ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

DECISION F2024-D-01

May 21, 2024

UNIVERSITY OF CALGARY

Case File Number 018793

Office URL: www.oipc.ab.ca

Summary: The Public Body requested that the adjudicator recuse herself on the basis that it had a reasonable apprehension of bias regarding the adjudicator. The Public Body pointed to the fact that in Order F2023-45 the adjudicator did not follow a precedent the Public Body argued she should have followed, and because the adjudicator changed the order of submissions, which the Public Body considered to reverse the burden of proof in the inquiry. The Public Body also pointed to the fact that it had applied for judicial review of Order F2023-45.

The Adjudicator determined that the Public Body had not established that it had been denied procedural fairness or that it had a reasonable apprehension of bias. The Adjudicator determined that the inquiry would proceed on the issues of whether section 4(1)(b) applies.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act,* R.S.A. 2000, c. F-25, s. 56, 71

Authorities Cited: AB: Order F2010-016, F2023-45 **ON:** PO-2899-R

Cases Cited: *Lavesta Area Group Inc. v. Alberta (Energy and Utilities Board)*, 2011 ABCA 108; *Lavesta Area Group Inc. v Alberta (Energy and Utilities Board)*, 2012 ABCA 84 (CanLII); *Summerside v. Maritime Electric et al*., 2015 PECA 1 (CanLII); *Commission scolaire de Laval v.*

Syndicat de l'enseignement de la région de Laval, 2016 SCC 8, [2016] 1 S.C.R. 29; *Agrium Vanscoy Potash Operations v United Steel Workers Local 7552*, 2014 SKCA 79 (CanLII); *Big Loop Cattle Co. Ltd. v. Alberta (Energy Resources Conservation Board)*, 2009 ABCA 302

I. BACKGROUND

[para 1] The Applicant made a request for access under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) to the University of Calgary (the Public Body) regarding a complaint she had made. She requested:

> 1) the final investigation report into the conduct of [a professor]; and 2) records related to corrective action taken.

[para 2] The Public Body decided to break the access request into two parts: the first for the final investigation report and the second for records relating to corrective action.

[para 3] The Public Body refused access to the final investigation report on the basis that the FOIP Act did not apply to it through application of section 4(1)(b) of the FOIP Act.

[para 4] The Applicant requested review by the Commissioner of the Public Body's decision to refuse access to the final investigation report. The Commissioner assigned case file number 018793 to the file and delegated her authority to conduct the inquiry to me.

[para 5] The Applicant requested an extension to the deadline for making initial submissions. I determined that the Public Body should make its submissions first. I said:

> The Applicant has raised various objections to the December 14, 2023 deadline for making her initial submissions and to the process for requesting an extension. I have decided that I do not need to address these objections as I do not need to hear from the Applicant at this point in the inquiry.
> Section 4(1)(b) of the *Freedom of Information and Protection of Privacy Act* is a provision intended to protect deliberative secrecy of judicial and quasi-judicial decision makers. The Public Body has applied section 4(1)(b) to what appears to be a report of an investigation regarding a complaint of employee misconduct. Before the Applicant is required to make submissions for the inquiry, it will be necessary for the Public Body to establish that the investigation report is one that falls within the terms of section 4(1)(b) – that is, that the report is a "personal note, communication or draft decision created by or for a person who is acting in a judicial or quasi judicial capacity including any authority designated by the Lieutenant Governor in Council to which the *Administrative Procedures and Jurisdiction Act* applies".
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> In *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8 (CanLII), [2016] 1 SCR 29, the Supreme Court of Canada determined that decisions made by an employer regarding an employee's employment under a contract or collective agreement are private and not quasi-judicial decisions.
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> The Public Body's decision to apply section 4(1)(b) to the records at issue relies on the notion that the report at issue is a communication by a quasi-judicial decision maker; however, the function of the report writer does not appear to be adjudicative or "quasi-judicial". It is also unclear that the report can be construed as a "personal note, communication, or draft decision" within the terms of section 4(1)(b). For this reason, I have decided that the Public Body must present its case that section 4(1)(b) applies before I need to hear from the Applicant.
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> The Public Body's submissions continue to be due on **January 18, 2024**.

[para 6] The Public Body then requested that I recuse myself on the basis that it had a reasonable apprehension of bias.

[para 7] I determined that the Public Body's application should be decided prior to deciding the issues for inquiry. Both the Public Body and the Applicant made submissions regarding the issue of bias.

II. ISSUE: Has the Public Body established it has a reasonable apprehension of bias in the inquiry?

[para 8] In *Lavesta Area Group Inc. v. Alberta (Energy and Utilities Board)*, 2011 ABCA 108 (CanLII), Rowbotham J.A. in deciding to grant leave to appeal, said the following at paragraphs 16 – 17 regarding establishing a reasonable apprehension of bias:

> A reasonable apprehension of bias captures the requirement that justice be seen to be done: *Wewaykum Indian Band v Canada*, 2003 SCC 45 at para 67, [2003] 2 SCR 259. The question is whether a reasonable, informed, person viewing the matter realistically and practically and having thought the matter through, would think it was possible that, consciously or unconsciously, the adjudicator would decide unfairly: *Committee for Justice and Liberty v National Energy Board* (1976), [1978] 1 SCR 369 at 394*,* 1976 CanLII 2; *RDS* at para 11. Put another way, the test for reasonable apprehension of bias is "whether a reasonable and right-minded person, with full knowledge of the facts, would have a reasonable apprehension that the [adjudicator] was biased in relation to this case?": *R v LaFramboise*, 1997 ABCA 172 (CanLII), 200 AR 75 at para 10, 34 WCB (2d) 501.
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> Included in the analysis of reasonable apprehension of bias is the presumption of impartiality. The applicant must rebut this and as the respondents correctly point out, mere suspicion of bias is insufficient: *Boardwalk REIT LLP v Edmonton (City)*, 2008 ABCA 176 at para 29, 437 AR 199; *Lavesta Area Group v Alberta (Energy and Utilities Board)*, 2009 ABCA 155. The respondents point to the several reasons which the Commission gave for concluding that there was no reasonable apprehension of bias. The Commission's decision of course hinged in part on its conclusion that there had been no contravention of the guidelines. In this case, McGee was involved in hearing panels related to the transmission line during the proceedings which resulted in the EUB's conduct considered in Decision 2007-075. I am persuaded that the applicant has raised a *prima facie* meritorious ground of appeal. The issue of whether this raises a reasonable apprehension of bias is of significance to this action, and to the practice.

[para 9] In *Lavesta Area Group Inc. v Alberta (Energy and Utilities Board)*, 2012 ABCA 84 (CanLII) the Court of Appeal determined that a finding of bias may require evidence of a "closed mind".

> In determining if there is a reasonable apprehension of bias, it is relevant to note the alleged source of bias. Here it does not relate in any way to the personal conduct of Mr. McGee. He was not on the panel conducting the failed facility hearing that was sitting contemporaneously with the activities of the private security consultant, nor is it shown that he had any involvement in those activities. There is no evidence on this record that he has a closed mind, and that he is not able to fairly consider the matters before him. It is not suggested that there is any animosity between him and the participants in the hearing, nor is there any suggestion of pre-judging. His disqualification must depend on an absolute rule that anybody associated with the prior hearings will be reasonably apprehended to be biased. That is contrary to *Wewaykum Indian Band.*

[para 10] From the foregoing cases I understand that there is a presumption that a decision maker is impartial. To establish bias, an applicant claiming a reasonable apprehension of bias must rebut this presumption, and establish that a reasonable, informed person, viewing the matter realistically and practically, and having thought the matter through, would think it possible that consciously, or unconsciously, the adjudicator would decide unfairly or with a closed mind.

[para 11] The Public Body argues:

> This inquiry raises the same legal issue as was decided by the same Adjudicator with regard to the same party, the University, in Order F2023-45. This suggests that Adjudicator Cunningham may have predetermined the issue given her familiarity with the factual underpinnings at issue. This could lead a reasonable observer to conclude that the University faces a higher burden than it otherwise would face.
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> On December 6, 2023, Adjudicator Cunningham issued Order F2023-45. That Order concerned an applicant's request under the Act to access a report communicated from a University Investigation Committee to the Protected Disclosure Advisor. The main issue in that Order involved the application of section 4(1)(b) of the Act.
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> Section 4(1)(b) exempts from the Act "a personal note, communication or draft decision created by or for a person who is acting in a judicial or quasi-judicial capacity". In that Order, Adjudicator Cunningham decided that section 4(1)(b) did not apply to the report because it was not a "communication" and that the Investigation Committee was not a "quasi-judicial decision maker". As such, she held that the report was subject to the Act.
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> In making her determination in Order F2023-45, Adjudicator Cunningham departed from past precedent of the Office of the Information and Privacy Commissioner. In Order F2010-016, the Adjudicator held that "communication" in section 4(1)(b) was to be interpreted in line with the definition of "communication" used in *Black's Law Dictionary*. Adjudicator Cunningham, in Order F2023-45, declined to follow this approach but did not explain why she was departing from this past precedent.
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> The questions at issue in this inquiry are nearly identical to those that were at issue in Order F2023-45. The University anticipates arguing, as it did previously, that the Adjudicator ought to follow the past precedent of the Office of the Information and Privacy Commissioner and hold that some of the records at issue are communications within the meaning of section 4(1)(b) of the Act. While the law is clear that decision-makers are permitted to hear new disputes with the same legal issues or the same parties, the question remains whether there is a risk of bias in this particular factual scenario.
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> A similar issue sometimes arises where courts remit matters back to the same administrative decision-maker. There is a risk of a reasonable apprehension of bias because the same decision-maker will be deciding the same issue. While it is not impermissible in every situation, courts have sometimes expressed concern where the same adjudicator may be deciding the same issue. For example, in *Agrium Vanscoy Potash Operations v United Steel Workers Local 7552*, the chambers judge remitted a matter to an arbitrator, having previously held that the arbitrator erred by granting a remedy early. One issue was whether the arbitrator's rehearing of the case would raise a reasonable apprehension of bias. The Court of Appeal noted that, generally, the same decision-maker may reconsider its earlier decision if remitted to it. A key fact in the Court of Appeal's decision to remit the matter to the same arbitrator was that the arbitrator would "not be in the position of deciding an issue on which she has already pronounced an opinion". Primarily for this reason, the Court held that remitting the matter to the same arbitrator did not raise a reasonable apprehension of bias.
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> That is not the case in this inquiry. If Adjudicator Cunningham continues to preside over this inquiry, she will be tasked with pronouncing an opinion on the same issue with the same party as she pronounced in Order F2023-45 a short time ago.

[para 12] The Applicant takes the position that the Public Body has not demonstrated that it has a reasonable apprehension of bias. The Applicant states:

> The University's pursuit of judicial review of Order F2023-45 is not relevant to determining the alleged reasonable apprehension of bias against Adjudicator Cunningham. Adjudicator Cunningham's departure from past precedent in Order F2023-45 is permissible and does not constitute a reasonable apprehension of bias. This departure reflects the evolution of the common law and administrative tribunal decisions. The alleged errors outlined in the University's Originating Application for Judicial Review of Order F2023-45 (the "Judicial Review") have not been proven in court, and the Judicial Review does not claim that Adjudicator Cunningham was biased in her decision. The University has not provided any legal authority demonstrating how a pending judicial review establishes that Adjudicator Cunningham is approaching the Inquiry with a closed mind.
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> […]
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> The University's claim that Adjudicator Cunningham's reversal of the submission order suggests a reasonable apprehension of bias is not supported by facts. The reversal of submissions was done—at least in part—in response to the Applicant's request for additional time to provide her submissions.
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> The request for an extension stemmed from the Applicant's disability. The University is aware that the Applicant had requested accommodation as she copied the University on her communications to Adjudicator Cunningham asking for same on December 3, 2023. It is reasonable to assume that the Applicant's request for accommodation is what prompted Adjudicator Cunningham to review the submission schedule, not a predisposition toward either party's position.
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> In undertaking her review of the submission schedule at the Applicant's request, Adjudicator Cunningham decided to amend the submission schedule and reverse the typical order. We disagree with the University that "it is unclear why this procedure was reversed." The Adjudicator explained her reasoning for reversing the typical order and provided the authority that permits her to do so in a letter to the parties dated December 11, 2023. A reasonable observer could not conclude that bias informed the Adjudicator's decision to reverse the typical order, as a sound reason for the reversal was provided. Before the Applicant can respond, it is logical that the University must first establish how the Report falls within the terms of section 4(1)(b) of the FOIP Act, which they are relying on, and how the Report writer functioned as a quasi-judicial decision maker.
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> Due to the Inquiry being de novo, there is no obligation for the University to advance the arguments they relied on at mediation. As the burden of proof lies with the University, requiring their submission first avoids the Applicant having to speculatively address the position the University may take in establishing how section 4(1)(b) of the FOIP Act applies to the Report. Further, given that both parties are provided an opportunity to submit rebuttal submission, each party will have a fair chance to address all of the arguments raised

[para 13] The Public Body asserts that I changed the submission schedule without reasons. It also contends that doing so changes the burden of proof. It argues that not providing reasons and changing the burden of proof give rise to a reasonable apprehension of bias on my part. The Public Body further argues that the fact that I did not follow Order F2010-016 in Order F2023-45 is further evidence of bias on my part. The Public Body asserts that this departure from precedent was done without providing reasons for the departure. As Order F2023-45 deals with the interpretation of section 4(1)(b) the Public Body is concerned that I may have prejudged the matter and will not decide the inquiry fairly.

[para 14] I will address each of these concerns in turn.

Did the reversal of the submission schedule "shift the burden of proof"?

[para 15] The Public Body takes the position that I have changed the burden of proof to its detriment. As cited, in my letter, I noted:

> The Public Body's decision to apply section 4(1)(b) to the records at issue relies on the notion that the report at issue is a communication by a quasi-judicial decision maker; however, the function of the report writer does not appear to be adjudicative or "quasi-judicial". It is also unclear that the report can be construed as a "personal note, communication, or draft decision" within the terms of section 4(1)(b). For this reason, I have decided that the Public Body must present its case that section 4(1)(b) applies before I need to hear from the Applicant.

The burden of proof is not tied to the order of submissions and changing the order of submissions does not change the burden of proof, although it may permit the parties to make their cases more efficiently. The Applicant does not have a burden of proof in the inquiry until the Public Body establishes that section 4(1)(b) probably applies. That is so whether the Applicant makes her submissions first, or the Public Body does. The Public Body has exerted authority to deny the Applicant access to records based on its view that the records are not subject to the FOIP Act. The Public Body is also familiar with the contents of the records and the terms under which they were created, while the Applicant is not. Only the Public Body can speak to its decision to exercise authority to deny the Applicant the right of access with reference to the records at issue.

[para 16] Section 71 of the FOIP Act sets out the burden of proof in an inquiry. It states:

> *71(1) If the inquiry relates to a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part of the record.*
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> *(2) Despite subsection (1), if the record or part of the record that the applicant is refused access to contains personal information about a third party, 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.*
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> *(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,*
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> *(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*
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> *(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 17] Section 71(1) of the FOIP Act establishes that a public body has the burden of proving that an applicant has no right of access to records. The Public Body has always had the burden of proving that section 4(1)(b) applies to the records it withheld and my changing the sequence of records does not change that fact. Rather, the change reflects the burden the Public Body has always had.

[para 18] I note, too, that changing the submission schedule was not found to be evidence of bias in Order PO-2899-R, a decision of an adjudicator of the Ontario Information and Privacy Commissioner. In that case, the adjudicator found that a Ministry had not been denied procedural fairness by not being given the opportunity to provide a rebuttal. The adjudicator held:

> In *Baker v. Canada (Minister of Citizenship and Immigration*, 1999 CanLII 699 (SCC), [1999] S.C.J. No. 39, the Supreme Court of Canada held that the duty of fairness will vary according to the circumstances, but that those affected by a decision should be afforded the opportunity to put forward their views and their evidence fully. Justice L'Heureux-Dubé stated in the *Baker* case that:
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> > …the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances: Brown and Evans, supra, at pp. 7-66 to 7-70. While this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints: *IWA v. Consolidated-Bathurst Packaging Ltd*., 1990 CanLII 132 (S.C.C.), [1990] 1 S.C.R. 282, per Gonthier J.
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> In *Forest Industrial Relations Ltd. v. I.U.O.E., Local 882*, [1961] S.C.J. No. 65, the Supreme Court of Canada held that the duty of fairness is not violated if a decision maker, having heard all the evidence, decides that a debate has gone on long enough and denies a party the right to reply to a reply [see also *Canada Post Corporation v. Canadian Union of Postal Workers*, 2007 BCSC 1702].
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> I find that the Ministry was afforded the opportunity to put forward its views and evidence fully in this appeal. Therefore, I find that the Ministry was not entitled to provide representations in reply to the appellant's representations and I dismiss this ground for reconsideration.

[para 19] In the foregoing case, the Adjudicator determined that procedural fairness required a Ministry to be afforded the opportunity to put forward its views and evidence fully, but did not require more than that.

[para 20] As the Applicant notes, I provided reasons in my letter for changing the order of submissions. These reasons express the fact that the Public Body has the burden of proof and that it should go first for that reason.

[para 21] I am unable to agree with the Public Body that my decision to alter the submission schedule also altered the burden of proof or resulted in unfairness to it. The burden of proof remains the Public Body's. Had it required more time to make its submissions, there is a process for requesting more time if it is reasonably required. I find that this ground does not establish a reasonable apprehension of bias.

Does my decision not to follow Order F2010-016 in Order F2023-45 give rise to a reasonable apprehension of bias?

[para 22] In Order F2023-45 I determined that a final report was not subject to section 4(1)(b) of the FOIP Act. In that Order I said, in part:

The Public Body's position is that even though the Final Report is a final decision and not a draft decision, it is a "communication". The Public Body relies on Order F2010-016, in which an adjudicator found that a four page final report disposing of a complaint was a "communication" within the terms of section 4(1)(b), with the result that the applicant could not request the report under the FOIP Act.

The Adjudicator said:

> After a review of the submissions before me, I find that this first requirement under section 4(1)(b) is fulfilled. I find that the record at issue consists of a "communication" from the Committee to the Provost. In coming to this conclusion, I accepted the Public Body's definition of "communication" as found in Black's Law Dictionary. Black's Law Dictionary defines a "communication" as "the expression or exchange of information by speech, writing, or gestures". I find that the record fulfills this definition. I find that the record consists of an expression or exchange of information from the Committee that was communicated in writing to the Provost.

The Adjudicator did not explain why she found the definition provided by *Black's Law Dictionary* to be determinative of the meaning of "communications" where it appears in section 4(1)(b) of the FOIP Act.

I agree that a "communication" is ordinarily understood to be "the expression or exchange of information by speech, writing, or gestures". The question is whether the context in which the Legislature placed the word "communication" permits such a broad interpretation.

Section 4(1)(b) applies to the "personal note, communication, or draft decision written by, or on behalf of, a person acting in a judicial or quasi-judicial capacity. The inclusion of the word "personal" to modify "note" indicates that only personal notes by or for persons acting in a judicial or quasi-judicial capacity are to be included. That is, only notes created for the personal use of the decision maker are included, but not other kinds of notes.

The use of the word "draft" to modify the word "decision" indicates that the only types of decisions contemplated are drafts, rather than final decisions.

If the word "communication" is interpreted in the broad manner accepted by the adjudicator in Order F2010-016, the restriction of "notes" to "personal notes," and the restriction of "decisions" to "draft decisions", would serve little purpose, as notes and decisions that have been communicated would be included by virtue of the word "communication", despite the note not being personal or the decision not being a draft. In my view, the specific reference to "draft decision" in section 4(1)(b) is intended to exclude a final decision from the ambit of the section and the word "communication" should not be interpreted so as to nullify this legislative choice.

[…]

As it has been presented to me, the Policy is binding on the Public Body through an agreement, rather than legislation. As discussed in *Commission Scolaire de Laval*, (*supra*) when the power to decide a matter comes from a contract or collective agreement, the matter is private and is not public for that reason.

I note, too, that some of the procedures followed by the Public Body do not support finding that the decision was intended to be quasi-judicial. While this point is not determinative, as a tribunal may be quasi-judicial but fail to follow quasi-judicial processes, it is also true that decision makers that are not intended to act quasi-judicially may follow procedures that are not judicial or quasi-judicial.

The hearing in question was conducted in private and was not open to the public. The complainant's counsel was not permitted to make submissions on the complainant's behalf. Only the respondent was provided a copy of the Final Report containing the decision and the reasons for it. The panel deciding the matter was not limited to accepting the evidence of the parties, but obtained its own evidence without notice to the parties and based its decision, in part, on that evidence (lines 358 – 363 of the Final Report).

> The Legislature has not spoken to the subject matter of the Final Report or the processes the Public Body is required to follow when making decisions. The panel that authored the Final Report conducted the hearing as would an inquisitorial decision maker. The hearing was held in private and not subject to the "open Court principle". The panel's view of its role does not accord with a quasi-judicial decision (lines 284 – 286 of the Final Report). The foregoing are all indicia that the Final Report is not a report of a person acting in a quasi-judicial capacity.
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> Conclusion
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> On the evidence and submissions before me, I cannot conclude that the panel that authored the Final Report was a quasi-judicial decision maker. For all the reasons above, I find that the Final Report does not fall within the terms of section 4(1)(b). As a result, I find that the Final Report is subject to the FOIP Act and the Applicant has a right to make an access request for this report under section 7 of the FOIP Act. I will therefore direct the Public Body to include the Final Report in its response to the Applicant as the Final Report is subject to the FOIP Act.

[para 23] The Public Body asserts that I failed to provide reasons in Order F2023-45. It is unclear why the Public Body asserts that I did not provide reasons or that any lack of reasons resulted in unfairness. Order F2023-45 contains reasons. Even if it did not, it is not clear that this claimed failure to provide reasons necessarily results in a failure to meet any duty of fairness owed to the Public Body.

[para 24] In *Baker v. Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC), [1999] 2 SCR 817 the Supreme Court of Canada said the following regarding the duty of fairness:

> Both parties agree that a duty of procedural fairness applies to H & C decisions. The fact that a decision is administrative and affects "the rights, privileges or interests of an individual" is sufficient to trigger the application of the duty of fairness: Cardinal v. Director of Kent Institution, 1985 CanLII 23 (SCC), [1985] 2 S.C.R. 643, at p. 653. Clearly, the determination of whether an applicant will be exempted from the requirements of the Act falls within this category, and it has been long recognized that the duty of fairness applies to H & C decisions: Sobrie v. Canada (Minister of Employment and Immigration) (1987), 3 Imm. L.R. (2d) 81 (F.C.T.D.), at p. 88; Said v. Canada (Minister of Employment and Immigration) (1992), 1992 CanLII 14729 (FC), 6 Admin. L.R. (2d) 23 (F.C.T.D.); Shah v. Minister of Employment and Immigration (1994), 170 N.R. 238 (F.C.A.).

[para 25] In *Summerside v. Maritime Electric et al*., 2015 PECA 1 (CanLII) the Prince Edward Island Court of Appeal reviewed decisions on procedural fairness and provided a helpful summary:

> Procedural fairness is a common law concept. A breach of procedural fairness is an error of law. Consideration of procedural fairness does not require an assessment of the appropriate standard of review. As a general statement, in the exercise of public powers administrative decision makers should act fairly in coming to decisions that affect the interests of individuals (*Dunsmuir*, at para.98). Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation (*Moreau-Bérubé v. New Brunswick (Judicial Council)*, 2002 SCC 11, at para.74). In the context of Summerside's application for a permit, fairness requires that a party who will be affected by a decision have an opportunity to make representations. To do that, the party must first be informed of the case to be met; otherwise the right to be heard cannot be effectively exercised. A tribunal decision should not turn on a matter on which a party made no representations because the party was not aware that matter was in issue (Blake, Sara: *Administrative Law in Canada* - Fifth Edition, (LexisNexis 2011), pp.36-37).

[para 26] Procedural fairness requires that an individual whose "rights, privileges or interests" are affected by a decision know the case to be met and be given the opportunity to meet it. Assuming the same holds true for the Public Body, in this inquiry to date, I have provided notice of the issues to the Public Body as well as specific questions regarding its application of section 4(1)(b). I have referred the Public Body to a case, *Commission scolaire de Laval v. Syndicat de l'enseignement de la région de Laval,* 2016 SCC 8, [2016] 1 S.C.R. 29, decided after Order F2010-016, in which the Supreme Court of Canada held that a decision of an employer regarding an employee's employment was not a quasi-judicial decision. Providing the Public Body with notice of the issues for inquiry and of decisions that appear to be adverse to its position provides the Public Body with notice of the issues and gives it the opportunity to make representations regarding them. The Public Body is free to distinguish *Commission scolaire de Laval* in its submissions for the inquiry. The actions on my part that the Public Body claims are unfair are the same actions I have taken in order to ensure it has the opportunity to know the case to be met and to make representations regarding it.

[para 27] If the Public Body's argument is that it is unfair in some way for me not to follow Order F2010-016, despite a recent Supreme Court of Canada decision that appears to contradict the adjudicator's conclusions as to quasi-judicial decisions, the Public Body has not supported this argument with case law establishing the existence of any such legal principle. Moreover, if I were to follow precedents without consideration of whether they reflect the law, or whether there have been changes in the law, including clarification by the Court, I would be open to complaints of bias from parties other than the Public Body and my decisions would be potentially subject to judicial review.

Does deciding a similar matter involving the same party give rise to a reasonable apprehension of bias?

[para 28] The Public Body asserts:

> That is not the case in this inquiry. If Adjudicator Cunningham continues to preside over this inquiry, she will be tasked with pronouncing an opinion on the same issue with the same party as she pronounced in Order F2023-45 a short time ago.

[para 29] The Public Body pointed to *Agrium Vanscoy Potash Operations v United Steel Workers Local 7552*, 2014 SKCA 79 (CanLII), a case in which the Saskatchewan Court of Appeal considered whether it was appropriate to *remit* a matter to the original decision maker. While the Court's discussion of bias in that case is helpful, the case is not on point, as it is discussing the situation where a decision maker has already made a binding decision in the same matter and the Court is considering whether to remit an issue to the decision maker who made it. The foregoing case does not suggest that a decision maker is biased by virtue of making a decision on an unrelated matter. I have not issued an order under section 72 of the FOIP Act disposing of the issues in inquiry case file #018793. Moreover, it is not clear that there is any similarity between inquiry case file #018793 and Order F2023-45, other than that the Public Body refused access to records through application of section 4(1)(b) of the FOIP Act.

[para 30] The Public Body also argues:

> Adjudicator Cunningham has previous knowledge of the University's position on this issue and the factual makeup of a similar circumstance from her involvement in Order F2023-45. This, along with the other factors, suggest there may be a reasonable apprehension of bias.

[para 31] From the foregoing, I understand that the Public Body intends to make the same arguments in made in Order F2023-45. It is free to do so. As the records in this case are not the same, it is also free to make different arguments. I am uncertain as to what the Public Body will argue as it has not yet made submissions regarding the issues the Commissioner sent to inquiry. It is unclear why the Public Body believes knowledge of its position in a previous inquiry would result in unfairness to it in another inquiry. Assuming I recused myself, another adjudicator searching for relevant cases on section 4(1)(b) of the FOIP Act would find Order F2023-45 and become familiar with the Public Body's position in that case.

[para 32] The Public Body has provided no authority to support its contention that finding against a party in a previous inquiry gives rise to a reasonable apprehension of bias. As the presumption that I am not biased has not been rebutted, I have decided that I will continue to conduct the inquiry.

III. DECISION

[para 33] The Public Body has not established that it was denied procedural fairness or that it has a reasonable apprehension of bias. The inquiry will proceed.

[para 34] In *Big Loop Cattle Co. Ltd. v. Alberta (Energy Resources Conservation Board)*, 2009 ABCA 302, Paperny J.A. denied leave to appeal a tribunal's decision regarding bias. She said:

> The applicants seek leave to appeal an interim decision of the Energy Resources Conservation Board (the "Board") dated March 16, 2009 wherein the Board concluded that the hearing of the Sullivan Field Proceeding should continue. The Sullivan Field Proceeding concerns Petro-Canada's application to drill sour gas wells, construct a multi-well gas battery facility, and construct and operate two pipelines near Longview, Alberta. The proceeding has been controversial, lengthy and complex. There have been 21 hearing days to date.
>
> The proceeding stood adjourned in February 2009 when a concern arose about a potential reasonable apprehension of bias after a Board technical employee declared a personal relationship with a Petro-Canada employee. The proceeding was suspended pending an investigation by the Board.
>
> […]
>
> The Sullivan Field Proceeding was commenced by Petro-Canada more than two years ago. The applicants are one of a number of groups of interveners. When the bias decision was made in March 2009, the Board had several outstanding matters before it and final argument on the merits of the application had not yet begun. The decision was that the proceeding would continue, in other words, the panel would decide the outstanding matters before it, hear final argument and ultimately make its decision on the merits of Petro-Canada's applications to drill wells and construct facilities in the Longview area. Those matters remain outstanding.
>
> In my view, this leave application is premature. This Court has regularly denied leave to appeal interim decisions of the Board and its predecessors (See *BP Canada Energy Company v. Alberta (Energy and*

> *Utilities Board)*, 2004 ABCA 75, 30 Alta. L.R.(4th) 248, and *Devon Canada Corp. v. Alberta (Energy & Utilities Board)*, 2003 ABCA 167, 3 Admin. L.R. (4th) 154). The reasons for this are several. First, the legislation does not specifically grant jurisdiction to instruct the Board prior to or midway through its processes. Moreover, this Court does not encourage litigation by installments. In most circumstances it is preferable, indeed highly desirable, that the Board complete its process and render its determination on the merits prior to review by this Court. This approach promotes appropriate use of scarce judicial and legal resources, timeliness, and a full and comprehensive disposition of the issues between the parties by the Board before an appeal is warranted.
>
> Having so determined, it is equally premature for this Court to opine on the merits of the proposed leave application on these grounds. Leave is denied pending the rendering of a final decision by the Board. This application is dismissed without prejudice to the applicants to renew it once that decision has been rendered.

The foregoing case deals with a statutory appeal; however, it sets out the procedure to be followed when bias is alleged under a statutory scheme. As in the foregoing case, the FOIP Act does not contemplate direction by the Court prior to the issuance of the final order. A decision regarding bias is an interim decision. Having decided that the Public Body has not been denied procedural fairness and has not demonstrated that it has a reasonable apprehension of bias, the inquiry will continue and I will continue to be the Adjudicator.

[para 35] The new schedule for submissions will be distributed in due course.

_____

Teresa Cunningham
Adjudicator
/bah