ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2024-17

May 31, 2024

OFFICE OF THE PREMIER/ALBERTA EXECUTIVE COUNCIL

Case File Number 025398

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Summary: An Applicant made a request to Alberta Executive Council (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for all records related to Benga Mining or the Grassy Mountain Coal Project.

The Public Body responded to the Applicant, informing it that it located 613 pages of responsive records. The Public Body provided 17 pages with some information withheld, and withheld the remaining records in their entirety citing sections 6(4), 21, 22, 24, 25, and 29 of the Act.

The Applicant requested an inquiry into the Public Body's response.

The Adjudicator determined that section 6(4) applied to a briefing binder, but ordered the Public Body to review the binder to determine whether any responsive record is likely to exist elsewhere.

The Adjudicator found that sections 21(1) and 25(1) did not apply to the information withheld under that provision.

The Adjudicator found that sections 22(1) and 24(1) applied to some but not all of the information withheld under those provisions.

The Adjudicator found that the Public Body did not properly apply section 29(1) to the information in the records.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss.1, 6, 21, 22, 24, 25, 29, 71, 72

Authorities Cited: AB: Decision F2014-D-01, Orders 96-012, 97-010, F2004-026, F2007-013, F2008-028, F2009-025, F2010-036, F2013-13, F2015-29, F2018-45, F2018-75, F2020-22, F2021-28, F2022-20, F2023-38, **Ont**: Orders P-123, P-191, P-327, PO-4286

Cases Cited: Alberta Energy v. Alberta (Information and Privacy Commissioner), 2024 ABKB 198, *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (CanLII), *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2024 SCC 4, *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII), *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23 (CanLII)

I. BACKGROUND

[para 1] Northback Holdings Corporation (the Applicant), made an access request to Alberta Executive Council (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) for the following:

> *All Executive Council of Alberta, including the Office of the Premier of Alberta, Office of the Deputy Minister of the Executive Council, Cabinet Coordination and Ministry Services, the Policy Coordination Office and Intergovernmental Relations ("Cabinet") records related to Benga Mining or the Grassy Mountain Coal Project from May 15, 2020 to present.*
> *Date Range: May 15, 2020 to July 28, 2021.*

[para 2] The Public Body responded to the Applicant, informing them that it located 613 pages of responsive records. The Public Body provided 17 pages with some information withheld, and withheld the remaining records in their entirety citing sections 6(4), 21, 22, 24, 25, and 29 of the Act.

[para 3] The Applicant requested a review of the Public Body's response. Following the review, the Applicant requested an inquiry.

II. RECORDS AT ISSUE

[para 4] The records at issue consist of the 613 pages of responsive records.

III. ISSUES

[para 5] The issues for this inquiry were set out in the Notice of Inquiry dated January 17, 2024, as follows:

1. Is the requested information/records excluded from the right of access by the application of section 6(4)?

2. Did the Public Body properly apply section 21(1) of the Act (disclosure harmful to intergovernmental relations) to the information/records?

3. Did the Public Body properly apply section 22(1) of the Act (Cabinet and Treasury Board confidences) to the information/records?

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

5. Did the Public Body properly apply section 25(1) of the Act (disclosure harmful to economic and other interests of a public body) to the information/records?

6. Did the Public Body properly apply section 29 of the Act (information that is or will be available to the public) to the information/records?

IV. DISCUSSION OF ISSUES

1. Is the requested information/records excluded from the right of access by the application of section 6(4)?

[para 6] The Public Body has withheld pages 26-327, and 352-355 in their entirety, citing section 6(4). The record comprising pages 26-327 and the record comprising pages 352-355 are both described in the Public Body's index of records as a "Committee of Supply eBinder".

[para 7] Section 6(4) states:

> *6(4) The right of access does not extend*
>
> *(a) to a record created solely for the purpose of briefing a member of the Executive Council in respect of assuming responsibility for a ministry, or*
> *(b) to a record created solely for the purpose of briefing a member of the Executive Council in preparation for a sitting of the Legislative Assembly.*

[para 8] Section 71(1) of the Act 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.*

[para 9] Therefore, the burden of proof lies with the Public Body to prove that section 6(4) of the Act applies to the records at issue.

[para 10] Sections 6(4)(a) and (b) do not apply if 5 years or more have passed since the member of Executive Council was appointed (section 6(5)) or if 5 years or more have

passed since the beginning of the relevant sitting of the Legislature. Neither of these limitations appear to apply in this case.

[para 11] The scope of section 6(4) was discussed in Order F2018-45 (at para. 10):

> I agree with the Public Body's position that a briefing binder is, in this case, one record. If it were otherwise, copies of the documents forming the binder could be withheld under section 6(4)(b), regardless of whether they are in the binder, and regardless of whether they meet an exception to disclosure. Under the Public Body's interpretation, a requestor does not have a right of access to a briefing binder, unless section 6(6) applies, but the requestor may have a right of access to some of its content if a copy exists elsewhere in the Public Body and it is not subject to an exception to disclosure. For example, a requestor would be entitled to statistics that may appear in the briefing binder, if the statistics are stored in another location.

[para 12] In that Order, the adjudicator accepted that a briefing created for a Minister in preparation for a sitting of the Committee of Supply is a briefing created in preparation for a sitting of the Legislative Assembly, within the terms of section 6(4). She said (at paras. 19-23, footnotes omitted):

> The Committee of Supply consists of *all* the members of the Legislative Assembly. The Legislative Assembly, by tradition, resolves into (forms by resolution) the Committee of Supply once the Lieutenant Governor has read the Speech from the Throne to introduce the new legislative session. The Legislature resolves into the Committee of Supply in order to consider interim and supplementary supply (funding) estimates arising from the Speech from the Throne. (An example of this process is found in Alberta Hansard, March 13, 2018 on page 41.)
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> Resolving into the Committee of Supply in order to review interim supply estimates is a practice drawn from parliamentary tradition. The Committee of Supply in Alberta is chaired by the Deputy Speaker and follows the procedure set out in Standing Orders for the Committee of Supply.
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> It is not constitutionally necessary that the Legislative Assembly resolve into the Committee of Supply in order to review and approve supply estimates. For example, the federal government reviews supply estimates by a motion of the Minister serving as President of the Treasury Board, "that the business of Supply be considered at the next sitting of the House [of Commons]." The Legislative Assembly of Alberta follows a process by which it resolves into the Committee of Supply in order to review and approve supply estimates subject to different rules of order and debate; however, it could also perform the same function without resolving into the Committee of Supply if it adopted another means of bringing interim supply estimates before itself. In either case, ensuring that supply estimates are reviewed is a function of the Legislative Assembly that takes place when the Legislative Assembly is in session.
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> Section 6(4)(b) authorizes withholding a record created solely for the purpose of briefing a Minister in preparation for a sitting of the Legislative Assembly. There is no requirement in the provision that the Minister actually sit as a member in the Legislative Assembly, although doing so is also encompassed by the provision. When the Minister submits an interim supply estimate, she may be seen as acting on behalf of the executive

> branch of government in seeking funds from the Legislature. This activity is also caught by section 6(4)(b), given that submitting interim supply estimates is a necessary and traditional aspect of a sitting of the Legislative Assembly.
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> I agree with the position of the Public Body that where the FOIP Act refers to a "sitting of the Legislative Assembly" it includes all the things that must necessarily take place in the course of a sitting of the Legislature, such as the business of supply.

[para 13] I agree with, and adopt the analysis above. Section 6(4) prevents applicants from obtaining a briefing binder in response to an access request. However, documents included in the binder are not necessarily outside the scope of the FOIP Act simply because they are contained in the binder; if copies of documents included in the binder also exist elsewhere, they continue to fall within the scope of the Act, subject to other exclusions or exceptions. In other words, where a record would normally be subject to the FOIP Act, a public body cannot remove that record from the scope of the Act by placing it in a briefing binder. Only the copy of the record *in the briefing binder* is excluded under section 6(4). For example, a particular memo may have been created for another purpose, well before the briefing binder was compiled; section 6(4) can apply to such a memo *as part of the briefing binder* but does not apply to a copy of the memo that may exist elsewhere. Briefing binders can often contain documents, such as annual reports, Hansard transcripts, or other documents that would normally be available to individuals through an access request under the FOIP Act or by other means.

[para 14] Having reviewed the records, I accept that pages 27-327 are comprised of a briefing binder within the terms of section 6(4)(b). However, page 26 is not part of that binder; rather it is an email between Government of Alberta employees, to which the binder was attached. Section 6(4) cannot apply to that page. That said, nothing in this page appears responsive to the Applicant's request; therefore, I will not order the Public Body to respond to the Applicant with respect to this page, as required under section 12(1).

[para 15] Even though the binder at pages 27-327 is excluded from the Act under section 6(4), I considered whether a copy of any document in that binder is likely to exist elsewhere, such that it could be subject to the Act. However, in reviewing the contents of the binder, it was not clear to me which part of the binder was considered responsive to the Applicant's request. By letter dated April 4, 2024, I asked the Public Body to clarify this point. I also said:

> It may be the case that only a portion of this eBinder is responsive; if so, the Public Body should identify what portion is responsive. Further, if only a portion of the eBinder is responsive, the Public Body should address whether that portion exists elsewhere, apart from being contained in the eBinder.

[para 16] I cited the portion of Order F2018-45 cited above, whereby the adjudicator commented that an applicant may have a right of access to a record located in the briefing if another copy exists in another location outside the binder.

[para 17] In its response, the Public Body states

> That the eBinder was identified as *potentially* responsive to the applicant's request merely shows the breadth of the search the public body conducted. However, it was determined non-responsive as it is not a record that is accessible under FOIP. No other copies of the record were located during the public body's search.

[para 18] The Public Body seems to suggest that the briefing binder is not responsive to the Applicant's request for the reason that it is outside the scope of the FOIP Act. However, a record can be both responsive and outside the scope of the FOIP Act. The application of section 6(4) does not render a record nonresponsive. Rather, a record is nonresponsive because it does not relate to the access request.

[para 19] The fact that I cannot locate a document in the binder that appears responsive to the Applicant's request does not mean that no document in the binder is responsive. As the subject-matter expert, the Public Body is in the best position to determine whether information is responsive. The Public Body now states that the binder is not responsive, but this is based on a misunderstanding of responsiveness.

[para 20] I will be ordering the Public Body to re-process its response to the Applicant for various reasons set out in the remainder of this Order. I will order the Public Body to review the content of the briefing binder at pages 27-327 and determine whether any document in the binder is responsive to the Applicant's request and if so, whether another copy of that document is likely to exist elsewhere, outside the binder. If any responsive document likely exists elsewhere, the Public Body is to conduct a search and provide a new response to the Applicant with respect to that document, under section 12(1).

[para 21] The Public Body has also withheld pages 352-355 under section 6(4), describing this record as a "Committee of Supply eBinder".

[para 22] Unlike the record comprising pages 27-327, there is no indication that pages 352-355 are part of a briefing binder. Even if these pages were contained in a briefing binder, which the Public Body has not shown to be the case, these pages are part of a record that would also exist outside any briefing binder. Therefore, these pages are subject to the Act. However, the records also fall outside the timeframe of the Applicant's request and are therefore nonresponsive for that reason.

2. Did the Public Body properly apply section 21(1) of the Act (disclosure harmful to intergovernmental relations) to the information/records?

[para 23] The Public Body applied section 21(1) to part of a sentence on page 606 of the records. This provision states:

> *21(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*
>
> *(a) harm relations between the Government of Alberta or its agencies and any of the following or their agencies:*

(i) the Government of Canada or a province or territory of Canada,

(ii) a local government body,

(iii) an aboriginal organization that exercises government functions, including

(A) the council of a band as defined in the Indian Act (Canada), and

(B) an organization established to negotiate or implement, on behalf of aboriginal people, a treaty or land claim agreement with the Government of Canada,

(iv) the government of a foreign state, or

(v) an international organization of states,

or

(b) reveal information supplied, explicitly or implicitly, in confidence by a government, local government body or an organization listed in clause (a) or its agencies.

[para 24] Under section 71(1) of the Act, cited above, the Public Body has the burden of proving that the Applicant has no right of access to the information that it refused to disclose under section 21.

[para 25] The Supreme Court of Canada has clearly enunciated the test to be used in access-to-information legislation wherever the phrase "could reasonably be expected to" is found (such as in section 21(1)). In *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII), the Court stated:

> Given that the statutory tests are expressed in identical language in provincial and federal access to information statutes, it is preferable to have only one further elaboration of that language; *Merck Frosst*, at para. 195:
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> > I am not persuaded that we should change the way this test has been expressed by the Federal Courts for such an extended period of time. Such a change would also affect other provisions because similar language to that in s. 20(1)(c) is employed in several other exemptions under the Act, including those relating to federal-provincial affairs (s. 14), international affairs and defence (s. 15), law enforcement and investigations (s. 16), safety of individuals (s. 17), and economic interests of Canada (s. 18). In addition, as the respondent points out, the "reasonable expectation of probable harm" test has been followed with respect to a number of similarly worded provincial access to information statutes. Accordingly, the legislative interpretation of this expression is of importance both to the application of many exemptions in the federal Act and to similarly worded provisions in various provincial statutes. [Emphasis added.]
>
> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable

> and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences": *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53 (CanLII), [2008] 3 S.C.R. 41, at para. 40.

[para 26] The Supreme Court of Canada has made it clear that there is one evidentiary standard to be used wherever the phrase "could reasonably be expected to" appears in access-to-information legislation. There must be a reasonable expectation of probable harm, and the Public Body must provide sufficient evidence to show that the likelihood of any of the above scenarios is "considerably above" a mere possibility.

[para 27] The Public Body cites section 21(1)(a) in its initial submission, as the relevant provision. The Public Body asserts that the information relates to

> …a meeting scheduled between the Premier and the Chief of a First Nation organization, immediately after a decision was made by the Federal Government with respect to the Grassy Mountain Coal Project. Given the nature of the project and the desire to show respect to the First Nation organization, disclosure of this information could reasonably be expected to harm intergovernmental relations between the Government of Alberta, the Federal Government, and this First Nation organization.

[para 28] The withheld portion of the relevant sentence on page 606 reveals only that a meeting was taking place, and names the individual with whom the Premier intends to meet.

[para 29] The Public Body has not explained how revealing the fact that this individual was meeting with the Premier could reasonably be expected to harm relations between the Government of Alberta and another body listed in section 21(1)(a)(i)-(v). The Public Body states that it is refusing to disclose this information to show respect to the First Nations organization; however, the Public Body has not stated why it believes that disclosing the intended meeting would be harmful or disrespectful. For example, the Public Body has not indicated that the meeting was in any way confidential.

[para 30] Following the Supreme Court's decision cited above, there must be a reasonable expectation of probable harm, and the Public Body must provide sufficient evidence to show that the likelihood of any of the identified harms is "considerably above" a mere possibility. The Public Body has not met this burden.

[para 31] Given this, I cannot conclude that the Public Body properly applied section 21(1) to withhold this information on page 606. As no other exception was applied, I will order the Public Body to disclose this information to the Applicant.

[para 32] Although it isn't noted in the Public Body's index of records, or mentioned in the Public Body's submissions, it appears that the Public Body also withheld a sentence in an email on page 590 under section 21(1)(a). There are two emails on pages 590-591,

which relate to a draft document attached to the emails. Portions of the emails were withheld under section 24(1), which I will address below. However, the Public Body withheld one sentence in the first email on page 590 under section 21(1)(a). I have no explanation for the application of this provision. The relevant sentence refers to grammatical edits in the document relating to other jurisdictions – something akin to noting that the names of provinces should be capitalized. I cannot conceive a situation in which the disclosure of this sentence could reasonably be expected to harm relations between the Government of Alberta and another body listed in section 21(1)(a)(i)-(v). I find that section 21(1)(a) does not apply. As no other exception was applied, I will order the Public Body to disclose this information to the Applicant.

3. Does section 22(1) of the Act (Cabinet and Treasury Board confidences) apply to the information/records?

[para 33] The Public Body applied section 22(1) to most of the information in page 587, and to pages 5-25, 568-570, 573-580, 581-586, 588-589, and 607-611 in their entirety. Some of this information was withheld under section 22(1) alone, and some was also withheld under section 24(1).

[para 34] The Public Body's index of records indicates that it withheld some information on page 606 under section 22(1), but none of the information in the record provided to me indicates this. As well, although the Public Body's index of records does not indicate this, the records at issue show that the Public Body applied section 22(1) to the titles of a few email attachments (for example, on pages 558, 587).

[para 35] Section 22 of the FOIP Act is a mandatory exception that requires a public body to withhold Cabinet confidences. It states:

> *22(1) The head of a public body must refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees or of the Treasury Board or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees or to the Treasury Board or any of its committees.*
>
> *(2) Subsection (1) does not apply to*
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> *(a) information in a record that has been in existence for 15 years or more,*
>
> *(b) information in a record of a decision made by the Executive Council or any of its committees on an appeal under an Act, or*
>
> *(c) information in a record the purpose of which is to present background facts to the Executive Council or any of its committees or to the Treasury Board or any of its committees for consideration in making a decision if*
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> *(i) the decision has been made public,*
> *(ii) the decision has been implemented, or*

> *(iii) 5 years or more have passed since the decision was made or considered.*

[para 36] Under section 71(1) of the Act, cited above, the Public Body has the burden of proving that the Applicant has no right of access to the information that it refused to disclose under section 22.

Parties' arguments

[para 37] In its initial submission, the Applicant argues that past Orders of this office have found that information that does not reveal the substance of deliberations, such as dates, names, business contact information, and subject lines cannot be withheld under section 22(1) (citing Orders F2008-28, F2022-20, F2004-026). The Applicant points to the titles of email attachments that were withheld under section 22, arguing that this information is unlikely to reveal the substance of deliberations. The Applicant further argues it is likely that at least some of the information to which section 22(1) has been applied is likely to consist of the type of information identified in past Orders, to which this provision cannot apply.

[para 38] In its initial submission, the Public Body argues that the Supreme Court of Canada "affirmed that the importance of protecting Cabinet confidence outweighs the need for access to information", citing *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2024 SCC 4 (*AG Ontario*).

[para 39] The Public Body characterizes the records at issue as Cabinet presentations and speaking notes with respect to the Coal Policy, as well as meeting minutes for Cabinet discussion and a record of decision.

[para 40] In its rebuttal submission, the Applicant argues that section 22(2)(c) may apply to information in the responsive records. The Applicant states that "the decision statement issued with respect to a proposed project which was the subject of the access request was issued in August 2021. Accordingly, a final decision had already been made…" (at para. 17).

[para 41] The Applicant argues that *AG Ontario* is distinguishable from the current case, insofar as *AG Ontario* "is primarily predicated on the access of journalists to letters from the Premier of the Province of Ontario to their Ministers" (at para. 19). The Applicant further disagrees with the Public Body's characterization of the Supreme Court's decision in *AG Ontario* as stating that the importance of protecting Cabinet confidence outweighs the need for access to information. The Applicant argues:

> 21. Such a blanket statement by the Public Body is an oversimplification of *AG Ontario*. The Applicant rather puts forward the following from *AG Ontario*, wherein the Supreme Court of Canada supports an approach which mandates "… a substantive analysis of the requested record and its substance to determine whether disclosure of the record would shed light on Cabinet deliberations … ."

Relevant case law

[para 42] In Order F2008-028, the adjudicator considered section 22 and said (at paras. 102-104, 108):

> Where the Public Body applied section 22 to records requested by the Applicant, it did so because it believed that the information would reveal the substance of deliberations of the Executive Council - i.e., Cabinet. To fall within section 22(1) on this basis, a record must be generated for or received by Cabinet members or officials while taking part in the collective process of making government decisions or formulating government policy (Order 97-010 at para. 52).
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> The Public Body states that it "consulted with Executive Council on the records [to which it applied section 22(1)] and confirmed that the records at issue were provided to Cabinet". I am prepared to accept this assertion, even where the record itself does not indicate that members of Cabinet or its officials were the recipients of it, or that the record was prepared for them. For example, some documents appear to have been prepared for, or to have arisen out of, meetings of a caucus. Although Cabinet members are members of the government caucus, they are not the only members. A caucus is not a committee of the Executive Council. The reason that I nonetheless accept the Public Body's assertion that the records in question were sent to or prepared for Cabinet is that it is possible for documents prepared by or for, or given to, the government caucus to have also been provided to Cabinet for its information or consideration.
>
> Even where a record was submitted to Cabinet, section 22(1) only permits the withholding of information that would reveal the substance of deliberations by it. The term "substance" has its normal dictionary meaning of the essence, the material or essential art of a thing; "deliberation" means the act of weighing and examining the reasons for and/or against a contemplated action or course of conduct, or a choice of acts or means (Order 97-010 at para. 28). Section 22(1) does not extend to the withholding of information such as the names of persons who prepared the material, or the dates, or the topics of the deliberations, unless this information would in itself reveal the substance of the deliberations (Order F2004-026 at para. 33). I would add to this business contact information, as it does not normally reveal any substantive content.

[para 43] The adjudicator further said (at para. 127):

> Cabinet does necessarily deliberate over everything that is given to it; a public body's submissions or the record itself must establish that Cabinet actually deliberated.

[para 44] The Adjudicator in Order F2008-028 found that evidence establishing only that records were provided to cabinet was insufficient to ground the application of section 22. However, if it could be established that the information in question is advice intended for Cabinet, or some other information that reveals what was considered by Cabinet in making a decision the requirement that information reveal the substance of Cabinet deliberations would be met.

[para 45] The Adjudicator also considered the application of section 22(2)(c), which provides circumstances in which section 22(1) cannot apply. He said (at paras. 105-108):

> The Applicant raises the possibility that section 22(2)(c)(iii) of the Act applies, so as to make section 22(1) inapplicable to some of the information in the records at issue. Section 22(2)(c)(iii) states that section 22(1) does not apply to information in a record the purpose of which is to present background facts to Cabinet for consideration in making a decision if five years or more have passed since the decision was made or considered.
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> I thought about the possibility that section 22(2)(c)(iii) is not relevant in this inquiry because, at the time of the Public Body's response to the Applicant's access request in October 2003, five years had not yet passed since a relevant decision of Cabinet (as the decisions also date from 2003). I do not find that I have to address this, as the alternate section 22(2)(c)(i) applies in any event. Under section 22(2)(c)(i), section 22(1) does not apply to information the purpose of which is to present background facts to Cabinet for consideration in making a decision if the decision has been made public. At the time of the Applicant's access request, relevant decisions of Cabinet had already been made public.
>
> In this inquiry, the relevant decisions of Cabinet to which section 22(2)(c)(i) applies are the decisions to formulate, draft and present Bill 27 and its related regulations in a set form with set content on behalf of the government. Bill 27 was made public when it was tabled as the *Labour Relations (Regional Health Authorities Restructuring) Amendment Act* and received first reading in the Legislature on March 11, 2003. A regulation in relation to Bill 27 was the *Regional Health Authority Collective Bargaining Regulation*, which was made public when it was published in the issue of the *Alberta Gazette* dated April 15, 2003. The content of Bill 27 and its related regulations were a reflection of Cabinet's decisions regarding their formulation and drafting, and these decisions were the ones being deliberated when the background facts were presented.
>
> Section 22(2)(c) promotes more accountability for the decisions actually taken by Cabinet, by exposing the background facts on which they were based; this exception for background facts is considered crucial in opening up the information which forms the general basis on which Cabinet acted without exposing its deliberations (Order 97-010 at para. 39). Accordingly, any information that constitutes background facts presented for Cabinet's consideration in the formulation and drafting of either Bill 27 or its related regulations may not be subject to the exception to disclosure under section 22(1). The Public Body submits that none of the records at issue constitute background facts, but I disagree in some instances, as noted below.

[para 46] In *AG Ontario*, the Supreme Court of Canada discussed the application of section 12(1) of the Ontario FOIP Act, which is similar to section 22 in Alberta's Act, to mandate letters provided to Ontario Ministers by the Ontario Premier. The Supreme Court overturned the decision of the Ontario OIPC (Order PO-3973), finding that the Commissioner "excluded 'outcomes' of the deliberative process, without regard for the impact that premature disclosure of policy priorities at an early state of the process may have on the efficient workings of government" (at para. 7).

[para 47] The Court discussed the purposes of Ontario's section 12(1) at paragraph 32 of that decision:

> [32] The IPC demonstrated appreciation for the import of the candour and solidarity rationales supporting Cabinet confidentiality, citing this Court's decision in *Babcock* (see para. 87). These rationales informed the IPC's articulation of the purpose of s. 12(1) as "promot[ing] the free and frank discussion among Cabinet members of issues coming before them for decision, without concern for the chilling effect that might result from disclosure of their statements or the material on which they are deliberating" (para. 86). But the IPC's engagement with the convention of Cabinet confidentiality essentially stopped there (see para. 87). Despite the submissions of Cabinet Office that disclosure of the mandate Letters could harm the efficacy of the Cabinet decision-making process (A.R., vol. III, at pp. 101-2), the Commissioner did not engage with a core purpose of Cabinet secrecy to promote the efficiency of the collective decision making, nor with the ultimate goal of this constitutional convention: effective government. This was critical context to interpreting s. 12(1).

[para 48] The Court found that "[t]he prerogative to determine when and how to announce Cabinet decisions is grounded in the harmful impact that premature disclosure of policy priorities can have on the deliberative process" (at para. 36). The Court disagreed with the Commissioner's finding that the mandate letters did not fall within the scope of section 12(1) for the reason that they reveal only a final outcome or decision; the Court noted that some of the priorities set out in the mandate letters were subsequently revealed in the Legislative Assembly, but other priorities were kept confidential. Further, of the priorities that were revealed, they were discussed "at a high level of generality not necessarily reflective of their description in the Letters" (at para. 38). The Court concluded that because the deliberative process includes making decisions about when and how to make decisions public. The Court also concluded that the mandate letters from the Premier to the Ministers initiated Cabinet's deliberative process, rather than concluding it.

[para 49] The Court also disagreed with the Commissioner's characterization of the information in the mandate letters as mere topics, rather than substantive information, stating (at para. 57):

> As noted, the Letters are communications between the Premier and his Cabinet colleagues relating to policy priorities that are or will be before Cabinet; they cannot be written off as mere "topics" like general items on an agenda. The Letters reveal the Premier's initial views on priorities for the new government — priorities subject to change as the deliberative process unfolds. The communication of the Premier's initial views to other members of Cabinet are part of Cabinet's decision-making process, and will be revealing of the substance of Cabinet deliberations when compared against subsequent government action. This context is crucial.

[para 50] In Order 97-010, the former Commissioner said that information would "reveal" the substance of deliberations within the terms of section 22(1) if its release would permit the drawing of accurate inferences with respect to the substance of deliberations. The former Commissioner further stated (at para. 29):

> Accordingly, it is reasonable to assume that if a release of information in a record would 'explicitly or implicitly' reveal the substance of deliberations of Cabinet, then the

> information must not be disclosed. A release of information implicitly reveals the substance of Cabinet deliberations if it is reasonable to expect that the released information could be combined with other information to reveal the substance of Cabinet deliberations. The information, by itself may not reveal the substance of Cabinet deliberations.

[para 51] In other words, the information must reveal the substance of deliberations of Cabinet or one of its committees, either on its own or in combination with other information. Where it is not clear from the record itself that it could reveal the substance of deliberations on its own or in combination with other information, the Public Body has the burden of showing this to be the case.

[para 52] In Order F2022-20, the adjudicator discussed the application of section 22(1) to similar records as those at issue in this case. In that Order, the public body (Alberta Energy) described the information withheld under section 22(1) as the name of a topic presented to a Cabinet committee, as well as information revealing the content of the presentation. The public body had argued that this information would reveal the substance of Cabinet deliberations. The adjudicator rejected this argument, stating (at para. 45):

> Even accepting that the severed information may refer to general topics that may have been discussed by Cabinet at some point, the information does not reveal anything of the substance of such deliberations.

[para 53] Order F2022-20 was upheld in *Alberta Energy v. Alberta (Information and Privacy Commissioner)*, 2024 ABKB 198 (*Alberta Energy*). In that decision, the Court rejected that public body's argument that the adjudicator erred in her decision regarding section 22(1), stating:

> [36] The Commissioner found that there is a distinction between information that was provided to Cabinet and information that would disclose the deliberations of Cabinet. It is the case that there are circumstances where the information and the deliberation would be inseparable but this must be proven.
>
> [37] The Public Body urges me to apply a "broad interpretation encompassing the subject matter of discussion." I disagree. As I have commented, the foundational premises of *FOIPP* contemplate limited and narrow restraint on access.
>
> [38] The Public Body argued that even the general title and topic of a presentation would be sufficient to invoke cabinet confidence. The Commissioner disagreed, saying, "Even accepting that the severed information may refer to general topics that may have been discussed by Cabinet at some point, the information does not reveal anything of the substance of such discussions." Having reviewed the disputed materials, I agree with the Commissioner's reasoning and conclusion. It is not only reasonable, but it is also correct.
>
> [39] There may be cases where the topic of discussion would be sufficient to reveal the deliberations of Cabinet, but again, that must be considered contextually and based on evidence. For example, if the Cabinet had an agenda item discussing the potential and previously unraised imposition of a provincial sales tax, it would be arguable that the

> item itself was sufficient to disclose protected deliberations. That said, an agenda item on an area of publicly disclosed policy, such as the proposed Alberta Pension Plan, may not attract the same concerns of disclosing deliberations.
>
> [40] Accepting the position of the Public Body would allow the government to shield the public access to records simply by their proximity to Cabinet. Cabinet Confidence is essential to ensure that the government can deliberate freely and unimpeded, but it does not exist to allow governing in secrecy. There is a balance here that the Adjudicator recognized and reasonably applied. I further find that she was correct in doing so.

[para 54] The Court of King's Bench had the benefit of the Supreme Court's *AG Ontario* decision in coming to its conclusions.

Analysis

[para 55] In *AG Ontario*, the Supreme Court of Canada recognized the importance access-to-information legislation, as well as the importance of exceptions in access-to-information legislation to protect Cabinet confidences. The Court clearly acknowledged that "[a]ll FOI legislation across Canada balances these two essential goals through a general right of public access to government-held information subject to exemptions or exclusions – including those for Cabinet records or confidences" (at paragraph 4). Given this, I disagree with the Public Body's argument that the Court determined that Cabinet confidences outweigh any need for access to information.

[para 56] With respect to the titles of email attachments, the title on page 558 does not reveal the topic of any matter that may have been before Cabinet or a committee. Section 22(1) cannot apply to this information. The title on page 587 reveals that the document consists of meeting minutes, which was already disclosed to the Applicant in the body of the email. Therefore, disclosing the title of the attachment cannot *reveal* any information and section 22(1) cannot apply.

[para 57] Page 5 is comprised of an email, which the Public Body has withheld in its entirety. A presentation for a Cabinet committee was attached to the email. As stated above, section 22(1) generally does not apply to the names of employees, dates, job titles etc. Nothing in the body of the email reveals information contained in the attached presentation, or otherwise refers to any deliberation of Cabinet or its committees. The Public Body has not provided any specific arguments on its application of section 22(1) to this email. From the information before me, I cannot conclude that section 22(1) applies to the email on page 5. The Public Body has also applied section 24(1) to this page, which I will discuss in the next section of this Order.

[para 58] The presentation comprising pages 6-25 of the records also includes speaking notes. From the content of the records, I accept that this presentation was given at a Cabinet committee. As found in Order F2022-20, cited above, section 22(1) does not apply to information simply because it was provided to a Cabinet committee. In this case, the records were prepared by or on behalf of a Minister; in other words, the records

reveal what was put forward by one Minister in the meeting. Therefore, the records reveal the substance of deliberations of Cabinet or one of its committees.

[para 59] However, the decision to be made by the committee has already been made and implemented; the relevant legislative instrument is publicly available, though I cannot identify it without revealing the content of these records. As the relevant decision has been implemented, section 22(2)(c) applies to any information that consists of background facts in these pages.

[para 60] As pages 6-15 is comprised of a presentation made to a Cabinet committee, rather than a record of the committee's deliberations regarding that presentation, some of the information in pages 6-15 is properly characterized as background facts. However, some information, such as recommendations, cannot be characterized as background facts. For example, the information on pages 13-14 can be characterized as recommendations and are not mere background facts, and section 22(1) applies to the information in those pages. In contrast, much of the information on pages 9-10 is about past policies that are available to the public; this can be characterized as background facts to which section 22(2)(c) applies. The Public Body has also applied section 24(1) to pages 5-15 in their entirety, which I will discuss below.

[para 61] Pages 18-26 comprise the same presentation as above, without the speaking notes. The same analysis above applies to these pages.

[para 62] The email on pages 16-17 summarizes a meeting of a Cabinet committee. Only the first item appears responsive to the Applicant's request. In any event, the body of the email reveals the substance of the committee deliberations, such that section 22(1) applies. However, that provision cannot apply to the header of the email or the signature line. The Public Body has not applied any other exception to this information so I will order the Public Body to disclose it to the Applicant.

[para 63] Pages 568-570 is comprised of a memo from a Minister to members of Cabinet. This memo summarizes deliberations that took place in previous meetings; section 22(1) applies to those summaries. However, the header, subject line, signature line, and first paragraph of this memo do not reveal the substance of any committee deliberations. Some of that information reveals the topic presented by the Minister to Cabinet in the memo, but that mere topic is not the substance of deliberations. Section 22(1) cannot apply to that information. A small portion of the memo also consists of background facts in relation to a decision that has been made and implemented, such that section 22(2)(c) applies. The Public Body has also withheld this memo in its entirety under section 24(1), which I will discuss below.

[para 64] Pages 573-580 and 581-586 consist of meeting notes or minutes of a Cabinet committee. The meeting minutes contain information about several distinct topics, only one of which appears responsive to the Applicant's request. I agree that the majority of the information in these pages would reveal the committee's deliberations. Therefore section 22(1) applies, with the exception of dates, meeting attendees, and subject headers.

The Public Body has also withheld this information under section 24(1), which I will discuss below.

[para 65] The Public Body has withheld the title of a meeting on page 587. I accept that the relevant meeting was a Cabinet committee meeting; however, section 22(1) does not apply to information that reveals only that a Cabinet committee meeting occurred. No other exception was applied to that information, so I will order the Public Body to disclose it.

[para 66] The second half of the email on this page contains minutes from that meeting. These minutes reveal information that was presented to the committee, as well as responses of the committee to that information. The minutes contain only a short summary of what likely occurred in the meeting; none of the information recorded in the minutes consists merely of background facts such that section 22(2)(c) could apply. I agree that section 22(1) applies to this information.

[para 67] Page 588 consists of an email to which another document was attached. Page 589 consists of the attached document. Page 589 is a record that reveals a Cabinet deliberation such that section 22(1) can apply to the substantive information, but not the header, date, subject line etc. As no other exception was applied, I will order the Public Body to disclose the non-substantive information. The email on page 588 does not reveal the substantive information contained in page 589, or any other information that could reveal the substance of Cabinet deliberations. Therefore, section 22(1) cannot apply to page 588. As no other exception was applied, I will order the Public Body to disclose this page to the Applicant.

[para 68] Page 607 consists of an email to which another document was attached. Pages 608-611 consists of the attached document. The email on page 607 reveals only the title of the attached document; this information does not reveal the substance of a Cabinet deliberation. Therefore section 22(1) cannot apply. The Public Body has also applied section 24(1), which I will discuss below.

[para 69] Page 608-611 is comprised of a summary document. A similar summary record with the same title appears on pages 556-557, and was withheld under section 24(1) but not section 22(1). It is not clear why the Public Body applied section 22(1) to the record on pages 608-611. It is not clear that it was prepared for or discussed by Cabinet or a Cabinet committee and nothing in the record itself indicates it was. It is possible that the record reveals Cabinet deliberations but absent evidence of that in the record itself, the Public Body has the burden of showing this to be the case and it did not do so. Therefore, I cannot find that section 22(1) applies. The Public Body also applied section 24(1), which I will discuss below.

Other records to which section 22(1) may apply

[para 70] The Public Body withheld pages 571-572 in their entirety under section 24(1). For the reasons set out in the discussion of section 24(1), I find that exception does

not apply. However, in reviewing these pages it appears that section 22(1) applies to some information in these pages.

[para 71] As stated above, section 22(1) is a mandatory exception; this means that a public body must withhold information to which the exception applies. As such, it is appropriate for me to consider whether this exception applies to information even where the Public Body did not apply it.

[para 72] Pages 571-572 consist of a memo that appears to have been created by or on behalf of a Minister for Cabinet. The content of this memo relates to other records to which the Public Body has applied section 22(1), such as the records at pages 6-25, discussed above. Having reviewed all of the records before me, it seems that disclosure of some of the information in pages 571-572 could reveal the substance of Cabinet deliberations, when read together with other records at issue. This is especially the case once the Public Body discloses the background facts in other records at issue, in compliance with this Order.

[para 73] That said, the relevant Cabinet decision to which pages 571-572 relates has been made and implemented; therefore, section 22(2)(c) applies to background facts in this record, such that section 22(1) does not apply to these pages in their entirety. Given the similarity of pages 571-572 to other records to which section 22(1) was applied, discussed above, I will order the Public Body to review pages 571-572 and apply section 22(1) in a manner consistent with the direction above.

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

[para 74] In some cases, the Public Body withheld portions of records under section 24(1) while identifying other portions as non-responsive. Specifically, the Public Body identified portions of records comprising pages 592-597, 598-599, and 601-602 as non-responsive. Some of these records contain several distinct topics, unrelated to each other.

[para 75] The Public Body seems to have processed most of the records at issue without considering whether they are in fact responsive to the request. I have discussed above that most or all of the records withheld under section 6(4) do not appear responsive to the Applicant's request.

[para 76] Further, many pages of records withheld in their entirety under section 22(1) or 24(1) also comprise many distinct topics, yet the Public Body did not identify any of those topics as non-responsive. It is not entirely clear why the Public Body processed the records at pages 592-602 differently from other records it identified as responsive.

[para 77] The Public Body is not required to provide access to records that have not been requested by the Applicant. However, 'non-responsiveness' is not an exception to the right of access created by section 6 of the Act (see Order F2009-025). Where a record

is comprised of separate and distinct portions, it may be appropriate to withhold those portions that are not responsive to the applicant's request.

[para 78] Past Orders address how public bodies should properly characterize information in a record as non-responsive. Order F2018-75 states (at paras. 55-58):

> Separate items of information in a record cannot be viewed out of context of the record as a whole when determining if they are separate and distinct from the remaining record…
>
> Information must be considered in the context of the record as a whole, in determining whether it is separate and distinct from the remainder of the record. In the case of a personal information request like the Applicant's, in order to withhold portions of a record as non-responsive, the Public Body must consider whether that portion contains the Applicant's personal information *or* whether that portion provides context to the remainder of the record that *is* the Applicant's personal information.
>
> An example of 'separate and distinct' might be distinct emails in an email chain. Another example relates to police officers' notebooks, which often contain notes on unrelated incidents on a single page. In response to an access request for police records relating to one incident, the part of the notebook page that relates to a different incident might be non-responsive. Another example is where a personal note is added to a work email, such as a note referencing a medical absence, holiday or so on. Where that personal note does not have any relation to the remainder of the email or to the access request, it might be non-responsive.

[para 79] Whether the information at issue was properly characterized as non-responsive is not listed as an issue in this inquiry.

[para 80] I note that in the Public Body's response to the Applicant's access request, the Public Body did not inform the Applicant that it had identified parts of records as non-responsive; nor does it appear to have informed the Applicant that it was refusing to provide access to those parts of the record that it identified as non-responsive. The redacted records that were provided to me for the inquiry identify information in pages 592-602 as non-responsive; presumably this copy of the redacted records is the same as the copy the Applicant received. It may be the case that the Applicant is aware that the Public Body refused access to some information as non-responsive. However, as this was not noted in the Public Body's response letter to the Applicant along with the list of exceptions the Public Body had applied to information in the records, what the Applicant knew at the time it requested a review or inquiry of the Public Body's response is not clear.

[para 81] I considered adding the responsiveness of this information as an issue for the inquiry. However, this would further delay the proceeding in a situation where it is clear from the face of the records that the Public Body characterized portions of records as non-responsive, in a manner inconsistent with the precedent of this Office. Further, I will not order the Public Body to disclose the information erroneously identified as non-responsive; rather, I will order the Public Body to review the relevant record in light of

the direction provided here, and include the responsive information in the Public Body's new response to the Applicant.

[para 82] In many instances, the Public Body's identification of topics as non-responsive is reasonable; these pages contain distinct topics that can be separated in a manner akin to a police officer's notebook discussed in Order F2018-75, above. However, in some pages the Public Body identified portions of a topic as non-responsive while withholding other portions of the same topic under section 24(1); these latter portions are clearly responsive to the access request.

[para 83] For example, on page 597, the Public Body withheld part of a topic under section 24(1) but identified the remainder of the same topic as non-responsive. In my view, the portion of this topic withheld under section 24(1) is not separate and distinct from the portion withheld as non-responsive. The same applies to pages 598-599, which is comprised of an email on one topic. The Public Body identified most of the information as non-responsive, but withheld information in the middle of the email under section 24(1). In my view, the information relating to the same topic to which the Public Body applied section 24(1) is all responsive to the Applicant's request. Therefore, the Public Body is to include this information in its new response to the Applicant.

[para 84] Similarly, the information on pages 601-602 relates to a single topic, yet the Public Body disclosed two separate bullet points in the middle of the record, withheld some information under section 24(1), and identified other information as non-responsive. As above, the information disclosed to the Applicant, the information withheld under section 24(1), and the information withheld as non-responsive is all related and not separate and distinct. I find that all the information relating to the topic to which the Public Body applied section 24(1) is responsive, and the Public Body is to include this information in its new response to the Applicant.

Section 24(1)

[para 85] The Public Body applied sections 24(1)(a) and (b) to withhold discrete items of information on page 1, and 558. It withheld portions of pages 590-591, 593-597, 598, and 602, It also applied these provisions to pages 3-4, 5-15, 18-25, 556-557, 559-567, 568-570, 571-572, 573-580, 581-587, and 607-611 in their entirety.

[para 86] Sections 24(1)(a) and (b) state:

> *24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*
>
> *(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,*
>
> *(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,

...

[para 87] Under section 71(1) of the Act, the Public Body has the burden of proving that the Applicant has no right of access to the information that it refused to disclose under section 24.

[para 88] The test for sections 24(1)(a) and (b), as stated in past Orders, is that the advice, recommendations etc. (section 24(1)(a)) and/or the consultations and deliberations (section 24(1)(b)) should:

1. be sought or expected, or be part of the responsibility of a person by virtue of that person's position,
2. be directed toward taking an action,
3. be created for the benefit of someone who can take or implement the action (see Order F2013-13).

[para 89] 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 90] Sections 24(1)(a) and (b) apply only to the records (or parts thereof) that reveal substantive information about which advice was sought or consultations or deliberations were being held. Information such as the names of individuals involved in the advice or consultations, or dates, and information that reveals only the fact that advice is being sought or consultations held on a particular topic (and not the *substance* of the advice or consultations) cannot generally be withheld under section 24(1) (see Order F2004-026, at para. 71).

[para 91] 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, neither section 24(1)(a) nor (b) apply to a decision itself (Order 96-012, at para. 31).

[para 92] The first step in determining whether section 24(1)(a) and/or (b) were properly applied is to consider whether a record would reveal advice, proposals, recommendations, analyses, or policy options (which I will refer to as "advice" (section 24(1)(a)); and consultations or deliberations between specified individuals (section 24(1)(b)).

Parties' arguments

[para 93] The Public Body argues:

> Portions of the records package contain advice and deliberations between employees tasked with preparing material for briefing the Premier or members of the Executive Council. …
>
> The Public Body submits that section 24 also applies to the advice provided and to the back-and-forth deliberations of public body employees in preparation of the material to brief the Minister for those meetings, in that it was prepared by Government of Alberta employees for Cabinet, so they could discuss and make a decision related to the Grassy Mountain Coal Project, as part of Cabinet's responsibility.

[para 94] The Applicant argues the Public Body applied section 24(1) in an overly broad manner. The Applicant points out that the Public Body applied this provision to document titles even when it disclosed the subject matter in the body of related correspondence. The Applicant also argues that the Public Body applied this provision to merely factual information, such as forwarded materials that appear to have been provided only for information purposes rather than to elicit feedback or input.

Analysis

[para 95] The Public Body withheld the names of documents attached to various emails in the records; some were withheld under section 22(1), as discussed above, and others were withheld under section 24(1). Specifically, the Public Body withheld the title of email attachments on page 1 and 558 under section 24(1). The Public Body's submissions do not address why it believes the titles of documents consist of information to which section 24(1)(a) or (b) applies. This information does not reveal the substance of advice or deliberations as those terms have been discussed in past Orders, cited above. Section 24(1) does not apply and I will order the Public Body to disclose the information to the Applicant.

[para 96] The Public Body also withheld entire documents, such as memos or briefing notes, under sections 24(1)(a) and (b) without explaining how those provisions apply to the records in their entirety. From a review of these records it seems clear that the Public Body did not conduct a line-by-line review of the records to ensure it withheld only the

portions to which section 24(1)(a) or (b) can apply, which is a requirement under section 6(2) of the Act.

[para 97] Pages 3-4 are comprised of a document the Public Body has described as "Information prepared for Minister." From the record itself I agree with this description. However, nothing in this record can reasonably be characterized as advice or deliberations. Rather, the information can be characterized as a status update regarding actions being taken by a third party outside the Government of Alberta. Those actions are discussed on the third party's website and have been discussed in the media. I cannot be more specific on this point without revealing the content of the information in the records. The Public Body has the burden of showing that either section 24(1)(a) or (b) applies; absent specific argument or evidence on this point, I cannot conclude from the record itself that it reveals any advice or deliberations. Therefore, I must conclude that section 24(1) does not apply. As no other exception was applied, I will order the Public Body to disclose this information to the Applicant.

[para 98] I have discussed the content of page 5 above, as the Public Body also applied section 22(1) to this page in its entirety. As stated above, page 5 is comprised of an email, to which a presentation for a Cabinet committee was attached. The email itself does not reveal the content of the attachment, nor does it include anything that could be characterized as advice or recommendations. Therefore, section 24(1) does not apply. As I also found that section 22(1) does not apply, I will order the Public Body to disclose this information to the Applicant.

[para 99] Pages 6-15 have also been described in the discussion of section 22(1). This record is comprised of a presentation made to a Cabinet committee, with speaking notes. Pages 18-25 are a copy of the same presentation without speaking notes. I found that section 22(1) does not apply to background facts in the presentation or speaking notes where section 22(2)(c) applies to that information. As discussed above, section 24(1) also does not apply to background facts that do not reveal the substance of advice or deliberations. In my view, section 24(1) cannot apply to the same information in these pages to which section 22(1) does not apply. I will order the Public Body to review these pages and sever only the information to which section 22(1) and/or 24(1) can apply, using the direction set out in this Order.

[para 100] Pages 556-557 is a document described by the Public Body as information prepared for the Premier. The information in this record can be described as status updates on various topics; I cannot locate information that could be characterized as advice or deliberations. Most of the information in these pages is not responsive to the Applicant's request, except for one topic. The information relating to that one topic does not appear to consist of advice or deliberations. Without additional argument or evidence from the Public Body to show that section 24(1) applies to the information about the one topic, I find that it does not. I will order the Public Body to disclose the responsive information to the Applicant.

[para 101] As stated above, pages 607-611 are comprised of a record similar to the record at pages 556-557. Two of the topics discussed in pages 607-611 appear responsive to the Applicant's request; none of the information relating to these topics appears to consist of advice or deliberations. Much of the information relates to actions taken, or announcements made, by third party bodies, information about which has been reported in the media or is otherwise available to the public. As such, I will order the Public Body to disclose the responsive information to the Applicant.

[para 102] Pages 559-567 is a record described by the Public Body as information for the Premier/Minister. It is not clear from the record who authored it, or for what purpose; the Public Body has not made specific arguments regarding this record aside from the brief description. Much of the information in this record is comprised of background facts or information that the Government of Alberta has already made public. I cannot refer to where this information has been made public without revealing the information at issue here; however, I can say that the information relates to matters that have received media attention. Information that has been made public cannot said to be *revealed* by disclosing it in these records. As no other exception has been applied to these pages, I will order the Public Body to review the information and determine what, if any, information would reveal the *substance* of advice or recommendations, and disclose the remainder to the Applicant.

[para 103] Pages 568-570 are described in the discussion on section 22(1) above. They comprise a memo from a Minister to members of Cabinet. I found that section 22(1) applies to information that summarizes deliberations that took place in previous Cabinet committee meetings. I found that the header, subject line, signature line, and first paragraph of this memo do not reveal the substance of any committee deliberations. Some of that information reveals the topic presented by the Minister to Cabinet in the memo, but that mere topic is not the substance of deliberations. For the same reasons, section 24(1) also does not apply to that information. I will therefore order the Public Body to disclose it to the Applicant.

[para 104] Pages 571-572 is described by the Public Body as information prepared for Executive Council. The title of the document indicates that the document contains advice, but it also indicates that the document is only for information. The information in this record appears to provide a status update to Cabinet on decisions or plans that have already been made. Nothing in these pages appears to consist of advice or deliberations. Therefore, section 24(1) does not apply. However, I have found that section 22(1) applies to some information in these pages, as discussed above.

[para 105] Pages 573-580 and 581-586 consist of meeting notes or minutes of a Cabinet committee; the Public Body also applied section 22(1) to these pages. I found that most of the information in these pages would reveal the committee's deliberations such that section 22(1) applies. I found that section 22(1) does not apply to dates, meeting attendees, and subject headers. As this is information that does not reveal the substance of any advice or deliberations, section 24(1) also does not apply. I will order the Public Body to disclose this information to the Applicant.

[para 106] Half of page 587 was withheld under section 24(1). I found that section 22(1) applies to this information; therefore, I do not need to consider whether section 24(1) also applies.

[para 107] The Public Body applied section 24(1) to portions of two emails appearing on pages 590-591, which relate to a draft document attached to the emails. The emails consist of a request for input on the attached draft document, and the input requested. I agree that section 24(1)(b) applies to this information, as it consists of a deliberation within the terms of that provision.

[para 108] The Public Body withheld portions of pages 593, 597, 598, and 602 under section 24(1). The Public Body's index of records only identifies section 24(1) as having been applied on page 593. The index does not indicate that section 24(1) was applied to any information on pages 597, 598 or 602; it states only that these pages are not responsive. However, the records provided by the Public Body for this inquiry have information withheld under section 24(1), and the information withheld under that provision is clearly responsive to the Applicant's request. Therefore, I will consider the application of section 24(1).

[para 109] Pages 592-597 consist of an email in which the author is seeking input on the content of a proposed report. The proposed report is contained in the body of the email. I agree that section 24(1)(b) applies to the information withheld under that provision in these pages.

[para 110] Pages 598-599 also consists of an email. The subject line of the email, which was disclosed to the Applicant, states "FYI – Coal Consultation"; this indicates that the content of the email is provided for the recipients' information rather than to request input or provide advice. The information in the record itself supports finding that it is a status update, rather than information that falls within the scope of section 24(1). Without some explanation from the Public Body as to how section 24(1) applies, I cannot conclude that it does. As no other exception was applied, I will order the Public Body to disclose this information to the Applicant.

[para 111] Pages 601-602 consists of a summary document on a particular topic. The Public Body has not provided any context for this record such as who authored it and for what purpose, and the surrounding pages also do not provide context. The information in these pages appear to be a status update; there is no indication that the information consists of advice or deliberations. Without an explanation from the Public Body that supports the application of section 24(1) I cannot conclude that this exception applies. Therefore, I find that it does not and will order the Public Body to disclose this information to the Applicant.

[para 112] I have described pages 607-611 in the discussion of section 22(1). Page 607 consists of an email to which another document was attached. Pages 608-611 consists of the attached document. The Public Body withheld the title of the attached document on

page 607. This title does not reveal the substance of any advice or deliberations within the terms of section 24(1); therefore, that exception does not apply. I will order the Public Body to disclose this information to the Applicant.

[para 113] As stated above, pages 608-611 are comprised of a summary type of record, as indicated by the title page. I cannot locate information that could be characterized as advice or deliberations. Most of the information in these pages is not responsive to the Applicant's request, except for one or two topics. The information relating to those topics does not appear to consist of advice or deliberations. Without additional argument or evidence from the Public Body to show that section 24(1) applies to this information, I find that it does not. I will order the Public Body to disclose the responsive information to the Applicant.

Exercise of discretion

[para 114] Section 24(1) is a discretionary exception to disclosure. In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23 (CanLII), the Supreme Court of Canada commented on the authority of Ontario's Information and Privacy Commissioner to review a Public Body's exercise of discretion.

[para 115] The Supreme Court of Canada confirmed the authority of the Information and Privacy Commissioner of Ontario to quash a decision not to disclose information pursuant to a discretionary exception and to return the matter for reconsideration by the head of a public body. The Court also considered the following factors to be relevant to the review of discretion:

- the decision was made in bad faith
- the decision was made for an improper purpose
- the decision took into account irrelevant considerations
- the decision failed to take into account relevant considerations

[para 116] In Order F2010-036 the adjudicator considered the application of the above decision of the Court to Alberta's FOIP Act, as well as considered how a public body's exercise of discretion had been treated in past orders of this Office. She concluded (at para. 104):

> In my view, these approaches to review of the exercise of discretion are similar to that approved by the Supreme Court of Canada in relation to information not subject to solicitor-client privilege in *Ontario (Public Safety and Security)*.

[para 117] In *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (CanLII), the Court provided detailed instructions for public bodies exercising discretion to withhold information under the Act. The Court said (at para. 416):

> What *Ontario Public Safety and Security* requires is the weighing of considerations "for and against disclosure, including the public interest in disclosure:" at para 46. The

> relevant interests supported by non-disclosure and disclosure must be identified, and the effects of the particular proposed disclosure must be assessed. Disclosure or non-disclosure may support, enhance, or promote some interests but not support, enhance, or promote other interests. Not only the "quantitative" effects of disclosure or non-disclosure need be assessed (how much good or ill would be caused) but the relative importance of interests should be assessed (significant promotion of a lesser interest may be outweighed by moderate promotion of a more important interest). There may be no issue of "harm" in the sense of damage caused by disclosure or non-disclosure, although disclosure or non-disclosure may have greater or lesser benefits. A reason for not disclosing, for example, would be that the benefit for an important interest would exceed any benefit for other interests. That is, discretion may turn on a balancing of benefits, as opposed to a harm assessment.

[para 118] It further explained the weighing of factors at paragraph 419:

> …If disclosure would enhance or improve the public body's interests, there would be no reason not to disclose. If non-disclosure would benefit the public body's interests beyond any benefits of disclosure, the public body should not disclose. If disclosure would neither enhance nor degrade the public body's interests, given the "encouragement" of disclosure, disclosure should occur. Information should not be disclosed only if it would run counter to, or degrade, or impair, that is, if it would "harm" identified interests of the public body.

[para 119] Lastly, the Court described burden of showing that discretion was properly exercised (at para. 421):

> I accept that a public body is "in the best position" to identify its interests at stake, and to identify how disclosure would "potentially affect the operations of the public body" or third parties that work with the public body: EPS Brief at para 199. But that does not mean that its decision is necessarily reasonable, only that it has access to the best evidence (there's a difference between having all the evidence and making an appropriate decision on the evidence). The Adjudicator was right that the burden of showing the appropriate exercise of discretion lies on the public body. It is obligated to show that it has properly refrained from disclosure. Its reasons are subject to review by the IPC. The public body's exercise of discretion must be established; the exercise of discretion is not presumptively valid. The public body must establish proper non-disclosure. The IPC does not have the burden of showing improper non-disclosure.

[para 120] The Public Body has not provided any information regarding its exercise of discretion in applying section 24(1). Therefore, I will order the Public Body to re-exercise its discretion to withhold the information to which I have found section 24(1) applies. The Public Body is to explain to the Applicant in its new response whether it continues to apply section 24(1) and if so, the reasons for doing so.

5. Did the Public Body properly apply section 25(1) of the Act (disclosure harmful to economic and other interests of a public body) to the information/records?

[para 121] The Public Body applied section 25(1) to phone numbers of Government of Alberta employees appearing in signature lines of emails.

[para 122] Section 25(1) states:

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

[para 123] Under section 71(1) of the Act, the Public Body has the burden of proving that the Applicant has no right of access to the information that it refused to disclose under section 25.

[para 124] The test set out by the Supreme Court of Canada to be used where the phrase "could reasonably be expected to", cited above, applies to the Public Body's application of section 25(1).

[para 125] In its initial submission, the Public Body states:

> It is recommended section 25(1)(b) be applied to GoA employee cell phone numbers as the GoA has a proprietary right of use of those numbers. Cell phone numbers are unlisted. If they were disclosed in response to a FOIP request, they would more than likely need to be changed. These numbers are not published for a variety of reasons, including to preserve the functionality of the number by preventing unwanted and unsolicited phone calls; to preserve the security of the individual given the number; and to protect the integrity of the communication system of the GoA. As well, if disclosed, it may result in financial loss to the GoA and loss of work time for employees if it is necessary to redeploy their cell phones if the number is compromised for the reasons noted above. It should be noted that section 20(1)(m) is usually applied to unlisted cell phone numbers in conjunction with section 25. In this case, the failure to do so was an inadvertent error.

[para 126] The Applicant does not dispute the Public Body's arguments with respect to the application of section 25(1), but objects to the Public Body's late-raising of section 20(1)(m).

[para 127] Several past Orders of this office have rejected the application of section 20(1)(m) to cell phone numbers, finding a lack of support for the argument that disclosing cell phone numbers could harm the security of a communications system (see Orders F2013-13, F2020-22, F2021-28, F2023-38).

[para 128] In Orders F2021-28, F2023-38, the adjudicators also addressed the application of section 25(1) to withhold the cell phone numbers if there is evidence that the Public Body will likely have to expend funds to change the numbers if they become public. In Order F2021-28, the adjudicator discussed the type of evidence that would be required in order to find that section 25(1) is properly applied to a cell phone number. She said (at paras. 49-51):

> Section 25 will apply to the telephone numbers assigned to a public body's employee if it can reasonably be expected that the Public Body will need to change the employee's telephone number once it has been provided to an applicant / made public through an access request. Evidence as to the reasons why a public body restricts access to the number, how it treats the employee's calls, the public body's organizational structure and purpose, and the employee's work duties, will be necessary to establish the application of section 25.
>
> From the records at issue, I understand that the police officers in this case do not provide cell phone numbers to witnesses or complainants to contact them directly regarding active cases, but use either email or the numbers on their business cards. In this way, the Public Body is able to manage, to a certain extent, the kinds of business related calls officers receive, and that they are appropriately documented, and to ensure that police officers do not receive inappropriate calls that could compromise the integrity of investigations, among other kinds of inappropriate calls.
>
> If the Public Body were to release the cell phone numbers or direct lines to applicants, it would have no ability to control further dissemination of the numbers. The phone number could be used by any member of the public, including the Applicant, to contact police officers and Crown prosecutor whose numbers are contained in the records, in addition to the Applicant. If so, then it is reasonable to expect that both the Public Body and Alberta Justice and Solicitor General would have to assign new unlisted cell phone and direct line numbers to their employees if they are disclosed.

[para 129] The Public Body has not provided arguments regarding why the particular phone numbers withheld on pages 1, 2, and 558 would likely need to be changed if they are disclosed in the records at issue; the Public Body has provided only general arguments regarding cell phone numbers of Government of Alberta employees.

[para 130] It is not clear whether the phone number withheld on pages 1 and 2 is a cell phone number or landline. I have located this employee's name appearing along with this

phone number as part of what appears to be a Government media release. Given that this employee's name and this phone number have been made public already, I cannot accept that disclosing this phone number as it appears in the records at issue could reasonably be expected to lead to the harm identified by the Public Body.

[para 131] The only other phone number withheld under section 25(1) appears on page 558. The phone number appears as part of the employee's signature line. There is no indication that it is a cell phone number rather than a landline. There is also no indication that is not otherwise disclosed, as it appears in the employee' signature line. In accordance with the Supreme Court's direction above, the Public Body must show that there is a reasonable expectation of probable harm if the information is disclosed; the Public Body must also provide sufficient evidence to show that the likelihood of the identified harm is "considerably above" a mere possibility. In Order F2021-28, cited above, the adjudicator set out the type of information that might support an application of section 25(1). The Public Body did not provide any supporting evidence in its submissions. Therefore, I cannot find, on a balance of probabilities, that disclosing this phone number could reasonably be expected to lead to the harm identified by the Public Body.

[para 132] The Public Body states that section 20(1)(m) also applies to the phone numbers. The Applicant objects to the late-raising of this exception. I agree that the Public Body has raised this exception late in the process. Prior to this inquiry the Public Body participated in a review of its response to the Applicant, conducted by a Senior Information and Privacy Manager with this office. The Public Body had an opportunity during that review to identify its error in not applying section 20(1)(m) but did not.

[para 133] In any event, the Public Body's arguments on the application of section 20(1)(m) would fail for the same reason that its arguments on section 25(1) have failed. Section 20(1)(m) permits a public body to refuse access to information where disclosure *could reasonably be expected to* harm the security of any property or system, including a communications system. The standard set out by the Supreme Court discussed above also applies to section 20(1)(m). In this case, the Public Body said only:

> Certain cell phone numbers belonging to Government of Alberta employees are unlisted for security reasons. Disclosing this information would jeopardize the safety of our communications system. Were this information disclosed, the safety of our communications system would be at risk and new unlisted numbers would have to be obtained.

[para 134] This argument falls short of satisfying me that there is a reasonable expectation of probable harm if the information is disclosed, and the Public Body has not provided sufficient evidence to show that the likelihood of the identified harm is "considerably above" a mere possibility. The Public Body has also not addressed the fact that the application of section 20(1)(m) has been rejected in several past Orders, or argued why the outcome should be different here.

[para 135] The Public Body has failed to support its application of section 25(1) (or section 20(1)(m)) to withhold the phone numbers in the records at issue. As no other exceptions were applied to this information, I will order the Public Body to disclose it to the Applicant.

6. Did the Public Body properly apply section 29 of the Act (information that is or will be available to the public) to the information/records?

[para 136] The Public Body has applied section 29(1)(a) to pages 328-351, which are comprised of copies of Hansard transcripts. This provision states:

> *29(1) The head of a public body may refuse to disclose to an applicant information*
>
> *(a) that is readily available to the public,*
>
> *(a.1) that is available for purchase by the public, or*
>
> *(b) that is to be published or released to the public within 60 days after the applicant's request is received.*

[para 137] Under section 71(1) of the Act, the Public Body has the burden of proving that the Applicant has no right of access to the information that it refused to disclose under section 29.

[para 138] The Public Body states that these transcripts are readily available to the public.

[para 139] In its initial submission, the Applicant states that it has not been provided with any details regarding how the information withheld under section 29(1)(a) is available to the public. The Applicant's initial submission was made before the Public Body's initial submission; it appears that the Public Body's initial submission is the first instance in which the Public Body informed the Applicant that the relevant pages are comprised of Hansard transcripts. In its rebuttal submission, the Applicant argues:

> 33. The Applicant accepts that the record in question is available via Alberta Hansard; however, the Applicant strongly submits that the Public Body had the onus of informing the Applicant of same in its initial response to the Applicant from November 30, 2021.
>
> 34. As mentioned in the Applicant's initial submission, the Public Body had a positive obligation to assist the Applicant pursuant to section 10(1) of *FOIP*. While there are no specific criteria that delineate what a reasonable effort to assist the Applicant may be, the Applicant submits that it would not have been onerous for the Public Body to have provided the applicable link to Alberta Hansard to the Applicant in the Public Body's initial response.

[para 140] The Public Body has not addressed this argument in its rebuttal submission.

[para 141] Having reviewed the records, I agree that pages 328-351 are copies of Hansard transcripts, which are available to the public on the Legislative Assembly of Alberta website.

[para 142] The Ontario FOIP Act contains a provision substantially similar to section 29(1)(a) (section 22(a) of the Ontario Act). Several Orders from the Ontario Information and Privacy Commissioner's office have found that in order for a public body to rely on this provision to withhold information responsive to an access request, a public body must identify the record to the applicant and inform the applicant of its of its specific location (see Orders P-123, P-191, P-327 and PO-4286). In Order PO-4286, the adjudicator found:

> [58] Section 22(a) permits an institution to refuse to disclose a record where "the record or the information contained in the record has been published or is currently available to the public." Section 22(a) is intended to provide an institution with the option of referring a requester to a publicly available source of information where the balance of convenience favours this method of alternative access. For this section to apply, the institution must establish that the record is available to the public generally, through a regularized system of access, such as a public library or a government publications centre.[23] In order to rely on the section 22(a) exemption, the institution must take adequate steps to ensure that the record they allege is publicly available is the record that is responsive to the request.[24]
> …
>
> [60] IPC adjudicators have consistently held that, to be able to rely on this exemption, an institution has a duty to identify for the requester the record at issue and inform the requester of its specific location.[25] Applying the same approach here, to be able to rely on the section 22(a) exemption, the ministry must provide the appellant with the specific location of the article. The ministry asserts that the article is publicly available but fails to provide the appellant with the byline and date of the article so that he may obtain access to it, should he wish to do so. I find that the ministry has failed to establish the application of the section 22(a) discretionary exemption to the article. Because the ministry has not claimed any other exemption to withhold the article, I will order it disclosed.

[para 143] In my view, the same analysis applies to section 29(1)(a) of the FOIP Act. This provision has the same purpose as section 22(a) of the Ontario Act: to permit a public body to refuse access to a record that is available to the public. In other words, a public body can refuse to provide a copy of a record that the applicant can obtain via another readily available avenue. However, if the public body does not identify the record to the applicant, or inform the applicant how to obtain the record (i.e. by what other avenue the applicant can obtain access), then the purpose of section 29(1)(a) is not fulfilled. This is because, unless the record is identified and the alternative means of access is not identified, the applicant is effectively denied access without those alternative means.

[para 144] This is especially true in a case like the one here, where there are 613 pages of responsive records, all of a different type, and the Applicant has no way of knowing what kind of record was withheld under section 29(1)(a).

[para 145] Following the analysis in the Ontario Orders, I find that the Public Body did not properly apply section 29(1)(a) to withhold the information in pages 328-351 because it did not provide the Applicant with any means by which to identify or obtain the record via another avenue.

[para 146] All that said, the date of the transcripts at pages 328-351 identified by the Public Body as responsive to the Applicant's request fall outside the timeframe of the request. Therefore I will not order the Public Body to disclose them to the Applicant.

V. ORDER

[para 147] I make this Order under section 72 of the Act.

[para 148] I find that section 6(4) applies to the record comprising pages 27-327. However, I order the Public Body to review the record to determine whether any responsive record is likely to exist elsewhere, and if so, to respond to the Applicant as set out at paragraphs 13-20 of this Order. If no responsive record exists elsewhere, the Public Body is to inform the Applicant of that.

[para 149] I find that section 21(1) does not apply to the information on page 606 and order the Public Body to disclose this information to the Applicant.

[para 150] I find that section 22(1) applies to some, but not all of the information in the records withheld under that provision. I order the Public Body to disclose to the Applicant the information that is responsive to the Applicant's request and to which this provision does not apply, as set out at paragraphs 56-69 of this Order.

[para 151] I also order the Public Body to review pages 571-572 and apply section 22(1) in a manner consistent with the guidance provided in that section, as discussed at paragraphs 70-73 of this Order.

[para 152] I find that the Public Body mischaracterized some information on pages 597-599 and 601-602 as non-responsive to the Applicant's request. I order the Public Body to include that information in its new response to the Applicant.

[para 153] I find that section 24(1) applies to some, but not all of the information in the records withheld under that provision. I order the Public Body to disclose to the Applicant the information that is responsive to the Applicant's request and to which this provision does not apply, as set out at paragraphs 95-113 of this Order. I also order the Public Body to re-exercise its discretion to withhold information under section 24(1), following the direction set out at paragraphs 114-120. If the Public Body continues to

withhold responsive information under that provision, it is to explain its exercise of discretion to the Applicant.

[para 154] I find that section 25(1) does not apply to the information withheld under that provision and order the Public Body to disclose it to the Applicant.

[para 155] I find that the Public Body did not properly apply section 29(1) to the information in the records; however, as the records fall outside the timeframe of the Applicant's request, I will not order the Public Body to disclose this information to the Applicant.

[para 156] I further order the Public Body to notify me in writing, within 50 days of receiving a copy of this Order, that it has complied with the Order.

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Amanda Swanek
Adjudicator