacted section 24(2), which establishes circumstances in which information otherwise meeting the requirements of section 24(1) must never be withheld. In other words, the Legislature did not consider the application of section 24(1) to be a complete bar to access.

[para 79] From my review of the Public Body's response to the Applicants and from its submissions, I am unable to say why the Public Body applied section 24(1) to withhold information. While I have found that section 24(1) applies to particular records, I am unable to say that the purpose of the FOIP Act is served by withholding information under this provision in all cases. Some of the information appears to be innocuous and it is unclear that it could lead to interference with the Public Body's decision making processes if it is disclosed. As I do not know the Public Body's reasons for withholding the information to which it applied section 24(1) from the Applicants, and the severed information does not necessarily support finding that the Public Body's internal decision making process would be affected by disclosure, I must require the Public Body to exercise its discretion again with regard to the information I have found is subject to section 24(1).

Issue D: Did the Public Body properly apply section 27(1) of the Act (privileged information) to the information in the records?

[para 80] The Public Body withheld records under section 27(1)(a), (b), and (c). The Public Body did not provide the records for my review. It explains its decision to apply sections 27(1)(b) and (c) to the records to which it applied section 27(1)(a), stating:

> In addition to section 27(1)(a), the Public Body relies on section 27(1)(b) and (c) to withhold a number of additional records. Where section 27(1)(b) has been applied, litigation privilege has been claimed as well. Where section 27(1)(c) has been applied, solicitor-client privilege has been claimed as well as such records relate to the continuum of information and correspondence necessary to provide legal advice. As a result, these records are addressed by way of the Public]Body's in-camera affidavit.
>
> Section 27(1)(b) provides that the head of a public body may refuse to disclose to an applicant information prepared by an agent or lawyer of a public body in relation to a matter involving the provision of legal services. Section 27(1)(b) applies to substantive information prepared by or on behalf of a lawyer so that the lawyer may provide legal services.
>
> Section 27(1)(c) provides that the head of a public body may refuse to disclose to an applicant information in correspondence between an agent or lawyer of a public body and any other person in relation to a matter involving the provision of advice or other services by the lawyer.

[para 81] In *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII), [2016] 2 SCR 555 the Supreme Court of Canada quashed a notice to produce issued by this office for records to which the University of Calgary had applied section 27(1)(a), as it determined that the Commissioner lacks the

power to review records in the custody or control of a public body when the public body claims solicitor-client privilege over them. The Court held that the Commissioner has the power under section 56 to demand records subject to privileges of the law of evidence, but not records over which a public body claims solicitor-client privilege. The Court reasoned that the phrase "privilege of the law of evidence" was not sufficiently clear to enable the Court to interpret the phrase as encompassing solicitor-client privilege, given the "importance" the Court assigned this privilege:

> Solicitor-client privilege is clearly a "legal privilege" under s. 27(1), but not clearly a "privilege of the law of evidence" under s. 56(3). As discussed, the expression "privilege of the law of evidence" is not sufficiently precise to capture the broader substantive importance of solicitor-client privilege. Therefore, the head of a public body may refuse to disclose such information pursuant to s. 27(1), and the Commissioner cannot compel its disclosure for review under s. 56(3). This simply means that the Commissioner will not be able to review documents over which solicitor-client privilege is claimed. This result is consistent with the nature of solicitor-client privilege as a highly protected privilege.

[para 82] As a consequence of the Supreme Court of Canada's decision, the Commissioner must issue orders in relation to the application of solicitor-client privilege to government records without the evidence the records would otherwise provide.

[para 83] Historically, "litigation privilege' was considered to be included in the term "solicitor-client privilege". For this reason, the Commissioner does not review records over which litigation privilege is claimed.

[para 84] The Public Body has also applied sections 27(1)(b) and (c) to records over which it has claimed section 27(1)(a). I am unable to confirm the Public Body's decisions regarding sections 27(1)(b) or (c) as it has refused to provide the records for my review. The Court's decision that the Commissioner may not review records applies only to solicitor-client privilege, and by implication, litigation privilege. It does not apply to a public body's application of sections 27(1)(b) and (c). Section 27(1)(a), which permits public bodies to withhold records on the basis of privilege, is the provision to be applied when solicitor-client privilege or litigation privilege is claimed. As I have not been provided the records to which the Public Body applied sections 27(1)(b) and (c), I am unable to find that the Public Body is authorized to withhold them under these exceptions.

[para 85] With regard to the Public Body's application of section 27(1)(a), I accept from its description of the records that the records are likely to be privileged. The records indicate that issues had been raised that would give rise to a need to obtain legal advice to create records in contemplation of litigation. I accept that the Public Body sought legal advice. When solicitor-client or litigation privilege is claimed, the Supreme Court has determined that exercise of discretion need not be reviewed because of the strength of the public interest protected by solicitor-client privilege. (See *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23 (CanLII), [2010] 1 SCR 815 at paragraph 75.)

[para 86] For the foregoing reasons, I find that the Public Body is authorized to withhold information under section 27(1)(a), but not sections 27(1)(b) or (c).

IV. ORDER

[para 87] I make this Order under section 72 of the Act.

[para 88] I find that the Public Body is required by section 17(1) of the FOIP Act to withhold the information to which it applied this provision, with the exception of records 104 and 511. I order the Public Body to give the Applicants access to the information I found was not subject to section 17(1) in records 104 and 511.

[para 89] I have found that section 24(1) does not apply to information in records 6, 700[1], 789, 914, 917, 920, 926 – 931, 1629 – 1631, 3118 – 3124 (also numbered as records 739 – 745 of 904 and as records 821 – 827). I order the Public Body to give the Applicants access to the information severed from the foregoing records under section 24(1) that I have found is not subject to section 24(1).

[para 90] I find that section 24(1) applies to information in records 700, 735, 736, 781, and 2371. I order the Public Body to reconsider its decisions to withhold this information from the Applicants.

[para 91] The Public Body is authorized to withhold the information severed from records 757 and 825 under section 27(1)(a), despite applying section 24(1).

[para 92] By application of the *University of Calgary* decision, *supra*, the Public Body is authorized to withhold the records over which it claimed solicitor-client privilege.

[para 93] I order the Public Body to inform me within 50 days of receiving this order that it has complied with it.

Teresa Cunningham
Adjudicator
/kh

[1] I found above that one email on record 700 is subject to section 24(1) while the other is not.